1. Introduction: taking back control?

A. NEW BEGINNINGS

The law of the United Kingdom changed, and yet stayed the same, on 1 January 2021. This was the day when European Union (EU) law no longer applied under any international obligation, but continued to be enforced under domestic law. It marks the first day, its proponents would say, of when Britain was able to “take back control”¹ of its laws and Parliament was sovereign again.² It is also the day when the United Kingdom became responsible for its external trade relations once more. The ability to enter new free trade agreements was heralded as a liberty which would promote domestic prosperity and enhance Britain’s role as a champion of global trade. On the same day many of the free trade agreements the EU had agreed with third countries were replaced with near identical agreements applying to the United Kingdom³ and, at almost the last second, the EU and UK agreed a Comprehensive Trade and Cooperation Agreement.

It is these free trade agreements, and particularly, the rolled-over agreements which are the subject of this book. These treaties, like all international law, create new obligations on both parties,⁴ although in the realms of intellectual property these obligations largely follow the law as it stood previously. In this discussion we will explore the extent to which obligations in EU law have become ones in international trade law. Before exploring this more complex question, there is the canvas upon which all international law is painted and that is the domestic framework. The infrastructure upon which most intellectual property law is now built in the United Kingdom is its retention of EU law.

¹ The slogan of “Vote Leave” during the referendum campaign in 2016.

² European Union (Withdrawal Agreement) Act 2020, s. 38; but Parliamentary sovereignty has been said not to be a principle of Scots law: *MacCormick v Lord Advocate*, 1953 SC 396 at 411 (“The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law”).

³ At least in relation to intellectual property.

⁴ Or restate existing ones (turning an obligation owed by and to the EU into one owed by and to the United Kingdom).

B. THE RETENTION OF *EXISTING* EU LAW

This harmonised law of intellectual property has been retained in the United Kingdom, by the European Union (Withdrawal) Act 2018, to maintain legal certainty.⁵ The mechanism by which it has been done is not always straightforward even if the basic principle is simple. It is important to first identify the different types of retained or preserved legislation.⁶

The first type of retained EU legislation is EU-derived domestic legislation.⁷ This covers all enactments⁸ already made under section 2(2)⁹ of the European Communities Act 1972.¹⁰ The power in section 2(2) was used to implement Directives, but it has also been used to give further effect to EU Regulations and in some cases to implement designated treaties. In the context of intellectual property it has done all three. All the copyright Directives,¹¹ the recast trade marks Directive,¹² the designs Directive,¹³ and the enforcement

⁵ See for instance, Mark Elliott and Stephen Tierney “Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018” [2019] *Public Law* 37 at 40.

⁶ European Union (Withdrawal) Act 2018, s. 4 (does not cover any rights).

⁷ European Union (Withdrawal) Act 2018, s. 2(1).

⁸ See inclusive definition: European Union (Withdrawal) Act 2018, s. 20(1).

⁹ European Union (Withdrawal) Act 2018, s. 1B(7)(a).

¹⁰ As to how intellectual property laws were made under s. 2(2) of the European Communities Act 1972, see Phillip Johnson “Implementing Community Obligations in the Realms of Intellectual Property” (2006) 1 *Journal of Intellectual Property Law and Practice* 449.

¹¹ There have been a significant number of copyright Directives; for example, during the 1990s alone: Directive 96/9/EC on the legal protection of databases was implemented by the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032); Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright and Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission were both implemented by the Copyright and Related Rights Regulations 1996 (SI 1996/2967); Directive 93/98 harmonising the term of protection of copyright and certain related rights which was implemented by the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297); Directive 91/250/EEC on the legal protection of computer programs was implemented by the Copyright (Computer Programs) Regulations 1992 (SI 1992/3223).

¹² Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trade marks (Recast); implemented by the Trade Marks Regulations 2018 (SI 2018/825).

¹³ Directive 98/71/EC on the legal protection of designs; implemented by the Registered Designs Regulations 2001 (SI 2001/3949).

Directive¹⁴ have all been implemented (or reimplemented)¹⁵ by instruments under section 2(2). This is only the beginning of the story as some Regulations, such as the Community Design Regulation,¹⁶ also required provision to be made under section 2(2) as did the implementation of the TRIPS Agreement¹⁷ and the WIPO Performances and Phonograms Treaty.¹⁸ Thus, absent the saving provision,¹⁹ vast swathes of domestic intellectual property legislation would simply have lapsed when the European Communities Act 1972 was repealed.²⁰

The second type of EU-derived domestic legislation relates to all other enactments which were passed, made, or operating for the purpose of implementing EU law.²¹ This would include Acts of Parliament which were passed to implement EU law, such as the Trade Marks Act 1994 which was passed to implement the original Trade Marks Directive.²² It would also apply to parts of enactments which give effect to EU law,²³ such as certain sections of the Copyright, Designs and Patents Act 1988 which were already compliant

¹⁴ Directive 2004/48/EC on the enforcement of intellectual property; implemented by the Intellectual Property (Enforcement, etc.) Regulations 2006 (SI 2006/1028).

¹⁵ The Intellectual Property (Enforcement, etc.) Regulations 2006 also reimplemented aspects of Directive 98/71/EC on the legal protection of designs and the WTO Agreement (see the Explanatory Note to the Instrument). Likewise the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356) reimplemented Directive 2001/29/EC on copyright in the information society.

¹⁶ Regulation (EC) No. 6/2002 on Community Designs; Community Design Regulations 2005 (SI 2005/2339).

¹⁷ Patents and Trade Marks (World Trade Organisation) Regulations 1999 (SI 1999/1899); this was possible as the WTO Agreement was designated as a Community treaty by the European Communities (Definition of Treaties) (The Agreement Establishing the World Trade Organisation) Order 1995 (SI 1995/265).

¹⁸ Performances (Moral Rights, etc.) Regulations 2006 (SI 2006/18); again this was possible because the Treaty was designated as a Community Treaty; see European Communities (Definition of Treaties) (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) Order 2005 (SI 2005/3431).

¹⁹ European Union (Withdrawal) Act 2018, s. 2(1).

²⁰ European Union (Withdrawal) Act 2018, s. 1; as to delegating legislation lapsing when the enabling legislation is repealed see *Watson v Winch* [1916] 1 KB 688 at 690–1.

²¹ European Union (Withdrawal) Act 2018, s. 1B(7)(b).

²² The first part of the long title for the Trade Marks Act 1994 makes this clear “An Act to make new provision for registered trade marks, implementing Council Directive No. 89/104/EEC of 21st December 1988 to approximate the laws of the Member States relating to trade marks ...”

