FAST Legal Update

Federation Against Software Theft

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Contents

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Introduction

Brexit! The UK delivered a shock vote on 23 June 2016, opting by 52% to 48% to end its 43 year union with the EU. By the time the dust had cleared, Theresa May had become Prime Minister, the UK had lost its coveted triple A credit rating, the markets had plunged and recovered, and the pound had fallen to a 31 year low. Boris had become little Bo peep and Jeremy Corbyn's Labour Party is struggling to make itself relevant. We are in for turbulent times ahead. But what will Brexit mean for your business?

The legal position is not set to change in the immediate future. As you are aware the Government must give a formal notification under Article 50 to begin the process of withdrawal. But what will Brexit mean for implementing the GDPR? What will happen to your company's IP rights? Brexit has already triggered fears of talent leaving the UK. Other companies are worried about what it might mean for the future of cybersecurity in the UK. Businesses that start preparations now for the significant changes ahead will be best placed to navigate the impending challenges, although the terms of an eventual British Exit from the EU are still unclear. Despite that lack of clarity today there are some issues we can be reasonably sure of. So in this Update I am going to walk through some of the legal implications of Brexit and give an early indication of the issues that you need to be aware of. If you have any questions please don't hesitate to raise them with me.

Legal Implications of Brexit

What kind of Brexit?
On what terms will Britain exit the EU? The answer to this question will determine to some extent the impact that Brexit will have on your intellectual property rights. Will Britain retain membership of the European Economic Area, thereby obliging Britain to maintain compliance with all EU law, in an arrangement similar to that enjoyed by Norway? Or will Britain join the European Free Trade Association? Alternatively Britain may choose to stay out of the EEA entirely and thereby become subject to the rules of the World Trade Organisation (WTO). While it is clearly too soon to tell there are some issues that you may wish to start thinking about now. If Britain remains part of the EEA then it is likely that it will continue to comply with all aspects of EU intellectual property law, but a more radical parting of the ways will give Britain greater freedom from compliance with EU law.

Should the UK leave the EU and the EEA and not agree a free trade agreement with the EU, any EU unitary intellectual property rights will most likely not continue in the UK and the courts would no longer have to interpret intellectual property laws as they exist in the UK in

conformance with EU rules. Over time this will inevitably lead to a divergence between UK and EU intellectual property law. I have discussed in the Legislation update below further possible Brexit options.

EU Intellectual property rights lost?
Under EU law we currently have a system of registrations whereby you can register your trademark and or your designs just once and they will be protected in every member state of the EU. There may be some discussion following recent cases such as the now infamous Trunki case as to what that protection might mean in practice. But it is not necessary today for a company to register their trade marks or their industrial designs in more than one member state of the EU in order to gain protection in all member states of the EU. But if Britain leaves the EU altogether and for that matter the EEA, then companies will have to reconsider their strategies for protecting their trademarks and designs. It will become necessary to protect those assets under British law separately from any registration you may wish or need to make within an EU minus Britain. As part of your preparations for any exit we would recommend that you review your brand protection strategy now and consider filing, in respect of your trademarks, for a national UK mark as well as an EU trademark.

This may cause you to suffer certain compliance burdens but better to review that position now than at a later date when millions of other applications may be being made on very short notice.

The EU Trademark torpedo?
The EU Trademark torpedo is a well-known practice adopted by defendants in trademark disputes. A defendant when sued in the UK may apply to the EU Intellectual Property Office (EUIPO) to invalidate or revoke the EU trademark that is being relied upon by the claimant. The UK proceedings are then stayed until the EU trademark revocation action is adjudicated upon. But if you register your national marks in the UK you can prevent this happening to you where you are bringing an action against a defendant in the UK, as you can simply rely upon your registered UK mark instead. So you may wish to consider registering your trademarks in the UK in any event to maximise the level of protection available to you.

Patents
Although patent holders are not expected to be affected in the immediate future, this still raises significant issues in relation to the Unified Patent Court (UPC) Project which had sought to offer a system that would allow companies to litigate infringement claims concerning European patents regardless of their unitary effect. The project was due to take effect from January 2017. The UK was one of the three member states (including Germany and France) who were to ratify the agreement before its implementation. Another member state will now likely be chosen for the UPC to go ahead but the UK's absence is likely to create another hurdle for businesses who are seeking protection across the entirety of the EU. Undertaking litigation in both the EU and the UK to benefit from the full effect of such protection will be burdensome and expensive for companies to adhere to.

