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Brief Speculations about Changes to Intellectual Property Law in the UK after ‘Brexit’

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Introduction

It has often been said that the decision of a slight majority of the British people to leave the EU after a referendum that was originally envisaged as advisory will bring fundamental changes to the UK. Indeed, but at the moment one can only speculate which ones, and with regard to IP law in the UK one may even speculate that the changes will actually not be that great and fundamental. Since lawyers’ speculations are always also normative speculations due to their subject-matter, legal commentaries ostensibly describing the law also shape it *de lege ferenda*, inadvertently or not. One has to ascertain the starting point for such speculations. The question is first whether the ‘Brexit’ will be a ‘soft Brexit’, that is, a departure from the EU while staying in the common market and the customs union, or a ‘hard Brexit’, where that is not the case, although some free trade agreement with the EU will be concluded. The ‘soft Brexit’ is a contradiction in terms and irreconcilable with the fundamental principles of the EU, as the EU itself has pointed out frequently,¹ and in any case, this can now finally be ruled out after the decisive vote of the House of Commons in favour of an EU (Notification of Withdrawal) Bill without any amendments on 8 February 2017.² A third possibility, still generally overlooked in public discourse, is the ‘crash Brexit’, where no significant agreement after Britain’s departure from the EU will be in place once the EU Treaties cease to apply to the UK at least two years (this period can be extended) after notification of withdrawal according to Art. 50 (3) of the Lisbon Treaty.

I tend to think that the ‘crash Brexit’ is the most likely outcome, especially for IP law. A ‘hard Brexit’ will be more difficult to attain, because the extraordinary complexity of disentangling over forty years of UK membership of the EU will require an unpredictably long amount of time well over the initial two years. It will need enormously extensive expertise in one place and at one time which the current

¹ J. Rankin, H. Stewart, ‘EU council president: it’s hard Brexit or no Brexit at all’, *The Guardian*, 14 Oct. 2016; *Report by President Donald Tusk to the European Parliament on the European Council meeting of 15 December 2016*, European Council Press Release, 18 Jan. 2017.

² HC 8 Feb. 2017, Vol. 621, Col. 567 *et seq.* Div. no. 161. The changes required by the House of Lords may have some effect, but even the politically most prominent amendment, securing the rights of EU citizens after ‘Brexit’ (HL 1 March 2017, Vol. 779 col. 855, amendment 9B), may not be followed by the House of Commons.

British administration is unlikely to muster. It is not a very motivating job for politicians and civil servants involved either because, unlike the negotiation of a truly new trade deal, it has the air of destructiveness. Realistically, IP law as it is will be taken over into the post-‘Brexit’ era without much reflection about possible reform. It is hard to imagine that the present British government will excel in accomplished diplomacy as the conductor of a finely tuned compromise, a well-organised and competent process of give and take in an amicable environment for future trade negotiations with the EU. The present British ‘let’s have the cake and eat it’ attitude³ does not further the British cause in negotiations with the EU opponents. These can increasingly afford to be difficult, not only to ensure that the British exit route proves unattractive to other EU States, but also because the long-term economic damage on both sides may have been done already anyway. And, for obvious reasons, Art. 50 is not designed to favour the leaving Member State.

Overwhelming complexity and understandable ignorance in many issues when ‘setting out the arrangements for [the State’s] withdrawal, taking account of the framework for its future relationship with the Union’, as Art. 50 (2) stipulates, will not leave much capacity and time to deal with IP law in any significant detail. So for IP law as a relatively minor area by comparison there is likely to be a ‘crash Brexit’ anyway, even if there is a successfully negotiated substantial agreement in other areas. The envisaged Great Repeal Bill indicates that, like largely everything else, current IP law in its mix of national and EU law, will stay in force as domestic law for the time being,⁴ and that will probably not change much whether the result is a ‘hard Brexit’ or a ‘crash Brexit’.

