Review of the Balance of Competences - Intellectual Property Law

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1. Introduction

This evidence is submitted in support of the Review of the Balance of Competences organised by the UK Government. The evidence covers the area of free movement of goods, and more in particular intellectual property rights.

Intellectual property legislation has witnessed a rather substantial change in attention the last few decades. Until pretty much most of the 20th century, IP legislation and IP systems were seen a rather technical, and attracted very little interest from the public at large and legislators in particular. To the extent that attention as caught, it was to amend certain technical specificities of any one given IP system.

That lack of attention is surprising and not surprising at the same time. It is not surprising, in view of the rather esoteric nature of IP legislation. It is a quite technical subject matter, difficult to understand and it is even more difficult to visualise the broader ramifications of such legislation for those who are not involved in the daily functioning of those IP rights.

It is at the same time, however, also surprising to see that for such a long time there was very little interest in IP systems, as their importance in society cannot easily be overstated. Intellectual property rights as a system of regulation of economic activity are capable of having a major influence on trade, fostering innovation and stimulating creative activity. IP rights allow businesses to trade in goods and services which may be protected by IP rights without having the risk that their products or services will be copied. In other words, IP rights to a large extent prevent free-riding by third parties. IP right owners are with the aid of their IP rights capable of recouping the investments they have made in creating goods and services which are covered by such IP rights.

The last decade of the last century and the entirety of this century have witnessed a complete shift in attention vis-à-vis IP rights. Suddenly the public at large and politicians discovered the importance but also the sensitivity of IP rights. This raised attention has been caused by attempts on the side of right holders to expand IP rights both in terms of subject matter and scope. Not only tried industry to obtain IP protection for things that were not

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protected before,[1] it also tried to obtain a wider scope of protection for the subject matter that was already capable of being protected.[2] Most recently, discussions around the enforceability of copyright in the digital age have generated a fundamental discussion about the future of copyright protection and its relationship with other rights such as the right to access to information, the right to privacy, and the right to communication.[3]

In other words, the IP system has now also gained a public policy dimension which it always had but which remained unnoticed for a long time.

This raised attention focused towards the intellectual property had a number of effects which were of a mixed nature. On the positive side, coming into the spotlight has without a doubt led to somewhat more of a balance in most IP systems between the rights of the IP right holders and those of third parties and the public at large. It unfortunately also led to more legislative intervention which has shown to be not always of the highest quality, largely due to two factors: 1) the complex nature of IP legislation does not lend itself easily to quick changes, and; 2) the IP system has become the playground of lobby groups, both in the interests of right holders and in the public interest.

It is in that environment that the current review is to be seen.

2. Evaluation of EU competences in IP: harmonisation and unification

2.1. Introduction

The status of EU competences in IP is very much a mixed bag. One can on the one hand say with confidence that harmonisation (through directives) and unification (through regulations) in the area of IP has benefitted all users of the various IP systems, including UK

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1 Notable example is the sui generis database right, which did not exist before. Under the sui generis database right, the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents of the database has the right to prevent extraction and/or re-utilization of the whole or of a substantial part of the database (See Art. 7(1) Directive 96/9/EC on the legal protection of databases, implemented in the UK by the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032)).

2 For instance, the growing trend to (try to) obtain trademark protection for smells, sounds, single words, etc. See also the trend to interpret patents and their scope broader than in the past.

3 The latter two issues have been raised since the inception of the so-called "graduated approach" according to which a copyright infringer is informed a number of times about established copyright infringement through the internet, after which measures can be taken such as closing internet access for a certain period of time. That approach was laid down in s. 17 of the Digital Economy Act 2010 (DEA2010), but the provision has now been repealed. The so-called French law HADOPI (Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet, Loi n° 2009-669 du 12 juin 2009 parue au JO n° 135 du 13 juin 2009) coined the principle, but the law has now been revised, and the principle of internet access closure after establishing a number of infringements is no longer in the statute as it was deemed to be disproportionate.

businesses, as such harmonisation and unification has led to more legal certainty in cross border trade, which is of paramount importance for businesses.

On the other hand, however, it must be admitted that any legal certainty gained by the introduction of harmonising provisions or EU wide uniform rights has to some extent been outweighed by a growing degree of legal uncertainty due to a number of factors, which will be discussed in what follows.

Harmonisation and unification are important and even crucial in the area of IP as most businesses operate worldwide or at least within the EU. Harmonisation and unification allows users of the various IP rights to evaluate and predict the rights they will be able to exercise and their scope in a cross border situation. That creates legal certainty, which is crucial for businesses with a view to organise, plan and strategise their business.

Unification is obviously the most advanced form of cooperation. Examples in the area of IP are the Community trade mark,[4] the Community design[5] and the Community plant variety right.[6]

All the abovementioned central and uniform rights have proven to be successful and are widely used by businesses. They demonstrate that a deep harmonisation and even unification of IP rights can work.

2.2. CTM

The Community trade mark (CTM) system was created after a number of harmonising directives in the area of trademark law were introduced,[7] and the CTM system is widely based on the principles laid down in those harmonising directives. Noteworthy is that the

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4 COUNCIL REGULATION (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ L78/1, 24.3.2009, codifying Regulation Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark as amended; Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark, OJ L 303, 15/12/1995.

5 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24

6 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227 , 01/09/1994 P. 0001 – 0030, as amended by Council Regulation (EC) No 2506/95 of 25 October 1995 L 258 3 28.10.1995; Council Regulation (EC) No 807/2003 of 14 April 2003 L 122 36 16.5.2003; Council Regulation (EC) No 1650/2003 of 18 June 2003 L 245 28 29.9.2003; Council Regulation (EC) No 873/2004 of 29 April 2004 L 162 38 30.4.2004; Council Regulation (EC) No 15/2008 of 20 December 2007 L 8 2 11.1.2008.

7 DIRECTIVE 2008/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version), OJ L299/25, 8.11.2008, amending and codifying First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks Official Journal L 040 , 11/02/1989 P. 0001 – 0007 as amended.

CTM jurisdictional system is to some extent built on the template which was created earlier for the Community Patent which, however, never entered into force.

Irrespective of the above, it seems that the system has been well received by users and is widely used indeed. The total number of CTM applications shows a steady rise over the years. Annex 1 shows some statistics regarding CTM applications. Annex 2 shows the numbers for the UK in relation to the CTM. The statistics show a clear and steady rise in applications and registrations over the years, with a drop in 2009, the year the financial crisis hit the EU and the UK.

The system has never been perfect, however, which was reason why, after a study carried out by the Max-Planck Institute for Intellectual Property Law[8] evaluating the European trade mark system, a review of the system has now been proposed.[9] The review aims at repairing some of the shortcomings and/or inconsistencies which were present in the current system. Some of these are based on some of the findings and suggestions made in the Max-Planck study, which concluded that overall the trademark system in Europe functions reasonably well.

One of the issues that will be remedied is the concept of a sign protectable by trade mark. Under the current system, only signs which can be represented graphically can be protected. That requirement will be repealed as it is considered out of date, as it would prevent protection of sounds, smells etc.[10] Another contentious issue related to infringement on the basis of double identity. There has been confusion as to whether all three functions of the trademark (i.e., origin function, advertising function and investment function) need to be affected before infringement can be decided in case of double identity. The new system will clarify that only the origin function must be affected with a view to come to a conclusion of infringement in case of double identity.

The reviewed trademark system will also remedy some procedural anomalies and will further harmonise national procedures regarding trademarks.

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8 Study on the Overall Functioning of the European Trade Mark System, presented by Max Planck Institute for Intellectual Property and Competition Law Munich, 15 February 2011, http://ec.europa.eu/internal_market/indprop/docs/tm/20110308_allensbach-study_en.pdf (last visited 9 August 2013).

9 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 207/2009 on the Community trade mark /* COM/2013/0161 final - 2013/0088 (COD); Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL to approximate the laws of the Member States relating to trade marks (Recast) /* COM/2013/0162 final - 2013/0089 (COD).

10 A different question is obviously whether we should stimulate or grant trade marks for sounds or smells.

2.3. Community Design

The Community design system is a somewhat different breed. It took very long to reach an agreement on a common right, predominantly influenced by issues regarding car spare parts and so-called modular systems (e.g., LEGO etc.). The end result is probably a suboptimal solution at best, but it seems that businesses have embraced the system and use it frequently. The Community design system covers the registered Community design (RCD), and the unregistered Community design. In this document, focus will be on the registered design system.

Annex 3 provides an overview of the evolution of the total number of RCD applications received over the years. Annex 4 gives the details for the UK in relation to the RCD. The statistics show a clear and steady rise in applications and registrations over the years, with a drop in 2009, the year the financial crisis hit the EU and the UK.

Similarly to the CTM, the Community design system uses national courts who acts as Community courts regarding community designs.[11] This has recently led to some tension, as in the Apple v Samsung case relating to community designs for tablet computers and smartphones, a German Court assumed jurisdiction, even though a UK court had already pronounced judgement on the same issue acting as a Community Court.[12] The UK court criticised the German court for this. That shows that national reflexes are still quite common.

2.4. CPVR

The Community Plant Variety Right (CPVR) system is fundamentally based on the UPOV 1991 Convention,[13] to which most EU member states were already party, hence creating such a central right did not require a major philosophical and dogmatic overhaul of existing regimes.

There is a clear upwards evolution in the number of rights under protection under the CPV system (see Annex 5). The number of applications filed over the years has seen a rather varying profile, probably also influenced by the financial crisis, witness whereof a very clear drop in the number of applications in 2009 and 2012 (Annex 6).

Overall, the CPVR system has been quite successful, and has largely replaced national systems. A Community right is evidently much more useful for businesses that trade beyond national borders. That is largely the case for seed and plant producers.

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11 See Artt. 81-84 Regulation 6/2002/EC.

