

The Impact of BREXIT on Intellectual Property Law Education

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IP, Brexit and beyond – opportunities and challenges
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Overview

- The vote to leave the EU
- What should the UK do with EU IP law?
(Special thanks to my EU law expert colleague,
Elspeth Berry, Reader in Law at NLS)
- UK Quality Code for Higher Education HE
Benchmark Statement for Law (July 2015)
- LPC/BPTC, Law Society, General Council of the Bar
- Challenges & Opportunities

About me

- Dr Janice Denoncourt is a Senior Lecturer at the Nottingham Law School, Nottingham Trent University
- British Council Chevening Scholar (2002)
- Completed LLM degrees in IP Law (2002) IP Law, Policy & Management (2003), PhD (2015) Nottingham
- Senior Fellow, Higher Education Academy (2017)
- Chair of the European IP Teachers' Network (EIPTN), the Europe-wide association of those involved in the research and teaching of IP law.
- Founded in 2007, the EIPTN is supported by the European Patent Office and EU IP Office.

History of UK in the EU

EU law has been integral to English law over the last 40 years.

- EEC Treaty 1957 (Treaty of Rome)
 - Italy, France, Germany, Belgium, Netherlands, Luxembourg
 - The European Economic Community – aimed to create a single market involving the free movement of goods, persons, services and capital
- The UK joined in 1973 (with Ireland and Denmark)
- 1975: (1st) British referendum on EU membership – 1975 "Do you think the UK should stay in the European Community (Common Market)?"
 - Yes (Remain) = 67.2%: No (Leave) 32.8%
 - 'Yes' vote across the country.

Source: Elspeth Berry, Reader in Law, NLS

EU developments and the UK

- **Schengen Agreement 1985** - removal of border controls
 - UK opted out
- **Treaty on European Union 1992** (Treaty of Maastricht)
 - Provisions for economic and monetary union, including adoption of the euro - UK opted out
 - Provisions for co-operation on justice and home affairs - UK partly opted out
 - Provisions on social policy – UK opted out (later opted in)
- **Treaty of Lisbon 2010**
 - Gave legal effect to the EU Charter of Fundamental Rights

Source: Elspeth Berry, Reader in Law, NLS

Why BREXIT?

- Many people in UK do not feel “European”
- Globalisation
- Immigration – border control
- Different values

Source: Elspeth Berry, Reader in Law, NLS

When and how?

UK Prime Minister Theresa May says she will give notice under Art 50 TEU by end of March 2017

- 1. Any Member State may decide to withdraw from the Union** in accordance with its own constitutional requirements.
- 2. A Member State which decides to withdraw shall notify the European Council of its intention....the Union shall negotiate and conclude an agreement with that State**, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. It shall be concluded....by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
- 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2.**

Source: Elspeth Berry, Reader in Law, NLS

The UK BREXIT Strategy

UK seeks:

- UK citizens' right to live, work, access benefits/public services in EU States (reciprocal rights for EU citizens in UK?)
- UK access to Single Market, especially for financial services;
- UK participation in EU Justice and Home Affairs measures on crime and terrorism, including UK membership of Europol;
- Special arrangements for Northern Ireland and Gibraltar.

Undesirable:

- Free movement of persons
- Jurisdiction of the EU Court of Justice

However,

- Donald Tusk, President of the EU Commission, has said 'There will be no single market "a la carte"'

Source: Elspeth Berry, Reader in Law, NLS

Current legal position:

- Until the Article 50 process of negotiations is over, the United Kingdom remains a member of the EU, with all the rights and obligations that derive from this.
- EU law continues to apply to the full to and in the UK until it is no longer a Member.
(Statement by EU leaders, 24 June 2016)
- No immediate change to the HE IP law curriculum.

Source: Elspeth Berry, Reader in Law, NLS

Going forward: What should the UK do with EU law?

Two types of EU law:

1. Directly applicable EU Treaties, EU Regulations and EU Decisions

Problem?