²³ That is, those “operating” to give effect to obligations: see Explanatory Note [77]. For instance, the Copyright, Designs and Patents Act 1988, s. 17 gives effect to the United Kingdom’s obligations under Directive 2001/29/EC on copyright in the information society, art. 3 but it was not enacted for this purpose.

with the copyright Directives when the latter came into force. While primary legislation like the 1994 Act was not affected by the repeal of the European Communities Act 1972, this type of legislation is included in the definition to enable ministers to amend it by order should that be necessary.²⁴ Finally, there is a catch-all for any legislation “related” to the first or second type of EU-derived domestic legislation, or otherwise relating to EU or EEA law. The term “related to” was construed broadly for the purposes of the European Communities Act 1972²⁵ and it is reasonable to assume that the court might be equally robust should this issue arise under the withdrawal legislation.

The next class of legislation which is saved is direct EU legislation.²⁶ While the definition in the European Union (Withdrawal) Act 2018 is broad, as it includes decisions and other tertiary legislation, in relation to intellectual property it is only EU Regulations which continue to have effect.²⁷ These Regulations have been amended²⁸ to make them “fit” with British law under a power in the European Union (Withdrawal) Act 2018.²⁹ Thus, the Supplementary Protection Certificate Regulations,³⁰ the Geographic

²⁴ European Union (Withdrawal) Act 2018, s. 8 (time limited power).

²⁵ *Oakley Inc v Animal Ltd* [2005] EWCA Civ 1191, [2006] Ch 337 [39], [46]–[47] and [73]–[80].

²⁶ The EU Charter of Fundamental Rights is not incorporated into domestic law (European Union (Withdrawal) Act 2018, s. 5(4)) but adhering to the European Convention of Human Rights is a general principle of EU law.

²⁷ None of which are exempt instruments: see European Union (Withdrawal) Act 2018, s. 20 and Sch. 6.

²⁸ Where amending instruments were due to come into force on exit day (31 December 2019) this was extended to the end of the transition period: European Union (Withdrawal) Act 2020, Sch. 5, para. 1.

²⁹ These are made under European Union (Withdrawal) Act 2018, ss. 8–8C.

³⁰ Regulation (EC) No. 469/2009 concerning the supplementary protection certificate for medicinal products; Regulation (EC) No. 1610/96 concerning the creation of a supplementary protection certificate for plant protection products; the amendments were made by Supplementary Protection Certificates (Amendment) (EU Exit) Regulations 2020 (SI 2020/1471); Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1050); and Patents (Amendment) (EU Exit) Regulations 2019 (SI 2019/801). The much less significant Regulation (EC) No. 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems is also retained.

Indications Regulations³¹ and the Border Regulation³² remain part of UK law as direct EU legislation.³³ While the EU Trade Mark Regulation,³⁴ and Plant Variety Regulation³⁵ were both saved by the 2018 Act as direct EU legislation, they were independently repealed at the end of the transition period.³⁶

C. THE CONTINUING ROLE OF EU JURISPRUDENCE

The whole of the EU law *acquis* as it stood on 31 December 2020 (IP completion day)³⁷ was incorporated into UK law as retained EU case law and retained general principles of EU law.³⁸ Accordingly, the validity, meaning or effect of any retained EU law, so far as it is modified, is decided in accordance with the so-called retained EU case law³⁹ and general principles of EU law.⁴⁰ We will begin by looking at how the general principles have been preserved.

There are numerous general principles of EU law, which include proportionality, legal certainty, equality before the law and subsidiarity. However, most significant is the general principle recognising fundamental rights. This recognition by the Court of Justice began before the United Kingdom even joined the EU,⁴¹ and the protection of fundamental rights became one of the

³¹ Regulation (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs; Regulation (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products; Regulation (EC) No. 110/2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks; Regulation (EU) No. 251/2014 as regards the authorised production processes for obtaining aromatised wine products; amendments made by Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1637).

³² Regulation (EU) No. 608/2013 concerning customs enforcement of intellectual property rights; amended by Customs (Enforcement of Intellectual Property Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019/514).

³³ European Union (Withdrawal) Act 2018, s. 3(1) and (2).

³⁴ Regulation (EU) 2017/1001 on the European Union trade mark.

³⁵ Regulation (EC) No. 2100/94 on Community plant variety rights.

³⁶ Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/269), Sch. 5, para. 6; Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/204), Sch.

³⁷ European Union (Withdrawal) Act 2018, s. 1A(6) and the European Union (Withdrawal Agreement) Act 2020, s. 39(1)–(5) (IP is short for implementation period, not intellectual property).

³⁸ European Union (Withdrawal) Act 2018, s. 5(5); as to the definition see s. 6(7).

³⁹ Defined in European Union (Withdrawal) Act 2018, s. 6(7).

⁴⁰ European Union (Withdrawal) Act 2018, s. 6(3); as to the scope of these see Takis Tridimas, *The General Principles of EU Law* (2nd ed., Oxford 2006).

⁴¹ *Stauder v City of Ulm* (29/69) [1969] ECR 419; there were a few earlier cases suggesting this was not the case however, for example, *Stork v High Authority* (1/58) [1959] ECR 17.

general principles of EU law soon after the UK became a member.⁴² In 1992, the Maastricht Treaty expressly required the European Union to respect the fundamental rights set out in the European Convention of Human Rights and this was reinforced in subsequent treaties.⁴³ In the EU context it has been held⁴⁴ that fundamental rights can restrict the power to legislate and must be taken into account by the EU legislator and, in particular, the area of law concerned, the nature of the right at issue, the nature and seriousness of the interference with the right and the object pursued by the interference. However, even with this broad scope, it is unlikely that the retention of the general principle to protect fundamental rights would take matters further than requirements in domestic law⁴⁵ under the Human Rights Act 1998.

The status of retained case law is much more complicated, largely because everything changed at the last moment. The European Union (Withdrawal) Act 2018 originally made Court of Justice decisions, including those of the General Court,⁴⁶ equivalent to Supreme Court decisions⁴⁷ with a requirement to apply the same test for departing from European jurisprudence as that applied by the Supreme Court to its own decisions: that is the decisions are normally binding, but the Court would depart from such decisions when it appeared right to do so.⁴⁸ This would have provided stability, but the length of time it would have taken for appeals to reach the highest court meant that the lower courts would be bound by EU law for years to come. Thus, after a consultation the govern-

⁴² *J Nold Kohlen- und Baustoffgrosshandlung v Commission of the European Communities* (4/73) [1974] ECR 491 [13]; this was reinforced by a Joint Declaration of the Council and Parliament: Joint Declaration of 5th April 1977 [1977] OJ C103/1.

⁴³ The European Convention of Human Rights is a Council of Europe instrument and *not* an EU instrument. Thus, it has wider membership than the EU and its interpretation is by the European Court of Human Rights in Strasbourg.

⁴⁴ C-293/12 *Digital Rights Ireland*, EU:C:2014:238.

