

Brexit and IP: The Great Unraveling?
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As the pieces in this volume suggest, Brexit will, in theory, free the United Kingdom (UK) from the constraints and burdens of membership in the European Union (EU). It will transfer sovereignty back to the people from what was perceived as the technocratic rule of Brussels; replace the jurisprudence of the Court of Justice with the adjudicative power of national courts; and allow the UK to tailor its market regulation to the particular exigencies of its own economy. Whether, as a general matter, the restoration of a classic Westphalian state enhances value either nationally or globally is an issue we leave to others to debate.

We ask a different question: we explore how well the rhetoric of Brexit comports with the reality and the institutional economics of nation-state lawmaking in an era of global trade and digital communication technologies. We use intellectual property (IP) law as a concrete example. We think it a good context in which to consider the impact of the UK's exit from the EU. Copyrights are deeply intertwined with culture and education, patents have significant implications for health and safety, and trademark law sets the rules of the road for the marketplace in products and services. What is more, the public, judges, and legislators have come to realize just how much IP law—technical though it may appear—can interfere with access to things that are critical to their lives. For example, France was forced to withdraw a controversial anti-piracy law intended to limit Internet access in the face of intense opposition (including judicial recognition of access to the Internet as a basic human right);¹ proposed US legislation targeting the role of intermediaries in tackling Internet piracy was similarly scuttled by widespread opposition.² In 2000, the World Trade Organization's Seattle Ministerial meeting collapsed, in part because of massive public protest in the streets over patenting pharmaceuticals.³ The Anti-Counterfeiting Trade Agreement⁴ was concluded and signed by 10 countries. But widespread public distaste for its pro-IP owner stance led to ratification by only one, and the popularly-elected European Parliament killed its adoption by the EU when the Parliament for the first time exercised its Lisbon Treaty power to

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¹ See Siraj Dato, France Drops Controversial “Hadopi Law” after Spending Millions, *The Guardian* (July 9, 2013), available at <https://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy>.

² See Elaine Burke, SOPA, PIPA, ACTA and the Battle for Freedom on the Internet, *Siliconrepublic* (January 3, 2013), available at <https://www.siliconrepublic.com/life/sopa-pipa-acta-and-the-battle-for-freedom-on-the-Internet>. The problems with these proposals were also recognized in academia and legislative circles, see Michael Carrier, SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements, 11 *Northwestern J. Tecy & Intell. Prop'y* 21 (2013).

³ Ellen 't Hoen, PRIVATE PATENTS AND PUBLIC HEALTH 26-28 (Health Action International 2016), <http://accesstomedicines.org/wp-content/uploads/private-patents-and-public-health.pdf>

⁴ Anti-Counterfeiting Trade Agreement, 3 Dec. 2010, opened for signature 1 May 2011, 50 ILM. 243 (2011).

reject an international trade agreement negotiated by the Commission.⁵ More pointedly, UK judges have been scathing in their comments on the Court of Justice's inclination toward broad protection.⁶ Since the critique of one-size-fits-all IP regimes is well-known and widely accepted—and is specifically triggered by concerns about culture, education, health, and competitive markets—some might think that this is an area where the UK would quickly move to restore self-rule and put control over access to cultural and technological materials into the hands of a democratically elected legislature, accountable to the people for its actions.⁷

And yet IP regulation that transcends the nation-state is intimately associated with the incentive system of the Knowledge Economy. Intellectual property mediates the infrastructure of the modern—*global*—business environment. In this climate, worldwide protection is necessary. It protects innovators from free-riding rivals and permits firms to decouple research, production, and manufacturing functions and aggregate consumer demand. It is thus not surprising that nations with robust creative sectors embed themselves in a rich weave of international, regional and bilateral obligations. For the UK, that includes participation in the EU, for that single political alignment situated the UK within that transnational web. Because exit would present a significant loss of the efficiency gains, the UK will, to maintain a robust creative sector, be forced to recreate much of what it previously enjoyed. We thus conclude that the projected sovereignty gains of Brexit are unlikely to be fully realized.

By resituating itself in the international regime outside the EU, we do foresee some room for the UK to reconstitute its IP regime and engage in national experimentation. But we also predict an increased importance of transnational private ordering as a means of securing efficiencies; the rise of other harmonisation efforts, which may be no more transparently negotiated or balanced than was the case with measures developed through EU lawmaking institutions; and the development of new forms of political convergence. Some of these arrangements may present opportunities for innovation in knowledge governance, but others raise concerns about increased costs, decreased accountability, and other difficulties. We therefore question whether the transaction costs of the bureaucratic, diplomatic, and private machinations necessary to duplicate EU membership are worth the candle. While our study is limited to IP, we expect that many of the features that we discuss are true of other areas of law as well.

I. Gains of Leaving: Enhanced Sovereignty

Being freed from the constraints and burdens of EU membership will in theory open up substantial

⁵ See Carrier, *supra* note 2; see also The Last ACTA: Intellectual Property Treaty Dies in European Parliament, SPEIGEL ONLINE INT'L (July 4, 2012, 4:00 PM), <http://www.spiegel.de/international/europe/acta-international-property-treaty-voted-down-by-european-parliament-a-842583.html>.

⁶ Joel Smith and Darren Meale, L'Oreal Victory Over Protecting Brands Raises Questions on Free Trade, *The Guardian* (May 24, 2010), available at <https://www.theguardian.com/law/2010/may/24/loreal-victory-protecting-brands-trade>

⁷ See generally Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *A NEOFEDERALIST VISION OF TRIPS: BUILDING A RESILIENT INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM* (Oxford University Press 2012); *TRIPS and Essential Medicines: Must One Size Fit All? Making the WTO Responsive to the Global Health Crisis*, in *INCENTIVES FOR GLOBAL PUBLIC HEALTH: PATENT LAW AND ACCESS TO ESSENTIAL MEDICINES* (Thomas Pogge, Matthew Rimmer and Kim Rubenstein eds., Cambridge University Press 2010).

scope for the UK to revise its IP regime in ways that fit better with its own national policy interests. But this will vary by regime because the extent to which, and means by which, UK law had been Europeanised over the last forty-four years differs by the form of IP in question.⁸

A. Copyright Law

Copyright law in the EU has been harmonized by nine directives (not including horizontal directives such as the Enforcement Directive).⁹ Thus, much of UK copyright law is now determined by EU law. But EU copyright harmonisation is partial compared to other IP regimes. And relative to trademark or design law, a greater part of the harmonization in copyright law has been the result of judicial interpretation by the Court of Justice, rather than comprehensive legislative intervention—a phenomenon which has been critically received in the UK.¹⁰ Of course, this judicial harmonisation has still been binding on the UK courts because of the role of the Court of Justice in the EU scheme; Brexit would alter that.

For example, it is possible that the UK courts would take the opportunity post-Brexit to depart from the 2009 *Infopaq* decision of the Court of Justice, which requires the same test of originality (whether a work is an “author’s own intellectual creation”) for all works and not just for photographs, databases and computer programs, as the text of the directives provided.¹¹ And, the UK may revert to a closed list of categories of protected works rather than the more generous open approach that might be anticipated by the suggestion in that same Court of Justice case law that all works constituting the “original creation” of authors should be protected.¹² This open approach might lead to copyright protection for controversial types of work such as perfumes; the UK could now resist any such evolution in protectable subject matter.¹³

⁸ See Richard Arnold, Lionel A.F. Bently, Estelle Derclaye & Graeme B. Dinwoodie, *The Legal Consequences of Brexit through the Lens of IP Law*, 101 *Judicature* 65 (2017).

⁹ See Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111/16; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376/28; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372/12, amended by Directive 2011/77/EU, OJ L 265/1; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10 [hereinafter *Information Society Directive*]; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272/32; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012, OJ L 299/5; Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72.

¹⁰ See Lionel A.F. Bently, *Creeping Harmonisation* [speech].

¹¹ See Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569; [2009] ECDR 16.

¹² See, e.g., Case C-393/09 *Bezpečnostní softwarová asociace v. Ministerstvo kultury*, [2010] I-13971 (CJEU); see generally Eleonora Rosati, *Closed Subject-matter Systems are no Longer Compatible with EU Copyright*, 12 *GRUR Int* 1112 (2014).