In addition, there is for the first time the possibility of Scotland leaving the UK for economic and constitutional reasons⁵ – a factor which highlights how much EU membership of the UK has contributed to the stability of the national integrity of the UK. The recent Supreme Court decision ruled that the devolved governments have no veto on the withdrawal of the UK from the EU.⁶ This is constitutionally correct and unsurprising, but also politically unfortunate: it shows that when the Scotland Act 1998 was introduced, Britain transformed itself effectively into a federal state⁷ without ever acknowledging that and without providing for that transformation properly in the UK political and constitutional system. It is imaginable that Scotland

³ S. Coates, ‘Have cake and eat it’ – aide reveals Brexit tactic’, *The Times*, 29 Nov. 2016.

⁴ House of Commons Library Briefing Paper, No. 7793, November 2016, ‘Legislating for Brexit: the Great Repeal Bill’, pp. 7-8. The Great Repeal Bill shall be included in the next Queen’s Speech (May 2017).

⁵ A. Sparrow and S. Carrell, ‘May’s hints at single market exit leave Scotland sidelined’, *The Guardian*, 9 Jan 2017.

⁶ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 150.

⁷ See particularly Scotland Act 1998, ss. 29, 30, 63A and schedule 5.

does not follow England and leave the EU (since the Scots have voted clearly against ‘Brexit’ with 62%) and, given that there will be uncertain times ahead for the economy anyway, declares independence to re-join the EU later (with unclear success),⁸ probably, but not necessarily, after a second independence referendum. In such a case Scotland may carefully maintain the present status of IP laws and follow legislative developments in the EU before its readmission which may lead to legal discrepancies between Scotland and the rest-UK⁹ soon. The IP industries may find the Scottish version more attractive in some instances and plan their business accordingly.

There is the final, no longer entirely remote, possibility that the EU will not survive for long, at least not in its present form. Particularly the outcome of the French presidential elections in 2017 is of central importance for the future of the EU.¹⁰ In addition, the EU will suffer economically substantially with the departure of the UK, and the balance of powers in the EU will change dramatically which may lead to an amendment of the EU-Treaties, or to a breakdown of the EU. If the EU were to disintegrate, this would obviously make the ‘Brexit’ negotiations redundant, certainly in the currently planned arrangement. From a British (or rest-UK and Scottish) perspective the effect on the reorganisation of IP law in the UK would be the same as in a ‘crash Brexit’.

The following discussion assumes the continuation of the EU, and the departure of the UK from the EU in form of a ‘crash Brexit’ in relation to IP law, with the possibility of a subsequent or concurrent separation of Scotland from the rest of the UK, which would not change the rest-UK’s situation in the present context. Even in this assumed scenario IP law in the rest-UK will probably not change instantly as much as one may think.

Legal Changes to Copyright Law

⁸ The idea of the SNP that Scotland, after having left the UK, could somehow continue to stay in the EU, is a whimsical *idée fixe* with no foundation in international law, see before the 2014 independence referendum A. Rahmatian, ‘The English Pound in an Independent Scotland’, (2012) 27(9) *Journal of International Banking Law and Regulation*, 336-339, discussing the international law aspect, and recently the EU, see L. Paterson, ‘Brexit: Independent Scotland would have to “join back of the queue” for EU membership’, *The Independent*, 10 Feb. 2017.

⁹ The term ‘rest-UK’ denotes the UK without Scotland and avoids a discussion of the future of Northern Ireland in or outside the UK.

¹⁰ Mehreen Khan, ‘Marine Le Pen’s poll lead hits Franco-German bond spread’, *Financial Times*, 20 Feb 2017.

