

# WOORD VOORAF

## AVANT-PROPOS

### Post-Brexit IP Law – Some guesses about the long view

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Britain (I do not say UK – Scotland’s story is in part different) has had many European Brexits and Brentries. The first and greatest Brexit – the one that led to all the others – was the flooding of Doggerland just over 8.000 years ago – a consequence of global warming as sea levels rose at the end of the last great ice age. A Brexiteer of today would say the Continent was cut off; a Remainer would say Britain was cut off. The Britons became an island people. But so close to the rest of Europe that it was inevitable that people on both sides of the Channel and North Sea would cross that little bit of sea in both directions. The first Brentry was by the stone age Beaker people. The first recorded and great Brentry was by the Romans who occupied England and Wales (not Scotland which the Romans cut off with Hadrian’s Wall) for about 400 years. When they went in 410 AD the reason and motive came from Rome – it was a Eurexit. Over the next 1.000 years or so there were Brentries from the Anglo-Saxons, several waves of Vikings (King Cnut was king of England, Norway and Denmark) and then the French-speaking Norsemen who had come to be called the Normans. For some 300 years the ruling classes (including the courts) spoke French whilst the English language (an amalgam principally of Latin, Celtic, Anglo-Saxon with quite a bit of Scandinavian and other languages) evolved. England and Aquitaine were one for several 100 years. The Catholic Church was an important unifying influence. Then came another Brexit with Henry VIII. It was fortified by the defeat of the Spanish Armada in 1585. England for the next 400 years or so was out, building an empire. It engaged in wars with various Continental powers not so much about territory in Europe but about world trade and rival empires. The Second World War finally put an end to that. So what was now (and for nearly 250 had been) the UK did another Brentry. Only to be followed by the current Brexit. I adapt the children’s dance song: “Britain in: Britain out, In Out In Out? You do the Hokey Cokey, and you turn around; That’s what it’s all about!” What has this got to do with how Brexit may affect IP? Answer: because helps one take a long view! Rather necessary for a Remainer

like me. It helps to make us slightly less miserable about this current foolishness. We know the next move will be back in!

I do not intend to make short term predictions – that is what all law firms have been trying to do for their clients. My idea is to try to see around say 30 to 40 years ahead – assuming we are all here of course! I will prognosticate about each kind of IP right in turn.

First patents. In terms of the rules as to what is patentable and what is not, it is difficult to envisage any significant change – the better view that to be patentable an invention will still have to be the sort of thing that can be patented (patent eligible) new, inventive (non-obvious) and sufficient (enabled). These basic rules have stood the test of time broadly in their current form since the beginning of the industrial revolution. The big unknown is how AI will affect the application of these rules. For instance our current notion of the person skilled in the art prevents “mosaicing” of disparate pieces of prior art for the fundamental reason that there may be invention in combining two different ideas. But if AI machines do that anyway, that rule will probably go. The notional person skilled in the art will have AI at his/her disposal. Moreover machines may make inventions themselves – and perhaps humans will not even understand how. And of course there is a notion that inventors have to human. I wonder whether that will survive – I am not sure it should – I think a lot of this will resolve itself. Patent law has over the years adapted to changing technology and expect it to cope with AI and remain a driver for investment in innovation.

Structurally the biggest change for patents in Europe is likely to be the UPC which I assume will come into being in the next year or so – sadly without the UK. I could be wrong.<sup>2</sup> The court has what I regard as a pretty good procedural code – and is the first court in the world designed for patent litigation. An immense amount of work went into its making – work by judges and lawyers who know a lot about litigation

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<sup>2</sup> As I write I read that some are trying to promote a further constitutional challenge in Germany. Don’t the Germans have some sort of “you are too late” rule?

rather than civil servants who do not.<sup>3</sup> It should have very good judges (until the UK backed out I had the honour to lead the team picking candidates to be interviewed. We chose an impressive bunch of people). I hope it works and in 30 years' time has become a leading patent court of the world. It stands a good chance of doing this provided it uses its procedural powers wisely and does not say "well now the UK is out we can forget discovery of documents, party-appointed experts and cross-examination even for big cases".

I turn to trade marks. Here I think there will be divergence between the EU and the UK. The general opinion in the UK is that the EU system of trade marks is much too over-protective – and that its current litigation system far too ponderous, slow and bureaucratic. I confess that I hope our courts will disagree with what I (and many UK trade mark lawyers and judges) think are over-protective decisions of the CJEU. I did not hide my opinion when we had to apply the ECJ ruling in *L'Oréal / Bellure*<sup>4</sup> I hope a UK court will decline to follow it. The almost fantastically wrong decision in *Mitsubishi / Duma*<sup>5</sup> (parallel importing into the EU refurbished goods with the trade mark removed is nonetheless an infringement of trade mark) will stand little chance in the post-Brexit UK courts free not to follow existing case-law (at time of writing that would be the Court of Appeal). More generally I expect UK courts to be less trade mark proprietor friendly than within the EU. It is an aspect of a significant intellectual and cultural difference between the inherently more pro-competitive approach to soft-IP of the UK to the inherently more protectionist approach of the Continent. I regard a row-back from unnecessary protectionism as one of the few good things which Brexit may

lead to – but it is only a minor consolation given all the other possible downsides.<sup>6</sup>

Turning to copyright, I confess I have really little idea how things will be in 30-40 years' time. I hazard a guess that the UK will be less protective than the EU – principally because it has always regarded copyright not so much something personal to the author (an extension of personality) as simply an economic right. However I am far from sure – the making of copyright law is largely a study in irrationality.<sup>7</sup>

Design law I suspect will be much the same in the UK and the EU for many years. Somewhat uncharacteristically (compared with what I see as its overprotective approach to trade marks) the CJEU has largely kept design law within bounds. It has refused to grant expansive protection – to infringe designs, have be quite close to what is registered. If that stays the position, all European designers (UK and Continental) will have legitimate freedom to use old ideas for new designs and should flourish as they have done in the past.

Finally I should say what I prophesy about the UK courts and their continental counterparts. I think both will be much as they are now. The UK courts will likely be faster but more expensive than their continental counterparts. And a bit of competition may help both sides improve their game.

When the UK goes back in (perhaps in 50 years' time) there will be all sorts of fascinating problems for that future generation to solve. Part of it will be resolving the differences in IP law which have grown up whilst the UK (or perhaps England and Wales and an independent Scotland) has been away.

<sup>3</sup>. Hence the rather unsatisfactory EPO opposition system and the still less satisfactory EUIPO system.

<sup>4</sup>. [2010] EWCA Civ 535.

<sup>5</sup>. Case C-129/17.

<sup>6</sup>. Which includes above all the risk of war.

<sup>7</sup>. The ridiculous story of how the term went from 50 to 70 years *post-mortem* is a vivid case in point.