¹³ See HR, June 16, 2006, LJN AU8940, *Kecofa/Lancôme* (holding by Dutch courts that perfume may be copyrightable subject matter).

Post-Brexit, the UK will also be able to consider modifying other aspects of its copyright regime that *were* previously harmonized by EU legislation. It will, for instance, be liberated from the exhaustive list of exceptions set out in the EU *acquis* and thus be able to adopt a fair use exception modelled on the US Copyright Act.¹⁴ Moreover, even where an exception *is* presently listed as a permissible (but not mandatory) in the Information Society Directive, the Court of Justice has restricted the capacity of member states to shape the precise contours of the exception under national law by demanding that every provision of the *acquis* have an “autonomous EU meaning.”¹⁵ With Brexit, the UK might re-enact its narrow, compensation-free private copying exception. This provision was struck down after judicial review in the UK courts as incompatible with EU law, on the ground that the Government had tendered no evidence that the harm to right-holders caused by private copying was minimal (such that might justify a royalty-free approach to the EU concept of “fair compensation” in the Information Society Directive).¹⁶ And the UK courts might feel free to develop the parody exception which it introduced into its copyright law in 2014, and do so without regard to the concept as it was articulated by the Court of Justice in the *Deckmyn* case.¹⁷ Finally, it might also reinstate section 52 of its Copyright, Designs and Patents Act (CDPA), which limited the term of copyright for designs to 25 years from first marketing when more than 50 articles embodying the designs were produced, thus essentially confining copyright to the maximum term available under registered design law. The UK Government decided to repeal that provision in view of its (incorrect) reading of the Court of Justice’s (incorrect) decision in *Flos*.¹⁸

B. Trademark Law

Trademarks in the United Kingdom are almost entirely regulated by EU law.¹⁹ When the UK revised its national trademark law in 1994 to reflect the EU Trademark Harmonisation Directive, it substantially liberalised the subject matter that could be protected as a trademark. As recently as 1986 the House of Lords had held that the shape of the iconic Coca-Cola bottle could not be registered as a trade mark.²⁰ Since joining the EU, the UK courts have formally accepted the liberalisation of subject matter, but have never dropped their scepticism about the capacity of shapes and colours to serve as trademarks.²¹

¹⁴ See Information Society Directive, art. 5; see also 17 USC § 107.

¹⁵ See Case C-467/08, *Padwan SL v. SGAE*, EU:C:2010:620 at ¶ 32 (CJEU) (holding that “the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union”); Case C-201/13, *Deckmyn v. Vandersteen*, EU:C:2014:2132 at ¶¶ 14-17 (CJEU).

¹⁶ *BASCA v Secretary of State for Business and Innovation* [2015] EWHC 1723 (Admin); [2015] EWHC 2041 (Admin); see also Information Society Directive, art. 5(2)(b).

¹⁷ See CDPA, § 30A; Case C-201/13, *Deckmyn v. Vandersteen*, EU:C:2014:2132 (CJEU) (incorporating principle of non-discrimination based on race into analysis of parody).

¹⁸ Case C-168/09, *Flos SpA v Semeraro Casa e Famiglia SpA*, EU:C:2011:29 (CJEU); Enterprise and Regulatory Reform Act 2013, § 74(2); see generally Lionel Bently, *The Return of Industrial Copyright*, 34 *Eur. Intell. Prop. Rev.* 654 (2012).

¹⁹ See Graeme Dinwoodie, *The Europeanization of Trade Mark Law*, in *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* 81 (Angsar Ohly & Justine Pila eds., 2013).

²⁰ See *Coca-Cola Trade Marks* [1986] FSR 472 (HL).

²¹ See, e.g., *Philips v. Remington Consumer Prods* [1998] E.T.M.R. 124 (Ch. D. 1997); *Société Des Produits Nestlé SA v Cadbury UK Ltd (KitKat shape)* (C 215/14) [2015] ETMR 50; *Société Des Produits Nestlé SA v Cadbury UK Ltd (KitKat shape)* [2016] EWHC 50 (Ch), *aff’d* [2017] EWCA Civ 358.

Likewise, in implementing the Directive, the scope of protection offered a UK trademark was extended beyond uses that might cause confusion to protection against dilution.²² Although the UK courts have been cautiously willing (even under domestic passing off law) to contemplate some forms of actionable damage beyond that caused by consumer confusion (for example, through blurring or tarnishment of the mark),²³ the robust form of dilution (or “unfair advantage”) encompassing protection against “reaping where one has not sown” was clearly accepted by the UK courts only under protest.²⁴ And in the same case, where a strong form of anti-free riding was endorsed by the Court of Justice, the UK courts succumbed with evident fatigue to the pressure from the Court of Justice to limit comparative advertising. As Lord Justice Jacob commented, “[m]y own strong predilection, free from the opinion of the ECJ, would be to hold that trade mark law did not prevent traders from making honest statements about their products where those products are themselves lawful. . . I do not agree with or welcome [the contrary] conclusion – it amounts to a pointless monopoly. But my duty is to apply it.”²⁵

This grudging acceptance of EU policy in the field has thus been seen in a number of trademark cases, where the UK courts have indicated dissatisfaction with what they see as unduly protectionist policies before obediently applying them.²⁶ Indeed, in the recent (2015, still to be implemented) reforms of EU trademark law, the EU legislator has (over the objection of the UK and Dutch governments) further expanded the powers of trademark owners to stop goods in transit through the EU bearing marks that might be infringing in the EU even though there is no intent for those goods to enter the EU market.²⁷ There are only a very few areas of trademark law where the Court of Justice has allowed for variation in member state law, most notably in regulating potential liability of online intermediaries such as Google or eBay for the trademark infringements and counterfeiting allegedly facilitated by their platforms.²⁸ Such liability, if any, would most likely arise out of arguments that these platforms are secondarily responsible for the infringements

²² First Council Directive 89/104/EEC of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1990 O.J. (L 40) 1, art 5(2).

²³ Cf. *Harrods v Harrodian School* [1996] R.P.C 687; Ilanah Simon Fhima, *Exploring the Roots of European Dilution*, IPQ 25 (2012).

²⁴ *L'Oréal SA v. Bellure NV* [2007] EWCA Civ 968; [2009] ETMR 55 (ECJ 2009); [2010] EWCA Civ. 535 (CA 2010).

²⁵ *L'Oréal SA v. Bellure NV* [2010] EWCA Civ. 535 (CA 2010).

²⁶ As another example, paradoxically going to the free trade roots of the European project, the UK national courts were the most reluctant adherents to the doctrine of EU-wide exhaustion (rather than international exhaustion). See *Mastercigars Direct Ltd v. Hunters & Frankau Ltd.*, 2007 E.T.M.R. 44 (CA 2007) (“The policy behind this rule has been called ‘fortress Europe.’ . . . It means traders can use trade marks to partition Europe from the rest of the World Market. . . . [G]enerally the rule is self-evidently rather anti-competitive and protectionist. Our task is not to consider whether the rule is good or bad from an economic perspective. It is to apply it.”) (Jacob LJ). Even the (very respected) British Advocate-General in the *Silhouette* expressed his preference, as a policy matter, for a different outcome. However, potential price competition and benefit to consumers were outweighed by the threat to the integrity of the internal market if one Member State provided for international exhaustion while another did not. *Silhouette v. Hartlauer*, [1998] 2 CMLR 953 (ECJ 1998) (Advocate-General Jacobs).

²⁷ See Council Regulation 207/2009, 2009 O.J. (L 78/1), (EC) as amended by Regulation 2015/2424, 2015 O.J. (L 341/21) (EU) art. 9(4) (allowing for in-transit seizures of goods passing through a free trade area bearing identical marks to those registered as a EUTM); cf. *Nokia Corporation v Her Majesty’s Commissioners of Revenue and Customs*, (C 446/09 and C 495/09), [2012] E.T.M.R. 13 (CJEU 2011).

²⁸ *Joined Cases C-236 to 238/08 Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-2417; *L’Oreal SA v eBay International AG* (C-324/09), [2011] E.T.M.R. 52 (CJEU 2011).

of their customers. However, secondary liability tests have not been harmonised. Thus, in many areas of trademark law, the effect of Brexit will be to allow the UK to adopt national trademark law that reflects less protectionist policies more attuned to its historical preferences.