What will Brexit mean for the Digital Single Market (DSM)?
I attended a conference last week on the DSM and was surprised to hear the civil servant leading the DSM negotiations for the British Government, basically explain that they were muddling through the current negotiations as best they could. We should not be too surprised by this as everyone is crying out for No 10 to give a clear sense of direction, to provide leadership on what Brexit will look like. But whatever form Brexit takes the DSM proposals are likely to have an impact on our members.

Under the DSM sixteen European Directives or Regulations are being either proposed or amended, all with a view to making sure that Europe stays ahead in the Digital age, by giving European companies a platform from where they can compete more effectively with their North American and East Asian competitors. But many of the proposals within the DSM propose an increase in regulation. The proposals relating to the regulation of online platforms, the free flow of data and digital content are particularly worrying. So Brexit in this context at least is a double edged sword. British companies will not be subject to some of the more onerous proposals should they be enacted. But as we will no longer be part of the EU our ability to influence the drafting of those laws will become limited and members will at the very least have to comply with them when they are doing business in Europe. As the proposals for Brexit emerge over time I will keep you updated on which if any of the DSM reforms are likely to be adopted into English law, and what this will mean for you be it the proposals on geo-blocking, digital content, or the free flow of data.

Recommendations?
I would recommend that you identify now your intellectual property rights that may be most affected by Brexit, be it an exit within the EEA or a more distant exit all the way to the WTO. You will then have the time to plan how best to protect those rights in the UK and where necessary the wider EU in the future.

Headline Stories

Plot to dilute the General Data Protection Regulations (GDPR) before Brexit. It has come to light, via a leaked email, that the government sought to get around aspects of the GDPR in order to go forward with plans to share the data of UK citizens. Given the widespread concern over how personal data is processed, the exiting of the UK from the EU has many fearful of the consequences for individual privacy. Whatever happens in the future British companies need to start thinking about how to comply with the GDPR as it will come into force in May 2018, which will be before any UK exit becomes effective. Even after exit it is difficult to envisage a situation where the UK does not have to comply with the GDPR or its British equivalent. As the rest of the EU will be processing personal data in line with the requirements of the GDPR Britain would risk becoming a pariah state in data protection terms if it failed to introduce a level of protection for data subjects at least equivalent to that contained within the GDPR.

According to an Information Commissioner's Office spokesperson after the referendum result, "The Data Protection Act remains the law of the land irrespective of the referendum result. If the UK is not part of the EU, then upcoming EU reforms to data protection law would not directly apply to the UK. But if the UK wants to trade with the Single Market on equal terms we would have to prove 'adequacy' - in other words UK data protection standards would have to be equivalent to the EU's General Data Protection Regulation framework starting in 2018. With so many businesses and services operating across borders, international consistency around data protection laws and rights is crucial both to businesses and organisations and to consumers and citizens. The ICO's role has always involved working closely with regulators in other countries, and that would continue to be the case. Having clear laws with safeguards in place is more important than ever given the growing digital economy, and we will be speaking to government to present our view that reform of the UK law remains necessary."

No one knows yet how the UK government will implement the GDPR, least of all the UK Government, but we would recommend that you should continue your compliance preparations with the GDPR as if Brexit had not occurred.

Cyber-security after Brexit. The cyber security industry is concerned that Brexit will have a detrimental impact in the UK. Fears have been raised that the UK will now be more vulnerable to cyber-attacks as it will no longer share in the intelligence garnered by the remaining 27 member states. It is also feared that talent working in the industry whose standard of living may be adversely affected as a result of Brexit, may leave the UK to work in countries such as the US, taking their much needed talent with them. This could lead to a glut in talent that leaves the UK's cyber security standing, the poorer for it.

There are also concerns about the impact on university research funding. Simon Crosby of CTO and founder of Bromium asserts that "There is another longer term worry: Over a third of research funding for universities in the UK comes from the EU. In the absence of new funding from the UK government, there will be a huge impact on university's ability to deliver highly skilled tech workers to the UK economy." Whilst this does not affect the industry in the immediate future, this could well cause more of an issue for the UK in the long term particularly as cybercrime evolves and becomes ever more sophisticated. You may wish to review your security processes and ensure that they are able to react accordingly in light of any potential breaches. You may also want to consider how you can remain competitive given the likely competition for talent from a future EU without Britain.