When the UK leaves the EU, **directly applicable EU law will cease to apply to the UK** – even though the **UK may actually want to keep (some of) this law!**

Solution?

- Copy and paste these laws into UK law
= the 'Great Repeal Bill' 2017
- But some require agreement of other EU States e.g. EU Regulations on cross border recognition of judgments of foreign courts – and they may refuse.

Source: Elspeth Berry, Reader in Law, NLS

What should the UK do with EU law?

2. EU Directives which EU States transpose into their own national law

- Problems arising due to UK constitutional law:
When the UK repeals its European Communities Act 1972 (ECA), **some UK laws which transpose EU law will be repealed automatically, but some will not.**

Impact:

- **May repeal EU-related UK laws the UK wants to keep!**
- **May not repeal EU-related UK laws the UK doesn't want!**

Solution?

–Before repeal of the ECA, the UK needs to repeal or re-enact each UK law which transposes EU law!

= The 'Great Repeal Bill' 2017

Source: Elspeth Berry, Reader in Law, NLS

Qualifying Law Degrees (LLB)

- Quality Assurance Agency for Higher Education produces a **Benchmark Statement for Law** (July 2015) see <http://dera.ioe.ac.uk/23774/1/SBS-Law-15.pdf>

- IP law HE providers are responsible for meeting the requirements of legislation and any other regulatory requirements placed upon them.
- **No subject bench mark statement for IP law** as it is an elective module on the Qualifying Law Degree (LLB). Benchmark statements are used as reference points in the design, delivery and review of academic programmes. Allow flexibility in programme design within a framework agreed by the subject community.
- IP regulatory and professional bodies DID NOT participate in the 2015 Law Subject Benchmark statement.

Subject Statement for Law (July 2015)

1.1 Studying law at undergraduate level is an academic matter.

- Law graduates do not, by virtue of their degree, have a right to practise law professionally.
- The balance that there will be between the acquisition of legal knowledge, general intellectual skills and subject specific skills in a curriculum will vary between Law Schools.

1.3 The study of law **may focus on one or more jurisdictions.**

- Law is, however, shaped by and in turn impacts on the ethical, social, political and economic norms of that (or those) jurisdiction(s) and these may also be reflected in the curriculum.

How will Brexit eventually affect LLB IP law module content ?

- High level of flexibility in terms of content in undergraduate IP law modules.
- Continue to focus on both UK and EU law jurisdictions.
- No loss of IP protection in the UK.
- Many IP rights are national rights and so will be unaffected.
- EU-wide rights such as EU TMs and Community Designs will also remain unaffected until the UK formally leaves the EU.
- Look ahead for 'transitional provisions' to be put in place to handle the carve-out of UK rights from their EU counterparts.
- Trend will be for UK HE curriculum to focus more on UK IP law than EU IP law in the future.

IP Law curriculum in academic year 2017/18

- Impact on academics who are drafting IP law materials, textbooks and assessments now, lead time issues.
- Update materials and texts with EU Intellectual Property Office instead of OHIM (23 March 2016)
- Update materials to reflect current UKIPO advice on implication of BREXIT on IP: See 'IP and Brexit: The Facts' (2 August 2016) at <https://www.gov.uk/government/news/ip-and-brex-it-the-facts>
- Recommend UKIPO regularly update progress to the repeal of the European Communities Act 1972, and legislation repealed or re-enacted to transpose EU law that will form the **'Great Repeal Bill' 2017**

IP Law curriculum in academic year 2017/18

Progress to BREXIT

- Recommend '**Progress to BREXIT**' as a new topic in IP law modules in HE, identifying specific difficulties and concerns, noting UK progress with BREXIT and UKIPO policy.
- Note future UK legislation enacted to create substitute rights and appropriate transitional provisions.
- IP enforcement: clarify that post-Brexit UK case law is likely to diverge from EU case law as UK courts will no longer be bound by the European Court of Justice and the General Court's decisions.