Moreover, national autonomy over trademark law in the UK has for twenty years been circumscribed not only by EU harmonisation of national UK law, but also by the overlay of a “federal” trademark registration that covered the entire territory of the EU (now known as the EUTM). Under that arrangement, a single application secures a right valid throughout the entire territory of the European Union and the right can be enforced in one proceeding via the grant of an EU-wide injunction even without the plaintiff having used its mark anywhere in the EU let alone the UK. Indeed, registration at the EU level does not even require an intent to use the mark (as is the case under UK national law), although (as in the UK) use is required to maintain the mark.²⁹

The availability of EU-wide trademark registrations created policy challenges because such easy-to-acquire EU-wide rights constituted earlier rights that would bar registration of similar marks in the UK (whether national marks or other EUTMs).³⁰ The UK Intellectual Property Office was one of the leading proponents of a stricter approach to registration, fearing the development of clutter on the register.³¹ But such fears were less pronounced in non-English speaking countries in Europe, and in the recent reforms of EU trademark law only minor changes were implemented to address this problem.³² In particular, although the Max Planck Study that prompted the 2015 reforms canvassed whether the EUTM system should adopt an “intent to use” requirement, the reforms did not include such a requirement. Because EUTMs will, after Brexit, no longer extend to the UK, the clutter on the UK register could be substantially ameliorated making it potentially easier for UK traders to clear rights in the UK.

C. Patent Law

Of the major IP rights, patent law will be the area where the UK will formally re-acquire the least sovereignty as a result of Brexit. There is very little substantive EU patent law at present; the most significant EU instrument in the field of patent law is the Biotechnology Directive, although the

²⁹ National systems within the European Union can under the Trade Mark Directive require intent to use as a precondition to application. See, e.g., Trade Marks Act 1994, § 32(3) (Eng.).

³⁰ See Directive 2008/95 of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks (codified version), 2008 O.J. (L 299/25) (EC), art. 4(2)(a)(i) (definition of “earlier mark” for purposes of assessing applications for registrations under national law includes earlier EUTMs).

³¹ See, e.g., Georg von Graevenitz et al., UK Intellectual Prop. Office, Trade Mark Cluttering: An Exploratory Report (2012); Georg Von Graevenitz et al., UK Intellectual Prop. Office, Cluttering and Non-Use of Trade Marks In Europe 10 (2015),

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568675/TM_cluttering_report.pdf.

See generally Barton Beebe & Jeanne Fromer, Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion (February 2017) (unpublished draft), to be published at 131 Harv. L. Rev. ____ (2017).

³² See, e.g., Regulation 2015/2424 of the European Parliament and of the Council of Dec. 16, 2015, Amending Council Regulation 207/2009 on the Community Trade Mark (EC) and Commission Regulation 2868/95 Implementing Council Regulation 40/94 on the Community Trade Mark (EC), and Repealing Commission Regulation 2869/95 on the Fees Payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (EC), 2015 O.J. (L 341/21) (EU), art. 1(26) (eliminating the “three classes for one fee” rule).

Enforcement Directive (which applies to all forms of IP) affects the remedies available under patent law.³³ Instead, in 1973 (the same year that the UK joined the institutions that later became the EU), a number of European states concluded an international convention, the European Patent Convention (EPC), which now substantially regulates patentability law throughout Europe (though it also, albeit minimally and indirectly, addresses questions of infringement).³⁴ The EPC is not part of EU law and the UK Government has made it clear that it intends to abide by its commitments under international law, which includes the EPC. Indeed, the EPC already has ten adhering states which are not EU Member States; the UK will simply join those ranks.

Brexit could affect the enforcement of patent law beyond matters of biotech patents and remedies, however, insofar as it might endanger UK participation in the Unitary Patent system that is hoped will come into effect in early 2018. For decades, the EU has been trying to establish an EU-wide patent that could be enforced throughout the EU. At present, patent rights secured through the (transnational) EPC system constitute a bundle of national rights and efforts to enforce such rights on an EU-wide basis through a liberal reading of EU law on jurisdiction and recognition and enforcement of judgements have been largely thwarted by the Court of Justice.³⁵

In late 2012, a compromise solution was reached, which is to be implemented in part by an EU regulation and in part by an international agreement, the Unified Patent Court Agreement (UPCA), that is formally a “special agreement” concluded by the member states of the EPC.³⁶ Under this arrangement, a right holder will be able to enforce a single patent (the “Unitary Patent”) throughout participating EU states through a single patent court (the “Unified Patent Court” or UPC). Because the system is established by an international agreement (rather than EU legislation), Brexit might be assumed not to affect the new judicial arrangements.

However, in order to accommodate the treatment of an earlier institutional arrangement by the Court of Justice, the UPC has been conceptualised as a “a court common to the participating Member States [of the EU] and part of their judicial system”, with an obligation to refer to the

³³ See Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213) 13 (EC); Case C-34/10 *Brüstle v Greenpeace* [2012] 1 CMLR 41; Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 22; *HTC Corp. v. Nokia Corp.* [2013] EWHC 3778 (Pat) at [26]-[32] (reading patent remedies subject to EU law).

³⁴ See European Patent Convention, 13 I.L.M. 268; see also *Fujifilm Kyowa Kirin Biologics Co., Ltd. v. AbbVie Biotechnology Limited*, [2017] EWCA Civ 1, ¶¶ 5-15. In fact, most countries of the EU have adopted statutory language on infringement that is in line with the defunct Community Patent Convention, and scope of infringement is to some extent further harmonized within the EPC system by a Protocol on the Interpretation of Article 69 of the EPC. See also Robin Jacob, *The Herchel Smith Lecture 1993*, 19 EIPR 312, 313 (1993) (“We had no statutory definition of infringement before the [1977 Patents] Act. Now we have section 60 reflecting Articles 29 to 31 of the CPC. Again other countries have got the same law, but may interpret it differently”).

³⁵ See Case C-539/03, *Roche Nederland BV v. Primus*, 2006 E.C.R. I-6535; Case C-4/03, *GAT v. LuK*, 2006 E.C.R. I-6509; see generally Annette Kur, *A Farewell to Cross-Border Injunctions? The ECJ Decisions Gat v. Luk and Roche Nederland v. Primus and Goldenberg*, 37 *Int'l Rev. Intell. Prop. & Competition L.* 844, 849 (2006); Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality*, 51 *Wm. & Mary Law Rev.* 711, 743-752 (2009).

³⁶ See Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, O.J. (L) 361/1 (Dec. 31, 2012); Council Document No. 16351/12 of Jan. 11, 2013, Agreement on a Unified Patent Court [hereinafter UPCA]; see also European Patent Convention, art. 142.

Court of Justice the supposedly few questions of EU law that will arise in proceedings before it.³⁷ If the UK Government adheres to its political position that the UK will not in any way be subject to EU law and the jurisdiction of the Court of Justice, then it is hard to see how the UK can participate in the new scheme.³⁸ Indeed, because the agreement establishing the system requires the ratification by the UK in order for it to start functioning,³⁹ the UK's indication of intent to withdraw from the EU could have meant that the entire system would not go into effect even for the remaining Member States.

Under this view, Brexit would likely effect a change in UK patent law not because of the exercise of enhanced sovereignty but because the lack of EU membership would disempower the UK and preclude its membership of the new European patent system. Surprisingly though, the UK has recently confirmed it will ratify the UPCA.⁴⁰ At least for now, the new system has apparently been saved (though to what real effect, and with what British involvement, is not yet entirely clear).

This derogation from the UK Government's political position as regards the total expungement of the Court of Justice and EU law from the UK might, in light of the currently minimal scope of EU patent law, fly below the political radar. But it has already attracted the attention of the (hard line Brexiteer) popular newspapers in the UK.⁴¹ And it is not clear how much political turbulence the government is willing to withstand—or how far it is willing to stretch the case law of the Court of Justice without seeking its opinion—to ensure UK participation.

