Written evidence submitted by Mr Joe Sekhon [RAB0002]

Regulating after Brexit

Executive Summary

This evidence submission responds to the following issues of specific interest to the European Scrutiny Committee in this call for evidence (numbering taken from the Call for Evidence):

2. After Brexit, how can the UK now regulate differently?

7. In which sectors is the UK well placed to maximise the opportunities afforded by its newfound regulatory autonomy?

This evidence focuses on the UK's intellectual property (IP) regime post Brexit and makes a number of recommendations as to how it could be reformed so as to maximise the opportunities afforded by leaving the EU as well as minimising the challenges.

These recommendations are as follows:

- The UK should change to a mixed exhaustion of rights regime, where the ability to parallel import goods would depend on any decision on the treatment for a specific IP right, good or sector. Whilst the exporting of goods would only be permitted to countries with an international regime **(further details see page 4)**.

- Given the value of UK GIs (geographical indications) to the domestic economy, "...UK GIs represent over £5 billion in UK export value each year (25% of all UK food and drink exports by value) and play an important role in rural economies"[1], it is imperative therefore that post Brexit, any free trade agreements with non-EU countries must include "...bilateral reciprocal protection of GIs…[as] part of the United Kingdom's…"[2] negotiating position **(further details see page 6)**.

- The Government should make it a priority to legislate for the protection of "computer generated works and text and data mining by copyright and AI devised inventions…"[3] by patents; particularly if it wishes to realise its ambition of turning the UK into an AI global superpower[4] **(further details see page 7).**

- Though not directly related to the UK's withdrawal from the EU, nonetheless given the legislative 'ground zero' nature of Brexit, it is in the UK national interest to provide utility model protection post Brexit in order to incentivise the creation and commercialisation of inventions which may not meet the criterion of a patent but are still worthy of protection. Utility models would be of particular interest to the UK's

[1] Geographical Indications, Consultation on establishing UK Geographical Indications (GI) schemes after EU Exit, Department for Environment Food and Rural Affairs, October 2018, pg. 5, accessed 21 July 2022
[2] A close look at the United Kingdom's post-Brexit GI regime, World Trademark Review, 25 January 2021, accessed 21 July 2022
[3] National AI Strategy, HM Government, September 2021, pg.42 accessed 21 July 2022
[4] National AI Strategy, pg.4

SME community because in contrast to patents, utility models registration requirements are less costly, complicated and time consuming, whilst still offering a sufficient degree of protection to incentivise product creation and commercialisation. This would explain why comparable European countries such as Germany, Spain, France and Italy amongst others offer utility models alongside patent protection **(further details see page 7)**.

Author Introduction

Joe Sekhon is a senior lecturer in intellectual property law at the University of Portsmouth, UK. He is also a visiting professor at Paris Nanterre University and Bocconi University (Milan, Italy) as well as the lead academic in residence for one of the world's leading innovation intelligence companies, Patsnap. Joe has an international reputation in the field of intellectual property education and his work has been recognised by the UK Intellectual Property Office, who awarded him £30,000 in seed funding to set up one of the UK's first university based IP clinics for student and graduate entrepreneurs.

Joe has submitted his evidence because he wishes to bring to the attention of the European Scrutiny Committee the importance of intellectual property regulation post Brexit and stress how to navigate this complex area of law so that any IP centric Brexit opportunities are maximised whilst the challenges minimised.