⁴⁵ The retained general principles of EU law do not give a domestic right of action or enable an enactment to be disapplied (i.e., “retained” EU supremacy does not apply in respect of general principles of law): see European Union (Withdrawal) Act 2018, Sch 1, para 3.

⁴⁶ As to the binding nature of General Court decisions in the United Kingdom before leaving the EU: see *Jaguar Land Rover Ltd v Bombardier Recreational Products Inc* [2016] EWHC 3266 (Ch), [2017] FSR 20 [38].

⁴⁷ European Union (Withdrawal) Act 2018, s. 6(4) (as originally enacted).

⁴⁸ European Union (Withdrawal) Act 2018, s. 6(5); the Supreme Court made clear in *Austin v Southwark LBC* [2010] UKSC 28, [2011] 1 AC 355 [24]–[26] that it would continue to apply the House of Lords approach from the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

ment proposed to widen the number of courts that could depart from retained EU case law to include, amongst others, the Court of Appeal.⁴⁹

This decision by the government makes the status of retained case law somewhat confusing and it was not clarified much when the Court of Appeal considered the matter for the first time in *Tunein v Warner Music*.⁵⁰ In the usual course of things, the Court of Appeal is bound by its own earlier decisions except in limited circumstances.⁵¹ Indeed, while the instrument itself⁵² is ambiguous, the government's intention was that existing Court of Appeal decisions applying EU law should be treated like any other decision of that court.⁵³ The complexity increases as at any time after 1 January 2021, once the Court of Appeal has applied (or modified) EU case law for the first time, it is converted into the domestic authority of that court⁵⁴ and should be applied in the same way as its other decisions.⁵⁵ This leaves the question of what "applied" should mean.

The most straightforward case is where the Court of Appeal itself made a reference to the Court of Justice and then applied the result. There are, however, many shades of grey. Numerous decisions of that court, particularly in the field of trade marks, set out all the principles from a range of Court of

⁴⁹ This was provided for by a power under European Union (Withdrawal) Act 2018, s. 6(5A) and 6(5B) and the courts were set out in European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525), reg. 3. While other courts are listed in the regulation, the Court of Appeals in England and Northern Ireland and the Inner House of the Court of Session are the only courts that might hear intellectual property cases. Furthermore, of those, the Court of Appeal in England hears almost all such cases and so the discussion will be so confined.

⁵⁰ [2021] EWCA Civ 441.

⁵¹ *Young v. Bristol Aeroplane Co. Ltd* [1944] KB 718 at 729–30 (confirmed as still the law by the House of Lords in *Davis v Johnson* [1979] AC 264); there is a further exception where there is a fixed view of the European Patent Office: see *Actavis v Merck & Co.* [2008] EWCA Civ 444, [2008] RPC 26.

⁵² As the Supreme Court was the only body originally able to overturn EU case law the general law of precedent did not matter as it could treat a decision of the Court of Justice like one of its own. But as the Court of Appeal cannot usually overturn its own decisions, retained EU law becomes a chimera with different Court of Justice decisions having different rules applying.

⁵³ *Government Response to the consultation on the departure from retained EU case law by UK courts and tribunals* (October 2020), p. 22 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926811/departure-eu-case-law-uk-courts-tribunals-consultation-response.pdf.

⁵⁴ European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, reg. 4(2).

⁵⁵ If an EU case is not applied and it should have been then the Court of Appeal decision not applying EU law was *per incuriam* and need not be followed by other courts.

Justice cases⁵⁶ and then apply them. It must be the case that these principles are all locked in until the Supreme Court says otherwise following the normal rules of precedent; indeed, the stifling effect of summarising case law in this way was raised in *Tunein*.⁵⁷ There are also instances of the Court of Appeal applying the reasoning of the High Court or that of the registrar, which in turn are based on judgments of the Court of Justice.⁵⁸ These too must be considered as applying EU law, as application must be direct and also indirect. Indeed, there may be cases where the Court of Appeal has applied Case A which in turn was dependent on Case B, even if Case B was not directly mentioned. It is arguable at least that this dependency amounts to the application of Case B. The more difficult question is whether a passing statement, or an *obiter* comment, during a Court of Appeal decision, such as the suggestion by Lewison LJ that the Court of Justice has raised the standard of originality,⁵⁹ is applying EU retained case law.

Where particular retained EU case law has never been considered by the Court of Appeal (or Supreme Court), then the Court of Appeal may depart from it on the same basis as the Supreme Court⁶⁰ – where departing from it appears right to do so – a test which has only infrequently been applied even by the highest court.⁶¹ Indeed, Lord Bingham explained in *Horton v Sadler*⁶² that when considering such a departure:

It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors.

⁵⁶ For instance, the summary of principles used for assessing the likelihood of confusion set out in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, [2016] FSR 30 [31]–[33].

⁵⁷ See Rose LJ's comment in *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [182]–[183] and the broader concerns on legal method express by Vos MR at [192]–[194].

⁵⁸ This is what happened in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, [2016] FSR 30 [31].

⁵⁹ *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482, [2014] RPC 8, [37]; the test was confirmed, in any event, by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645, [2020] FSR 3 [43]–[53].

⁶⁰ European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, reg. 5.

⁶¹ Between 1966 and it functions moving to the Supreme Court in 2010 the House of Lords invoked the Practice Statement 21 times: Louis Blom-Cooper “1966 and All That: The Story of the Practice Statement” in Louis Blom-Cooper et al., *The Judicial House of Lords: 1876–2009* (Oxford 2009), p. 128 at 136. Its use has not increased significantly since that time.

⁶² [2006] UKHL 27; [2007] 1 AC 307 [29] cited with approval by Lord Wilson in *Peninsula Securities Ltd v Dunnes Stores Ltd* [2020] UKSC 36 [2020] 3 WLR 521 [49].

A departure might be justified, however, where the current law is leading to unjust results or is contrary to public policy, or where it is impeding the development of the law.⁶³ These are high hurdles to overcome.⁶⁴ Nevertheless, it would be wrong to consider retained EU case law as equivalent to a Court of Appeal decision, as there is some *limited* freedom to depart from retained EU case law where there is almost none in relation to domestic appellate decisions.

Essentially, all this means is hundreds of Court of Justice cases on intellectual property,⁶⁵ and well-over a thousand from the General Court,⁶⁶ remain firmly embedded in British law notwithstanding the United Kingdom's departure from the EU. In *Tunein v Warner Music*, the first request was made to the Court of Appeal to depart from retained EU law. And the court's judgment demonstrates that this large body of case law is likely to keep EU law tightly embedded. Members of the court put forward various reasons why it was *not* appropriate to depart from the existing *acquis*. First, it was suggested by a majority that the failure of Parliament to amend the relevant domestic implementing enactment⁶⁷ was a reason not to depart.⁶⁸ As almost all EU intellectual property obligations have been given effect in the United Kingdom by legislation, this would suggest that until Parliament legislates there will be a very strong pull towards continuing to give effect to EU case law. Secondly, the court was united in believing that where the relevant rule comes from an international treaty, domestic courts should strive to have a harmonious interpretation of its international obligation,⁶⁹ that is follow EU law, and not "indi-

⁶³ *Knauer v Ministry of Justice* [2019] UKSC 9, [2016] AC 908 [22]–[23].