The discussion in this Part suggests that there is substantial *theoretical* room for the reacquisition of sovereignty by the UK. But, as we discuss below, this theoretical sovereignty is overstated. The United Kingdom will regain far less “sovereignty” than one might think because of the web of the international, regional and bilateral obligations that exist in the field of IP, the benefits that this harmonization brings to the creative environment, and the practical integration of markets that has occurred in part through the 60 years of the EU and in part because of the rise of global trade and digital communication technologies.

II. Benefits of Harmonization

The problem with Brexit is that escaping the yoke of EU membership also risks losing many of the benefits conferred by harmonization (or at least, coordination). For IP, these have been

³⁷ The Court of Justice believes that—as a matter of fundamental EU constitutional law, rather than optimal international patent policy—certain institutional dynamics (including the coordinating authority of the Court of Justice in matters of EU law) are essential. See *Re Draft Agreement on the European and Community Patents Court* (Opinion 1/09), 3 C.M.L.R. 4 (CJEU Full Court 2011).

³⁸ See UPCA art. 20-24 (application of EU law and references to the Court of Justice). *But see* Richard Gordon & Tom Pascoe, *Opinion On the Effect of ‘Brexit’ On The Unitary Patent Regulation and the Unified Patent Court Agreement* (Sept. 12, 2016), <http://www.eip.com/assets/downloads/gordon-and-pascoe-advice-upca-34448129-1.pdf>; Winfried Tilmann, *EPUE-Reg and UPCA After Brexit*, EPLAW (June 27, 2016), <http://eplaw.org/eu-winfried-tilmann-epue-reg-and-upca-after-brexit/>; Ansgar Ohly and Rudolf Streinz, *Can the UK stay in the UPC system after Brexit?*, 12 J. Intell. Prop. L. & Prac. 245 (2017).

³⁹ See UPCA art. 89(1).

⁴⁰ See Intellectual Property Office, *UK signals green light to Unified Patent Court Agreement* (Nov. 28, 2016), at <https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement>.

⁴¹ See David Maddox, *Exposed: Secret Plan to Tie Britain to EU After Brexit is being Kept “Under the Radar”*, Daily Express, Feb. 10, 2017.

substantial and well recognized for more than a century. Although controversial, the convergence of national IP laws has increased over time, as the technologies of production have developed and business models have adapted to them.

Copyright furnishes a good example. At one time, nations awarded copyright to their own nationals, but not to others. As a result, books authored and protected in one country were often available in unauthorized editions in other places.⁴² When the same language was spoken (England versus Ireland and America; France versus Switzerland and Belgium), this increased public access but came at considerable cost to authors. Not only was revenue lost on sales abroad; books could be imported back into the country of origin, leading to decreased rewards domestically as well. When the loss of revenue grew intolerable, countries at first entered into bilateral agreements within language groups that extended protection to each other's creators; by the late 19th century, multilateral arrangements became necessary.

The Berne Convention, first adopted in 1886, imposed an obligation of national treatment which required member states to protect the works of the nationals of other members,⁴³ in successive rounds of negotiations, standards of substantive protection were added and—as new methods of exploitation were invented—expanded. By the end of the 20th century, creators of literary and artistic works who lived or published in a Berne country enjoyed rights over reproduction, translation, performance, adaptation, and broadcast of their works, as well as moral rights to claim authorship and to object to their works' distortion.

But the drive to harmonize did not end there. The invention of the computer coupled with the ability to digitize copyrighted works and distribute them on the Internet, once again threatened the power of authors to exclude others from benefiting from their works without authorization. In 1994, the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property (the WTO's TRIPS Agreement) incorporated the Berne Convention by reference, made almost all the substantive requirements enforceable for all WTO members, and added obligations regarding the protection of computer programs and performances.⁴⁴ Two years later, two treaties tackling online issues were negotiated under the auspices of the World Intellectual Property Organization (WIPO). These so-called WIPO Internet Treaties enhanced the power of right holder to control Internet uses.⁴⁵

For patents, the account is similar. Absent a right to obtain patents in foreign markets, inventors could not protect themselves from free riders outside their countries of origin. To promote broader dissemination of technical knowledge and its fruits, the Paris Convention of 1883 imposed an

⁴² Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, §§ 1.20-1.24 (OUP, Oxford 2005).

⁴³ Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 1161 U.N.T.S. 31 [hereinafter Berne Convention].

⁴⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

⁴⁵ World Intellectual Property Organization Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997) [hereinafter WIPO Copyright Treaty]; World Intellectual Property Organization Performances and Phonograms Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997) [hereinafter WIPO Performances and Phonograms Treaty].

obligation of national treatment and rules that facilitated serial application across member states.⁴⁶ The TRIPS Agreement incorporated the obligations of the Paris Convention and added substantive obligations creating rights to exclude others from making, using, selling, offering to sell, or importing the patented invention in, or into, the state.⁴⁷

Both Paris and TRIPS also recognize trademark rights, where the need for international agreement is, in some sense, even greater than it is for patents and copyrights. Trademarks protect the ability of producers to convey information to consumers about the source and quality of their products; absent multilateral protection, consumers who travel from one country to another, read foreign publications, hear foreign broadcasts, or see remote Internet transmissions could become confused about the meaning of the marks they see. Furthermore, the marks could as a result lose their cognitive impact and their capacity to differentiate goods in a competitive marketplace.

Paris and TRIPS solve the problem by extending national treatment obligations to trademark rights, by facilitating registration of identical trademarks in all Paris (and later, WTO) countries, and through provisions that protect against unfair competition, including uses that are likely to confuse (and perhaps dilute) the mark.⁴⁸ These instruments also entitle well known marks to enhanced protection, even when not in use in a particular country.⁴⁹

But even with these fairly comprehensive agreements, which delineate rights and limit exceptions to them, there is considerable agitation for more protection.⁵⁰ The Internet and collaborative platforms such as Google Drive and Dropbox facilitate communication, collaboration, and joint venturing. Moreover, value chain business models mean that operations are increasingly unbundled and disaggregated geographically. To protect information wherever it travels and avoid friction among a wide range of actors (commercial firms, universities, government, private-public partnerships) located in multiple jurisdictions, globally-enforceable rights are necessary. In pursuit of that goal, it is helpful if the details of national systems are similar.⁵¹ (And a system that ensures that each participant reaps an award commensurate with the knowledge it added is normatively desirable for other reasons).

A new round of bilateral, regional, and mega-regional trade agreements, with enhanced (“TRIPS-plus”) obligations, has been initiated to meet these new demands.⁵² These agreements are,

⁴⁶ Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention], arts. 2 (national treatment) & 4 (priority). See also John Gladstone Mills III, A Transnational Patent Convention for the Acquisition and Enforcement of International Patent Rights, 88 J. Pat. & Trademark Off. Soc’y 958 (2006); Gerald J. Mossinghoff, National Obligations Under Intellectual Property Treaties: The Beginning of a True International Regime, 9 Fed. Circuit B.J. 591 (2000).

⁴⁷ See TRIPS art. 28.

⁴⁸ See Paris Convention, arts. 2 (national treatment), 4 (priority), 6(2) (no home registration requirement), 6quinquies (telle quelle), 10bis (unfair competition); see also TRIPS, art. 16 (scope of protection).

⁴⁹ See Paris Convention, art. 6bis; TRIPS, art. 16.

⁵⁰ See *infra* text at notes 48-61.

⁵¹ See Daniel Jacob Hemel and Lisa Larrimore Ouellette, Knowledge Goods and Nation-States, 101 Minn. L. Rev. 167 (2016); Rochelle Cooper Dreyfuss, Collaborative Research: Conflicts on Authorship, Ownership, and Accountability, 53 Vand. L. Rev. 1161 (2000). Cf. Jonathan M. Barnett, Intellectual Property as a Law of Organization, 84 S. Cal. L. Rev. 785 (2011).