12 Samsung Electronics v Apple, Court of Appeals, 18 October 2012 [2012] EWCA Civ 1339, see paragraphs 56-63.

13 INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991)

2.5. Community/Unitary Patent

Somewhat surprisingly, it was not until December 2012 that something akin but not at all equal to a central EU patent saw daylight. We will discuss the Patent with Unitary Effect later in this document.[14]

Even though patents are the strongest intellectual property right in the sense that they provide arguably the widest scope of protection – and are also most closely scrutinised at examination – they also seem to have been the most divisive of all IP rights.

Substantive patent law has de facto been harmonised by virtue of the European Patent Convention (EPC), but implementation of those substantive rules is left to the member states in validity proceedings before national courts. Infringement is purely a matter of national law. Practices regarding the evaluation of the various grounds for invalidity (novelty, inventive step, industrial application, enabling disclosure or sufficiency and added subject matter) vary widely within the EU and member states of the EPC. For instance, while a good number of countries have adopted the so-called problem-solution-approach to inventive step, coined in EPO case law,[15] the UK does not use this approach in evaluating inventive step.[16] Novelty under German law means something different than the same concept under EPO law. Post-filed evidence with a view to establish (in)validity is admitted under EPO case law,[17] and is also under UK case law, but the admissibility may be more restricted.[18]

As far as infringement is concerned, once again, statutory harmonisation has already largely taken place, as most EU member states have adapted their statutes in conformity with the then Community Patent Convention (CPC),[19] which never entered into force.[20]

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14 See sub 6.2.

15 E.g., T 24/81 [1982] EPOR 354.

16 Application of Windsurfing test as refined in Pozzoli: Windsurfing International v Tabor Marine [1985] FSR 59 at 73, [1985] RPC 59 (CA); Pozzoli SpA v BDMO SA [2007] EWCA Civ 588.

17 Johns Hopkins University School of Medicine/ Growth Differentiation Factor T 1329/04 [2006] EPOR 8: *"Therefore, even if supplementary post-published evidence may in the proper circumstances also be taken into consideration, it may not serve as the sole basis to establish that the application solves indeed the problem it purports to solve."*

18 Generics [UK] Ltd (t/a Mylan) v Yeda Research And Development Co Ltd and Teva Pharmaceutical Industries Ltd [2013] EWCA Civ 925.

19 Convention on the European Patent for the Common Market (Community Patent Convention), Luxemburg, 15 December 1975, OJ 1976, L 17, 1; Agreement Relating to Community Patents, Luxemburg, 15 December 1989, OJ 1989, L 401, 1 (this Agreement incorporates the Convention on the European Patent for the Common Market and the Protocol on the Settlement of Litigation Concerning the Infringement and Validity of Community Patents).

But also in the context of infringement, despite statutory harmonisation, judicial practices are quite diverse between EU member states, leading to legal uncertainty, as a patent could be held to be infringed in one country, but not in another, based on an identical set of facts. One notable example is infringement by equivalence, a concept not accepted under UK case law,[21] but accepted and applied in all other EU member states, be it in a rather wide variety of forms and with varying results as a consequence.

Hence, unlike for other IP rights where substantive rules were quite divergent prior to the introduction of a Community right or harmonising EU legislation, EU interference in patent law should never have been aimed at harmonising the substantive statutory regime, but should have been aimed at creating a uniform right and uniform interpretation of the substantive patent rules, supported by a uniform body of procedural and evidence collecting provisions, other areas with considerable differences between member states.

And it is exactly in that respect that the various attempts and the now existing patent with unitary effect have failed and still fails.

3. Harmonisation often incomplete and fragmented

3.1. Introduction

Why is the picture for IP so mixed? One of the main causes is without doubt the level of harmonisation that EU legislation has achieved.

For reasons not entirely clear, IP rights are entrenched in well rooted legal traditions of member states, and it has been impossible to come to deep harmonisation or even unification for some IP rights. For the present author, that is somewhat surprising, as IP rights have traditionally led a somewhat obscure life, used and enforced by right holders, but not very much on the radar of the public at large and politicians in particular. Whether that obscure existence was justified is another issue, but fact remains that the highly technical level of legislation in that area has not attracted much interest of the public and politicians for most of the 20th century. Not surprisingly, most EU IP legislation dates from the late 20th and early 21st century, as that was the time when IP rights left their obscure existence and became the subject of often heated debates.[22] One could be tempted to think

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[20] One notable example is the concept of contributory patent infringement, which was a ground for infringement not existing in some EU member states. Art. 26 Community Patent Agreement has introduced the concept, to some extent based on US law. Member states who did not have such ground of infringement in their statute have amended their Patent statutes accordingly. For the UK, see s. 60(2) UK Patents Act 1977.

[21] Kirin Amgen v Hoechst [2005] RPC 9.

[22] Good examples are initiatives relating to patent protection for software and biotechnological inventions, copyright in the digital age etc.

that legal traditions as an argument against deep harmonisation are something of an afterthought, a handy argument to oppose further harmonisation.

It is also surprising to see that harmonisation has not been deeper in some areas in light of the importance IP rights have in society. They have become almost indispensable for an efficient running of a business, as they protect investment made in creations or technical development against free-riding by third parties and foster creativity and technical innovation.

Partly because of that opposition within member states against deeper harmonisation or unification, the legislative framework is fragmented. That obviously begs the question as to whether, knowing that, harmonisation should have been pursued in the first place. The answer to this is probably positive, as the legislature has always seen the process of harmonisation in IP as a long term project. The disappointing element is that, at least for some IP rights, the process got stuck somewhere in the middle, leaving us with a half-finished construction, which must operate besides and together with what remains of national systems. That is not an ideal situation, but quite inevitable if one chooses the harmonisation route instead of the unification route.

The need for political compromise, always necessary in politics and hence in any legislative process, equally had a negative influence on the level, degree and consistency of harmonisation. If political compromise is difficult within one country, the situation becomes even more difficult between all EU member states, with their different national interests and traditions.

In what follows, a non-exhaustive overview is given of the fragmented and incomplete framework created in a number of IP rights.

3.2. Copyright

Copyright is one example of an IP right with a fragmented and incomplete level of harmonisation. The Berne Convention[23] and the later WIPO Copyright treaties[24] have led to a high level of harmonisation even without the EU, but some rather fundamental principles remain non-harmonised.

The EU legislative framework in the area of copyright covers in general the following areas:

[23] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979.

[24] WIPO Copyright Treaty (adopted in Geneva on December 20, 1996); WIPO Performances and Phonograms Treaty (WPPT) (adopted in Geneva on December 20, 1996).

- Copyright in the Information Society[25]
- Orphan works[26]
- Rental and lending rights[27]
- Term of Protection[28]
- Satellite and Cable[29]
- Resale right[30]
- Protection of Computer Programs[31]
- Protection of Databases[32]
- Protection of semi-conductor topographies[33]
- Enforcement[34]

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[25] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19

[26] DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27.10.2012

[27] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376, 27.12.2006, p. 28–35

[28] DIRECTIVE 2011/77/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1, 11.10.2011; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) OJ L 372, 27.12.2006, p. 12–18.

[29] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21

[30] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32–36

[31] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance), OJ L 111, 5.5.2009, p. 16–22, replacing directive 91/250/EEC.

[32] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28

[33] Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, OJ L 24, 27.1.1987, p. 36–40; 94/824/EC: Council Decision of 22 December 1994 on the extension of the legal protection of topographies of semiconductor products to persons from a Member of the World Trade Organization, OJ L 349, 31.12.1994, p. 201–202; 96/644/EC: Council Decision of 11 November 1996 on the extension of the legal protection of topographies of semiconductor products to persons from the Isle of Man, OJ L 293, 16.11.1996, p. 18–19.

[34] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004.

The EU legislature has harmonised copyright law by harmonising the term of protection, lying down provisions relating to copyright in the digital age, introducing a new exclusive right, i.e., the right to communicate the work to the public, and clarifying certain infringement issues.[35] Neighbouring rights,[36] i.e., the rights of performers etc., have also been harmonised, as there was quite some disparity between member states in this area. The EU has also harmonised copyright protection for computer programs and databases, and has introduced a new sui generis right for databases which do not fulfil the requirements for copyright protection.

Quite a lot has thus been harmonised. However, two major issues in copyright, i.e., protectable subject matter and criteria for protection have not been fully harmonised. Some harmonisation has taken place relating to protectable subject matter, such as for instance the introduction of copyright for computer programs and copyright and sui generis rights for databases. Such harmonisation is important, but has been rather contested. Especially the introduction of IP right protection for databases has caused a lot of debate, and is still a cause for concern. But further harmonising legislation regarding protectable subject matter has not materialised. That is why categories such as the UK concept of artistic works remain open to interpretation.[37]

Introduction of copyright for computer programs and databases has also led to the introduction of a new European concept of originality as the main criterion for protection, i.e., the aforementioned works are original if they derive from the author's own intellectual creation. That brings us to the second major issue relating to copyright protection, the criteria for protection. Under copyright, the main criterion is that protection can be obtained if the work is original. The concept of originality has been interpreted very differently in the various member states, with roughly two traditions, i.e., the so-called "droit d'auteur" tradition and the more industrial UK copyright tradition, which has traditionally been seen to have a lower standard for originality. The EU concept of originality coined for computer programs and databases is a sui generis concept, not as such existing in any of the member states, and it has been the subject of quite some discussion.

That discussion has become even more vivid since the ECJ Infopaq case,[38] where the ECJ seems to have widened application of the originality criterion used for computer programs

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35 The so-called e-commerce directive is also relevant here, as it defines the conditions under which service providers in the digital environment can be held liable for IP right infringements committed on or through their infrastructure (see Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178 , 17/07/2000 P. 0001 - 0016).