⁶⁴ These standards were acknowledged in *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [75] (Arnold LJ) and [200]–[201] (Vos MR).

⁶⁵ The website ipcuria.eu has collated the intellectual property decisions of the Court of Justice (with some minor caveats), using this data by 31 December 2020 the Court of Justice had given judgment on 462 preliminary references and 330 appeals concerning intellectual property law; also see the comment of Sir Robin Jacob "Is IP Out of Control?" (2020) 15 *Journal of Intellectual Property Law and Practice* 98 at 101.

⁶⁶ The General Court's judgments were searched on curia.europa.eu using the term "trade mark" and there were over 1,800 judgments identified as having been given before 31 December 2020. As they have not been individually searched it is possible that a small selection of these judgments may not be trade mark cases.

⁶⁷ Copyright, Designs and Patents Act 1988, s. 20, which was inserted by the Copyright and Related Rights Regulations 2003 (SI 2003/2498), reg. 6.

⁶⁸ *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [78]; Arnold LJ's reasoning was not adopted by Vos MR who presented his own (at [196]), but it appears to have been accepted by Rose LJ [184]. Accordingly, the majority of the court have considered this relevant and until overturned by the Supreme Court it is the appropriate to consider.

⁶⁹ See p. 49.

vidualist disharmony”.⁷⁰ Thirdly, there is a general desire for legal certainty and when the case law of the Court of Justice is developed and that court has already considered a range of issues, it is not desirable for the domestic courts to have to return to the drawing board.⁷¹

In addition to the limitations on departing from EU jurisprudence, the principle of supremacy of EU law continues to apply to any enactment passed or rule of law made before 31 December 2020.⁷² It can also apply to any modification of an enactment or rule of law after that date if this was intended.⁷³ So, for example, if it is found that an original provision of the Copyright, Designs and Patents 1988 was incompatible with EU law (as it stood on 31 December 2020), it should still be disapplied⁷⁴ or read down⁷⁵ by a court even now.

The court may also *have regard* to EU decisions after 31 December 2020,⁷⁶ and the extent to which courts do this will be central to the continuing role of EU law. In areas of law where there is substantial or total harmonisation and substantial existing case law, as is the case for most areas of intellectual property, the approach is certain to differ from parts of the law which are largely untouched. There does already seem to be some judicial willingness to move on, for instance, the comments of Michael Green J in *Lifestyle Equities v Amazon*:⁷⁷

The removal of the jurisdiction of the CJEU seems to have been a non-negotiable part of the Government’s plan to deliver Brexit and the UK courts will possibly now have to develop their own jurisprudence in relation to areas such as trade mark law.

However, the approach the courts take will be in the context of British law starting in the same place as that of the EU and, critically for the purposes of

⁷⁰ *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [79], [184] and [198]. This was a point upon which the Court was united.

⁷¹ *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [80] and [83]. The other reasons for not departing in the case are not of general application.

⁷² European Union (Withdrawal) Act 2018, s. 5(1) and (2); there is provision relating to “separation law”, that is law under the Withdrawal Agreement, which can affect this as well: see s. 7C.

⁷³ European Union (Withdrawal) Act 2018, s. 5(3); it is not clear how the intention will be demonstrated but it is presumed that there would be a strong presumption against any such intention.

⁷⁴ On the grounds of supremacy: see *R v Secretary of State for Transport, Ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603 at 644; also see *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454 [62].

⁷⁵ Based on the *Marleasing* Principle: *C-106/89 Marleasing SA v La Comercial Internacional de Alimentación SA* [1991] 1 ECR 4135.

⁷⁶ European Union (Withdrawal) Act 2018, s. 6(2).

⁷⁷ [2021] EWHC 118 (Ch) [129].

this discussion, the obligations freely entered in the numerous free trade agreements. This is already evident from *Intune v Warner Music* where Arnold LJ stated that a judgment given by the Court of Justice after the United Kingdom had left the EU⁷⁸ was “highly persuasive”. He gave three reasons.⁷⁹ First, the case was the end of a long line of jurisprudence all of which he had already held should continue to be followed. Considering the number of Court of Justice cases dealing with intellectual property matters, this will be a strong factor keeping the United Kingdom in line with EU developments. Secondly, the case in question develops the EU jurisprudence. It is not clear why this is material to assessing the persuasiveness of a decision. All cases develop the jurisprudence to some degree. It may be that what he meant was that it is worth following one judgment, so it is possible to follow the next judgment as well: that is keeping the jigsaw puzzle complete as long as possible.⁸⁰ Thirdly, it was a decision of the Grand Chamber of the Court of Justice and its decisions get more weight. So, it appears that the UK courts will be very willing to consider the evolving European intellectual property jurisprudence. It therefore falls to consider two possible approaches that might be taken⁸¹ when domestic courts consider whether to “have regard” to future decisions of the Court of Justice: the first, following the “conversation” approach taken to decisions of the European Court of Human Rights; and the second, the approach the courts have taken to foreign decisions where there is textual harmony in the law being construed as has occurred in the field of patent law.

1. The First Approach

The Human Rights Act 1998 requires the domestic courts to “take account”⁸² of the European Court of Human Rights’ decisions; how this works in practice was explained in *Manchester City Council v Pinnock*:⁸³

This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would

⁷⁸ C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, EU:C:2021:181.

⁷⁹ *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [91]. There were five reasons put forward, but the other two were not of general application.

⁸⁰ It may be that it is particularly relevant where the decision resolved a perceived conflict between two earlier Court of Justice cases (which was put forward as a factor in its own right).

⁸¹ As to the effect of international law see Chapter 2.

⁸² Human Rights Act 1998, s. 2(1).

⁸³ [2010] UKSC 45, [2011] 2 AC 104 [48] (citations omitted); followed in *R (on the application of) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 also see *R (Hallam) v Secretary of State* [2019] UKSC 2, [2020] AC 279 [172].

destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law ... Of course, we should usually follow a clear and constant line of decisions by the European court ... But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out ... [the Human Rights Act 1998] requires our courts to “take into account” European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.

There is something to commend about this approach, but there is a real difference between the courts in Luxembourg and Strasbourg. The Court of Justice is unlikely to wish to enter any “dialogue” with the British courts and so should this desire for consistency apply if the courts are passive listeners to a monologue? It is also clear that to “have regard” is less imperative than to “take account”, so it may be that another approach is more appropriate.