IP Law curriculum in academic year 2017/18

Progress to BREXIT

Keep abreast of developments:

1. Future impact of EU Regulations, EU Directives and CJEU and transition
2. Copyright, digital copyright
3. Registered Community Designs
4. Community Trade Marks
5. UK patents and EPC, PCT, Unified Patent and Patent Court
6. Trade secrets
7. Community Plant Variety Rights
8. Geographical Indications
9. Data Protection and data safety
10. IP transactions, enforcement and litigation (LPC and BPTC)
11. The IP professions in the UK (employability post-HE)
12. How UK law may diverge from the EU IP law.

Impact on EU HE Students attracted to the UK

- Will BREXIT complicate attracting EU students to study law in the UK (LLB, LLM) which currently includes a focus on EU law?
- In 2014-2015 there were approx. 125,000 EU students undertaking HE in the UK.
(Source: Universities UK)
- In 2017, UK government has confirmed that EU students applying for a place at a UK university will still be eligible for student loans and grants over the duration of their course (surge?).
- However, post-BREXIT, future arrangements will be less generous.
- Con: There may be a drop in EU students who study UK LLB due to reduced expectation of being able to stay and practise afterwards.



Impact on EU HE Students attracted to the UK

PROS

- Legal study remains strong in the nation that originated the common law system.
- EU students will continue to choose the UK because of the importance of English law and common law systems which underpin global business contracts.
- 27% of the world's 320 legal jurisdictions use English common law, including fast-growing economies such as India, established economies such as Hong Kong, Singapore.
- UK legal education is highly ranked globally.
- EU law module likely to remain compulsory for the QLD.
- UK law students study as undergraduates. Considerable flexibility in designing IP law elective modules to focus on both UK and EU law.
- Taylor Wessing IP high ranking of the UK's IP law system.
- UK's specialist IP courts and high quality IP litigation.

Challenges for LLB IP law education in the QLD

- IP law remains an 'elective' and continues to suffer from this status.
- No bench mark statement for IP law to facilitate curriculum development across HE in the UK.
- IP law unlikely to be introduced into the Property Law module of the qualifying law degree (QLD).
- Lack of IP law lecturers to draw on to resource property law modules.

Opportunities

- Growing consensus on key IP law issues that will form the ongoing curriculum for our future IP professionals.
- Matthew Larreta, Senior Policy Advisor UKIPO, consulted me for advice on the operation of the Qualifying Law Degree and the QAA Law Subject Benchmark Statements Review.
- I suggested modernising the existing compulsory Property Law module to cover both intangibles (goodwill, intellectual capital) and IP law in the syllabus.
- I carried out comparative jurisdiction research to confirm that IP law is currently an elective bar exam topic in the People's Republic of China (PRC) with our resident Chinese NLS PhD Legal Education student.
- UKIPO preparing survey report on provision of IP law education across HE to inform how to proceed with its IP education and employability project.

UKIPO Toolkit on IP for Universities

- IP law education is a prominent theme of the UKIPO policy agenda
- UKIPO's new **IP Tutor** training platform, a free online tool published to enable UK universities to create more IP savvy graduates, see <http://www.ipo.gov.uk/blogs/iptutor/>.
- This interactive CPD accredited e-learning tool helps HE students and lecturers understand IP rights (i.e. trade marks, patents, copyright, designs), drawing, together resources, games and videos to support IP education for all HE students during their time at university and beyond.
- **IP Tutor** provides four tailored learning pathways, adapted to suit the needs of different areas of study:
 - creative
 - science, technology, engineering, maths (STEM)
 - law, business and accounting
 - humanities, including creative writing

UKIPO IP Tutor

- In March 2016, **IP Tutor** celebrated its first birthday and there is quantitative data as to the impact the IP Tutor training platform.
- On 25 October 2016, Julia Leighton (UKIPO) reported that their data confirms that the **IP Tutor** for students across the UK is very popular and has been accessed over 8000 times and the 40 minute course has been completed by 800 plus learners.
- The **IP Tutor** is now being translated into German to make it available to Austrian university students and lecturers through a joint project between the UKIPO, the Austrian Patent Office and the Vienna University of Technology.
- The UKIPO is continuing to invest in the **IP Tutor** in 2017.

