



ALLIANCE
FOR INTELLECTUAL PROPERTY

IP and Brexit: outstanding ‘cliff-edge’ risks

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Introduction

This paper seeks to bring attention to a number of threats associated with Brexit and our future relationship with the EU which, if not given urgent consideration, have the potential to cause considerable damage to the industries represented by the Alliance and which rely fundamentally on Intellectual Property.

In doing so it makes every effort not to succumb to ‘kite-flying’ nor ‘wolf-crying’. Instead we identify precise, often technical, policy concerns, cutting through the noise of ambiguity that has surrounded many Brexit warnings in recent years and pointing directly to issues where urgent attention is required. We therefore intend this to serve as a constructive document and a genuine aid to Government and policy-makers.

Despite the difficulties caused by the legal and technical nature of the issues raised, and despite the ongoing uncertainty of negotiations with the EU and the overall Brexit process, we maintain

that the issues present such serious risks to IP-rich sectors that it is essential they are considered in depth, through consultation with industry and across relevant government departments. We then call for detailed assurances from Government on how it intends to avoid these cliff-edge risks.

For our part the Alliance will soon publish a follow-up ‘opportunities’ paper, detailing how the UK’s IP-rich industries – assuming such cliff-edges are avoided of course – can not only flourish in a post-Brexit environment but take on a unique and central role in delivering a domestically and internationally successful future for the UK.

The value of Intellectual Property

IP-rich sectors make a massive (and growing) contribution to the UK’s economy, its exports and its cultural standing. The creative industries alone now contribute £92 billion to the UK economy – more than the automotive, life sciences, aerospace and oil and gas industries combined.¹ Meanwhile trade mark-intensive industries, including brands, contribute an estimated 34% of UK GDP and 21% of UK employment.² And as our recent trade report, *‘Trading Places: The UK’s IP Future’* evidences, it is no coincidence that the UK is ranked in the top three in the world for both IP protection and soft power.³

It is also important to note that if the creative content, designs, sports rights and brands that these IP-rich sectors produce cannot be adequately protected, and their creators adequately rewarded, then it is consumers – the millions of citizens in the UK (and many more globally through exports) who enjoy and benefit from this output – who also stand to lose out.

Positive domestic action on IP – the right direction in IP protection

Since the vote to leave the European Union in June 2016 the Alliance for Intellectual Property has continued to work closely with the UK Government to further the IP agenda and assess the impact of Brexit on the UK’s world-leading IP regime. In many policy areas there has been great progress on a domestic level to protect IP, particularly as the UK seeks to forge a leading path in the online sphere.

- The **Digital Economy Act 2017**⁴ has strengthened the penalties for infringement online, giving creators better protection from copyright infringement.
- The **Code of Practice on Search and Copyright**⁵ has begun to establish a pioneering route to preventing consumers being led to infringing content, through collaboration and sharing of technical expertise between the creative industries and search engines.

¹ <https://www.creativeindustriesfederation.com/statistics>

² <https://www.gov.uk/government/statistics/intellectual-property-fast-facts-2017>

³ <https://www.allianceforip.co.uk/alliance-trade-report>

⁴ <http://www.legislation.gov.uk/ukpga/2017/30/contents/enacted>

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/609478/code-of-practice-on-search-and-copyright.pdf

- The **Digital Charter**⁶ has the potential to be a key vehicle through which we can better balance the liability of online platforms to help IP rights holders of all kinds prevent infringement and harmful activity taking place online.
- The **Creative Industries Sector Deal** sees a number of positive commitments from both Government and industry to protect and promote IP, in particular the establishment of roundtables between rights holders and the online advertising industry, social media, and online marketplaces.⁷
- The UK Intellectual Property Office (IPO) **has successfully increased awareness of the value of IP** among businesses, consumers and the public through compelling information campaigns and education programmes.

The Alliance encourages the continuation of such efforts, both within the context and irrespective of Brexit.