⁵² For an account of some of these agreements, see Rochelle Dreyfuss & Susy Frankel, From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property, 36 Mich. J. Int’l L. 557, 566-575 (2015).

however, hard fought. While raising the standards of protection is important for producers, users of information products are considerably less enthusiastic. For IP, one person's input is the next person's output; strong protection can inhibit the ability of others to build on earlier works, extend the frontiers of knowledge, and prevent the introduction of novel products that consumers might well value.⁵³ Most important, increasing the level of protection is not in the national interest of every country. In particular, for net importers of information products, high levels of protection reduce access to important resources—medicines, textbooks, cultural materials—that are necessary to keep the population healthy and allow it to reach the intellectual frontier and become the beneficiary of strong IP protection.⁵⁴ Many of these countries entered into trade agreements in order to access markets for their commodities and have found the price of joining TRIPS—let alone TRIPS-plus agreements—much higher than they expected.⁵⁵ For these reasons, further harmonization at the international level has been slow in coming. TRIPS is a minimum standards agreement and there has been no successful effort in the WTO or elsewhere to obtain more thorough harmonization.⁵⁶ ACTA failed; the Trans-Pacific Partnership is floundering;⁵⁷ and observers have suggested that absent backstops that set positive limits on protection, a moratorium on international IP law making is in order.⁵⁸

Significantly, this critique does not apply with the same force in the EU. Although the member states are not homogeneous, they are not as dissimilar culturally, economically, or technologically as the countries that belong to the WTO.⁵⁹ Furthermore, there are broader and ongoing politically-negotiated redistributive mechanisms within the EU that might ease the burden of accepting high levels of protection. Moreover, a collective commitment to deep market integration makes it imperative to develop an IP system that permits knowledge products to move freely throughout the Union and offers an efficient method for enforcement. And because EU integration facilitates more trade than does the looser WTO scheme, the benefits each member derives from membership is high enough to outweigh the cost of agreeing to levels of protection that exceed the domestic optimum. As a result, harmonization within the EU context is much tighter than that which WTO law seeks to effect.

Lawmaking within the EU is also very different. Negotiations are in some ways easier because

⁵³ See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁵⁴ See generally Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 *Duke L.J.* 85, 86 (2007)

⁵⁵ See, e.g., Carlos A. Primo Braga & Carsten Fink, *The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict*, 72 *Chi.-Kent L. Rev.* 439, 446 (1996).

⁵⁶ To the contrary, the Doha Round of WTO negotiations led to liberalization of the patent rules on compulsory licenses. See TRIPS art. 31*bis*; WTO General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (8 December 2005).

⁵⁷ See *Trans-Pacific Partnership Agreement*, available at <http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>. The US has indicated its intent to withdraw from the TPP. See Presidential Memorandum (January 23, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

⁵⁸ See Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* 3, 37 (Keith E. Maskus & Jerome H. Reichman eds., Cambridge University Press 2005); Dinwoodie and Dreyfuss, *supra* note 7, at 175-203.

⁵⁹ See Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 *U. Penn. L. Rev.* 469 (2000).

they occur among like-minded countries and benefit from the standing institutions of the EU (the Commission and the Parliament), which, thanks to successive reforms of the founding treaties, have the authority to issue regulations and directives that harmonize IP rights at a level of substantial detail.⁶⁰ The Court of Justice has also ensured strict compliance with the harmonized norms, and has effected common law development that has allowed quick dynamic adjustment to changing circumstances.⁶¹ Closer relations among the actors in a deeply-integrated market can give rise to industry standards and memoranda of understanding that substitute fine-grained norms for blunter legislation.⁶² Finally, the EU has the backstops that are missing at the international level. The Charter of Fundamental Rights has led to the “constitutionalization” of IP law through its recognition of the interests of users, competitors and IP right holders;⁶³ EU competition law has similarly exerted a strong countervailing influence.⁶⁴

When Brexit occurs, the UK will have to seek the benefits of harmonization through the same international process that has been the subject of sustained resistance as well as scholarly critique, rather than under these more efficient EU mechanisms.

III. Looking Post-Brexit

Given the many advantages of harmonization in the IP realm, the self-governance benefits of exiting the EU may be far less than it might appear. In the short-term, much of UK law that is derived from EU legal imperatives will remain; indeed, the Government’s proposed “Great Repeal Bill” will start from the default position that UK law on the day before Brexit will be the same on the day after.⁶⁵ Commercial certainty requires as much. Exercise of any reacquired sovereignty will therefore occur over time. Directives have been implemented into UK through amendment of the national legislation; thus, the content of IP directives is embedded in domestic statutes. Even if there is room to replace that EU-inspired law with different UK law, the work of revising UK law to remove the vestiges of the underlying EU law is likely to take many years. Furthermore, even a brief look at the principal IP regimes demonstrates that the room for replacement is, as a practical matter, limited. Indeed, there may be instances where the replacement will do no more

⁶⁰ Treaty on European Union, Official Journal C 191, 29 July 1992, as amended by the Lisbon Treaty, OJ C 306 (17 Dec. 2007), and consolidated OJ C 202/01, 13 (7 June 2016).

⁶¹ The role of the CJEU in the harmonization effort is substantial. In 2016, the Court of Justice handled 80 IP cases, and 40% of the case law of the General Court was trade mark cases. See Court of Justice of the European Union, Annual Report 2016 at https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf.

⁶² See Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, May 4, 2011 [hereinafter Memorandum of Understanding or MOU], *available at* http://ec.europa.eu/internal_market/ipenforcement/docs/memorandum_04052011_en.pdf.

⁶³ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, esp. arts. 11 (free expression), 16 (freedom to conduct business), 17 (intellectual property). See generally *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, EU:C:2014:192 (CJEU 2014); Christophe Geiger, Intellectual Property Shall be Protected, 31 EIPR 113 (2007); Jens Schovsbo, Mark My Words: Trademarks and Fundamental Rights in the EU (March 6, 2017), *available at* <https://ssrn.com/abstract=2928031>; Josef Drexler, European and International Intellectual Property Law Between Propertization and Regulation: How A Fundamental-Rights Approach Can Mitigate the Tension, 47 U. Pac. L. Rev 199, 216 (2016)

⁶⁴ Treaty on the Functioning of the European Union, art. 102, OJ C 202/01, 47 (7 June 2016).

⁶⁵ See Department for Exiting the European Union, *Legislating for the United Kingdom’s Withdrawal from the European Union* § 1.12 (Cm 9446) (March 2017).

than mirror (sometimes rather weakly) the advantages the UK previously enjoyed through its membership of the EU.

A. Trademark Law

The most immediate change will be in areas where EU law has been made effective in the UK through the use of regulations. Once the UK leaves the EU, regulations will cease to have effect in the UK immediately without the UK Parliament or Government having to do anything. Trademark law furnishes an example as EUTMs are unitary rights valid throughout the territory of the EU, which after Brexit will no longer include the UK.⁶⁶

While the UK has retained its own national trademark system to which right holders can resort, the loss of EUTMs will give rise to several commercially significant problems. Trademark holders have a strong need for international agreement in order to protect the signalling function of their marks. To a large extent, consumers have a similar interest: they too want clear signals because such marks save search costs and ensure the quality and source of the products consumers buy. Accordingly, it is important to make sure that the rights of (1.2 million) existing EUTMs holders be protected in the UK after Brexit. If they have to apply anew for UK national rights, it will be at great cost and with the risk of losing their rights to subsequent traders who jump in quickly to obtain a prior UK registration. Reciprocally, owners of EUTMs who had relied exclusively or substantially on use in the UK to maintain their EU rights throughout the rest of the EU (who are likely disproportionately to be UK businesses) may find their EUTM vulnerable to revocation after Brexit.

A number of options for resolution of these commercial uncertainties have already been floated.⁶⁷ Some mark owners can engage in self-help in advance of Brexit by filing for UK national rights and maintaining EUTMs by making use of their marks on a transborder basis. However, these might be second-best strategies, either legally (because a new filing will carry a later priority in the UK) or commercially (because earlier than anticipated transborder use might interfere with a trader's roll out plans). A comprehensive solution will inevitably require political intervention. On its face, it appears that there will be sufficient mutual interests among the UK and remaining EU member states to conclude some arrangement that accommodates all groups of mark owners equally, though the broader political climate may cause strategic analysis by Brexit negotiators of the extent to which these risks are equally shared by the UK and non-UK rights owners. Whatever deal is reached—and one is likely—the UK is expected to insist that former EUTM owners whose rights in the UK post-Brexit will emanate from some sort of politically-secured national rights show an intent-to-use in the UK. Thus, although mutual commercial interests will probably preclude the UK in practice from eliminating protection for 1.2 million marks, it is likely that the UK will be able to exercise its sovereign muscle to make it somewhat easier to clear rights in the UK post-Brexit.

