

# Keep calm and plan ahead

**Jonathan Silverman** addresses the potential effects of Brexit on IP practitioners and clients



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**If there's one thing lawyers hate it is uncertainty. It goes against the grain to not be able to give definitive advice to clients and Brexit has created the perfect storm of uncertainty for IP lawyers.**

The IP world has been significantly affected by globalisation and the digital revolution. No longer does a client simply address their home market with services or goods; digital technology knows no national boundaries. But once the UK parts with the EU, life will become far more complex.

Harmonisation of IP laws has been a key component to advising with certainty. With much of UK IP law shaped by EU regulations, the break may remove a key building block. But how and when to advise clients with any certainty is difficult. So, what should one be saying to them at present?

To quote a familiar but unregistered trade mark: 'Keep calm and don't panic.' Nothing has changed, until parliament debates the referendum result and serves notice under article

50. Even then there is likely to be two years of negotiations. Yet that doesn't mean some sensible planning for the future is not worthwhile. Indeed, it would be prudent for clients to consider where they might be down the line.

## Trade marks

Consider securing a UK trade mark in parallel with an EU mark. This may be prudent since one possible Brexit endgame could be that existing EU marks will have no validity here whatsoever.

## Registered designs

Clients should be asked whether they have detailed portfolios of their existing registered designs and to carry out a review as to where those portfolios might be vulnerable to change. On leaving the union, the UK will no longer form part of the EU's trade mark or registered community design systems. Owners of national marks will not be able to challenge conflicting EU applications. This adds a complication for passing off based on acquired reputation through unregistered use outside of the UK.

The UK and EU IP systems could run separately but contemporaneously, so it will be crucial to maintain a watching brief on both the UK Intellectual Property Office (IPO) and any European Court of Justice (CJEU) decisions that decide on the need to file, prosecute, and renew EU marks and designs.

Handling opposition and cancellation actions will remain equally important. However,

UK-qualified solicitors and trade mark attorneys will lose out, as they will no longer be able to represent clients before the EU IPO, unless the UK becomes a member of the European Economic Area (EEA).

## Patents

The patent situation is equally complex. While the European Patent Convention, of which the UK is a member, is not an organ of the EU, there will soon be a new system overlaying the current one.

The unitary patent aims to give patentees the option to apply for a single patent covering most member states rather than separate national patents. They are enforceable in all EU states via the Unified Patent Court (ironically under construction in London). Therefore, Brexit could see duplicate registrations and more complex enforceability.

Possible steps to consider include a review of existing portfolios and advising clients on the regulation governing registration. It is worth recognising that one major implication of Brexit relates to IP remedies, which are likely to be affected. For example, how will UK courts deal with infringement of EU rights and enforce EU rights in the UK?

An additional concern involves drafting contracts with any IP element, such as manufacturing, licensing, coexistence, or franchising. Care needs to be taken over how to address the separate body of rights which will exist once the UK is no longer part of the EU's IP framework. This is

going to be quite a challenge since numerous statutes will need to replace outgoing EU base legislation and may well give rise to lobbying by groups with differing interests.

## Copyright

Arguably, one area where EU law has yet to achieve true integration is copyright. However, continuing digitalisation and increasing web usage might be more important drivers for harmonisation.

The UK will seek to retain access to the EU single digital market. This could alter the landscape since it is considering geo-blocking cross-border content, platform liability, and copyright exceptions. Clients operating in this area will require a watching brief by their lawyers, especially with an EU desire to promote data protection laws that may reach further than the UK desires.

While the unravelling of EU legislation will not be a comfortable situation for lawyers, it might also prove an opportunity for UK law to evolve independently from Europe. However, a driver for harmonisation will remain to make trade both as easy and as profitable as possible.

If the UK adopts the Norwegian model and remains a member of the EEA and the European Free Trade Association, it will continue to be bound by EU IP legislation and influenced by harmonisation directives and CJEU decisions. Maybe the old British art of compromise could yet save the day. **SJ**