36 See under rental and lending rights.

37 See in that context the so-called Star Wars case law: Lucasfilm Ltd v Ainsworth [2009] FSR 9 Ch; [2010] FSR 10 CA; [2011] UKSC 39.

38 Infopaq v Danske Dagblades Forening, ECJ, C-5/08.

and databases to all literary works as well, despite the absence of any provision in any EU directive to that effect.

Some argue that national concepts applicable to copyright are part and parcel of the legal history and tradition of a nation, and any deviation from any such principle would be an attack on those historical roots. The justification of copyright has always been rather influenced by philosophical and societal ideas, predominantly from the 19th century, when it was thought that one has a natural right to the fruits of one's creative labour.

The different concepts of originality is indeed a good example. An originality concept emphasising somewhat more on the "creative" expression of an idea fits within the "droit d'auteur" tradition, where something is deemed to be original if it has some degree of artistic value. Under the more industrial "copyright" tradition, artistic value is irrelevant,[39] as it leans more towards a "sweat of the brow" standard of originality, i.e., something is original if substantial effort has been put into creating the work.[40] Countries with a "droit d'auteur" tradition could not see themselves evolve towards a more "industrial" originality standard, as in their view that would not synchronise with the origin of the copyright system in the first place as a natural right to the fruits of one's creative expression. Equally so, it is difficult to see how countries under a "copyright" tradition would be prepared to move towards the other approach.

It has been perceived that pursuing a deep harmonisation of copyright would be in conflict with legal and philosophical traditions within a country, reason why it has not materialised.

From a business perspective that may be deplorable, as businesses wish legal certainty, and it does not help if a work would be deemed to be protected because original in one country but not in another.

3.3. Trademarks

Trade mark protection was clearly less burdened by national traditions, reason why relatively quickly deep harmonisation has been achieved with the creation of first a number of harmonisation directives and later the introduction of the Community trade mark, which has proven to be successful and works satisfactorily.[41]

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[39] Notable exception is the category of artistic works, which by virtue of the statute requires some level of artistic value. See s. 4 CDPA 1988. This is also a rather contested category, however, see Lucasfilm Ltd v Ainsworth [2009] FSR 9 Ch; [2010] FSR 10 CA; [2011] UKSC 39.

[40] See the UK originality standard: University of London Press v University Tutorial Press [1916] 2 Ch. 601; Ladbroke v William Hill [1964] 1 All ER 465.

[41] Evidence of this is that in an evaluation of the CTM system carried out by the Max-Planck Institute for Intellectual Property Law, it was concluded that overall the system worked well. There were some

3.4. Patents

Harmonisation in patent law has de facto materialised through the EPC and international treaties such as the Paris Convention for the Protection of Industrial Property[42] and the Patent Cooperation Treaty (PCT).[43]

Harmonisation within the EU is very fragmented indeed, in the absence until recently of a uniform right.

An attempt has been made to harmonise the patentability of computer implemented inventions, but the resulting text was so confusing and virtually incomprehensible that it never survived a vote in the European Parliament and the plan was subsequently abandoned,[44] in my view a wise idea.

Earlier, harmonisation was attempted in the area of biotechnological inventions, as there were alleged major differences between member states in the patentability of such inventions. The latter can be doubted, but it is true that some divergences have grown over the years regarding the patentability of for instance plant related inventions. Furthermore, objections as to ordre public and morality, the latter very much linked to national traditions and concepts in society, also showed to be quite divergent. Rules as to scope of protection of biotechnological inventions are particularly sensitive as biological material propagates before the term of protection has lapsed. Furthermore, biological material can also be incorporated in other material, and questions then arise as to whether the material in which the patented biological material is incorporated is still protected by the patent. Finally, issues arose as to whether farmers should be entitled to re-use the seeds of protected material for subsequent crops. With a view to avoid disparity between member states on all of these issues, the biotech directive was finally voted in 1998 after a legislative process of

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concerned uttered, which have led to the currently proposed reform of the CTM system, which will not be fundamental, but aims at clearing some procedural deficiencies and some substantive aberrations.

[42] Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.

[43] Patent Cooperation Treaty Done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001.

[44] Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions (2002/C 151 E/05) COM(2002) 92 final — 2002/0047(COD), OJ C 151 E/129, 25.06.2002; COMMON POSITION (EC) No 20/2005 adopted by the Council on 7 March 2005 with a view to adopting Directive 2005/.../EC of the European Parliament and of the Council of ...on the patentability of computer-implemented inventions, OJ C 144 E/9, 14.06.2005; Rejection of Common Position by EP Parliament: OJ C157E/113, 06.07.2006.

10 years. The end result has now proven to be flawed with inconsistencies and provisions which are difficult, if at all, to understand.

Directive 98/44/EC on the legal protection of biotechnological inventions was seen by some as a laudable attempt to harmonise divergences in an important area of technology and industry. I have always been quite critical about this directive, as its wording is often clumsy and unclear.[45] That has now also shown to be true. The directive has already led to a number or referrals to the ECJ[46] and/or the Enlarged Board of Appeal (EBA) at the EPO,[47] the latter having adopted in the Rules to the EPC most substantive provisions as to patentability of biotechnological inventions. In the view of the present author, it is unlikely that this will be the end of all referrals, as there are still enough provisions which remain unclear.

In one of its recent cases (G 2/07 and G 1/08), the EBA had to come to the conclusion that a provision of the biotech directive[48] as transposed into Rule 26(5) EPC relating to essentially biological processes for the production of plants cannot be given any sensible meaning and could hence not be interpreted.

The issue relating to the (non-)patentability of human embryonic stem cells[49] equally shows that the need for the political compromise at EU level does not necessarily lead to the best solution for the public and for businesses, with legal uncertainty emanating from this state of affairs.

A more successful process of introducing an additional term of protection for patents in the form of so-called supplementary protection certificates led to a fully uniform system of grant of such SPC's based on a regulation.[50] The right as such needs to be filed for nationally and will be granted by national patent offices. As a commercial instrument, it has proven to be very successful, but the last few years, in particular the last 5 years, have shown an explosion of case law and referrals to the ECJ, caused by unclear wording of the text of the

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45 I have already pointed out some issues, which have later materialised, in 1999. See BOSTYN, S.J.R., The Patentability of Genetic Information Carriers, The new E.U. Directive 98/44 on the legal protection of biotechnological inventions, Intellectual Property Quarterly, 1999/1, 1-36.

46 See, C‑377/98 Netherlands v Parliament and Council [2001] ECR I‑7079; C-428/08 Monsanto Technology LLC v Cefetra BV and Others [2010] ECR I-06765; C-34/10 Oliver Brüstle v Greenpeace eV, judgement of 18 October 2011; C-364/13 International Stem Cell Corporation (referral).

47 G 2/06, Use of embryos/WARF, OJ EPO, 2009, 306; G 2/07, Broccoli/PLANT BIOSCIENCE, OJ EPO, 2012, 130; G 1/08, Tomatoes/STATE OF ISRAEL, OJ EPO, 2012, 206; G 2/12 Tomatoes II/STATE OF ISRAEL (referral); G 2/13, Broccoli II/PLANT BIOSCIENCE (referral).

48 It concerned Art. 2(2) juncto Art. 4(1)(b) biotech directive.

49 See C-34/10 and the new referral C-364/13.

50 REGULATION (EC) No 469/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version), OJ L 152/1, 16.06.2009. That Regulation replaces Regulation 1768/92/EC.

regulation.[51] Few people will doubt the value of the SPC system, but the legislative framework probably needs an overhaul, something which has unfortunately been ignored when regulation 1768/92/EC was replaced by regulation 469/2009/EC, which merely modernised the text of the regulation to make it applicable to all new member states and introduced the so-called 6 months paediatric use extension to a granted or applied for SPC. A missed opportunity indeed.

In conclusion for patents, harmonisation has been relatively unsuccessful, and the question has often been asked whether we needed any more harmonisation, in view of the fact that de facto harmonisation is largely achieved by the EPC and the central patent grant system in place within that system. The answer to that is that the only missing link, a uniform and central right with uniform effect and a central jurisdiction was maybe the only issue that the EU legislature should have been focused on. As we will see later, the now Unitary patent is not a system worthy the name, and will in the present author's view never lead to any uniform interpretation of patent law, which should have been the only goal of the system.

4. Regulatory framework often unclear and evidence of poor legal draftmanship

Unfortunately, EU legislation in the area of IP does more often than not give rise to problems in understanding what the EU legislature has meant to regulate. We have already pointed out a number of examples in the previous section of this document.

Some examples:

CTM: the requirement that the sign must be capable of being represented graphically has given rise to multiple cases. The requirement made it very difficult to register trademarks for things such as sounds, smells etc.[52]

Patents: the aforementioned issues relating to biotechnological inventions. The biotech directive in general is, as the result of extreme political compromising and lobbying, not a showcase for clear and unambiguous wording, even though some of the provisions look clear at first glance. Closer scrutiny, however, reveals that some of the wording used is just very difficult to give any sensible meaning to. A showcase example is the provisions clarifying what is a non-patentable essentially biological process for the production of plants. Under Art. 2(2) biotech directive, a process is essentially biological if it consists entirely of natural phenomena such as crossing and selection. Two contradictions slam the reader in the face, i.e., 1) essentially is not equal to entirely, and 2) crossing and selection are not necessarily natural phenomena. Called upon to interpret the equivalent provision in

[51] There are in total around 30 decisions and referrals to the ECJ regarding this regulation, which is quite substantial for a legal instrument of somewhat more than 17 articles (for an overview, see Annex 7).