The difference, however, is modest: UK traders who wish to do business in the EU will need to comply with EU law to obtain and maintain EUTMs. And, as described in greater detail with

⁶⁶ The same is true for Community Registered and Unregistered Designs. See Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (consolidated version), OJ L 386/14 (29 Dec. 2006).

⁶⁷ See Arnold et al, *supra* note 8.

regard to copyrights, UK national trademark law must continue to meet the requirements of the TRIPS Agreement. Thus, for example, repealing protection against dilution could run into a challenge at the WTO,⁶⁸ or would be difficult to reconcile with the likely content of future bilateral or plurilateral trade agreements, which experience suggests will include such protection in their TRIPS-plus provisions. Likewise, any attempt to give effect to the historical scepticism of UK judges towards non-conventional marks by excluding them entirely from registerable subject matter would raise difficult questions under existing TRIPS obligations and about-to-be negotiated trade agreements (if they bear any resemblance, as they must, to those presently in place among other countries with which the UK would wish to negotiate).

Finally, developments in the relatively minor space presently left for national trademark law by EU legislation suggest some of the mechanisms by which UK traders are likely to pursue the benefits of harmonization without access to EU institutions and the certainty of EU-wide norms. In particular, commercial actors are likely to adopt more expansive forms of private ordering to secure the gains denied by political rupture. In a UK case replicated in several countries, *L'Oréal v. eBay*, L'Oréal argued that the eBay auction site was secondarily liable for the trademark infringements allegedly committed by the sellers of goods who unlawfully used L'Oréal marks in their auction site listings.⁶⁹ The Court of Justice held that secondary liability for trademark infringement was a matter of national law.

EU law *was*, however, potentially relevant in immunizing eBay from liability under that national law by virtue of Article 14 of the E-Commerce Directive, which provides a hosting safe harbor heavily tied to a notice and takedown scheme, not unlike that found in Section 512 of the US Copyright Act.⁷⁰ But the Court held that whether eBay was within the protection afforded by the safe harbor would, as a threshold matter, depend upon how active it was in the allegedly illegal activity.⁷¹ Significantly, the determination of that question was left to national courts.⁷² Likewise, Article 11 of the Enforcement Directive requires member states to ensure that “right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an IP right.”⁷³ The Court of Justice held that trademark owners might be able to require assistance from eBay under this provision, but its ruling did not definitively answer many questions regarding the nature of that assistance. Indeed, in the copyright context, the Court has made clear that the procedures adopted by member states to implement this obligation can be shaped to reflect their different legal cultures.⁷⁴

In this climate of uncertainty, the process in Europe took a turn toward private ordering. eBay and

⁶⁸ Cf. Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, WIPO Doc. 833(E), Sept. 29, 1999 (interpreting TRIPS as incorporating dilution protection).

⁶⁹ Case C-324/09, *L'Oréal SA v. eBay Int'l AG*, 2011 E.C.R. I-6011.

⁷⁰ See Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 14, 2000 O.J. (L 178) 1, 11 (EC) [hereinafter E-Commerce Directive]; 17 U.S.C. § 512 (West 2014).

⁷¹ Case C-324/09, *L'Oréal SA v. eBay Int'l AG*, 2011 E.C.R. I-6011, ¶ 113.

⁷² *Id.* ¶ 117.

⁷³ Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 22 [hereinafter Enforcement Directive].

⁷⁴ Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, EU:C:2014:192 (CJEU 2014); see also Information Society Directive, recital 59 (“The conditions and modalities relating to such injunctions should be left to the national law of the Member States”).

L'Oréal are parties to a 2011 Memorandum of Understanding (MOU) among over thirty stakeholders consisting of brand owners and Internet platforms regarding their respective roles in tackling counterfeiting online.⁷⁵ The MOU arguably commits parties to obligations beyond those that might presently flow from hard law secondary liability standards. Among other things, the parties are required to operating notice and takedown systems, and agree to details that differ from the type of system that is currently thought to flow from legislation regarding secondary liability or intermediary safe harbors. In particular, the MOU commits platforms to what are called “[p]roactive and [p]reventive measures,” thus addressing the prevention of future infringement by ensuring that offers of counterfeit goods do not appear online.⁷⁶ And in implementing their proactive and preventive measures, platforms will act not only on item-based notices but also on notification by trademark owners of sellers who are generally engaged in the sale of counterfeits. In addition, the MOU tackles abuse of the notice and takedown system.⁷⁷

The MOU is limited to the provision of services in the European Economic Area (EEA).⁷⁸ However, such agreements can more easily be extended beyond the European Union than formal legal harmonization instruments.⁷⁹ Indeed, in July 2013, the European Commission “inquired whether the global players among the [s]ignatories with operations in North America and Japan might be ready to progressively apply the MOU in those regions.”⁸⁰ Signatories “responded positively.”⁸¹ Brexit would thus not appear to preclude the continued participation of UK-based companies in this scheme; indeed, insofar as Brexit has limited formal harmonization of law, it has made this private ordering even more important.

But elevating this type of mechanism has costs and benefits as compared to legal harmonization. The MOU reduces litigation expenses and the process through which it has been drafted and applied creates flexibility to adapt procedures to reflect both new forms of trading and changing technological capacity. However, to the extent that the MOU limits opportunities for concrete judicial development of the legal obligations under which intermediaries operate, it impedes a process that would over time inculcate greater certainty. Furthermore, the system is dominated by a specific set of stakeholders and uses technocratic procedures that are difficult for outsiders to assess. As concern grows generally in a number of countries about the extent to which the practice of notice and takedown causes excessive enforcement of IP rights—a concern acknowledged by the Court of Justice—some degree of publicly-enforced transparency is important to allow critical

⁷⁵Memorandum of Understanding, *supra* note 62. See generally, Graeme B. Dinwoodie, Secondary Liability for Online Trademark Infringement: The International Landscape, 36 Columbia J. L. & Arts 463 (2014).

⁷⁶*Id.* ¶ 25.

⁷⁷ See Dinwoodie, *supra* note 75, at 470.

⁷⁸Memorandum of Understanding at 1.

⁷⁹See European Comm’n, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Enhancing the Enforcement of Intellectual Property Rights in the Internal Market*, ¶ 4.2, COM (2009) 467 final (Sept. 11, 2009), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009DC046>.

⁸⁰*Id.*

⁸¹*Id.*; see also Florina Telea, EU Observatory on the Infringement of IPR, Working Group on Enforcement, *Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet (PowerPoint Slides)*, at 9 (2014), available at http://ec.europa.eu/internal_market/iprenforcement/docs/022014-observatory-mou_en.pdf (noting goal of “developing MOU at the international level by including operators from third countries such as the US”).

scrutiny.⁸² The European Commission (which has superintended the adoption and implementation of the MOU) has disseminated information about the practices developing thereunder but greater detail will likely be dependent in the short-term on disclosure by the market actors. In the long-term, participation by non-EU parties will require a new oversight mechanism.

B. Copyright Law. In the long-term, the UK Parliament and courts can be expected to act on some of the autonomy realised through no longer having to comply with the directives that have been used to implement EU copyright policy. But this too can be overstated, for here is a place where the network of continuing regional and international obligations will have considerable bite, as will the need to secure the benefits of harmonisation discussed in Part II without relying on the EU mechanisms.

As to the former, as a member of the WTO, the UK will be required to adhere to the TRIPS Agreement, the Berne and Paris Conventions, and the WIPO Internet Treaties. Thus, unless it pulls out of these agreements (and it is unthinkable that the UK would exit the WTO) any new IP law that it makes must still meet the minimum standards set out in those measures. Indeed, to the extent that the UK strikes a deal with the EU through a free trade agreement (FTA), the UK may well have to comply with some of the current EU *acquis* since every EU FTA with the rest of world comes with a detailed IP chapter which obliges the other party to comply with some features of EU law. The same is true if the UK chooses the option of joining the EEA or the European Free Trade Association (EFTA); indeed, membership of the latter would subject the UK to another international court (the EFTA Court), this time without a say in the form in the development of the legislation being considered by that court.