The UK's intellectual property regime post Brexit

Introduction

It is important to note the UK's Innovation Strategy[5] emphasises the importance of safeguarding UK intellectual property as a means of UK PLC "...compet[ing] with international competitors and accelerat[ing] growth."[6] This approach compliments this call for evidence as both wish "...to support the best interests of UK businesses and citizens"[7] post Brexit. The contention of this written evidence is the UK's withdrawal from the EU does create challenges but in the opinion of the author, these challenges are outweighed by the opportunities to enhance the UK's IP framework particularly when it comes to regulating IP generated by artificial intelligence; a sector in which the UK wishes to establish its position as a global superpower.[8]

The UK's withdrawal form the EU: the impact on the UK's IP regime

Prior to the UK's withdrawal, the UK's IP framework consisted of the following:

- UK domestic legislation and common law
- EU law
- International treaties and conventions

[5] UK Innovation Strategy July 2021
[6] UK Innovation Strategy July 2021, pg. 22
[7] Call for Evidence - Regulating After Brexit
[8] National AI Strategy, pg.4

Membership of the EU meant that from a UK perspective, UK individuals and entities could benefit from "...certain IP rights enjoying pan-EU coverage"[9] as required for the continued functioning of the internal market.[10] Specific EU-wide IP rights were created including patents, trade marks and design rights.

Upon departure, the UK-EU Withdrawal Agreement[11] mitigated against the loss of these rights, by "...converting [them] into comparable UK ones (with the exception of patents), with these new UK rights taking effect from the end of the transition period."[12]

The UK-EU Trade and Cooperation Agreement[13] also reinforced this approach with it obligating both parties to reduce "...distortions and impediments…"[14] in relation to intellectual property rights (IPRs) and ensuring "...an adequate and effective level of protection of [such rights]."

Whilst Brexit has certainly had an impact on a range of UK industries[15] and regulatory regimes[16], the UK's Intellectual Property rights framework has not been significantly impacted. Of course there has been some impact. For instance the UK chose not to participate in the EU Unitary Patent Scheme and thus deprived UK entities from applying for an EU wide patent. The rationale for this position is coherent from a Brexit standpoint; participating would have involved abiding by the decisions of the Unified Patent Court (whose decisions are applicable across all EU member states) and therefore giving the Court de facto jurisdiction in the UK. It is also worth noting that regardless of whether the UK is a member of the EU, it along with individual EU member states has existing obligations to provide for a range of intellectual property rights under a number of international treaties and conventions. The UK-EU Trade and Cooperation Agreement specifically provides for and recognises this context in "Article IP.4: International agreements"[17] So by way of example, irrespective of Brexit, the UK has IP commitments under the TRIPS Agreement[18], the Rome Convention[19] and the Berne Convention[20] These and other commitments have not been impacted by the UK's withdrawal from the EU.

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[9] Intellectual property after Brexit; The Law Society; accessed 18 July 2022
[10] Article 97a Treaty of the Functioning of the EU, accessed 18 July 2022
[11] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, accessed 18 July 2022
[12] Intellectual property after Brexit; The Law Society; accessed 18 July 2022
[13] UK-EU Trade and Cooperation Agreement, accessed 19 July 2022
[14] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland, Title V: Intellectual Property, Chapter 1: General Provisions, Article IP: 1: Objectives (a) and (b), accessed 19 July 2022
[15] 'New Brexit rules caused major shock to UK-EU trade - report', BBC News Website, accessed 19 July 2022
[16] UK Regulation after Brexit, UK in a Changing Europe, February 2021, accessed 19 July 2022
[17] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland, Title V: Intellectual Property, Chapter 1: General Provisions, article IP: 4: International Agreements, accessed 19 July 2022
[18] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994, accessed 19 July 2022
[19] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961, accessed 19 July 2022
[20] Berne Convention for the Protection of Literary and Artistic Works, 1886, accessed 19 July 2022

Arguably, it is these and other[21]agreements with their requirements for minimum standards of IP protection that will shape UK IP policy going forward rather than Brexit.

Brexit nonetheless does present the UK with a unique opportunity to build upon its existing IP framework so that it further incentivises not only UK companies and individuals to create ground breaking products and services knowing that their IP will be protected, but also encourages international companies to invest and create in the UK.