One may start with the least harmonised part of IP law at EU level, copyright law.¹¹ There are a number of EU Directives on special issues of copyright law,¹² but there is no central Directive of substantive copyright or author's right law. Harmonising model codes of European copyright prepared by academics have not advanced the matter further.¹³ A central substantive harmonisation would arguably not be desirable in view of the complexity of the concepts of copyright.¹⁴ The limited harmonisation however makes it easier to disentangle the UK from the EU. The specialist Directives (Rental and Lending Right Directive, Term Directive, etc.) will probably be retained within national law for the time being, either within the CDPA 1988, or as continuing statutory instruments or as new Acts of Parliament. Even where reform is needed, it will probably take several years until the British administration will have sufficient free space to consider changes, after urgent and necessary measures in the wake of the effects of 'Brexit' have been implemented. One example of desirable reform would be an amendment of the protection period based on the Term Directive and a reduction of the duration of copyright protection for sound recordings from 70 back to the original 50 years, in line with the recommendation of the Gowers Review in 2006, which did not see the need for extending the then 50 years' protection period.¹⁵ Following such an amendment, the shorter protection period would have to apply to new sound recordings only after a cut-off date, while the older works would remain subject to the old regime.

Where the CJEU has pursued a harmonising strategy through case law, for example by developing the doctrine of 'autonomous concept' in EU copyright law,¹⁶ or by establishing a quasi-harmonising definition of EU copyright originality¹⁷ (if this was indeed so¹⁸), it depends which position the English courts will take in the future (and whether the Scottish courts will follow suit). Since the main objective,

¹¹ That means that copyright will be less affected by 'Brexit' than other IP rights. See also O. Tidman, 'Brexit: what next for intellectual property?', (2016) *Scots Law Times*, 149-151.

¹² Especially Directive 96/9/EC – Database Directive, Directive 2001/29/EC – Information Society Directive, Directive 2001/84/EC – Resale Right Directive, Directive 2006/115/EC – Rental and Lending Right Directive, Directive 2006/116/EC – Term Directive (codified version), 2009/24/EC – Software Directive (codified version), Directive 2012/28/EU – Permitted Uses of Orphan Works.

¹³ *Model European Copyright Code* drafted by the Wittem Group in 2010.

¹⁴ A. Rahmatian, 'European copyright inside or outside the European Union: pluralism of copyright laws and the "Herderian paradox"', (2016) 47(8), *International Review of Intellectual Property and Competition Law*, 912-940, at 920-921, 937.

¹⁵ *Gowers Review of Intellectual Property* (HM Treasury, 2006), 4.40, p. 56.

¹⁶ E.g. in *Padawan SL v. Sociedad General de Autores y Editores de España* (SGAE) (C-467/08) [2010] ECR I-271, para. 33; *EGEDA* (C-470/14), 9 June 2016, paras. 38, 42.

¹⁷ Especially *Infopaq International v. Danske Dagblades Forening* (Case C-5/08), [2009] ECDR 16, *Painer v. Standard Verlags GmbH and others* (C-145/10), [2012] ECDR 6; *Football Dataco Ltd and others v. Yahoo! UK Ltd and others* (Case C-604/10), [2012] ECDR 10.

¹⁸ A. Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure', (2013) 44(4) *International Review of Intellectual Property and Competition Law*, 4-34, at 18, 22, 25, 29-30, doubting this far-reaching effect of a harmonising definition.

harmonisation across EU Member State jurisdictions, has fallen away, UK (or rest-UK) courts will have to be guided by the existing UK statutes and precedents and policy decisions within the UK, and here a divergence from the jurisprudence of the CJEU may emerge relatively quickly.

Whether the proposed Directive on Copyright in the Digital Single Market¹⁹ will be enacted and will have to be implemented before the UK leaves the EU is doubtful: any approximation to this Directive in the final form would probably be voluntary, and to the extent to which the provisions are acceptable to the UK.