Promising commitments on IP and Brexit – the right words from Government

In other areas, strong statements from government on IP have gone some way to allay the concerns of Alliance members in relation to Brexit:

- Prime Minister Theresa May recognised in her **Mansion House speech** that the future agreement with the EU will need to cover IP “to provide further legal certainty and coherence” and also called for “a comprehensive system of mutual recognition”.⁸
- A **technical note on ‘Other Separation Issues’** followed and contained a welcome section on IP rights.⁹ Here the Government stated an ambition for a “substantial future relationship on intellectual property”, predicted that “the effect of these wind down [transitional] provisions will be minimal” and stated that “in many areas, the UK’s position is closely aligned to that set out by the EU in their September position paper”.¹⁰
- **Minister for IP, Sam Gyimah**, has also stated that “The UK has one of the best IP regimes in the world, and leaving the EU will not change that ... The Government is considering options to ensure that the UK’s intellectual property regime will continue to support business and innovation in the future.”¹¹
- On **trade negotiations**, **Secretary of State for Digital, Culture, Media and Sport Matt Hancock** guaranteed at the launch of our ‘Trading Places’ report that IP “will be at the heart of these discussions”.¹²

⁶ <https://www.gov.uk/government/publications/digital-charter/digital-charter>

⁷ <https://www.gov.uk/government/publications/creative-industries-sector-deal>

⁸ <http://www.bbc.co.uk/news/uk-politics-43256183>

⁹ <https://www.gov.uk/government/publications/technical-note-other-separation-issues-phase-2>

¹⁰ https://ec.europa.eu/commission/sites/beta-political/files/intellectual_property_rights.pdf

¹¹ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-28/130361/>

¹² <https://www.allianceforip.co.uk/celebratingip>

Urgent action needed – ‘cliff-edge’ risks

Nonetheless there are still a number of concerns for which clear solutions have not yet been explicitly or even implicitly identified. In order to avoid significant damage to IP-rich industries who depend on a world-class (and reciprocal) IP protection and enforcement regime – and to turn the laudable commitments Government has made above into practical proposals which can gain consensus from the EU – urgent consideration must be given to such ‘cliff-edge’ risks.

Although the proposed implementation period would delay these ‘cliff-edges’ until 31st December 2020 (assuming of course a successful Brexit deal following negotiations), industry has been clear again and again that continued uncertainty will affect investment decisions long before then. Indeed in many sectors it is affecting investment decisions now.

Our asks for each issue recognise that the UK is in a negotiation, and therefore refrain from demanding ironclad guarantees on outcomes. Instead we call for nothing more than the “legal certainty and coherence” promised by the Prime Minister: explicit acknowledgements of the specific issues, clear definitions of what the UK’s negotiating ambition is, and detailed consultation on how this can be achieved.

There are three potential opportunities to deliver solutions to these concerns:

- 1) The final stages of deliberation of the Government’s EU Withdrawal Bill in Parliament
- 2) The implementation and future relationship stages of exit negotiations with the EU
- 3) The UK’s remaining period as a full EU Member State

To develop these solutions the Alliance is prepared to work with Government, constructively, in detail and as soon as is practically possible.

Unregistered design rights

The level of protection afforded to designers by the EU's unregistered Community design (UCD) right is significantly higher than that of the UK equivalent,¹³ however repeated commitments from Government have gone some way to assure designers that an equivalent level of protection will be introduced post-Brexit. This was bolstered by the technical note on March 6 which stated, "In the future, where the UK does not have existing domestic legislation to protect certain types of rights, it will establish new schemes".¹⁴

However, even if *equivalent* protection (that is, a new or improved UK right) is achieved through the Withdrawal Bill or by other means, the design sector will still be gravely at risk without *reciprocal* protection (that is, from the EU27). Post-Brexit, designs first disclosed in the UK, while they may well be sufficiently protected here, will incur no UCD protection in the EU, because the UK will no longer be a member of the EU.¹⁵

This would have grave consequences for UK designers, almost 80% of whom rely on the UCD right to protect their designs, according to a recent survey by Anti-Copying in Design (ACID).¹⁶ The EU is largest export market for many UK design sectors, contributing for example over two thirds of UK furniture manufacturers' export revenue.¹⁷

Such a loss of reciprocity also poses a serious threat to leading industry events, such as 100% Design, London Fashion Week and Top Drawer, at which creators from all over the world come to the UK to reveal new and innovative designs. Without protection designers will either have to run the risk of copying throughout the EU27 following disclosure, or simply avoid first disclosure in the UK altogether.

In a response to a question on design rights in October 2017, the then Minister for IP, Jo Johnson, stated: "We are exploring various options and we are discussing these with users of the system to establish the best way forward." This offered no certainty to designers, and in the absence of any real progress since then, more detailed assurances from Government are necessary.

Ask: An explicit assurance from Government that it is endeavouring to attain reciprocity on unregistered design rights as a high priority during upcoming negotiations.