2. The Second Approach

A parallel could be drawn with patent law which, in relation to infringement, was largely harmonised by the Community Patent Convention⁸⁴ even though eventually the convention never came into effect.⁸⁵ In *Grimme Maschinenfabrik GmbH & Co KG v Scott*⁸⁶ Jacob LJ set out what might be considered the high point of the weight to be attached to decisions of other “contracting” states:

Broadly we think the principle in our courts – and indeed that in the courts of other member states – should be to try to follow the reasoning of an important decision in another country. Only if the court of one state is convinced that the reasoning of a court in another member state is erroneous should it depart from a point that has been authoritatively decided there. Increasingly that has become the practice in a number of countries, particularly in the important patent countries of France, Germany, Holland and England and Wales. Nowadays we refer to each other's

⁸⁴ Convention on the European Patent for the Common Market (1976 European Communities No. 18; Cmnd 6553).

⁸⁵ There is an added complexity by reason of Patents Act 1977, s. 130(7); see Phillip Johnson, Ashley Roughton and Trevor Cook: *Roughton, Johnson and Cook: The Modern Law of Patents* (4th ed., Lexisnexis 2018) [1.17]–[1.22] and Phillip Johnson “Mr Skemp’s Preposterous Provision: The Drafting of the Patents Act 1977 and Harmonization in the 1970s” (2015) 5 *Queen Mary Journal of Intellectual Property* 367.

⁸⁶ [2010] EWCA Civ 1110, [2011] FSR 7 [80].

decisions with a frequency which would have been hardly imaginable even twenty years ago. And we do try to be consistent where possible.

The Supreme Court was more circumspect when they considered the matter in a *Schütz v Werit*⁸⁷ merely suggesting that “it is sensible for national courts at least to learn from each other and to seek to move towards, rather than away from, each other’s approaches” because “as a general rule it is desirable that international treaties should be interpreted by the courts of all the states parties uniformly”.⁸⁸ This more circumspect approach is a better fit and, as the rest of this book explores, is the starting point for considering free trade agreements and retained EU law. Nevertheless, any such desirability must be amplified when the court moves from considering a decision of the French, German or Dutch court to following the decisions of the European Court of Justice, which essentially represents the law of 27 countries and not just one.

D. THE GENERAL IMPLEMENTATION

The free trade agreement reached with the EU, but not the rolled over agreements, are given something very similar to direct effect and direct applicability⁸⁹ in national law by section 29(1) of the European Union (Future Relationship) Act 2020:⁹⁰

Existing domestic law has effect on and after the relevant day^[91] with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement ... so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

⁸⁷ [2013] UKSC 16, [2013] RPC 16 [40].

⁸⁸ *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629 at 657; this is explored in more detailed in Chapter 2; also see *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 [198], Vos MR (“it would be undesirable for one nation to depart from the CJEU’s approach without an exceptionally good reason”).

⁸⁹ These are concepts of EU law: for an explanation see Catherine Barnard and Steve Peers, *European Union Law* (3rd ed., Oxford 2020), pp. 104 and 157–61.

⁹⁰ In contrast to the implementing power in European Union (Future Relationship) Act 2020, s. 31, this provision only applies to the agreement on the day it came into force and not how it was subsequently amended or supplemented (see the definition of relevant agreement in s. 31(7)). There is a power to make statutory instruments to make any changes necessary to domestic law to implement all the other rolled over FTAs: Trade Act 2021, s. 2.

⁹¹ The relevant day is the day the agreement is provisionally applied, or if a provision is not so applied, when it comes into force: European Union (Future Relationship) Act 2020, s. 29(4).

The purpose of this clause is transpose the agreement into domestic law and thereby implicitly change domestic law⁹² to ensure all aspects of the agreement are implemented to the extent necessary to comply with any international obligation,⁹³ while not precluding future enactments being contrary to the agreement.⁹⁴ While all the intellectual property obligations in the EU FTA should have already been implemented during the United Kingdom's membership of the EU, the meaning of those terms, if not caught by the current implementation, would come through this gateway. Therefore, it is not just through being retained EU case law that obligations can come into domestic law. Indeed, it could even be argued that by reason of this general implementation (in certain respects at least) the text of the EU FTA becomes the best reflection of current domestic law. Nevertheless, the interpretation of retained EU law and this broad rule is only a precursor to the question that is central to this discussion – that is to what extent do the assorted free trade agreements entered into by the United Kingdom have harmonising effect.

E. HARMONISATION AND FREE TRADE AGREEMENTS

The United Kingdom has been an active member of most of the intellectual property conventions from early in their history. There are many (minimum) standards set in those conventions and by and large the United Kingdom has applied them all. For instance, in relation to copyright there are international agreements that provide for a reproduction right,⁹⁵ a distribution right⁹⁶ and a rental right⁹⁷ and much more besides; for patents the rules of subject matter⁹⁸ and the exclusive rights⁹⁹ and likewise the exclusive rights for trade marks.¹⁰⁰ These are just a selection of the minimum standards which exist and by which the United Kingdom is bound. However, because these are just minimum

⁹² *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454 [78].

⁹³ See Explanatory Note to the European Union (Future Relationship) Act 2020 [263].

⁹⁴ However, such an enactment would be contrary to international law: European Union (Future Relationship) Act 2020, s. 29(2)(a).

⁹⁵ TRIPS, art. 14; Berne Convention, art. 9 and 12; Rome Convention, art. 7(b), 10 and 13; WPPT, art. 7 and 11; Beijing Treaty, art. 7.

⁹⁶ WCT, art. 6; WPPT, art. 8 and 12; Beijing Treaty, art. 8.

⁹⁷ TRIPS, art. 11; WCT, art. 7; WPPT, art. 9 and 13; Beijing Treaty, art. 9.

⁹⁸ TRIPS, art. 27.

⁹⁹ TRIPS, art. 28.

¹⁰⁰ TRIPS, art. 16.

standards they provide substantial freedom to contracting parties¹⁰¹ as Sheldon Halpern and I explain in relation to copyright:¹⁰²

We are left, in short, with a structure of individual national regimes, with signatory states agreeing to abide by some form of minimal protection and maximal limitation, leaving a great rolling space with room for, at least theoretical, major differences. Thus, it might be said that the “floor” of copyright protection is harmonised around the world, but the ceiling is left for Member States to set. Moreover that floor, although present, is neither firm nor clear. Instead ... there is great flexibility in implementation and in the interpretation of those minimum standards.