Legislative Updates

Brexit and Article 50. Article 50 of the Lisbon Treaty is now in the spotlight after decades of obscurity. The Article requires that the UK notify the European Council of its intention to leave the EU, triggering a two year period for negotiating the terms of its withdrawal and what relationship it wishes to have with the EU in the future. As the withdrawal agreement will be an international treaty, it will need to go before parliament in the UK for ratification by the House of Commons. Given the pro-EU position of most MPs in the House, this could lead to a battle of wills should they decide to hinder the treaty's passage through parliament. Such a battle is likely to rest on issues of the exact nature of the relationship the UK will have with the EU post-Brexit.

The UK could choose to pursue an EEA agreement with the EU which would allow the UK access to the Single Market and would still require the UK to adhere to the four freedoms; the free movement of good, capital, services and persons as well as the relevant state aid and competition requirements. This would effectively mean the UK implementing the vast majority of EU law into domestic law in order for businesses in the UK to be compliant with EU rules when trading with the bloc.

Alternatively, the UK could choose to sever ties with the EU and adopt the World Trade Organisation route which would involve the UK being treated as any other non-EU country and paying tariffs. The UK, would still however, be subject to EU standards. A free trade agreement could be sought with the EU but UK businesses would still have to meet the requisite regulations.

There is also the option for the UK to adopt the system used by Turkey which provides access to the Single Market for goods. No tariffs would need to be paid but the UK would be required to bring its laws in line with EU law and such a customs union would not apply to services; an area for which is particularly strong for the UK. Negotiations would no doubt need to be thrashed out to protect the UK's service industry should this route be chosen.

The legislative effects of Brexit are significant with the UK facing the prospect of renegotiating 80,000 pages of EU agreements and deciding exactly which laws should remain in effect. This

is likely to take parliament a number of years with estimates ranging from four to ten years. It is likely given the routes to accessing the EU market, that no matter the road travelled, the UK will have to be prepared to harmonise at least some aspects of UK law with that of the EU. Businesses should be prepared to adapt, however the negotiations may end.

Directive (EU) 2016/943 – Trade Secrets. The Directive of the European Parliament (EP) and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, was published in the Official Journal on 16 June 2016. The Directive seeks to prevent illegal disclosures of trade secrets and prevent corporate spying by competitors. Information classed as trade secrets should not be "generally known among or readily accessible to persons within the circles that normally deal with that kind of information", must have "commercial value because it is secret" and is "subject to reasonable protective measures by its lawful holder to keep it secret."

The Directive will bolster the protection offered to companies who have suffered as a result of corporate espionage. This is especially important for businesses in Europe, where according to the European Commission, one in five companies have been the victim of the theft of trade secrets.

Parliament will need to pass the Directive into law in order to give it effect for which they will have two years to do so. Brexit has somewhat thrown a spanner in the works in this regards, however, UK companies accessing the EU market should remain alive to the Directive since the UK is still likely to have to implement similar rules should it continue to have links with the EU in future.

Case Law Updates

Oracle v Google: Success for Google. Google will not have to pay royalties to Oracle after a jury in San Francisco decided that the reuse of Java Class library APIs in Android fell within the fair use exemption that exists in American copyright law. The decision not only means that Google avoids having to pay out damages potentially in the billions, but also means that whilst software interfaces can be copyright protected, re-implementing such interfaces is covered by the fair use exemption. It was feared that had Google lost, this would have adversely affected innovation in the software community, preventing developers from using programming that would allow them to build more innovative products for consumers.

Oracle has said it will appeal but their chances of success are considered to be slim. It appears that the jury did not believe there should be a new strict IP regimen concerning APIs and in doing so relied upon the fair use exemption for copyright.

Monthly Book Recommendation

"Brexit: How Britain will Leave Europe". I have to confess I have not read this yet but I think I ought to. Of this book Amazon says on their website: "In this book, former Europe Minister Denis MacShane looks at the history of Britain's fraught relationship with Europe and shows how the possibility of Brexit has become increasingly more likely. Touching on one of the most divisive political issues of our times, this book will be essential reading as Britain makes its choice on Europe and future place in the world." Time to reflect on the decision we have made and plan for the future accordingly.