¹³ <http://mewburn.com/resource/uk-eu-unregistered-designs-the-basics/>

¹⁴ <https://www.gov.uk/government/publications/technical-note-other-separation-issues-phase-2>

¹⁵ A Q&A document published by the EUIPO on 30 January 2018 made this point quite unequivocally when it stated that the UCD right's "territorial scope of protection ceases to extend to the UK as from the withdrawal date".

https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/news/QandA_brexit_en.pdf

¹⁶ According to Alliance member ACID a number of reasons for this are reported, including scale of output, registration costs, legal costs and a lack of confidence in registration as a defence against copying.

¹⁷ <http://britishfurnitureconfederation.org.uk/about-the-industry/>

Exhaustion of IP rights

As a result of its membership of the EEA, the UK is currently part of a regional exhaustion regime. This allows owners of IP rights, to protect themselves against the unauthorised resale (parallel importing) of products into the EEA which were initially sold outside the EEA. Some other countries choose to follow an international exhaustion regime, whereby parallel importers can undercut domestic prices by importing the same or similar product from overseas. Prior to the vote to leave the EU there was no evidence of an appetite for change, either within industry or government, in such a direction.

There remains, however, no indication from the UK Government how it intends to continue the current, reciprocal exhaustion regime post-Brexit – which in itself is of deep concern to Alliance members. Should such an agreement prove impossible, there is for copyright a clear and immediate solution – that is the adoption of national exhaustion regime, to protect the UK's creative industries. For other IP rights holders the path forward is less clear, but extensive consultation and analysis must take place before any precipitate change to the status quo occurs.¹⁸ Where there is unanimous agreement across the Alliance is that any shift towards international exhaustion would have disastrous effects – on consumers, the UK economy, and its cultural standing.

Firstly consumers would stand to lose product consistency, in turn fundamentally damaging consumer trust. Unrestricted, unregulated parallel importing would allow editions and versions of products tailored for different markets around the world to make their way into the UK. Ironically, product choice could meanwhile decrease as rights holders, competing as they would be with their own products from cheaper economies, would have less incentive to tailor products and creative content specifically for local markets such as the UK. The risk of non-UK-compliant products would also rise significantly, presenting public enforcers with a significant challenge when resources are already stretched.

The threat to industry is equally concerning. As above, with companies forced to compete with their own products manufactured in cheaper economies with much lower costs of business (such as salaries, welfare costs, land and tax), world-leading UK sectors such as publishing and high tech can be expected to shift their activity and employment out of the UK – or else they risk failing to recover substantial investments (such as R & D) made in the UK. Exporting companies would also be prevented from entering or developing overseas markets on the basis of marginal pricing, due to the risks this would create of the products returning to, and undermining, mature markets such as the UK. Given the scale and breadth of UK IP-rich exports and the contribution this makes to our global cultural standing, as evidenced by our recent trade report, such an outcome is extremely worrying.¹⁹

¹⁸ The UK IPO has initiated research into the future of the UK's exhaustion framework however results are not expected for two years – far too late to be taken into consideration for any Brexit deal.

¹⁹ Alliance for Intellectual Property: *'Trading Places: The UK's IP Future'* (Dec 2017)
<https://www.allianceforip.co.uk/alliance-trade-report>

Ask: Government should make clear how it intends to deliver a continuation of the current EEA exhaustion regime after the UK's full withdrawal from the EU. Should this prove impossible it must act quickly to deliver certainty for rights holders – via national exhaustion for copyright, and extensive in-depth consultation on the best path forward for other IP rights in the UK.

Artist's Resale Right

The Artist's Resale Right (ARR) is a vital right that enables visual artists and estates to share in the increased value of their copyright-protected work when it is resold on the secondary art market by an auction house, gallery or dealer. ARR is a significant source of revenue supporting artists' practices and estates' legacies, which in turn benefits the art market. Derived from the EU Resale Right Directive 2001/84/EC, the UK's ARR Regulations was implemented in 2006. To date, more than 5,000 visual artists and estates have received over £65 million in ARR royalties distributed by DACS, the UK's visual artists' rights management organisation.

ARR is a standalone part of copyright law that is not integrated into the Copyright, Designs and Patents Act 1988. The Government's technical note²⁰ is reassuring where it states the UK's position is "closely aligned" with the EU's position set out in its paper on intellectual property rights and geographical indications²¹, however neither the UK Government nor the EU mention ARR.