The UK's intellectual property regime going forward

In the remainder of this response the author will address the following issues identified by the European Scrutiny Committee as significant to the call (numbering taken from the Call for Evidence):

2. After Brexit, how can the UK now regulate differently?

7. In which sectors is the UK well placed to maximise the opportunities afforded by its newfound regulatory autonomy?

The focus will be on the following areas which in the author's view, best demonstrate how the UK's existing IP regime could be amended so that post Brexit the UK becomes "...the best place in the world for scientists, researchers and entrepreneurs to innovate [as well as]...giving the UK a competitive edge:"[22] The author will outline:

- The approach the UK could take when dealing with exhaustion of IP rights.
- The importance of continuing to protect UK geographical indications (GIs) in future trade deals with non-EU countries.
- A suitable method by which inventions and creative works generated by artificial intelligence (AI) could be protected.
- Why the introduction of utility model protection for minor inventions and innovations would enhance the reach of the UK's existing patent regime.

The approach the UK could take when dealing with exhaustion of IP rights

Exhaustion of rights is an important component of any IP rights ecosystem with the UK being no exception; it "...essentially provides that once goods have been placed on the market by a rightsholder or with their consent, the rightsholder cannot then prevent the onward sale of those goods by asserting its IP rights, [which only] extend to preventing the first sale into a new territory. As a result, where the IP rights relating to goods have been exhausted, there is an opportunity for others to engage in the parallel trade of those goods.[23]

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[21] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland, Title V: Intellectual Property, Chapter 1: General Provisions, article IP: 4: International Agreements, accessed 19 July 2022

[22] National AI Strategy, September 2021, pg. 42, accessed 19 July 2021

[23] 'Future UK IP rights exhaustion regime decision delayed, Pinsent Masons, Out-Law News, 21 January 2022, accessed 20 July 2022

Prior to Brexit, the UK was part of the EU exhaustion of rights regime. This meant that once goods were made available anywhere in the single market, rightsholders were precluded from asserting their IP rights to prevent the resale of their goods by third parties anywhere in the European Economic Area (EEA). However exhaustion of rights did not apply to goods entering from outside the EEA; in this case IP rights were not exhausted and therefore could be used by rightsholders to prevent the non-EEA goods from being placed anywhere in the single market.

Post Brexit and until the expiration of the transition period, the UK and EU continued with this position which meant that IP rights exhausted in either the UK or EU remained exhausted in both territories.[24] However since the 1 January 2021, there has been a divergence in approach. The EU no longer regards goods placed onto the UK market as being exhausted in the EEA whilst the UK has continued with the existing position albeit unilaterally in what has become known as the 'UK+' or 'Unilateral EEA' regime; "…goods placed on the EEA market will still be deemed exhausted in the UK…"[25] The rules regarding goods from non-EEA countries remain the same for both the UK and the EU.

This divergence of position is consistent with the Trade and Cooperation Agreement between the UK and EU[26] which allows both parties to determine their own exhaustion of rights regimes.

The UK Intellectual Property Office on behalf of the Department for Business, Energy and Industrial Strategy (BEIS) launched a public consultation[27] in 2021 on what the UK's exhaustion of rights regime should consist of going forward. It asked for comment specifically on four proposed options:

- Continuation of the current unilateral exhaustion regime (UK+ or Unilateral EEA).
- A national regime in which the 'automatic' importing and exporting of goods (parallel trade) would not be permitted and therefore would become permission based.
- An international regime that would automatically permit the import of goods from any country and permit the export only to other countries with a comparable international regime.
- A mixed regime, where the ability to parallel import goods would depend on any decision on the treatment for a specific IP right, good or sector. Whilst the exporting of goods would only be permitted to countries with an international regime.