[52] In the draft recast of the CTM system, the requirement will be repealed.

the EPC, Rule 26(5), which had been copied from the biotech directive, the Enlarged Board of Appeal (EBA) had to come to conclusion that no sensible meaning can be given to this provision, and hence that it cannot be reasonably interpreted.[53]

Another example relating to the biotech directive is the issue as to whether it has abolished absolute product protection[54] for DNA sequences. The ECJ in the Monsanto case (C-428/08) held that absolute product protection is no longer possible for DNA sequences, whilst still being the standard for all other inventions in all other areas of technology. Instead, for DNA sequences, the only protection available is purpose limited protection.[55] The alleged legal basis for such decision was the unclear wording of Art. 9 and 5(3) of the biotech directive.[56]

The biotech directive has hitherto given rise to multiple cases (at least 9 cases to the ECJ and the EBA combined within a period of somewhat more than 10 years since the inception of the biotech directive, and the large majority of referrals even dating from the last 5 years).

Patents: The regulation on SPC's, already discussed earlier. Despite the rather short text of the regulation, numerous cases have been referred to the ECJ interpreting the provisions of the regulation. The introduction as such of the possibility to obtain a SPC under identical conditions and requirements for all EU member states was a welcome step. Prior to the EU intervention, national statutes often already provided for SPC's but the requirements and terms of protection were quite divergent, making it very difficult for businesses to know whether and for how long a product was still under protection of an SPC.[57] A statutory regime lying down identical terms and conditions for obtaining an SPC in each member state with an identical term of protection created the legal certainty much needed in this area. However, it has become clear over time that the wording of the regulation has been rather unsuccessful and very vague indeed.

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53 See G 2/07 and G 1/08 cases mentioned earlier. For more details, see BOSTYN, S.J.R., Resolving the patentability of plants produced by an essentially biological process conundrum: Squaring the circle? E.I.P.R. 2013, 35(7), 383-396.

54 Absolute product protection means that the product is protected by the patent, irrespective of the use of the product or the process of making it. In other words, under the absolute product protection doctrine, a product patents protects all uses of a product, present and future, and all ways of making the product, present and future.

55 Purpose limited product protection means that patent protection is limited to the specific purpose or function of the product mentioned in the patent specification. Purposes or functions not mentioned are not covered.

56 I have argued that the reasoning followed by the ECJ is flawed. See, BOSTYN, S.J.R.,A decade after the birth of the biotech directive: Was it worth the trouble?, in, GHIDINI, G., AREZZO, E., (eds), Biotechnology and Software Patent Law: A Comparative Review on New Developments, Edward Elgar Publishing, 2011, p. 221-259, at 224-234.

57 Italy for instance had various systems applicable simultaneously, covering SPC's for 14 years, for 7 years etc.

Copyright: the introduction of the originality concept of "the author's own intellectual creation". The directive on the legal protection of computer programs and the one on databases have introduced a new concept of originality as a requirement for copyright protection. That new criterion, which is "the author's own intellectual creation", is as good as not explained in the statutory framework, even though it pertains to a crucial requirement for protection. It comes as no surprise that this has led to legal uncertainty, as users and even national courts are unsure when a work fulfils this criterion. Adding to the uncertainty is also the fact that the concept is a sui generis EU concept, and not a standard taken from one or more EU member states.

5. Lack of judicial clarity and authority

Besides the lack of clear wording in some IP legislation, the case law of the European Court of Justice (or now called Court of Justice of the European Union) has equally added to the legal uncertainty.

The ECJ, as a non-specialised court, has struggled over the years with the rather technical and often complex IP legislation, not helped by the at times unclear wording of the legislation it was called upon to interpret.

In most EU member states, national courts have already for at least some time adapted the system of specialised courts or chambers within courts with exclusive jurisdiction over IP cases. It is disappointing to see that the ECJ has refused to follow this route, as the current state of affairs is not sustainable. There is so much legal uncertainty, and the frequent referrals to the ECJ add to the litigation costs of businesses, where in the view of the present author at least some of those cases could have been prevented by having specialised chambers for IP cases, as such chambers would have come with a more consistent body of case law pertaining to the EU statutory regime applicable to IP.

Some examples illustrate the disappointing state of affairs.

CTM: there has been a long battle to come to a solid concept of confusing similarity regarding trade marks. It took almost a decade and numerous referrals to the ECJ to come to an interpretation which is not immediately straightforward or transparent, but which is now more or less consistent.[58]

SPC's: the ECJ does not seem to be capable to come to a coherent body of case law relating to the definition of a "product" under Art. 1 of Regulation 469/2009/EC and to the principle

[58] Case C-251/95 SABEL [1997] ECR I-6191; Case C-39/97 Canon [1998] ECR I-5507; Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819; Case C-120/04, Medion AG v Thomson multimedia Sales Germany & Austria GmbH [2005] ECR I-8551; Case C-421/04, Matratzen Concord AG v Hukla Germany SA,; C-334/05 P, OHIM v Shaker di L. Laudato & C. Sas; Picasso v OHIM, C-361/04.

that the product may not have been licensed by an earlier market authorisation for the use as a medicinal product under Art. 3, witness whereof multiple referrals to the ECJ in recent years.[59]

Patents: In the area of patents, we can easily refer to the rather unsatisfactory case law relating to the biotech directive. The Monsanto case held that there is no longer room for absolute product protection for DNA sequences on the basis of a most debatable reasoning. The so-called Bruestle case, C-34/10 held that embryonic stem cells cannot be patented, as they require at some point the use of a human embryo, and that would be contrary to ordre public and morality under Art. 6(2)(c) biotech directive according to which the inventions which relate to the use of human embryos for commercial purposes shall not be patentable for being contrary to ordre public and morality, thereby ignoring that the human embryo is as such not part of the invention. The definition given in the judgement of a human embryo is now questioned once more in a subsequent referral to the CJ EU in the International Stem Cell Corporation case (C-364/13).

Copyright: The infopaq case (C-5/08) has now seemingly introduced the EU concept of originality, being "the author's own intellectual creation" for all literary works, even though there is no statutory foundation for such conclusion. The EU concept of originality has been coined in the directive on the legal protection of computer programs and the one on the legal protection of databases, but has never been used in the context of literary works.

In conclusion, users of IP systems have come to realise that the ECJ has not always been a very reliable partner in the quest for legal certainty. It comes as no surprise that a non-specialised court, called upon to adjudicate very complex and technical legislation, struggles to come to a consistent body of case law. That is deplorable, as the users of the IP system, mainly businesses, could do with more legal certainty. At the end of the day, it is the user who pays the bill for lack of clarity (and it is the legal profession that profits from it). The ECJ should have been reformed many years ago and should have introduced specialised chambers for IP cases, as the very specific nature of IP legislation is not suited for a generic court. Such a specialisation would surely not only benefit IP users, but it would without doubt also be welcome in other areas of EU law.

6. Complex legislative processes within EU not suitable for complicated and technical subject matter such as IP

6.1. General comments

It can also be questioned whether the very complex and technical subject matter of IP legislation finds a proper forum at EU level. Undoubtedly, there is an interest in having EU

[59] Some cases are already referred for the second time to the ECJ: e.g., The Georgetown case, C-422/10 and C-484/12, covering the same subject. In turn, the Medeva case also covered the same subject (C-322/10).

wide similar rules applicable to the various IP rights, as such creates more legal certainty for businesses. However, the need to find the political compromise amongst all member states relating to subject matter which is ill-understood by the legislature and the unavoidable influence of national interests which do not necessarily serve legal certainty for businesses have shown not to lead to good quality legislation.

6.2. Unitary Patent

We suffice here by giving only one example, namely the new Patent with Unitary Effect,[60] which is the most recent and maybe most telling example of this.

The entering into effect of the new Unitary Patent system is made dependent on the ratification of the Agreement on the Unitary Patent Court (hereinafter Agreement UPC).[61] The UK has signed the Agreement UPC on 19 February 2013. An Intellectual Property Bill[62] has been introduced which, amongst other things, is part of the ratification process for the Agreement UPC.[63]

In the view of the present author, it is not in the interests of UK businesses to continue with the ratification process, as the new Unitary patent system is creating more legal uncertainty than the present patent system based on central grant by the EPO, which patent then falls apart in a bundle of national patents after grant.[64]

This is so for a number of reasons. We will not dwell upon issues of pure European law, such as the suitability of the Enhanced Cooperation route for this type of measures,[65] but will confine ourselves to substantive patent law issues.

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60 REGULATION (EU) No 1257/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361/1, 31.12.2012; COUNCIL REGULATION (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361/89, 31.12.2012; Agreement on a Unified Patent Court, 16351/12, PI 148 COUR 77, 11 January 2013.

61 See Art. 18(2) Regulation 1257/2012: "It shall apply from 1 January 2014 or the date of entry into force of the Agreement on a Unified Patent Court (the 'Agreement'), whichever is the later."

62 Reference is made herein to the HL Bill 44 2013-14, Intellectual Property Bill as amended on Report, 23 July 2013.

63 See s. 17 HL Bill 44, introducing a s. 88A in the UK Patents Act 1977, stating in subsection (1) that "The Secretary of State may by order make provision for giving effect in the United Kingdom to the provisions of the Agreement on a Unified Patent Court made in Brussels on 19 February 2013."

64 As per Art. 2 EPC.

65 Which has been held acceptable by the CJ EU: C-274/11, Kingdom of Spain and Italian Republic v Council of the European Union, Judgment of the Court (Grand Chamber) of 16 April 2013.