Reciprocity is a fundamental principle within the ARR legislation in the UK and between EU Member States as it allows for UK artists to receive a royalty when their work resells in Europe and vice versa. It creates a level playing field in a globalised art market, which is vital for the UK having the largest art market in Europe – and the second largest art market globally.²²

If the reciprocity is not maintained for ARR, individual artists and estates will not enjoy the same level of protection in the UK and EU27, meaning that these creators will simply be deprived of royalties based on borders, despite having an international demand and profile.

Ask: An explicit commitment from the UK Government that it is endeavouring to maintain a reciprocal ARR post-Brexit, so that UK artists and estates continue to benefit from the right when their works sell in Europe.

²⁰https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/685748/Other_Separation_Issues_Technical_note_March_2018.pdf

²¹ https://ec.europa.eu/commission/sites/beta-political/files/intellectual_property_rights.pdf

²² TEFAF Art Market Report 2017: <http://1uyxgn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf>

Portability of online content services

The Portability Regulation allows EU consumers to continue to access any film, TV and music subscription services they pay for even while they are temporarily present in another Member State. It will come into force in the UK in April 2018, and the Alliance is generally supportive of its continued functioning after Brexit. Portability would deliver benefits for both UK and EU consumers, and we responded as such to the Government’s consultation on how the Regulation should be enforced.

However the “legal fiction” principle linked to application of relevant copyright rules and central to the Regulation (essentially allowing the consumer to be treated as if they were at home, even when abroad) relies fundamentally on reciprocity of application between EU Member States. Such reciprocity will not exist (legally) between the EU and UK post-Brexit, and as much was confirmed in the European Commission’s 28 March ‘Notice to Stakeholders’ on copyright.²³

In the absence of a specific arrangement between the UK and the EU that enables the continued application of the legal fiction in the context of the Regulation, UK service providers will simply not be in a position to deliver Portability in its current form, due to the severe risk of breaching the rights of third party right holders in the EU.²⁴ The Government recognised as much in its response to the consultation, where it agreed that “the continued provision of portable content services by UK-based providers will rely on reciprocal arrangements with the EU”.²⁵ However it offered no potential solutions, nor any commitment to endeavour to deliver solutions through negotiations with the EU.

It is likely that many UK-based (and other EU) companies have incurred significant expense to develop (and now to market) portability solutions for their respective customers. But such legal uncertainty for service providers and rights holders is not the only reason this deserves urgent Government attention. The potential consumer disappointment and negative reaction that would result from the marketing and introduction of Portability in April 2018, only for it to then end in April 2019, is clearly highly undesirable.

Ask: A clear statement from Government on the concrete steps it intends to take (or has taken already) to secure an agreement with the EU which enables the Portability Regulation to continue to function legally after Brexit.²⁶

²³ <https://ec.europa.eu/digital-single-market/en/news/notice-stakeholders-withdrawal-united-kingdom-and-eu-rules-field-copyright>

²⁴ In addition other obstacles might apply – for example that the content accessed by e.g. a UK-resident traveller who is temporarily on holiday in a hotel in France is, in fact, not legal to be viewed in France (for reasons other than copyright).

²⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/690128/DPS-007149-Cross-border-portability-of-online-content-services-response.pdf

²⁶ Note there are a number of other less directly IP-specific issues facing the AV sector that require a similarly reciprocal arrangement post-Brexit; these can be found detailed in the sectors’ own papers.

Broadcasting ‘Country of Origin’ principle

The UK’s departure from the Digital Single Market (as announced by the Prime Minister in her Mansion House speech) means that the 2010 Audiovisual Media Services Directive will, among other instruments, cease to apply in the UK post-Brexit. This would imply that the “country of origin” (COO) principle enshrined in this legislation (which allows broadcasters licensed in the UK to broadcast, without additional licenses and adherence to local regulations, throughout the EU – and vice versa), would also come to an end.²⁷ The European Commission’s ‘Notice to Stakeholders’ on 28 March confirmed this, clarifying that as of the withdrawal date, UK broadcasters “will have to will have to clear rights in all Member States where the signal reaches”.²⁸

The UK Government has always supported the COO principle, commenting as recently as 2015 that it has “simplified regulatory burdens on distributors” and “must not be lost or eroded”.²⁹ In her Mansion House speech the Prime Minister acknowledged this issue directly, and proposed exploring “creative options with an open mind, including mutual recognition which would allow for trans-frontier broadcasting”. However while there are 35 channels licensed in the EU27 and offered in the UK, there are over 750 licensed by Ofcom and broadcast in the EU27.³⁰

The Prime Minister’s words are welcome, but without substantial progress in forthcoming negotiations giving certainty to industry soon, broadcasters will be forced to act on relocation decisions without a clear knowledge of the long term UK position (enticed by the already forthcoming offers from other Member States³¹). Even if, ultimately, a solution is then found, the impact on UK industry would be difficult to reverse.