The UK Government's Hard Brexiteers have touted the ability to replace existing trade arrangements with the EU or EEA with a series of bilateral trade agreements with partner nations around the world. But there too, the UK might in effect have to comply with some of the EU *acquis*. Thus, even if it secures trade agreements only with countries such as New Zealand, Australia, or South Africa, the *acquis* will have an impact because such countries are often themselves bound by bilateral agreements with the EU (or with countries that have done deals with the EU). The network of bilateral and plurilateral obligations in the field is substantially framed by a loose amalgam of much EU and US law.

The UK will also not free itself of all the institutional and substantive backstops that have been cabining copyright law in Europe. For example, even though Charter on Fundamental Rights will no longer be effective in the UK, the UK is a member of the Council of Europe and is subject to the European Convention on Human Rights (ECHR) as well as its own Human Rights Act (which implements the ECHR and renders its provisions, and judgments of the European Court of Human Rights, effective in the UK).⁸³ Although the Government has on occasion pledged to repeal the Human Rights Act, withdraw from the Convention and enact a "UK Bill of Rights", this no longer

⁸² See Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 *J. Inst. & Theor. Econ.* 161 (2004).

⁸³ See Human Rights Act 1998, § 3(1) ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"); § 2(1)(a) ("A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights . . ."); cf. Human Rights Act 1998, § 4(6) (effect of declarations of incompatibility).

appears to be high on the Government's agenda. And, even if the effort were renewed, it would encounter domestic political resistance unless the new measure replicates the substance of the rights presently afforded UK citizens under the Convention.

These realities can be observed by considering some of the possible copyright reforms mentioned in Part I. As noted there, absent the constraints of the EU exceptions clause, the UK could revive an approach that permits unauthorized private copying without compensation. But even if that approach is no longer subject to conformance with EU standards, it will still have to pass muster under the TRIPS Agreement, including the stringent three step test on allowable exceptions found in Article 13 of that Agreement.⁸⁴ Of course, the EU also subjected exceptions—even if permissible under the terms of Article 5(3) of the Information Society Directive—to the rigours of the three step test in Article 5(5) of that same Directive. But there arguably is—and should be—a difference between the margin of appreciation afforded national interpretation under EU law and under WTO law.⁸⁵ Thus, even though the private copying exception failed to meet EU standards, it may be found to conform to WTO obligations.

The UK courts may also wish to develop the parody exception freed from the “autonomous” EU meaning of parody that the Court of Justice announced in *Deckmyn*.⁸⁶ However, that decision was grounded in the EU Charter on Fundamental Rights. Although the Charter will no longer apply, provisions parallel to those relevant to the decision are largely found in the ECHR, to which the UK at least for now remains a party. Thus, a new parody exception cannot stray far from the one the Court delineated. Likewise, although the legislature might wish to revisit the reaction to *Flos* after Brexit, the UK may well decide not to reinstate the shorter term of Section 52 if it believes it will face difficult questions concerning its ability to curtail property rights under Article 1 of the First Protocol to the ECHR, as Government policy is currently to maintain the UK's membership of this treaty arrangement.⁸⁷

Moreover, even where the UK is free of both EU law and the ECHR, the desire for commercial certainty may urge caution. For example, the judicial harmonisation of originality that was effected by *Infopaq* has to some extent been embedded in UK law through domestic jurisprudence in the UK appellate courts.⁸⁸ That case law creates expectations concerning the protectability of copyrighted materials and it is not clear that the legislature will be eager to act promptly to revise these expectations. Indeed, there may be good reasons to respect them.⁸⁹ Furthermore, it is unlikely that the courts will rush to exercise the sovereignty that has been conferred on Parliament when Parliament has not exercised it itself; the Great Repeal Bill would bless CJEU decisions with the precedential status of decisions of the UK Supreme Court, suggesting a strong desire for stability. Similarly, the UK may decide not to make drastic changes in the scope of copyright

⁸⁴ Under TRIPS art. 13, “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

⁸⁵ See generally Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 (2010) JIPITEC 67

⁸⁶ See Case C-201/13, *Deckmyn v Vandersteen*, ECLI:EU:C:2014:2132.

⁸⁷ See *Anheuser-Busch v. Portugal* [2007] ETMR 24 (ECHR Grand Chamber 2007).

⁸⁸ Cf. *The Newspaper Licensing Agency Ltd (NLA) v Meltwater Holding BV* [2011] EWCA Civ 890; [2012] RPC 1

⁸⁹ The UK is however likely to revert to a closed list of works rather than an open one (some CJEU decisions had made that increasingly ambiguous, even if had not formally addressed the question).

protection, lest the differences from EU protection make it more difficult to export copyrighted works into the EU.⁹⁰ Finally, as with trademarks, notice and take down procedures regarding Internet infringements could be made subject to a MOU that will itself be shaped by actors operating primarily under EU law.⁹¹

C. Patent Law. To be sure, there are some areas of IP law where the EU had little role and thus Brexit will have little effect. As noted earlier, this is true most notably of patent law. The UK belongs to the European Patent Convention in its own right and because the EPO has always issued national patent rights, those validated in the UK will continue to exist. Indeed, to the extent that EU patent law does exist (e.g., the Biotechnology Directive) it will continue to hold sway in UK law through the UK's membership of the EPC, whose organs have paid regard to the Directive (and the views of EU institutions).⁹²

For patents, however, the question of institutional structure is of considerable significance—and may prove far more important than some Brexiteers might have expected. In the case of the UPC, Brexit has endangered or altered (rather than augmented) UK sovereignty. Transborder enforcement of IP rights can be difficult, particularly for registered rights like patents, because courts are reluctant to pass on the validity of foreign rights. Because the UPCA solves that problem, it is not surprising that the UK Government and the patent profession in the UK desperately wish the UK to remain within the unified patent court system. Further, they would do so notwithstanding that the decision of the Court of Justice in *Opinion 1/09*, which appears to require the supremacy of EU law (and the Court of Justice) in certain matters.⁹³

There is an intriguing calculation being made by different parties in the process here, which speaks in implicit terms to a revised conception of sovereignty. Non-UK member states (such as Germany, the other principal player) understand that the success of the new system might be undermined by the absence of the UK, which represents a significant part of the market in the EU, and whose experienced judges are of central importance to the new court (which is slated to have one of its central divisions in London). Leading patentees may therefore not wish to risk the incompleteness (or uncertainty) of the new system without clear UK involvement, and strenuous efforts are underway to sketch out a way in which the UK can participate, most notably by elevating the conceptualisation of the UPC as an “international court” rather than a court “common to all participating member states of the EU.”⁹⁴

⁹⁰ Cf. Case 78/70, *Deutsche Grammophon Gesellschaft MBH v. Metro-SB-Grossmarkte GMBH & Co*, (8 June 1971); Case C-98/13, *Blomqvist v. Rolex SA* (6 February 2014).

⁹¹ Cf. European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – COM(2016)593 (Sept. 14, 2016), art 13.

⁹² See European Patent Office, *EPO Stays Proceedings in Certain Biotechnology Cases*, Dec 12, 2016 (reporting that the EPO has stayed all proceedings in examination and opposition cases in which the invention is a plant or animal obtained by an essentially biological process in light of a Notice of the European Commission related to certain articles in the EU Biotech Directive).

⁹³ See *Re Draft Agreement on the European and Community Patents Court (Opinion 1/09)*, 3 C.M.L.R. 4 (CJEU Full Court 2011).

⁹⁴ See Richard Gordon & Tom Pascoe, *Opinion On the Effect of ‘Brexit’ On The Unitary Patent Regulation and the Unified Patent Court Agreement* (Sept. 12, 2016), <http://www.eip.com/assets/downloads/gordon-and-pascoe-advice-upca-34448129-1-.pdf>; Winfried Tilmann, *EPUE-Reg and UPCA After Brexit*, *EPLAW* (June 27, 2016), <http://eplaw.org/eu-winfried-tilmann-epue-reg-and-upca-after-brexit/>; Ansgar Ohly and Rudolf Streinz, *Can the UK Stay in the UPC System After Brexit?*, 12 *J. Intell. Prop. L. & Prac.* 245 (2017).