1) It is unclear which substantive rules of patent law will apply. That is more the case for rules relating to exclusive rights and infringement than it is the case for rules as to patentability and validity, but as will be explained later, there are also issues relating to validity. According to Art. 5(3) of Regulation 1257/2012/EC, *"the acts against which the patent provides protection referred to in paragraph 1 and the applicable limitations shall be those defined by the law applied to European patents with unitary effect in the participating Member State whose national law is applicable to the European patent with unitary effect as an object of property in accordance with Article 7."*

   Art. 7 prescribes a rather complicated set of rules to determine which law will be applicable to the patent with unitary effect. Firstly, the patent will be deemed to be a national patent of the member state where (a) the applicant has his residence or principal place of business on the date of filing of the application for the European patent and hence that law will be applicable to an issue of infringement, or where that does not apply, (b) the applicant had a place of business on the date of filing of the application for the European patent, in which case the law of that country will be applicable. Where two or more persons are entered in the European Patent Register as joint applicants, point (a) of paragraph 1 shall apply to the joint applicant indicated first. Where this is not possible, point (a) of paragraph 1 shall apply to the next joint applicant indicated in the order of entry. Where point (a) of paragraph 1 does not apply to any of the joint applicants, point (b) of paragraph 1 shall apply accordingly.

   Where no applicant had his residence, principal place of business or place of business in a participating Member State in which that patent has unitary effect, the European patent with unitary effect as an object of property shall be treated in its entirety and in all the participating Member States as a national patent of the State where the European Patent Organisation has its headquarters in accordance with Article 6(1) of the EPC, which is Munich, and hence German law will be applicable to a case of infringement in such case.

   In other words, it is already clear from the above that the applicable law in case of an infringement claim is not known beforehand. This may present quite a substantial degree of legal uncertainty for businesses, especially for multinational businesses, and maybe even more than is the case under the present system, as under the present system it is clear that as a general rule the national law of the country where you sue or are sued for infringement will apply. Businesses are not only right holders, they may also be infringers. As we have seen, despite some level of de facto harmonisation of infringement provisions, there is no full harmonisation, leaving for instance major differences between jurisdictions regarding infringement by equivalence.

Even though Regulation 1257/2012/EC seems to be silent on the matter, it can be argued that the law applicable to validity issues follows the same scheme as that of Art. 7 for infringement. Also in the area of validity, despite a statutory harmonisation achieved by the EPC, national interpretation and implementation of patentability criteria such as novelty and inventive step vary widely between member states.[66]

There is a complicating factor, however, with regard to the scheme explained above and laid down in Art. 7 Regulation 1257/2012/EC. Even though that provision refers to national law for determining scope of protection and exclusive rights of the patent with unitary effect, the Agreement UPC equally defines in Artt. 25-26 the exclusive rights of the patent holder, and in Art. 27 the limitations to those rights.
According to Art. 24, *"In full compliance with Article 20, when hearing a case brought before it under this Agreement, the Court shall base its decisions on: […] (b) this Agreement; […]."*
Reading Art. 20 and 24 implies that the Court shall apply the provisions of the Agreement UPC. Artt. 25-27 form part of the Agreement, and need hence to be applied by the Court.
That leads to a first problem, and that is whether the Agreement prevails over the provisions of Regulation 1257/2012/EC, where different rules relating to infringement can apply according to Art. 7 of the said Regulation, or whether the Regulation applies. Art. 24 Agreement UPC does not shed any clarity on this, as both sources are mentioned, and there does not seem to be any hierarchical order between them.
One could argue that the Regulation should apply, as part of the supremacy of European law adhered to by the Court, and the Agreement is a multilateral Agreement. However, there is uncertainty, and it is likely that this will give rise to procedural issues and complications if the system would enter into force.

To the extent that the Agreement UPC would be applied by the Court, it needs to be pointed out that Art. 27 contains at least two limitations which are currently unknown under UK law. Under Art. 27, the rights conferred by a patent shall not extend to any of the following: *"[…](c) the use of biological material for the purpose of breeding, or discovering and developing other plant varieties;*
(k) the acts and the use of the obtained information as allowed under Articles 5 and 6 of Directive 2009/24/EC, in particular, by its provisions on decompilation and interoperability;"

[66] I reiterate the example of inventive step, where the EPO and a number of EU member states follow the problem-solution approach for determining inventive step, whilst the UK does not use that approach as per Pozzoli SpA v BDMO SA [2007] EWCA Civ 588.

In other words, Art. 27(c) Agreement UPC covers the so-called breeders' exemption, currently non-existing in the large majority of the EU member states. The Agreement hence introduces a new limitation to patent rights that is not only non-existing in the majority of EU member states, but which would also not be applicable if Art. 7 Regulation 1257/2012/EC would be applied, as in the large majority of cases, this would lead to the applicability of a national law which does not have such exemption in the statute.

Art. 27(k) is even more difficult to understand as it refers to acts which are allowed under copyright rules relating to computer programs. Indeed, Directive 2009/24/EC covers copyright protection for computer programs and does not contain any provision on patent protection for computer programs. Once again, the Agreement UPC seems to introduce a limitation to patent rights, in this particular case the use of the protected program for decompilation purposes with a view to guarantee interoperability. Such decompilation exemption would go much further than the present research exemption provisions already in place in national patent statutes.[67]

It is not in the interests of UK businesses and UK patent right holders if their patents would now be subject to further limitations than the ones existing under national UK law, and admittedly also under application of Art. 7 Regulation 1257/2012/EC if UK law would be applicable under that provision.

It goes without saying that the above will give rise to procedural and substantive law issues which will add to legal uncertainty.

2) The proposed system is also very complex and does not seem to provide any guarantee for uniform interpretation of the law, which should *in fine* be the alpha and omega of a unified patent system. The political compromise has entirely neglected the necessity of uniform interpretation of patent law across the EU. The currently devised system will apply different national laws, which defies any ambition of uniform legal interpretation. Hence, even though Art. 5(2) Regulation 1257/2012/EC states that the scope of the unitary patent right and its limitations shall be uniform in all participating Member States in which the patent has unitary effect, this is nothing more than rhetoric. The rights will be the same, but in case of litigation, different outcomes will materialise. In other words, despite the fact that the right granted has unitary effect, interpretation of the law relating to those rights is not going to be uniform, and will hence constitute another assault to legal certainty and predictability for users of the system. It is very important for users of the system (businesses) to be able to evaluate risk and determine strategy. One of

[67] For the UK, the research exemption is in s. 60(5)(b) UK Patents Act 1977.

the major disadvantages European businesses have vis-à-vis the US has in the past always been that in the US there is uniform interpretation of patent law at the federal level through the Court of Appeals for the Federal Circuit (CAFC), whilst in Europe one had to rely on national courts and the consequent divergent solutions to an identical set of facts. That should have been the leading example for the EU legislature when devising a unitary right and court. Instead, the unitary patent system has perpetuated national divergences but hides it now under a common denominator of UPC. Surely, this is not the solution in the interests of users and businesses, but a purely political comprise regardless of the consequences.

3) It must also be clear for UK businesses that, even though a UK section of the central division of the Unitary Patent Court may be competent to hear a case (the UK section of the central division will have exclusive jurisdiction over all cases relating to human necessities, chemistry and metallurgy),[68] that does by no means imply that it will be composed of UK judges exclusively. In fact, it will definitely not consist of UK judges only. Other judges will be part of the panel, and the applicable law is in conformity with Art. 7 Regulation 1257/2012/EC in many cases not going to be UK law.

4) It has been argued that the unitary patent system will be beneficial to the economy of the UK due to the UK section of the central division of the UPC which would be in London, and which would generate income for the national economy.
   That can be doubted for a number of reasons
   a. As we have said earlier, the system is surrounded by legal flaws and uncertainties, and will in effect cost more to users of the system than it will generate. Surely, a new patent system cannot and should not be created for the legal profession, which would arguably benefit from a higher degree of legal uncertainty.
   b. Secondly, the system can only survive if it is cost effective. Currently, the UK is one of the most expensive countries to litigate IP cases in the EU.[69] It can then also be expected that litigation costs for the unitary patent system can and will not be based on the current costs for national UK litigation. That will force UK practitioners to lower costs for their clients, which will put pressure on the entire cost and income model of the UK legal profession. In the alternative, cases will be handled by those non UK practitioners who charge lower fees.

[68] See Annex II to the Agreement UPC.

[69] That was one of the main reasons why the Patents County Court has been created in 1990 and most recently reformed in 2012 with the introduction of a small claims track.

c. Thirdly, it is an illusion to believe that the mere presence of a court in the UK would attract more business to UK law firms. As we have said, there will be non UK judges in the panels, and in many cases, non UK law will be applicable. It is reasonable to assume that legal practitioners from around the EU member states will litigate case before the London section of the central division. The presence of the ECJ in Luxemburg has not led to a concentration of legal business in Luxemburg, and a similar effect can be expected for the UPC.

In conclusion, in view of the huge number of legal uncertainties surrounding the unitary patent system, it is advisable and in the interest of UK businesses that the system never enters into force. That can be achieved by ensuring that the ratification process for the Agreement UPC is put to a halt, which can be effectuated by not supporting the Intellectual Property Bill in its current form.

7. European legislation put too much emphasis on strengthening IP rights without balancing

It has also been argued that the EU legislature has focused too much on strengthening the rights of IP right holders and put considerable effort in expanding the array of IP rights available, for instance by creating a sui generis system for databases, imposing copyright protection for databases and strengthening the neighbouring rights, such as the rights of performers, directors of films etc. That focus on creating and strengthening IP rights has been at the expense of public interest issues. In that sense the EU legislature has created an insufficiently balanced IP system in Europe. The present author thinks this is a valid concern, and is probably quite well illustrated by the problems we now face with copyright in the digital age, where discussions center around the question as to whether copyright enforcement should prevail over matters such as the fundamental rights like the right to access to information, the right to privacy, the right to communication etc.

The initiative on the patentability of computer programs which never materialised is probably another good example. It has been perceived by many as an attempt to expand patent protection for computer programs, which under the EPC are excluded from patentability if they are claimed as such,[70] but not if they are integrated in a machine or computer. I do not think that it is an entirely fair comment to say that draft directive tried to expand patent protection for computer programs, even though some drafts were quite liberal.