Ask: A concerted effort by Government to reach agreement on mutual recognition of rights linked to origin of broadcasts within both the UK and all EU member states, as early as possible in the next stage of negotiations with the EU.

²⁷ The principle is enshrined in the 2010 Audiovisual Media Services Directive as part of the EU’s Digital Single Market – which the Government has been clear the UK will no longer be a part of post-Brexit.

²⁸ <https://ec.europa.eu/digital-single-market/en/news/notice-stakeholders-withdrawal-united-kingdom-and-eu-rules-field-copyright>

²⁹ http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=11282

³⁰ Oliver & Ohlbaum, ‘The value of international channels to the UK’ (Feb 2018)

³¹ Ireland’s Industrial Development Authority is already courting the 750 channels which broadcast to the EU but which are based in the UK, and it is reported that Belgium, Luxembourg and the Netherlands are doing the same <https://www.theguardian.com/politics/2018/feb/25/ireland-pushes-for-uk-tv-channels-to-make-post-brexit-move>

Other concerns

A loss of influence over EU rules that the UK may have to take during the implementation period is particularly concerning given the current progression of the Digital Single Market package. There are many positive aspects for IP-rich industries within this, but as deliberation looks increasingly likely to extend beyond March 2019 it is vital that the UK is in a strong influencing position up until then and has clarity of legal authority afterwards. In this context the Alliance welcomes the approach to ongoing Union judicial proceedings set out in the recent Technical Note of Separation issues published by the Government.³² The UK must maintain a role at the CJEU in the period during which any pending UK cases are being heard.

Increased pressure on enforcement bodies at borders would leave the UK increasingly vulnerable to the import of counterfeit goods. Already the ‘front line’ of Trading Standards, Police and Border Forces suffer from limited funding and resources, and as such are struggling to prevent the sale of dangerous counterfeits such as cosmetics, toys and electrical goods in the UK. The lack of resolution for the Irish border question also presents concerning obstacles, such as the potential end to applicability of the Excise Movement and Control System (EMCS), which would disrupt the sharing of intelligence and collaboration between the UK and EU Member States about high-risk goods. With almost 4% of all UK imports being fake goods, resulting in almost £3.8 billion in lost tax revenue,³³ it is simply unaffordable for such increased border infrastructure and responsibilities to divert attention away preventing the import of counterfeits.

New trade deals with third countries offer many opportunities for IP-rich industries to improve their already impressive export performance, as detailed in our recent report *‘Trading Places: The UK’s IP Future’*.³⁴ However the UK’s world-leading IP regime must not be jeopardised during the negotiation of these new relationships. Instead UK trade policy must make every effort to raise standards in the jurisdictions with which we negotiate, to protect not just UK creators and rights holders in the UK but around the world as well.

³² <https://www.gov.uk/government/publications/technical-note-other-separation-issues-phase-2>

³³ <http://www.oecd.org/publications/trade-in-counterfeit-products-and-the-uk-economy-9789264279063-en.htm>

³⁴ <https://www.allianceforip.co.uk/alliance-trade-report>

About the Alliance

Established in 1998, the Alliance for Intellectual Property is a UK-based coalition of 20 organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. Our members include representatives of the audio visual, toy, music, games, business software, sports, brands, publishing, photography, retailing and design industries.

The Alliance's overriding objective is to ensure that intellectual property ('IP') rights are valued and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected.

The Alliance is also proactive in supporting the promotion of IP through educational and consumer awareness initiatives and encouraging the development of IP training for businesses and individuals seeking to develop, produce and trade goods, services and content.

Alliance Members

Anti-Copying in Design, Anti-Counterfeiting Group, Association of Authors' Agents, British Association of Picture Libraries and Agencies, British Association for Screen Entertainment, British Brands Group, BPI, British Toy and Hobby Association, Design and Artists Copyright Society, Educational Recording Agency, Entertainment Retailers Association, Film Distributors Association, Motion Picture Association, Premier League, Professional Publishers Association, Publishers Association, Publishers Licensing Society, UK Cinema Association, UK Interactive Entertainment

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