In simple terms, minimum standards give autonomy to contracting parties when implementing international obligations.¹⁰³ These standards are not the same as those which have been set by EU law where there is an entirely harmonised trade mark law, registered design law, law of geographical indications, data exclusivity rules and law relating to supplementary protection certificates.¹⁰⁴ The law of copyright in the EU, on the other hand, has moved from being considered to impose minimum standards to an almost (but not quite) harmonised standard. There has been very limited harmonisation of the law of patents and plant variety rights by the EU, but the law is essentially harmonised by the European Patent Convention and UPOV Convention respectively. Only trade secrets and remedies (enforcement) are left with a mere minimum standard.¹⁰⁵

While there undoubtedly remain some small differences in the way the various Member States apply these harmonised laws across these EU, the process of legislative and then judicial harmonisation led by the Court of Justice has narrowed down the divergences so that the different outcomes are

¹⁰¹ The one exception to this is the UPOV Convention which sets out the entire code which must be given effect. However, there is no adjudicatory authority, so even here it is a partial harmonisation.

¹⁰² Sheldon Halpern and Phillip Johnson, *Harmonising Copyright Law and Dealing with Dissonance: A Framework for Convergence of US and EU Law* (Edward Elgar 2014), p. 47; also see Susy Frankel “Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes” (2009) 12 *Journal of International Economic Law* 1023 at 1034.

¹⁰³ Susy Frankel “Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes” (2009) 12 *Journal of International Economic Law* 1023 at 1028.

¹⁰⁴ Although this is built on an unharmonised patent law: see C-392/97 *Farmitalia* [1999] ECR I-5553 [26]–[27].

¹⁰⁵ Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, art. 1(1); Directive 2004/48/EC on the enforcement of intellectual property rights, art. 2(1).

usually (although still not always) matters of procedure and practice.¹⁰⁶ Put simply, intellectual property in the United Kingdom was, on 31 December 2020, largely a European affair. It was substantially harmonised either under EU law, or by the European Patent Convention. The retention of EU law under the European Union (Withdrawal) Act 2018 means that, one day later, little had changed. The issue is not, therefore, whether the obligations under free trade agreements will change the law, but whether the agreements have the effect of indirectly retaining aspects of EU law and, thereby, restrict the legislative and judicial freedom in the future. These agreements have led the United Kingdom to take on a lot of new (meaningful) obligations beyond those required by its membership of multilateral treaties – what is commonly called TRIPS Plus.

F. TRIPS PLUS

The Agreement on Trade Related Aspects of Intellectual Property (TRIPS), an Annex to the World Trade Organization Agreement, allows Member States to adopt higher levels of protection than it requires.¹⁰⁷ Free trade agreements, or at least most of them, provide obligations over and above those required by the WTO Agreements, including TRIPS, that is they provide varying levels of intellectual property protection (or over protection).¹⁰⁸ These range from those agreements that just require TRIPS equivalents, that is where the parties do little more than reaffirm commitment to TRIPS (and other international conventions such as the UPOV Convention), those TRIPS-Plus obligations where levels of protection outside TRIPS are required and TRIPS-Superplus¹⁰⁹ where there are higher standards in relation to all intellectual property rights. The EU's approach, inherited by the United Kingdom, has been to require the similar obligations – non-negotiably – when it enters free trade agreements with third countries, albeit the requirements have expanded as the European *acquis* has developed.

¹⁰⁶ Some might be seen as rules of law, however.

¹⁰⁷ TRIPS, art. 1(1).

¹⁰⁸ Susy Frankel “Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes” (2009) 12 *Journal of International Economic Law* 1023 at 1029.

¹⁰⁹ Using the terms and scale from Susy Frankel “The Legitimacy and Purpose of Intellectual Property Chapters in FTAs” in Ross Buckley, Va Io Lo and Laurence (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer 2008), p. 185 at 195–6.

The role of free trade agreements in creating so-called TRIP-Plus obligations is widely discussed in the literature.¹¹⁰ However, when these agreements have been discussed it has usually been in the context of developed countries (usually the United States or EU) imposing or coercing¹¹¹ developing countries to adopt higher intellectual property standards. The coercion coming from these standards being a condition of other benefits being given (for instance, making agricultural markets slightly less restricted). Essentially, a country will agree to an FTA for the overall perceived net benefit from an agreement. This means, by their nature, some provisions of an FTA will be against a country's national interest: you win some, you lose some.

These concerns have led Susy Frankel to question the legitimacy of intellectual property chapters in FTAs on the grounds they do not recognise the object and purpose of the TRIPS Agreement.¹¹² Her argument goes that higher standards of protections are permitted only where there is a rational limit consistent with the purposes and objectives of TRIPS.¹¹³ Indeed, she goes further and suggests that FTAs need to be brought into check and that increasing harmonisation through these agreements is illegitimate,¹¹⁴ as WTO Member States should

¹¹⁰ A representative sample includes, Henning Ruse-Khan "The International Law Relation between TRIPs and Subsequent TRIPs-Plus Free Trade Agreements: Towards Safeguarding TRIPs Flexibilities" (2011) 18 *Journal of Intellectual Property* 325; Charles Collins "The Case against TRIPs-Plus Protection in Developing Countries Facing Aids Epidemics" (2008) 29 *University of Pennsylvania Journal of International Law* 763; Matthew Turk "Bargaining and Intellectual Property Treaties: The Case for A Pro-Development Interpretation of Trips but Not Trips Plus" (2010) 42 *New York University Journal of International Law and Politics* 981; Meir Pugatch "The International Regulation of IPRS in a TRIPS and TRIPS-plus World" (2005) *Journal of World Investment & Trade* 431; Hafiz Rehman "India, TRIPs-Plus Free Trade Agreements and the Future of Access to Essential Medicines" (2010) 19 *Information & Communications Technology Law* 267; Ping Xiong "Patents in TRIPS-Plus Provisions and the Approaches to Interpretation of Free Trade Agreements and TRIPS: Do They Affect Public Health" (2012) 46 *Journal of World Trade* 155; Assafa Endeshaw "Free Trade Agreements as Surrogates for TRIPs-Plus" (2006) *European Intellectual Property Review* 374.

¹¹¹ Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12 *Journal of International Economic Law* 1023 at 1025.

¹¹² Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12 *Journal of International Economic Law* 1023.

¹¹³ Susy Frankel "The Legitimacy and Purpose of Intellectual Property Chapters in FTAs" in Ross Buckley, Va Io Lo and Laurence (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer 2008), p. 185 at 192 (she continues that a range that is too broad is not helpful).

¹¹⁴ Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12 *Journal of International Economic Law* 1023 at 1043.

be able reasonably to expect the protection of intellectual property along with a degree of flexibility.¹¹⁵ Whether removing flexibility in implementing TRIPS is lawful or not, the practice is now widespread and unless and until there is a diplomatic *volte-face* or non-violation complaints become possible under TRIPS¹¹⁶ it is clear that TRIPS-Plus obligations are here to stay.

