In a referendum, the people of the United Kingdom have voted to leave the European Union (the act of actually leaving the EU happens later and is the ‘Brexit’). Charged with the clear will of a majority of the people Prime Minister, Theresa May, now has to put that vote into effect by first invoking Article 50 of the Lisbon Treaty. This triggers the procedure for departure from the EU which ultimately leads to Brexit. She has said she will not invoke Article 50 before the end of 2016. ¹ There will be enormous political pressure on her to do this and the current thinking is mid-2017. However, this is only speculation and a lot can happen between now and then. Presently, any further details in relation to how the UK will leave the EU have yet to be worked out – nobody actually knows how it will work. To say the Government was ill-prepared for the outcome is an understatement. Two years is the period allowed for in the Treaty for negotiating the exit but the complexities in untangling a sophisticated economy from a highly regulated political and economic union are daunting. Thus, the actual Brexit will be very unlikely to happen until at least 2020. Up to then the UK remains a full member of the European Union with all the rights and privileges that go with membership. This includes all IP legislation currently in force, as discussed here.

How can Article 50 of the Lisbon Treaty be invoked?

Article 50 provides the basis for the formal legal process for a Member State exiting the EU in accordance with its own 'constitutional requirements'. The process going forward is so unclear that even this has raised the question as to whether Article 50 can be triggered using the Royal Prerogative, a power now exercised by the Prime Minister, or whether parliamentary approval must be sought. Whilst Government lawyers argue that the former position is the correct approach, others have made it clear that Parliament will, and should, have a role. Further clarification on this is expected later in 2016 once the current legal challenges concerning this constitutional conundrum have been heard in the UK courts. Suffice to say that the UK courts are historically very reluctant to meddle in the workings of government. We will have to wait and see how clear their guidance is.

Once Article 50 is invoked, can it be revoked?

Article 50 does not state whether a withdrawal notification can be withdrawn. As a result, the House of Lords asked for legal advice to help clarify this. The findings revealed that a Member State can reverse its invoking of Article 50; if the reversal is before the date on which the withdrawal agreement took effect. In this situation before the UK withdrawal agreement is finalised. Frankly, this is academic. While there has been speculation that the UK may shy away from Brexit by some means or other (after all, the referendum was only advisory and the majority of law makers are in favour of remaining...), this is wishful thinking. Plan on the assumption that Brexit is going to happen at some point. It is politically too much of a hot potato for the UK Government to even contemplate not going ahead.

What is the effect of repealing the European Communities Act (ECA) 1972?

Since at least the 17th century, the supremacy of Parliament as the law making body of the UK has been more or less unquestioned – that is, until the European Communities Act (ECA) 1972. The ECA was enacted when the UK joined the EU in order to make provision for EU law to take effect in the UK. Put simply, the UK parliament ceded sovereignty on some law making to the EU. When the UK officially leaves the EU, the ECA will have to be repealed to remove EU obligations from UK law. Whilst this appears to be simple, repealing the ECA would result in a complex and time consuming legislative process as a significant amount of UK legislation is tied to EU law. It is doubtful Government as a whole had a comprehensive grasp of the legislative can of worms Brexit would be.

When the ECA is repealed, EU Directives will remain in force, unless they are repealed or replaced. EU Regulations, on the other hand, will cease to have effect. This is due to the fact that Directives require implementing UK legislation to become law in the UK. In contrast, EU Regulations are directly applicable in the UK, without the need for any further implementing legislation from...
the UK Parliament. This means that EU Regulations will cease to exist and there would be no existing implementing national legislation to rely on during any period of transition. As a lot of IP legislation coming from Brussels is in the form of Regulations, various IP rights in the UK face an uncertain future.

Notwithstanding the above, there is no reason why UK law originating from the EU could not remain in force if its practical operation does not rely on membership of the EU. This largely depends on the arrangements for the UK’s future relationship with the Union. Various models have been suggested. Most require the UK to sign up to some of the fundamentals of the EU that caused the UK to vote to leave the EU in the first place and are politically unacceptable. At this stage, such details have yet to be worked out (), but it is highly likely that Parliament will decide to retain a large amount of EU law post-Brexit in some form if only because of the administrative and legislative burden it represents to do otherwise. For example, Parliament may decide to essentially implement EU Regulations by way of statutory instruments, if they find that particular areas of existing EU Regulations did not require extensive replacement.

Therein lies another thorny issue: many see the repeal of EU originating law in various and diverse fields as an opportunity to look at things afresh – the legislative burden of this notwithstanding. Even adopting EU legislation wholesale (which we may have to do anyway depending on the future relationship we have with the EU) is not without its own problems: there are various EU bodies that oversee the application of EU originating legislation and the UK government will have to generate its own bodies to take their place if it is not to be subservient to EU law.

### The consequences for registrable IP rights post Brexit

#### Patents

The European Patent Office (EPO) is separate from the EU and is therefore completely unaffected by Brexit. There are no conceivable circumstances in which the UK will leave the European Patent Convention as a result of Brexit. Patents already granted by the EPO that have been validated in the UK will remain in force in the UK with full effect. Future European patents granted by the EPO in the usual way will be validated in the UK as now and will continue to exist, regardless of the UK’s ultimate relationship with the EU. The national UK patent system is also wholly separate from the EU and so it is likewise untouched by Brexit.

The post-grant Supplementary Protection Certificates (SPCs) are additional terms for granted patents in the pharmaceutical field that are available to recognise the cost and time involved in developing new drugs. They are in the form of EU Regulations and are affected by Brexit. As Regulations, they will effectively disappear in the UK with repeal of the ECA. It is more than likely that the Government will enact transitional legislation to take the place of the current EU SPCs but how and what form any future SPC-like provisions take is open to speculation. As with all things Brexit uncertainty prevails.