But the UK’s leverage to negotiate a new deal is unclear, for one of the paradoxes of market integration—contrary to the policy impulse of broader IP rights occasioned by global trade—is that global or regional results might be achieved through positive relief in a major nation state or in one large market.⁹⁵ Thus patentees might determine that protection (and efficient enforcement) within the rest of the EU may be sufficient to force infringing competitors out of Europe. That would make the UK market (and UK enforcement) an unnecessary sideshow as far as the rest of the EU is concerned. Neither the EU nor the UK can be entirely sure which calculation patentees will make. Indeed, the calculations may vary by industry and size of applicant.

Behind this veil of uncertainty, a reconfigured understanding of sovereignty is taking shape. The UK will, it might be argued, achieve greater control over patent policy in the UK by acceding to a system where questions might be referred to the Court of Justice, a tribunal on which it will (post-Brexit) have no judge, to be decided according to laws (such as the Biotechnology Directive) to which it will (post-Brexit) have no say in drafting. Yet if the UK is part of the Unified Patent Court system, its judges and patent practitioners can be expected to have a dominant role in the shape of European patent law. This will be a far more influential posture, it is assumed, than the barren and meaningless “sovereignty” of a nation-state. This is a new conception of sovereignty, reflecting integrated regional and global markets and the importance of judicial development of the law. Furthermore, this calculation is not static. The current assumption is that the content of EU patent law is very small, but over time, participants in the UPC may find that the Charter, EU competition law, and other EU policies (not to mention new substantive patent law enacted by the UK-less EU legislature) come to govern far more extensively the relationships among patent holders, licensees, and users.

Conclusion

If the UK were to seek a close relationship with the EU and join EFTA, the relatively quiescent EFTA court would receive a barrage of questions from an important economic state (the UK) with an experienced IP judiciary. It is possible, however, that the Hard Brexiteers and hardliners in the remaining 27 member states will ultimately reject even an attenuated relationship between the UK and the EU. But if they do, we would suggest that the benefits of harmonisation in IP matters are such that new arrangements will soon develop.⁹⁶

In addition to those canvassed above, some arrangements may take the form of new types of political convergence. The EPC model—bringing together member states from within and outside the EU under the umbrella of an international agreement—and the dogged pursuit of a Unified Patent Court despite apparently unsurmountable political hurdles suggest that there may also be

⁹⁵ See Graeme Dinwoodie, Territorial Overlaps In Trademark Law: The Evolving European Model, 92 *Notre Dame L. Rev.* 1669, 1724 (2017).

⁹⁶ Recent political discussions have also raised the possibility of a new supranational court created by any Brexit agreement, which would adjudicate ongoing disputes under that Agreement between the UK and the EU. Cf. Helena Kennedy, You Can’t Just Cut and Run from Europe, Theresa May – it’s illegal, *The Guardian* May 3, 2017, at <https://www.theguardian.com/commentisfree/2017/may/03/theresa-may-cut-and-run-europe-illegal-trade-deal-another-galaxy> (“if you have cross-border law you have to have supranational courts to deal with disputes”).

potential for institutional innovation for copyright and trademark.⁹⁷ Given the ubiquity of Internet and the many difficult questions raised by digitization, it is already clear that greater harmonisation on the European continent may be desirable (and is under discussion even as the UK departs, with efforts to ensure cross-border portability of user rights).⁹⁸ These efforts could usefully include substantive rules on the secondary liability of Internet platforms, as well as further convergence on procedural devices for ensuring intermediary assistance in countering infringement.⁹⁹ Pending proposals on the obligations of intermediaries and developing attitudes toward standard setting recognise the role that private agreements will play.¹⁰⁰ Such arrangements might more easily cross the English Channel than broad political agreements.

Enforcement problems might be mitigated at an intergovernmental level, where the Hague Conference on Private International Law has been working on an instrument that would facilitate the enforceability of foreign judgments.¹⁰¹ Recently, courts in both the UK and elsewhere in the EU have also taken a more generous view of the scope of their authority to resolve transnational cases.¹⁰² These initiatives all possess the potential to fill some of the harmonization gaps that the UK might bemoan after Brexit.

Finally, new or revived negotiations at the international level may lead to higher levels of IP harmonisation. And the UK would desperately want—and even more so post-Brexit, need—to be part of any arrangements that flow from those negotiations. For example, WIPO has had a longstanding project to promulgate a Substantive Patent Law Treaty (SPLT), which would bring member state patent laws into closer alignment.¹⁰³ Negotiations in the WTO have been dormant, but could resume and many countries continue to be involved in negotiating mega-regional agreements that include IP.¹⁰⁴ For the reasons suggested in Part II, these may not lead to as much

⁹⁷ See Lionel Bently, Building a Unitary Copyright: What About EFTA Countries and Post-Brexit Countries?, Presentation to the European Copyright Society Conference, May 2017 (Paris).

⁹⁸ See, e.g., European Commission, Proposal for a Regulation of the European Parliament and of the Council on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market, COM(2015) 627 final (Dec. 9, 2015); European Commission, Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593 final (14 Sept. 2016) [hereinafter Proposed Copyright Directive]; Report of the Rapporteur, Therese Comodini Cachia, European Parliament, Proposal for a directive COM(2016)0593 - C8-0383/2016 – 2016/0280(COD)(7 March 2017).

⁹⁹ See Graeme B. Dinwoodie, Rochelle C. Dreyfuss, and Annette Kur, The Law Applicable to Secondary Liability in Intellectual Property Cases, 42 N.Y.U. J. Int'l L. & Pol. 201 (2009).

¹⁰⁰ See Proposed Copyright Directive, art. 13; *Unwired Planet Int'l Ltd. v. Huawei Technologies*, [2017] EWHC 711, later proceeding, [2017] EWHC 1304.

¹⁰¹ See Hague Conference on Private International Law, Judgments Project, available at <https://www.hcch.net/en/projects/legislative-projects/judgments> (noting that a Diplomatic Conference may be convened towards the end of 2018 or early 2019). See also American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, And Judgments In Transnational Disputes* (American Law Institute 2008); *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary* (European Max-Planck Group for Conflict of Laws in Intellectual Prop. (Oxford University Press 2013)).

¹⁰² See Case C-145/10, *Painer v. Standard Verlags et al.*, 2011 E.C.R. (25 Jan. 2012); Case C-616/10, *Solvay SA v. Honeywell Fluorine Products BV*, 2012 E.C.R. (12 July 2012); *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39; *Actavis Group hf v. Eli Lilly & Co.*, [2013] EWCA Civ 517; cf. *Chugai Pharmaceutical v UCB* [2017] EWHC 1216 (Pat).

¹⁰³ See World Intellectual Prop. Org. (WIPO), Standing Comm. on the Law of Patents, Report, at 1-2, WIPO Doc. SCP/10/11 (June 1, 2005); WIPO, Standing Comm. on the Law of Patents, Information on Certain Recent Developments in Relation to the Draft Substantive Patent Law Treaty (SPLT), at 2-3, WIPO Doc. SCP/10/8 (Mar. 17, 2004); WIPO, Standing Comm. on the Law of Patents, Draft Substantive Patent Law Treaty (SPLT), at 2, WIPO Doc. SCP/10/2 (Sept. 30, 2003).

¹⁰⁴ See, e.g., Regional Comprehensive Economic Partnership (RCEP), <http://www.bilaterals.org/rcep>.

convergence as an EU agreement, but the UK would presumably negotiate them on its own behalf. Thus, while entering these agreements would sacrifice sovereignty, the instruments would also be an exercise of sovereign authority. As in other areas where the UK may have less flexibility than the concept of exit suggests,¹⁰⁵ it remains to be seen whether these new arrangements return to the UK advantages equivalent to that of full EU membership (and whether the costs of creating and maintaining those arrangements exceed the supposed costs of EU membership). However, at the very least, they are unlikely to create accountability or a fully democratic approach to IP lawmaking beyond that found under the present regime.

¹⁰⁵ See, e.g., Wolf-Georg Ring, *The Irrelevance of Brexit for the European Financial Market*, University of Oxford Legal Research Paper Series (2017), available at <<https://ssrn.com/abstract=290271>>.