Legal Changes to Patent Law

The EU unitary patent package,²⁰ apparently an example of harmonising or unifying patents law at EU level, is really a patchwork comprising existing and newly created international law treaties which are not EU law: the substantive law on patentability is still the European Patent Convention (EPC) 1973 (revised 2000),²¹ and the EU patent court system is based on the Agreement on a Unified Patent court, an intergovernmental treaty between EU Member States outside EU law.²² The unitary patent system is a third form of patent regime alongside the existing national and EPC patents which is created by allowing the voluntary transformation of EPC patents into patents with unitary effect or uniform protection in the participating EU Member States.²³ The unitary patent protection is however not autonomous but based on the Member States' national laws²⁴ and the EPC.²⁵ The actual Regulation 1257/2012 is an EU-cloak which gives the non-EU instruments the effect of EU legislation. This quality as 'empty shell legislation' or 'outsourced legal integration' was also one argument of an unsuccessful legal challenge of the EU regulation 1257/2012 by Spain and Italy before the CJEU.²⁶

¹⁹ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – COM(2016) 593, published 14 September 2016.

²⁰ Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection; Regulation 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements; Agreement on a Unified Patent Court (UPC Agreement) OJ C 175 (20/06/2013).

²¹ See Regulation 1257/2012, Recitals 5 and 6, and Arts. 1 (2), 2 (b) and (c), 3 (1).

²² UPC Agreement, Recital, paras. 3, 4 and 14.

²³ Regulation 1257/2012, Art. 3 (2), and J. Pila, 'The European Patent: An old and vexing problem', (2013) 62 *ICLQ* 917-940, at 936.

²⁴ Regulation 1257/2012, Arts. 5 (3) and 7 (1): unitary patent and nature of patent protection granted are defined by national law.

²⁵ K. Kaesling, 'The European patent with unitary effect – a unitary patent protection for a unitary market?', (2013) 2(1) *UCL Journal of Law and Jurisprudence*, 87-11, at 92, 110.

²⁶ *Spain v European Parliament* (C-146/13), *Spain v Council of the European Union* (C-147/13). See E. Pistoia, 'Outsourcing EU law while differentiating European integration – the unitary patent's

But it is this patchwork quality which may assist in constructing a unified patent system that may survive ‘Brexit’ if the UK (or the rest-UK) wishes that at all. For the EPC will continue to apply in the UK, and so could the intergovernmental treaty setting up the EU patent court system.²⁷ But this court system may become less attractive to the UK, because the effect of the European unitary patent, providing equal uniform protection in all participating Member States²⁸ and being an object of property under the respective national laws,²⁹ will no longer be available because these rules presuppose EU membership. The substantive law of patentability and the grant and registration system continue to be covered by the EPC anyway. However, the main concern of the ‘Brexit’-focused British government, that the UK should be outside the jurisdiction of the CJEU,³⁰ appears to be of limited importance here. The European patent court system comprises a Court of First Instance and a Court of Appeal,³¹ but not the CJEU as a final appeal court in patent matters; this was also a reason why the Regulation 1257/2012 avoided substantive law provisions as EU patent law which would have attracted CJEU jurisdiction.³² The CJEU is only included through the preliminary referral mechanism.³³ To what extent the CJEU will accept being confined to this role only in patent matters remains to be seen, given that the basis of the unitary patent is an EU regulation.³⁴

Even if the UK wants to abandon the powers of the CJEU completely, then at least any interpretation of Art. 50 of the Lisbon Treaty and dealings under this rule invariably remain within the CJEU’s jurisdiction. Furthermore, the recent affirmation of the UK government to ratify the respective EU unitary patent regulations³⁵ shortly before the planned exit of Britain from the EU can only make sense if UK legislation requires the UK Supreme Court to consider the CJEU’s decisions as binding or persuasive authority in relation to European patent law. After all, the planned Great

identity in the two “Spanish rulings” of 5 May 2015’, (2016), 41(5) *European Law Review*, 711-726, at 713, 716-718.

²⁷ Only EU states can accede to the UPC Agreement, see para. 14 of the Recital and Art. 84, but if the UK accedes as EU Member and negotiates a continuing membership to the UPC Agreement after departure from the EU, the UPC Agreement could survive. See H. Dunlop, ‘What now for the Unified Patents Court following the Brexit referendum?’, (2016) 38(10) *EIPR*, 595-597, at 597.

²⁸ Regulation 1257/2012, Art. 3 (2).