BEIS did not reach a decision as to their preferred regime to adopt stating that "the government has completed an initial analysis of the recent consultation…unfortunately there is not enough data available to understand the economic impact of any of the alternatives to the current UK+regime."[28] However the government went on to say that it "...remains

[24] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Article 61, accessed 20 July 2022
[25] Intellectual property after Brexit; The Law Society; accessed 20 July 2022
[26] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland, Title V: Intellectual Property, Chapter 1: General Provisions, Article IP: 5: Exhaustion
[27] Consultation on the UK's future regime for exhaustion of IP rights, 7 June 2021 to 31 August 2021, accessed 20 July 2022

committed to exploring the opportunities which might come from a change to the regime…[and] will provide a further update…in due course."[29] Whilst this approach has merit and enables the government to assemble the data it needs to make an appropriate decision, it is the view of this author that adopting at least in principle a mixed regime as the preferred option for perhaps a further consultation would enable the UK to have an exhaustion regime that met the needs of specific industries on a case by case basis reflecting their particular circumstances and therefore maximising the positive economic impact of any change to the UK+ status quo. It is worth reiterating that the EU excluded the UK from its exhaustion of rights regime as soon as the transition period expired; no doubt it considered the economic impact of this decision and still proceeded with it.

The importance of continuing to protect UK geographical indications (GIs) in future trade deals with non-EU countries

"GIs are a form of intellectual property protection that identifies a product as originating in a country, region or locality where a given quality, reputation or other characteristic of the product is attributable to the place it is produced."[30]

The UK previously protected GIs primarily via the EU's protection schemes[31]. The EU schemes were based upon the TRIPS Agreement, which set out an international framework for minimum standards to be adhered to by World Trade Organisation (WTO) members. Since the end of the transition period, the EU GIs schemes no longer apply in the UK. Instead the UK has established its own scheme under the Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020.[32] THe UK GIs scheme is divided into four and protects the following products:

- Food, agricultural products, beer, cider and perry.
- Wine.
- Aromatised wine.
- Spirit drinks

In the view of the author this domestic scheme has been working well, as in practice it closely resembles the EU schemes subject of course to the territories that they protect. In any event the UK would need to ensure that any further changes to its new scheme were consistent with its minimum standard obligations as a WTO member state. The more important observation however is given the value of UK GIs to the domestic economy. "...UK GIs represent over £5 billion in UK export value each year (25% of all UK food and drink

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[28] UK government's response to UK's future exhaustion of intellectual; property rights regime consultation, 18 January 2022, accessed 20 July 2022

[29] UK government's response to the UK's future exhaustion of intellectual property rights regime consultation, 18 January 2022, accessed 20 July 2022

[30] Geographical Indications. Consultation on establishing UK Geographical Indications (GI) schemes after EU Exit, October 2018, Department for Environment Food & Rural Affairs, pg 4, accessed 21 July 2022

[31] EU geographical indications and quality schemes explained, accessed 21 July 2022

[32] The Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020, accessed, 21 July 2022

exports by value) and play an important role in rural economies"[33], it is imperative therefore that post Brexit, any free trade agreements with non-EU countries must include "...bilateral reciprocal protection of GIs…[as] part of the United Kingdom's…"[34] negotiating position. This was the case in the agreement in principle the UK reached with Australia as part of their free trade negotiations; "...a commitment that if Australia introduces bespoke Geographic Indication (GI) schemes for spirits and agri-foods, the UK will be able to put forward GIs for potential protection subject to Australia's legal procedures. If such schemes are not introduced no later than two years after entry into force of the agreement, the GI provisions in the agreement will be reviewed by Australia and the UK. UK GIs that the UK intends to propose for protection may be named in a non-binding side-letter."[35]

Finally it is worth noting that the UK-EU Trade and Cooperation Agreement does provide for both parties "...to jointly use reasonable endeavours to agree rules for the protection and effective domestic enforcement of geographical indications."[36] In the view of the author this provision will lead to a review of current arrangements in due course.

A suitable method by which inventions and creative works generated by artificial intelligence (AI) could be protected.