[70] See Art. 52(2)(c) and 52(3) EPC.

The European Commission has also been contemplating expanding the term of protection for SPC's and has even thought about introducing patent term extension by means of SPC for plant patents, in view of the fact that also for genetically modified plants, there is a strict regulatory framework for authorisation of such plants on the market, which may take many years, and it is obviously true that this implies loss in real term patent protection. These initiatives have currently not been publicised, as the European Commission probably realises itself that in the current climate, such initiatives would not be well received.

In conclusion, the European legislature has indeed probably not put sufficient emphasis on balancing the importance of having effective and strong IP rights with the interest of third parties and the public interest. The relative "distrust" towards IP rights we see today is a consequence of that omission. It should then also be a priority for the European legislature to address these concerns.

8. Conclusion – challenges – outlook

Intellectual property is an indispensable tool in today's business, and hence of crucial importance to the EU economy in general and its businesses in particular. Intuitively, one would then think that EU intervention and harmonisation is beneficial. Indeed, EU competition rules and policy protect the common market from anticompetitive practises and abuse of monopoly. Such policy fosters fair competition, technological development and sustainable economic growth. Similarly, one can easily see that more harmonisation or even unification of IP systems will foster technological development, creative output and will stimulate economic growth of the common market and its businesses. Following that logic, there is a large appeal to deep EU harmonisation of IP regimes. The present author is of the belief that harmonised or even unified IP regimes are beneficial to EU citizens and businesses and bring the EU in par with other trade blocks such as the US and China, both benefitting from a fully unified IP system, the former through federal legislation and federal Appeal Courts ensuring uniform interpretation of the statute across the US, the latter as a centralised state with only one jurisdiction. Anything less than full harmonisation or even unification of IP regimes in the EU will always put our businesses in a comparative disadvantage, as multiple heads of jurisdiction create legal uncertainty and add to the overall cost of litigation in case of enforcement of rights.

For some reasons, that goal has only been partially achieved. A Community trade mark system has been devised that has proven to be relatively successful and reliable. Similarly, the Community Plant Variety Right has gained substantial popularity. But it must be admitted, these were relatively "easy" cases, as there was already a high degree of harmonisation achieved through harmonising directives and/or international treaties to the which the EU member states were already party.

The Community design system, despite it maybe being relatively popular, is less of a success, due to the not always beautiful political compromise that was necessary with a view to create it under the pressure of amongst others the car industry and companies such as LEGO.

In the area of copyright, despite some harmonisation efforts (term of protection, copyright in the digital age, computer programs, databases, neighbouring rights), which were again partly based on already existing international treaties, no further deep harmonisation has been achieved. Critical issues such as originality and enforcement of copyright in the digital age have not seen any harmonisation, mainly due to national opposition invoking longstanding national legal and philosophical traditions. We can nevertheless conclude that a certain level of harmonisation has been achieved in this area.

Patent law, despite a large extent of de facto harmonisation through the EPC, has probably led to the least successful results. Patent law has shown that EU interference in IP is not always desirable.

Deep harmonisation or even unification cannot exist without uniform interpretation of the law by the judiciary. Under EU law, the ECJ is called upon as the final arbiter of law. Experience teaches us that the non-specialised ECJ is not the best equipped to deal with the often legal technical complications of IP regimes. As a consequence, judicial quality of the ECJ is inconsistent and at times plainly unsatisfactory. The ECJ should have been reformed already a long time ago so as to be composed of at least specialised chambers for certain subject matter. Such reform will improve judicial quality and hence will benefit legal certainty for EU subjects.

The need to go for the political compromise at the EU level is, in view of its sheer size, likely to have quite extensive “watering down” effects on legislation. Consequently, quality of EU legislation in the area of IP is often average at best. That is obviously not in the interests of UK businesses, as average legislative quality leads to legal uncertainty and additional litigation costs as more referrals to the ECJ for prejudicial questions will be required.[71]

In the view of the present author, the only way forward in the area of IP is deep harmonisation or even unification. But that goal is conditional, however, on efficient and effective legislation. Consequently, instead of striving for less EU intervention, the UK should bargain for higher quality legislation. And the UK should also have the courage to use its relative power in the EU to block legislative work aiming at harmonisation and/or unification which is less than optimal in the interests of the common more than in the interests only of UK businesses. Anything which is in the interest of the common market will be in the interest of UK businesses.

[71] The biotech directive is a good example. The SPC regulation is also a good example, as, despite its relatively small size, the regulation has given rise to many referrals to the ECJ.

Harmonisation or unification cannot only be seen within the context of intra-common market trade, with which I mean trade between EU member states, but has obviously also ramification for extra-common market trade, i.e., trade with businesses outside of the EU. As much as harmonisation fosters creative development and technological innovation within the EU, it is without doubt also a major stimulating factor for extra-common market trade. In other words, harmonisation or unification makes EU and UK businesses also more attractive for businesses outside of the EU for pretty much the same reason as this is the case within the EU and that is legal certainty. The more harmonisation or unification, the easier it is for any business outside of the EU to evaluate the risks and develop strategic behaviour in its relationship with businesses within the EU. That is also the main reason why transatlantic trade agreement negotiations tend to contain IP chapters.[72] In other words, striving for more harmonisation and improving legislative quality of such legislation does not only benefit businesses within the EU in trade between them, but also EU businesses in their trade with businesses outside of the EU. That dimension may not be forgotten.

Finally, it must be emphasised that IP is not only about trade. Recent developments have shown that IP has also very much a public policy dimension. One can think for instance about the debate on the patentability of software, embryonic stem cells and biotechnological inventions in general, copyright enforcement in the digital age and the tension in that context between on the one hand the right to enforce copyright against infringement and the principle of proportionality on the other hand, where fundamental rights such as freedom of expression, right to privacy and access to information come into play. Public policy consequences of IP are best resolved within the EU, with the risk of being entirely ineffective otherwise. Furthermore, such public policy solutions can, if they would be unilaterally organised within one or more EU member states, be capable of having a distorting effect on trade, and should always comply with fundamental rights to which the EU is bound under the Charter of Fundamental Rights of the European Union.[73] The EU legislature has probably focused too much in the past on strengthening IP rights, at the expense of public interest issues, and at the expense of a balance of rights and interests on which the IP system as a whole is based. The IP enforcement directive is a good example,[74] focusing once more on the interests of IP right holders and providing more effective means of enforcing their rights. There is obviously nothing inherently wrong with harmonising enforcement of IP rights, but it cannot be the only thing that matters. The UK should use its influence to correct this unilateral approach.

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[72] Most recent example is the Transatlantic Trade and Investment Partnership (TTIP) negotiations started in July 2013 between the EU and the US.

[73] OJ C 364/01, 18 December 2000.

[74] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004.

As seems to be the case also in other areas of law, the EU has the tendency to legislate through harmonisation or even unification irrespective of any real positive synergetic effect of the legislation created compared to the already existing legal framework within the member states. A good example of this is the Unitary patent. It is difficult to see how this new system could benefit any user of it more than the present EP system does, as it does not in fact do anything more than adding another layer of legal uncertainty, as we have made clear earlier in this document. Some have also argued that harmonisation of the patentability of biotechnological inventions was not necessary. It has been argued in this report that there is some justification for the directive, but the way how it has been put into a statutory instrument has been rather unfortunate.

The principle that the UK as a major economy within the EU should adopt or continue to adopt is that if a proposed piece of legislation has no real positive synergetic effect compared to the existing legal situation, then processing such piece of legislation through the legislative process should be put to a halt and it should be abandoned. That might imply that in the area of IP less legislation could create a better legal climate for businesses, or at least not one that makes things worse, under the adage “less is more”. What happened to the draft directive on the patentability of computer related inventions is probably a good example. The text of the draft would not have added anything to creating more legal certainty for users of the system, and it was rightly voted away by the European Parliament. It was subsequently abandoned. One can question whether the draft should ever have been presented to European Parliament, but I assume that it was part of the democratic process to have each institution in the legislative process have its say. Each initiative in the area of IP should preliminarily be evaluated under these principles.

For all the reasons mentioned above, it is believed that the UK should use its influence to strengthen harmonisation and unification in IP matters within the EU, but only to the extent that such further harmonisation adds something valuable to the existing status quo, should seek reform of the ECJ with a view to improve judicial quality and should use its power to improve legislative quality. That will be in the interests of UK citizens and business alike.