Solicitors and Barristers: Academic Stage:

Under the Courts and Legal Services Act 1990 (as amended) the **Law Society** and **Bar Council** are responsible for laying down the qualification regulations in respect of those seeking to qualify as solicitors and barristers.

The Foundations of Legal Knowledge are:

The key elements and general principles of the following areas of legal study:

Public Law, including Constitutional Law, Administrative Law and Human Rights;

Law of the European Union;

Criminal Law;

Obligations including Contract, Restitution and Tort;

Property Law*; and

Equity and the Law of Trusts.

*Does not include intangible property or IP.

See <https://sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>

The Legal Practice Course: Vocational stage

The Solicitor's Regulatory Authority

- The SRA has a statutory duty to ensure that those who are admitted as solicitors have the knowledge and skills necessary for practice.
- The requirements for qualifying as a solicitor in England and Wales are detailed in the [Training Regulations 2014 - Qualification and Provider Regulations](#) and are supplemented by [Information Packs](#) which provide further guidance.

LPC comprises two stages:

Stage 1 - Core Practice areas and skills

Stage 2 - Three vocational electives

(e.g. commercial law which includes IP law)

The Core Practice Areas are:

Business Law and Practice (BLP);

Property Law and Practice (PLP); and

Litigation.

Bar Professional Training Course: Vocational stage

- Regulated by the Bar Council and the Bar Standards Board
see <http://www.barcouncil.org.uk/>
- BPTC aims to give students the skills required for a career at the Bar. It is primarily a practical course including advocacy and role-playing, as well as exercises in drafting legal documents and writing opinions.

Course Content

Case work skills: Case preparation, and Legal research

Written Skills: Opinion-writing (giving written advice on cases), and Drafting (writing various types of documents required for litigation)

Interpersonal skills: Conference skills (interviewing clients), Negotiation, and Advocacy (court or tribunal appearances)

Legal knowledge:

Civil litigation and remedies

Criminal litigation and sentencing

Evidence

Professional ethics, and

Two optional subjects, selected from a choice of at least six.
(IP is available)

The IP Professions

UKIPO and BREXIT: The Facts (2 August 2016)

See <https://www.gov.uk/government/news/ip-and-brexit-the-facts>

Rights of representation

The UK government fully recognises the concerns that IP professionals have about their future right to represent clients before the EU Intellectual Property Office. We welcome views on how to address these concerns and are involving stakeholders in consideration of these issues.

-UKIPO has evinced a clear commitment to ensure that mechanisms will be proposed by the UK government to protect the existence, priority, and seniority of existing unregistered and registered rights within both the UK and EU once the UK is no longer an EU member.

CIPA 'The Impact of Brexit on Intellectual Property' (23 February 2017)

see <http://www.cipa.org.uk/policy-and-news/briefing-papers/the-impact-of-brexit-on-intellectual-property/>

European Progress Conference (2017)

Dissemination of IP Knowledge in Universities

- Strong agreement to develop a working relationship between EU networks and non-EU countries.



European Intellectual Property Teachers' Network



EIPTN 10th Anniversary Conference 2017

University of Lund, Sweden

29-30 June 2017



Suggestions for further reading

- UK Parliament House of Commons library - Brexit section at <http://www.parliament.uk/business/publications/research/eu-referendum/>
 - Brexit: Article 50 TEU and the EU Court
 - Brexit: Trade aspects
 - Brexit: How does the Article 50 process work?
 - Brexit: IP Law
- Centre for European Law Studies, University of Cambridge - Brexit section at <http://www.cels.law.cam.ac.uk/brexit>
- Professor Mark Elliott, University of Oxford - blog at <https://publiclawforeveryone.com/>

Source: Elspeth Berry, Reader in Law, NLS