**EU Trade Marks (EUTMs) and Registered Community Designs (RCDs)**

EUTMs and RCDs will continue to be valid in the UK while the UK remains a full member of the EU. When the UK leaves the EU, the UK will no longer form part of the EU Trade Mark (EUTM) and Registered Community Design (RCD) regimes, since EUTMs and RCDs are defined by reference to the Member States of the EU, and are also in the form of directly effective Regulations.

Existing EUTMs and RCDs would not, therefore, continue to enjoy automatic protection in the UK and additional UK rights may need to be obtained. However, it is assumed that the UK legislature will put transitional provisions into place. The UK Intellectual Property Office (UK IPO) has issued a statement to say that the ‘government is exploring various options for the validity of EUTMs and RCDs in the UK and will be consulting users of the system about the best way forward’.

---

Therefore, at this stage we do not yet know what transitional provisions will be put into effect. It is likely to be something like one of the following:

- the UK will agree that EUTMs and RCDs continue to have protection in the UK, or
- there will be a process for ‘transforming’ an existing registration into a UK national registration, or
- a process for claiming seniority in a new filing

There are issues with all of these which are beyond the scope of this article. Suffice to say that there will be uncertainty and confusion, and it will cost money – a change in law always does.

Can the UPS go ahead without the UK?

For the UPS to come into effect without the UK, the UPC Agreement (UPCA) would need to be amended. Article 89(1) stipulates that the three Member States (Germany, France and UK) with the highest number of European Patents must ratify the UPCA before it can enter into force. The UK can ratify the UPC now while it is still in the EU and then leave, or the UPC will have to be renegotiated to take account of the UK not being out of the EU but not able to ratify as one of the top three patent countries. Likewise, the issue of the Central Division court which was to have been situated in London would have to be negotiated out of the UPC.

There has been informed speculation that the need to renegotiate various parts of the UPCA will be seen as an opportunity for amending the legislation in unconnected ways to (for example) take out the influence of the UK judicial procedures that are currently baked in. Whilst it is legally possible for the UPS to go ahead without the UK, Kevin Mooney, who is Chair of the committee drafting the rules and procedure of the UPC, has recently expressed the opinion that ‘it is more likely that the project will be lost in its entirety’. This seems pretty gloomy, but if anyone has an informed idea on this issue he does.

Can the UK still participate in the UPC post-Brexit?

The UK IPO recently published a statement setting out the UK government’s current position. According to the UK IPO:

‘The UK remains a Contracting Member State of the Unified Patent Court at present. We will continue to attend and participate in UPC meetings in that capacity’.

The contentious issue is whether the UK could stay in the system post-Brexit. Benoît Battistelli, President of the European Patent Office (EPO), is of the opinion that the UK should ratify the UPCA as soon as possible for the sake of the project. This he suggests would allow the UK, in its Brexit negotiations, to obtain continuous participation in the Unitary Patent Court and the Unitary Patent. However, Article 84 poses a problem as it implies that a state which has ratified must continue to be an EU Member State.

According to Professor Tilmann this obstacle can be overcome if (and bear with me on this), on the basis of Art 149(1)(a) EPC, if the Administrative Committee acting together with the Select Committee under Art 145 EPC amends Article 84 UPCA by a protocol to the UPCA. This provision prevents a Member State, which has ratified, from losing its contractual position if it leaves the Union. So if the UK ratifies the UPC and if the Administrative and Select Committee amend the law, the UK could still be in the UPC when not in the EU. Simple!

---

16 ibid
17 ibid
But even if all this was legally possible under EU law, it is not currently politically opportune. In the existing political turmoil it would be illogical (not to say self-harming) for the UK Government to ratify an agreement that limits national sovereignty by incorporating a provision accepting the primacy of EU law. Moreover, it is hard to see industry bringing any pressure on government to bring this forward while the risk of the UK later being ejected from the system remains.

In all likelihood the UK will defer invoking Article 50 until as late as politically possible in order to give maximum time for limited informal negotiations to take place with the EU bodies and Member States. In the meantime with such limited political capital attaching to the UPC in the grand scheme of things, and the political downside of being seen to cede power to the EU when a lot of the political rhetoric is about taking back power from Brussels, the chances of the UK ratified the UPC are slim whatever the IP pundits may say. The consequence of this will be that the negotiations may well have to go back to the drawing board. With various Member States seeing it as an opportunity to revisit aspects of the UPC that they may have found unattractive in the first place, Kevin Mooney’s downbeat prediction of a sticky end for the UPC may turn out not to be not so much pessimistic as realistic.

And there you have it. A mess of presently unfathomable depth and complexity which few were expecting and few understood. The patent system is essentially untouched by Brexit. Trademarks and designs will have to be made the subject of forms of transitional provisions. And we have not even touched upon unregistered rights stemming from EU Regulations, such as copyright, database rights etc. The fact is that nobody has a clear idea of how all this will unfold. That the UK will leave the EU has to be a given, but even this is not legally certain. The UK’s future relationship with the EU and the rest of the world is up for negotiation and lies primarily in the hands of two women (May and Merkel) who appear, on the face of it, to be rational, calm and very bright. That is at least a crumb of comfort in an uncertain world. Watch this space.

For further information about this please contact:

Peter Hale, Partner
phale@kilburnstrode.com

Nick Shipp, Partner
nshipp@kilburnstrode.com

*A special thanks to Rebekah Brook, from the University of Exeter, for her research and help in putting this article together*