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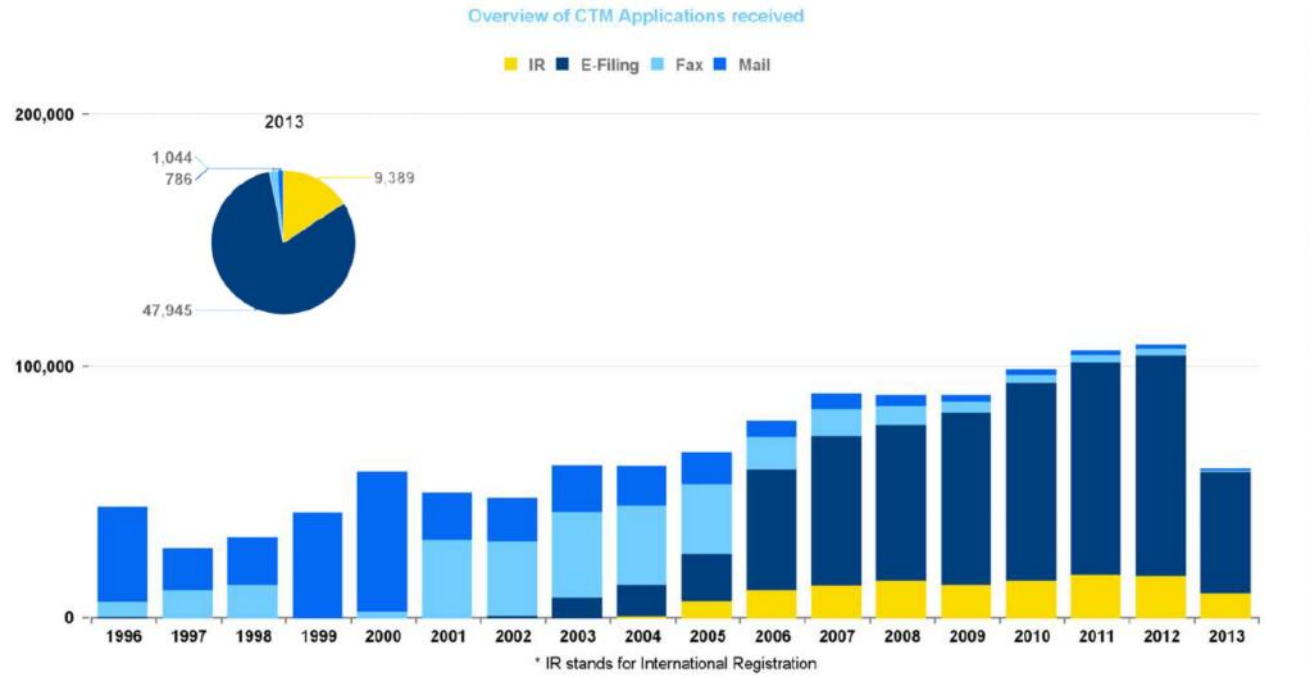
Annex 1



Source: OHIM, Statistics 2013

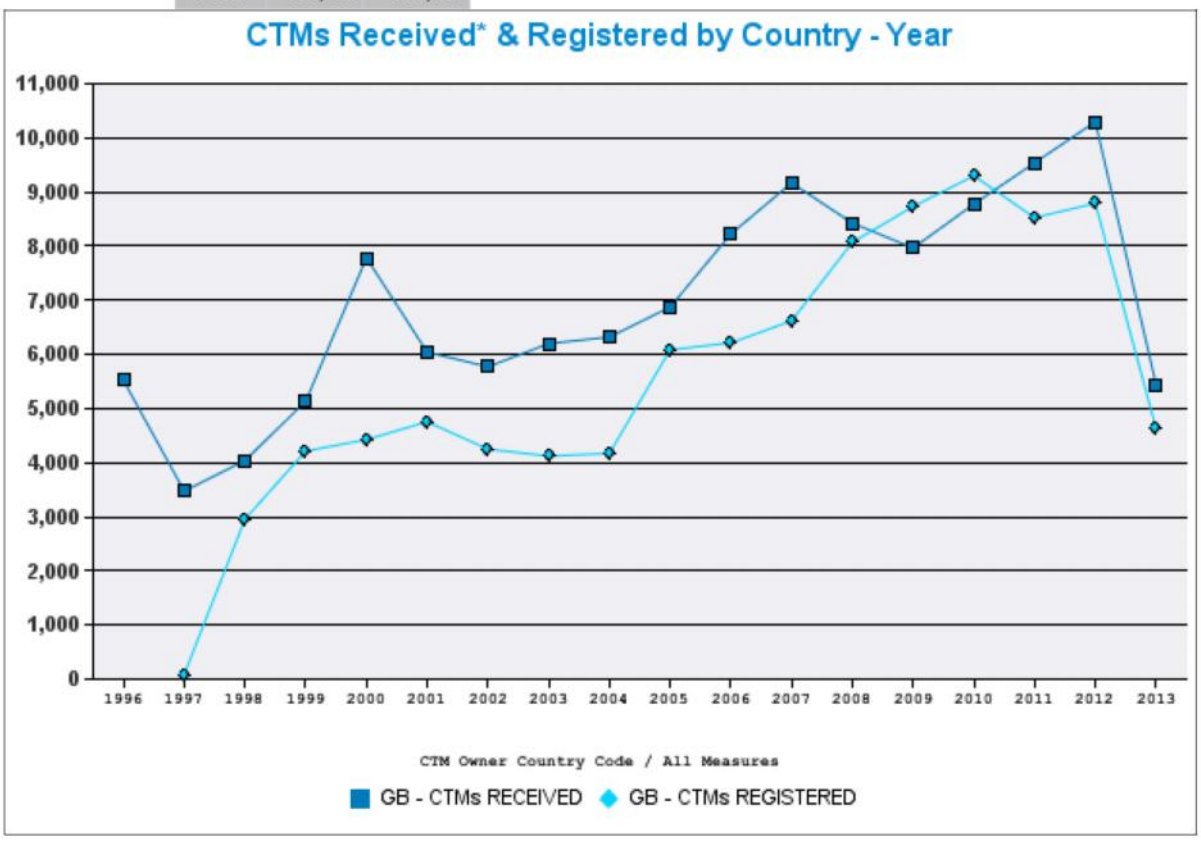
Annex 2

CTMs Received* by Year

	GB	Total
1996	5,006	5,006
1997	3,144	3,144
1998	3,602	3,602
1999	4,524	4,524
2000	6,880	6,880
2001	5,387	5,387
2002	5,118	5,118
2003	5,456	5,456
2004	5,494	5,494
2005	5,756	5,756
2006	6,736	6,736
2007	7,432	7,432
2008	6,690	6,690
2009	6,270	6,270
2010	7,168	7,168
2011	7,745	7,745
2012	8,328	8,328
2013	4,194	4,194
Total	104,930	104,930

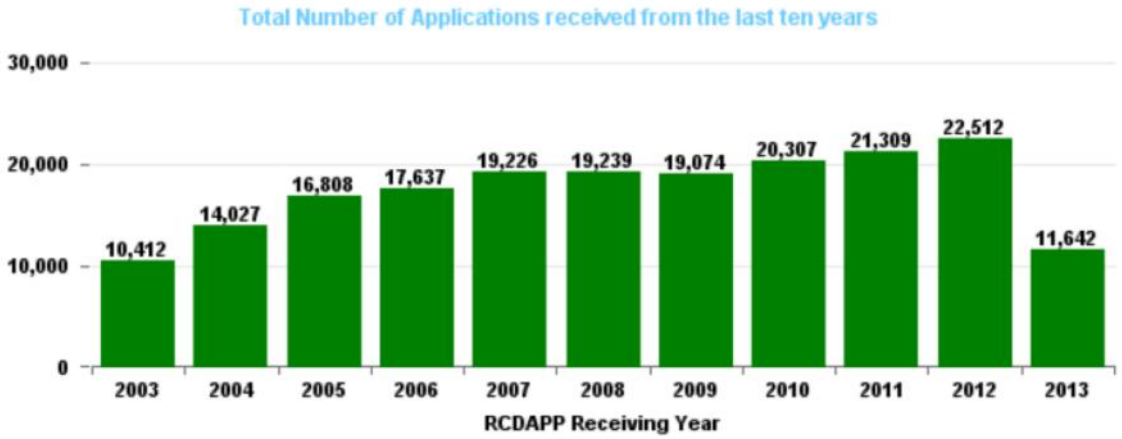
CTMs Registered by Year

	GB	Total
1997	85	85
1998	2,954	2,954
1999	4,213	4,213
2000	4,423	4,423
2001	4,753	4,753
2002	4,248	4,248
2003	4,120	4,120
2004	4,170	4,170
2005	6,084	6,084
2006	6,212	6,212
2007	6,618	6,618
2008	8,070	8,070
2009	8,731	8,731
2010	9,299	9,299
2011	8,525	8,525
2012	8,791	8,791
2013	4,630	4,630
Total	95,926	95,926