²⁹ Regulation 1257/2012, Art. 7 (1).

³⁰ White Paper, *The United Kingdom’s exit from and new partnership with the European Union*, Cm 9417, Feb. 2017, para. 2.3, p. 13.

³¹ UPC Agreement, Art. 6.

³² K. Kaesling, ‘The European patent with unitary effect – a unitary patent protection for a unitary market?’, (2013) 2(1) *UCL Journal of Law and Jurisprudence*, 98.

³³ UPC Agreement, Art. 21.

³⁴ J. Pila, ‘An Historical Perspective I: The Unitary Patent Package’, in: J. Pila and Ch. Wadlow (eds.), *The Unitary EU Patent System* (London: Hart Publishing, 2014), 9-31, at 30-31.

³⁵ On 14 December 2016, the UK’s deputy permanent representative to the EU signed the Protocol on Privileges and Immunities of the Unified Patent Court, see Council of the EU website:

<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2016047> (visited 20 Feb. 2017).

Repeal Bill is supposed to transpose the EU Regulations into UK law, if these are ratified by the date when the UK finally leaves the EU.³⁶ In addition, a framework of meetings between judges and patent examiners across Europe to adjust and align decisions and practices will have to be established.

The inevitable rapprochement between the UK and the US as a result of the UK about to leave the EU common market³⁷ may also have implications for the UK patent regime. It is possible that the UK will see the need to enter into a bilateral IP agreement with the US, a form of TRIPS-plus agreement, which is likely to benefit the US more than the UK, because true reciprocity is difficult to achieve in view of the unequal economic and political powers of the parties. Actual equality was not realised with TRIPS itself, irrespective of the initial good intentions:³⁸ TRIPS operated in favour of the Western world.³⁹ As a result of such a new bilateral IP regime, the UK may have to give up the non-patentability of business methods and computer programs according to the EPC⁴⁰ and therefore may have to withdraw from the EPC if the IP provisions of the new bilateral agreement are incompatible with mandatory EPC rules.

Legal Changes to Trade Marks Law

The underlying international framework remains in place and continues to set the scene, especially the TRIPS Agreement,⁴¹ the Madrid Protocol⁴² and the Paris Convention,⁴³ and it is most likely that the Trade Marks Directive harmonising national trade mark law⁴⁴ will remain incorporated in domestic UK law, as it is already in form of the Trade Marks Act 1994 which implemented the Directive. Where the newest (recast) version of the Directive departs from the older versions as enacted in the Trade Marks Act (particularly in relation to the abolition of the

³⁶ House of Commons Library Briefing Paper, No. 7793, November 2016, 'Legislating for Brexit: the Great Repeal Bill', pp. 22-23.

³⁷ The British Prime Minister's state visit to the new (controversial) US president immediately after his inauguration in late January 2017 is an indicator for this likely development.

³⁸ TRIPS Agreement 1994, Art. 7 and Preamble, para. 6.

³⁹ E.g. F. M. Abbott, 'Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework', (1989) 22(4) *Vanderbilt Journal of Transnational Law*, 689-745; P. Drahos, 'Developing Countries and International Intellectual Property Standard-Setting', (2002) 5(5) *The Journal of World Intellectual Property*, 765-89.

⁴⁰ EPC 1973, Art. 52 (2) (c). Compare the US: Patent Act 1952, §§ 101 and 102.

⁴¹ TRIPS Agreement 1994, Arts. 15-21.

⁴² Protocol Relating to the Madrid Agreement concerning the International Registration of Marks 1989. The UK is not a member of the Madrid Agreement 1891 itself.

⁴³ Paris Convention for the Protection of Industrial Property 1883 (1979), Arts. 6-10.

⁴⁴ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Members States relating to trade marks (recast). Before: Directive 2008/95/EC.

graphical representation requirement and the restriction of the own name defence⁴⁵) it is probable that the Trade Marks Act will be amended accordingly,⁴⁶ though, if that happens after ‘Brexit’, not by statutory instrument as it is at the moment, but by Act of Parliament,⁴⁷ which may be constitutionally more satisfactory anyway.