The concern over TRIPS-Plus obligations has related to agreements between developed countries and developing countries, but it can equally extend to large developed economies imposing obligations to maintain their relative strength over smaller developed countries.¹¹⁷ The United Kingdom remains one of the world's larger economies¹¹⁸ and it is a net exporter of intellectual property,¹¹⁹ so the imposition of higher levels of protection might be seen as a good thing without any real consideration of the merits.¹²⁰ Yet both the last two major government reviews of intellectual property have suggested changes which could not be made at national level, due to obligations in EU law.¹²¹ Thus, while the

¹¹⁵ Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12 *Journal of International Economic Law* 1023 at 1050.

¹¹⁶ The issue is bounced from each Ministerial Conference to the next, the last time this happened was the Ministerial Conference in December 2017: see Ministerial Decision, 13 December 2017 (WT/MIN(17)/66); also see Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12 *Journal of International Economic Law* 1023.

¹¹⁷ Susy Frankel "The Legitimacy and Purpose of Intellectual Property Chapters in FTAs" in Ross Buckley, Va Io Lo and Laurence (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer 2008), p. 185 at 199 (referring to agreements between the US and Australia and New Zealand).

¹¹⁸ The most recent data presented by the World Bank, from 2019, suggests that the United Kingdom is the sixth largest economy in the world (following the United States, China, Japan, Germany and India). This may not be the case anymore as it is projected that the British economy suffered more as a result of Covid-19 than others and it was also projected that it would decline further after it left the EU; see https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true.

¹¹⁹ In 2019, the United Kingdom exported £16,689 million in intellectual property services and imported £13,759 million (so is a net exporter to the extent £2,930 million): see ONS, Pink Book 2020, Balance of Payments Data: see www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/9geographicalbreakdownofthecurrentaccountthepinkbook2016.

¹²⁰ Won-Mog Choi "Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States" (2005) 8 *Journal of International Law* 825 at 848.

¹²¹ See *Gowers Review of Intellectual Property* (HM Treasury 2006), Recommendation 11 ("Propose that Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test") and Recommendation 13 ("Propose a provision for orphan works to the European Commission, amending Directive 2001/29/EC") and Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*

United Kingdom's new FTAs require no change in the law, they reduce future domestic autonomy of both parties to the agreement;¹²² it might be said they represent the United Kingdom "giving back control".

G. THE RANGE OF FREE TRADE AGREEMENTS

The free trade agreements between the United Kingdom and third countries tell very different stories for each of the areas of trade covered. We are concerned with the chapters in those agreements which deal with intellectual property. The lack of uniformity between the agreements is central to this whole discussion. Each of these chapters provides some intellectual property standards that the United Kingdom must comply with and together they provide (an overlapping) patchwork quilt of obligations.¹²³

In terms of their contribution to this quilt it is not the most significant in terms of trade that provide the most fabric. So, for instance, in terms of the value of trade, it is clearly the FTA between the EU and the United Kingdom that is most significant being valued at £294 billion in 2019.¹²⁴ Yet it includes far fewer intellectual property obligations than the FTA with Ukraine which covers trade worth less than a hundredth of that total (£1.63 billion in 2019). Critically, however, the depth of obligations is not consistent. There are detailed provisions setting the scope of supplementary protection certificates¹²⁵ in the Canadian FTA, but the Moldavian FTA¹²⁶ is more prescriptive in setting the term of such certificates. Thus, in combination those two FTAs mean the United Kingdom must retain a regime quite close to that set out in EU law.¹²⁷

(2011), Recommendation 5 ("... The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies ...").

¹²² Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12 *Journal of International Economic Law* 1023 at 1040.

¹²³ Following an earlier metaphor of harmonisation where "the multiplicity of [copyright] Directives, each highly specific, taken together began to form a kind of blanket across the Member States as a uniform subset of national laws", Sheldon Halpern and Phillip Johnson, *Harmonising Copyright Law and Dealing with Dissonance: A Framework for Convergence of US and EU Law* (Edward Elgar 2014), p. 100.

¹²⁴ The data is based on ONS, Pink Book 2020, Balance of Payments Data: see www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/9geographicalbreakdownofthecurrentaccountthepinkbook2016.

¹²⁵ *A sui generis* form of patent term extension.

¹²⁶ Amongst others.

¹²⁷ Regulation (EC) No. 469/2009 concerning the supplementary protection certificate for medicinal products.

On the other hand only the CARIFORUM FTA provides *any* rules on utility models,¹²⁸ and the rules relating to generic resources are confined to five FTAs.¹²⁹ There is a difference between these two areas of law, however. The former rule applies generally due to national treatment and the most favoured nation principle,¹³⁰ whereas the latter does not and so only applies between the parties.

Thus, it is the combination of FTAs, rather than any one agreement, which needs to be understood to establish the scope of the United Kingdom's international obligations. The weaving together of these obligations to provide the complete picture is the purpose of Part II of this book. However, before continuing it is important to understand the FTAs that have been agreed by the United Kingdom. These can be broken down into four groups: first, those agreements that include no substantive obligations in relation to intellectual property; secondly, those which include some general obligation to enforce intellectual property or similar which is often accompanied by a requirement to be a party to certain multilateral intellectual property conventions (TRIPS equivalents); thirdly, those agreements which include detailed provisions on geographical indications but not in relation to other rights (TRIPS Plus); fourthly, and finally, those agreements which include a wide range of obligations across the spectrum of rights (TRIPS Superplus).

Another factor to consider is the likelihood of enforcement of the trade obligations in a particular FTA. In simple terms, some countries are more likely to take steps to try and enforce the United Kingdom's obligations either under the FTA itself or through the WTO. The decision to challenge the implementation of trade agreement has risks. It opens up the complaining country to tit-for-tat complaints¹³¹ where the complainant country has also fallen short under the agreement. As was explained by a former UK Foreign Office Legal Adviser, in the context of interpretational disputes:

It is not correct as a matter of practice and experience to state that the meaning of a treaty provision cannot be clear or otherwise the States concerned would not be going to the trouble and expense of litigating about it. It certainly happens that the meaning of a treaty provision is perfectly clear but that one or another party to the treaty has for one reason or another found the provision inconvenient.¹³²

¹²⁸ CARIFORUM, art. 148.

¹²⁹ Andean, art. 201; CARIFORUM, art. 150; Central America, art. 229(4) and (5); Korea, art. 10.39; Ukraine, art. 219(1).

¹³⁰ See Chapter 3.

¹³¹ These are a not a defence of course, but a good way of reaching settlement.

¹³² (Sir William) Eric Beckett "Observations des membres de la Commission sur le rapport de M. Lauterpacht – 1. Comments by Sir Eric Beckett" (1950) 43(I) *Annuaire de l'Institut de droit international* 435 at 440.