There is no consensus currently on how inventions and creative works generated by artificial intelligence should be protected across the world. The World Intellectual Property Organisation (WIPO) is currently leading discussions with government and non governmental representatives on how best to achieve protection.[37] In light of this and therefore quite understandably the UK-EU Trade and Cooperation Agreement is also silent on this issue, Given the UK's 'National AI Strategy' with its objective of making "...Britain a global AI superpower" within ten years[38] it is imperative that the UK post Brexit provides a regulatory framework that incentivises the creation and dissemination of AI generated inventions and creative works. The UK Government's response to its consultation on this issue[39] which focussed on using copyright to protect "computer generated works and text and data mining, and…patents for AI devised inventions…"[40] is a welcome step forward. However in the view of the author, legislation to realise these protections is required as a matter of urgency particularly if the ten year AI superpower objective is to be realised. In addition, although not discussed in the National AI Strategy, utility model protection could

[33] Geographical Indications, Consultation on establishing UK Geographical Indications (GI) schemes after EU Exit, Department for Environment Food and Rural Affairs, October 2018, pg. 5, accessed 21 July 2022
[34] A close look at the United Kingdom's post-Brexit GI regime, World Trademark Review, 25 January 2021, accessed 21 July 2022
[35] Australia- United Kingdom Free Trade Agreement, Australian Government, Department for Foreign Affairs and Trade, 16 June 2021, accessed 21 July 2022
[36] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom, Title V: Intellectual Property, Chapter 4: Other provisions, Article IP.57: Review in relation to geographical indications, accessed 21 July 2022
[37] WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI), 4 November 2020, Summary of Second and Third Sessions, accessed 21 July 2022
[38] National AI Strategy, HM Government, September 2021, accessed 21 July 2022
[39] Government response to call for views on artificial intelligence and intellectual property, 23 March 2021, accessed 21 July 2022
[40] National AI Strategy, HM Government, September 2021, pg.42 accessed 21 July 2022

also be deployed to protect AI inventions; this approach will be explored in the section below.

Why the introduction of utility model protection for minor inventions and innovations would enhance the reach of the UK's existing patent regime.

"In some countries, a utility model system provides protection of so called 'minor inventions' through a system similar to the patent system. Recognising that minor improvements of existing products, which do not fulfil the patentability requirements, may have an important role in a local innovation system, utility models protect such inventions through granting an exclusive right, which allows the right holder to prevent others from commercially using the protected invention, without his authorisation, for a limited period of time."[41]

Unlike patents, there is no international agreement that regulates utility model protection. Therefore it is left to individual countries to decide whether to offer such protection and the type of inventions it should cover along with registration requirements. In the context of this discussion there is also significantly, no EU-wide utility model protection[42]; individual member states are left to determine whether to offer this intellectual property right and many do; albeit each state has its own registration requirements and types of inventions that will qualify for such protection.

It is worth noting that currently the UK does not offer utility model protection and because there is no harmonisation of such protection in the EU, it did not feature in either the UK-EU Withdrawal Agreement or the UK-EU Trade and Cooperation Agreement. It is questionable therefore whether utility models should be discussed in the context of this call for evidence. However this would miss the point. Brexit offers an opportunity for the UK to legislate as it sees fit and not be restricted by its own historical norms (no track record of utility model protection in the UK) and EU convention (no harmonisation in this area).

In the author's view, it is in the UK national interest to provide utility model protection post Brexit in order to incentivise the creation and commercialisation of inventions which may not meet the criterion of a patent but are still worthy of protection. Utility models would be of particular interest to the UK's SME community because in contrast to patents, utility models registration requirements are less costly, complicated and time consuming, whilst still offering a sufficient degree of protection to incentivise product creation and commercialisation. This would explain why comparable European countries such as Germany, Spain, France and Italy amongst others offer utility models alongside patent protection. By way of example, any future UK legislation in this space could look to enable AI inventions to be protectable by both patents and utility models depending upon the significance of the invention. In the author's view, this would accelerate innovation in the UK based AI sector and make the aim of the UK becoming an AI superpower eminently achievable and in a relatively short space of time.

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[41] Utility Models, WIPO Website, accessed 22 July 2022

[42] European Commission, Internal Market, Industry, Entrepreneurship and SMEs webpage, accessed 22 July 2022