In relation to the European Union Trade Mark (until 23 March 2016: Community Trade Mark), it follows from Art. 1 (2) of the EUTM Regulation that EU Trade Marks can only have effect in an EU Member State. Thus it may be advisable to introduce a regime whereby the existing EU Trade Marks should benefit from a conversion regime similar to that in the Madrid Protocol⁴⁸ that prevents the effect of a successful central attack of an international trade mark under the Madrid Agreement.⁴⁹ (The EUTMR in Arts. 34 and 35 would be no sufficient basis for that; a special settlement would be required.) That means that with the departure of the UK from the EU, existing EU trade marks would be converted into national trade marks in the UK with the original priority date. The trade mark registers would have to be amended accordingly over time, but this change should only be declarative, otherwise there would be too much delay because of a too great administrative burden on the trade mark offices at too short notice.⁵⁰ British applicants for EU Trade Marks after ‘Brexit’ would presumably have to appoint a representative for any proceedings before the EUIPO except for the filing.⁵¹ Otherwise, future international or European trade marks from UK applicants would have to be subject to the Madrid regime.

Assuming that the EU continues to exist, then the CJEU will keep handing down decisions based on the Trade Marks Directive and Regulation. Since the legal provisions remain the same in the UK and the EU for some time, the CJEU’s decisions could remain persuasive authority for a while, unless political opinion dictates a petulant contrarian attitude for its own sake. Obviously this does not rule out departure from the case law of the CJEU where this is felt necessary, and that may frequently be the case.

⁴⁵ Directive 2015/2436, Arts. 3, 4, 14 (1)(a).

⁴⁶ Member States have to implement the Directive (at least the great majority of its changes) by 14 January 2019, see Directive 2015/2436, Art. 54 – that is, before the earliest possible date of the UK leaving the EU.

⁴⁷ Ch. Morcom, ‘The implications of “Brexit” for trade marks and for practitioners in the UK: what are the likely effects and what needs to happen now?’ (2016) 38(11) *EIPR* 657-660, at 660.

⁴⁸ Madrid Protocol 1989, Arts. 4, 6 (4), and Art. 9^{quinquies}.

⁴⁹ Madrid Agreement 1891, Art. 6 (3).

⁵⁰ For this problem, see also Ch. Morcom, ‘The implications of “Brexit” for trade marks and for practitioners in the UK: what are the likely effects and what needs to happen now?’ (2016) 38(11) *EIPR* 657-660, at 658.

⁵¹ This would certainly be so under the present rules if the UK also leaves the EEA which seems to be planned, see the EUIPO website: <https://euipo.europa.eu/ohimportal/en/ownership> (visited 20 February 2017).

The Economic and Social Reality of ‘Brexit’ for IP

While by and large the changes of English IP law will be limited even after a ‘crash Brexit’, the political and social implications of the departure from the EU will be fundamental and will directly affect the IP market and the creative sector. The present British government has interpreted quickly the result of the ‘Brexit’ referendum as a decision against immigration and against foreigners (especially EU citizens) in general,⁵² and the behaviour of the government so far suggests that resident EU-citizens are only considered as bargaining chips,⁵³ but otherwise not really welcome. A mysterious feature of this new UK policy is a drive for free trade agreements worldwide (though not with the biggest trading partner, the EU), while at the same time a willingness to impose severe restrictions on immigration and even to induce people to leave Britain who have been in the country for many years.⁵⁴ That is particularly contradictory for the service industries which consist of people, their creativity and their know-how, the essence of IP protection. This is the spectre of a free market without human beings. A constraint of free movement and exchange of people, their services and their know-how can significantly damage the real market. A seller needs a buyer, a creditor a debtor, a service provider a customer, and, in a globalised world, these are very often foreigners. And why would anyone want to trade with you if you intimate clearly that you have a dislike for foreign people working with and for you and applying their expertise?