Source: OHIM, Statistics 2013

Annex 3



Source: OHIM, Statistics 2013

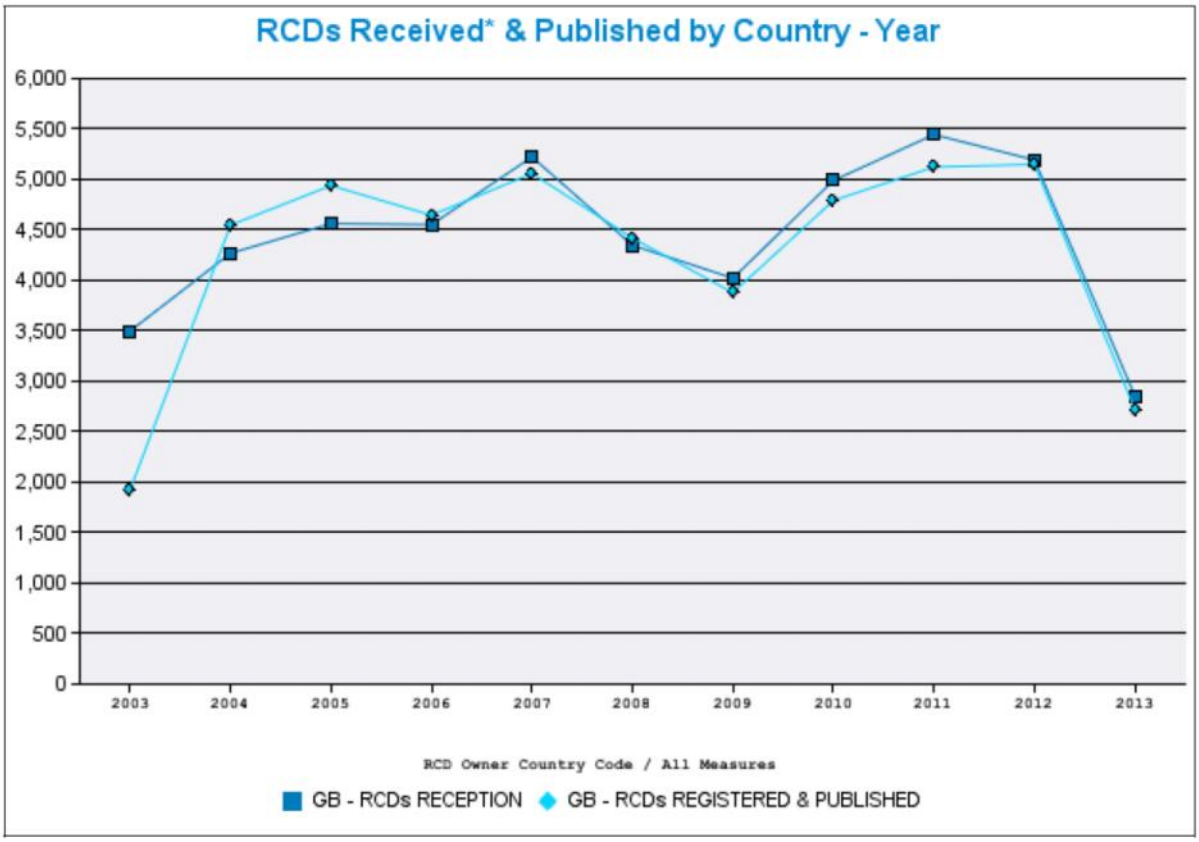
Annex 4

RCDs Received* by Year

Country	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
GB	3,498	4,269	4,563	4,553	5,224	4,348	4,022	4,991	5,445	5,194	2,855	48,962
Total	3,498	4,269	4,563	4,553	5,224	4,348	4,022	4,991	5,445	5,194	2,855	48,962

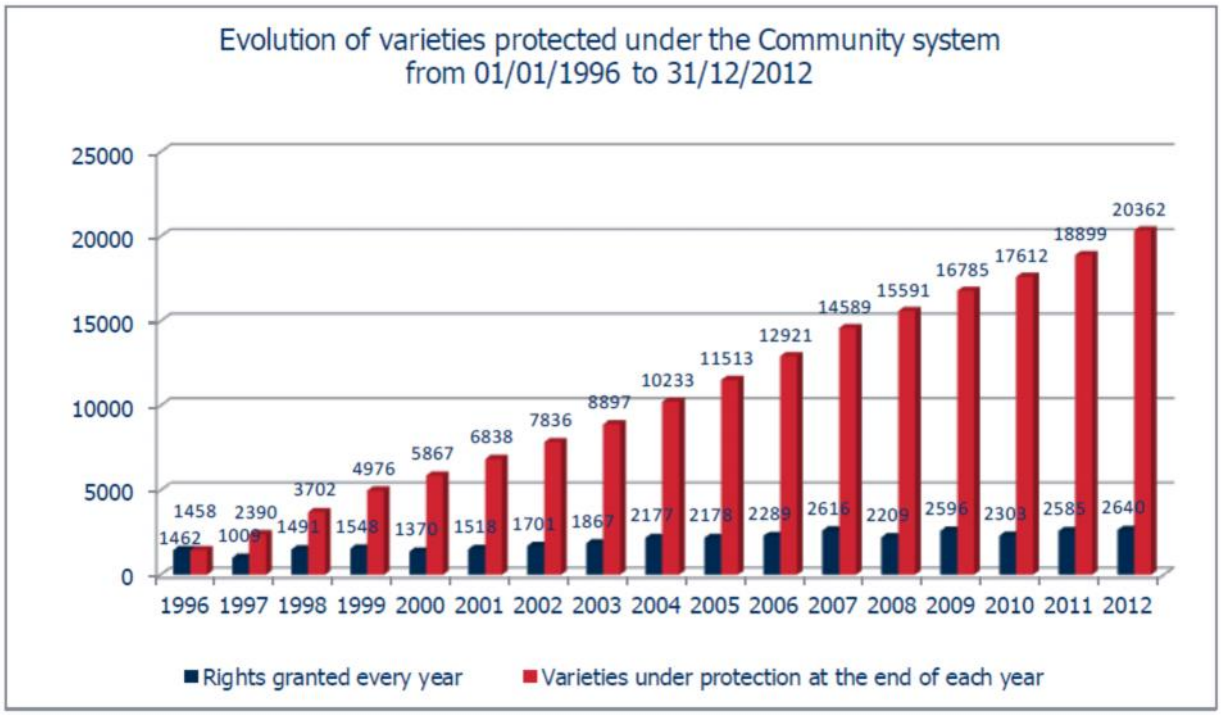
RCDs Published by Year

Country	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
GB	1,925	4,548	4,940	4,646	5,060	4,420	3,878	4,792	5,124	5,150	2,722	47,205
Total	1,925	4,548	4,940	4,646	5,060	4,420	3,878	4,792	5,124	5,150	2,722	47,205



Source: OHIM, Statistics 2013

Annex 5



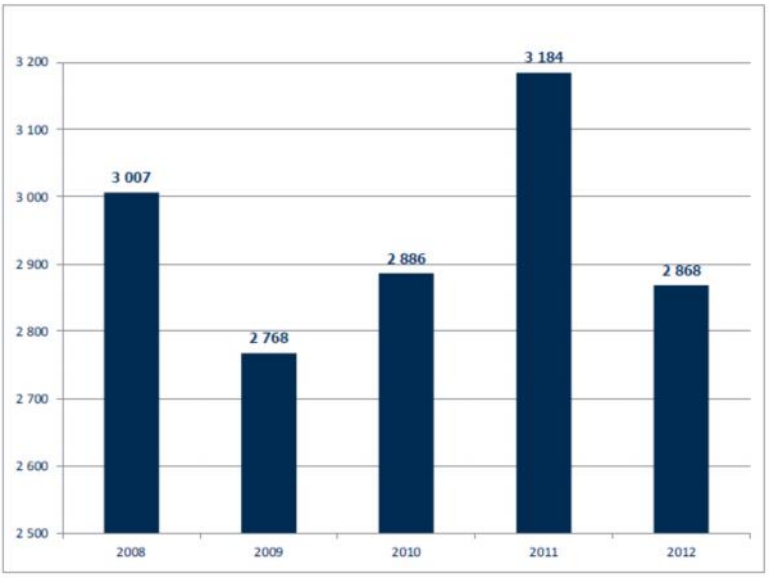
Source: CPVO Annual Statistics, update 24 January 2013.

Annex 6

Applications yearly comparison

From 01/01/2008 to 31/12/2012

Year	Number of applications
2008	3 007
2009	2 768
2010	2 886
2011	3 184
2012	2 868



Source: CPVO Annual Statistics, update 24 January 2013.

Annex 7

List of pending and decided ECJ cases regarding Supplementary Protection Certificates (Regulation 1768/92/EC as replaced by Regulation 469/2009/EC for medicinal products and Regulation 1610/96/EC for plant protection products)

Case	Document	Date	Name of the parties
C-210/13	Application (OJ)	14/06/2013	Glaxosmithline Biologicals and Glaxosmithkline Biologicals, Niederlassung der Smithkline Beecham Pharma
C-11/13	Application (OJ)	08/03/2013	Bayer CropScience
C-617/12	Application (OJ)	08/03/2013	Astrazeneca
C-493/12	Application (OJ)	14/12/2012	Eli Lilly and Company
C-484/12	Application (OJ)	11/01/2013	Georgetown University
C-477/12	Application (OJ)	11/01/2013	Hogan Lovells International
C-443/12	Application (OJ)	30/11/2012	Actavis Group and Actavis
C-210/12	Application (OJ)	29/06/2012	Sumitomo Chemical
C-574/11	Order	09/02/2012	Novartis
C-442/11	Order	09/02/2012	Novartis
C-130/11	Judgment	19/07/2012	Neurim Pharmaceuticals (1991)
C-6/11	Order	25/11/2011	Daiichi Sankyo
C-630/10	Order	25/11/2011	University of Queensland and CSL
C-518/10	Order	25/11/2011	Yeda Research and Development Company and Aventis Holdings
C-422/10	Order	12/01/2011	Georgetown University and Others
C-422/10	Judgment	24/11/2011	Georgetown University and Others
C-322/10	Order	12/01/2011	Medeva
C-322/10	Order	11/10/2011	Medeva
C-322/10	Judgment	24/11/2011	Medeva
C-125/10	Judgment	08/12/2011	Merck Sharp & Dohme
C-414/11	Judgment	18/07/2013	Daiichi Sankyo and Sanofi-Aventis Deutschland
C-125/10	Judgment	08/12/2011	Merck Sharp & Dohme

Case	Document	Date	Name of the parties
C-427/09	Judgment	28/07/2011	Generics (UK)
C-229/09	Judgment	11/11/2010	Hogan Lovells International
C-195/09	Judgment	28/07/2011	Synthon
C-66/09	Judgment	02/09/2010	Kirin Amgen
C-482/07	Judgment	03/09/2009	AHP Manufacturing
C-452/07	Removal (OJ)	06/12/2008	Health Research
C-452/07	Order	03/09/2008	Health Research
C-202/05	Order	17/04/2007	Yissum
C-431/04	Judgment	04/05/2006	Massachusetts Institute of Technology
C-207/03	Judgment	21/04/2005	Novartis and Others
C-31/03	Judgment	19/10/2004	Pharmacia Italia (anciennement Pharmacia & Upjohn)
C-454/00	Order (OJ)	10/08/2002	VIS Farmaceutici Istituto scientifico delle Venezie
C-127/00	Judgment	11/12/2003	Hässle
C-258/99	Judgment	10/05/2001	BASF
C-392/97	Judgment	16/09/1999	Farmitalia
C-181/95	Judgment	23/01/1997	Biogen
C-110/95	Judgment	12/06/1997	Yamanouchi Pharmaceutical
C-350/92	Judgement	13/07//1995	Spain v Council