Table 1.1 Trade deals agreed (whether or not in force) by the United Kingdom by 30 June 2021

No IP provisions	Limited IP provision	Geographical indications only	Wide range of IP provision
Cameroon	Albania	Iceland and Norway	Andean countries ⁴
Côte d'Ivoire	Chile	Southern Africa	Australia ⁵
Eastern and Southern Africa (ESA) trade bloc ¹	Egypt	Customs Union and Mozambique (SACUM)	Canada
Faroe Islands	Israel	trade bloc ³	CARIFORUM trade bloc ⁶
Kenya	Jordan	Switzerland	Central America trade bloc ⁷
Kosovo	Lebanon		EFTA ⁸
Liechtenstein	Mexico		European Union ⁹
Pacific States ²	Morocco		Georgia
	North Macedonia		Japan
	Palestinian Authority		Moldova
	Serbia		Singapore
	Tunisia		South Korea
	Turkey		Ukraine
			Vietnam

Notes: ¹Comprising Mauritius, Seychelles, and Zimbabwe. ²Comprising Fiji, Papua New Guinea, Samoa, and Solomon Islands. ³Comprising: Botswana, Eswatini, Lesotho, Mozambique, Namibia, and South Africa. ⁴Comprising Colombia, Ecuador and Peru. ⁵This assessment is based on the UK–Australia FTA Negotiations: Agreement in Principle (Policy Paper: 17 June 2001). ⁶Comprising Antigua and Barbuda, Barbados, St Kitts and Nevis, Belize, Bahamas, St Lucia, Dominica, Dominican Republic, Grenada, Guyana Jamaica, St Vincent and the Grenadines, and Trinidad and Tobago. ⁷Comprising Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. ⁸Comprising Iceland, Liechtenstein and Norway. There was a separate agreement relating to agricultural GIs and Iceland. ⁹Comprising Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia (Czech Republic), Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

However, there is also the damage to international relationships that arises from trade fallouts, and so whether a complaint is raised will depend on the political capital countries have with each other and how much would be jeopardised. One can imagine that the EU is the most likely to monitor the United Kingdom's implementation of its FTA¹³³ and all things considered it is the

¹³³ But, as we shall see, the UK owes the EU obligations in third party FTAs under the WTO Agreement by reason of the Most Favoured Nation Principle and under both the WTO Agreement and the EU FTA for national treatment.

most likely to seek enforcement,¹³⁴ but the placing of others on the scale is more difficult.

Trade agreements are not set in stone¹³⁵ and it is possible for the parties to change the agreement to reflect changing policy desires or economic circumstances. In simple terms, if the United Kingdom wants to change the law in a way which would be in conflict with a free trade agreement it could risk infringement actions under the agreement, or it could ask the other party to agree a change to the agreement.¹³⁶ But what if the obligation is in more than one FTA? Agreeing a change to one FTA would be difficult, a change to two FTAs more difficult still, and to three or more FTAs incredibly difficult unless the United Kingdom was willing to make major concessions. Likewise, if Parliament¹³⁷ legislates contrary to an FTA, the risk of enforcement action multiplies for each FTA imposing the obligation in international law. Accordingly, obligations can be locked in with one or more keys, and an obligation which is double-locked or tripled-locked is very unlikely to be changed or an infraction worth risking.

H. APPROACHING THE ISSUE

This book falls into three parts. The first begins in Chapter 2 by exploring how free trade agreements, as international agreements, would be interpreted by dispute resolution tribunals under the agreements themselves, by a WTO

¹³⁴ There have already been steps to enforce the Northern Ireland Protocol: Letter from Vice-President Maroš Šefčovič to David Frost, 15 March 2021 https://ec.europa.eu/info/publications/letter-vice-president-maros-sefcovic-david-frost-15-march-2021_en and, at the time of writing, there remains disagreement between the parties as to how it should be applied.

¹³⁵ President Trump, who had been unhappy with the North American Free Trade Agreement (NAFTA) managed to renegotiate it so that it could be replaced by the United States-Mexico-Canada Agreement (USMCA), which entered into force on 1 July 2020.

¹³⁶ There is a very broad implementing power for the Trade and Cooperation Agreement (that is the EU FTA): see European Union (Future Relationship) Act 2020, s. 31 and also for other trade agreements under the Trade Act 2021, s. 2. Indeed, the powers seem wider than even the European Communities Act 1977, s. 2(2) as the 2020 and 2021 Acts allows any provision to be made which the relevant national authority “considers appropriate” and it extends to future agreements.

¹³⁷ As intellectual property (except plant variety rights) is a reserved matter it would only be the Westminster Parliament: see Scotland Act 1998, Sch. 5, para. C4; Northern Ireland Act 1998, Sch. 3, para. 27; Government of Wales Act 2006, Sch. 7A, para. C4. Accordingly, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which empowers Scottish Ministers to use delegated powers to give effect to EU law has no role.

Dispute Resolution Panel and also by the domestic courts. From this basic starting point the discussion goes on in Chapter 3 to look at the rules against non-discrimination in international trade law and, in particular, its two cornerstones: the principles of national treatment and most favoured nation. These principles mean that where the United Kingdom enters a trade agreement with country A, it can have implications in respect of obligations it owes to countries B, C and D as well.

Over the following six chapters, the second part of the book, the obligations the United Kingdom has agreed under the various FTAs are explored. The discussion is confined to agreements that have been concluded by the end of June 2021,¹³⁸ any subsequent agreement will probably just reinforce the points made. It will be seen from each of these chapters that large swathes of EU law, set out in Directives and Regulations, are textually replicated in FTAs. Thus, it will become apparent that despite leaving the European Union, a substantial part of the EU intellectual property regime is not only retained EU law, but is locked in for the future as departure requires amendment, renouncing or breaching a range of international obligations. Furthermore, the United Kingdom is currently in the process of trying¹³⁹ to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.¹⁴⁰ This Agreement, like many FTAs, includes an intellectual property chapter. Accordingly, the discussion in Part II will examine the extent to which existing international obligations of the United Kingdom might present challenges as well as highlighting the changes that might need to be made to domestic law to implement the CPTTP. The final part of the book provides a calendar of these locked-in laws for easy reference.

¹³⁸ The UK–Australia Free Trade Agreement, which was reached on 16 June 2021, is only an agreement in principle at the time of writing. It is expected that a final text will be agreed by the end of 2021.

¹³⁹ Liz Truss, Secretary of State for International Trade, Written Statement on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 1 February 2021, Hansard, Vol. 688.

¹⁴⁰ Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam are all currently parties; there are a further four signatories who have yet to ratify: Brunei, Chile, Malaysia and Peru (and the United Kingdom has separate FTAs with all but Brunei, Malaysia and New Zealand).