This conflicting approach – consume British products and services and produce them in Britain by British employees, but export them freely to the world – may have unexpected consequences. Europeans and other non-British people who decide to leave Britain under its new order or may even be made to leave under draconian immigration rules are unlikely to be great ambassadors in favour of the consumption of British products and services.⁵⁵ British trade marks – duly denoting the origin and quality of the product or service as British – could then prove detrimental. There could even be an informal boycott of British products on the European Continent, a hypocritical move because the current nationalistic sentiment on the Continent is comparable to that in Britain and by no means morally superior. In

⁵² See e.g. Prime Minister Theresa May’s keynote speech at Tory Conference, *The Independent* (full transcript), 5 Oct 2016: ‘But let’s state one thing loud and clear: we are not leaving the European Union only to give up control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice. That’s not going to happen.’

⁵³ L. O’Carroll, ‘Assuring EU Citizens of right to stay “would lose UK negotiating capital”’, *The Guardian*, 9 Jan 2017.

⁵⁴ See e.g. D. Boffey and L. O’Carroll, ‘Plight of EU nationals seeking UK residency to be investigated’, *The Guardian*, 25 Jan. 2017.

⁵⁵ See also D. Boffey, ‘Britons living in the EU face Brexit backlash, leaked paper warns’, *The Guardian*, 13 Feb. 2017.

any case, a boycott would not be a too heroic undertaking, because most exported British products can be substituted fairly easily by products from Europe or elsewhere: for example, British food production will never pose a challenge to the French and Italian food industries or indeed any other.

Copyright will also be affected: in the arts and culture nationalism and a movement towards inward-looking isolationism drives creativity away. Such a culturally insular attitude is obviously not a new British phenomenon. As the constructive artist Naum Gabo (1890-1977) said about his stay in Britain during the second world war (he lived in Russia, Germany and France before):⁵⁶

‘[A]nybody who was not born English ... will always be and remain a stranger in this country and he will always be made to feel it. I ... understand why all those foreign intellectuals who came first to this country left it so hurriedly one by one. ... [T]he atmosphere is saturated with such a static tradition ... that it simply does not permit any penetration by a foreign body...’

But even if one assumes that Britain may not have absorbed too much foreign artistic, intellectual and scientific influences, it has always provided a friendly substrate on which such developments could flourish. With this friendly substrate – a sound and stable democracy and constitutional order and openness to people coming from elsewhere – now fast disappearing, artists and other representatives of the creative industries, as well as scientists, may depart to Paris (still the unopposed capital city of the arts), Rome or Berlin and may take many British creative people with them who also need this intellectually enriching atmosphere.⁵⁷ Britain may then have a fine copyright law, but what it protects may be culturally less interesting.

The same situation is in relation to technological innovation and patent law. The sources of innovation, science and technology are mostly still the universities, and the transmission of knowledge and experiment may translate into start-up and spin-off companies: how an exchange of scientific and technological knowledge in a globalised world can happen despite a severe limitation of free movement of people is beyond comprehension. British enterprises which are limited in recruiting skilled employees in the IT and technology sector from Eastern Europe or Asia will seriously have to think about relocating their businesses to countries with fewer restrictions. Thus Britain may have a fine patent law, but what it protects may not be very innovative on a world scale.

⁵⁶ M. Hammer and Ch. Lodder, *Constructing Modernity: The Art and Career of Naum Gabo* (New Haven and London: Yale University Press, 2000), 277.

⁵⁷ Perhaps an early example: S. Pritchard, ‘Top orchestra quits Britain over Brexit migration clampdown’, *The Guardian*, 18 Feb. 2017.

While IP law will probably be able to adapt to ‘Brexit’ without insurmountable difficulties, in the reality of business the IP industries may well face fundamental problems. The IP economy could shrink significantly (except probably the defence and combat of cybercrime sectors), which may relegate IP law again to a rather esoteric specialisation within commercial law, as in the 1960s.
