

# CRUNCH TIME

*With just six months until a historic vote, Robert Buchan considers the impact of independence on Scottish IP*

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**O**n 18 September 2014, eligible voters in Scotland will be asked, "Should Scotland be an independent country?" Voters face a simple choice between "yes" or "no". However, the plethora of constitutional law issues to be considered, as well as key post-independence issues, such as currency, European Union (EU) membership and allocation of territory and territorial waters, means that, in reality, the decision is not a straightforward one.

Media coverage of the referendum has so far largely focused on the constitutional and financial issues, with IP not playing a leading role in the debate. Yet, Scotland is home to many IP-rich sectors, such as food and drink, oil, gas and renewables, IT and life sciences, all of which are integral to the success and prosperity of its

economy. As companies doing business in Scotland continue to invest increasingly in intangible assets, it is vital that they be assured of the continued ability to effectively protect and exploit their IP, whether Scotland remains part of the UK or not.

This article therefore considers the current IP regime in Scotland and the potential impact of independence for IP.

## Current IP regime

While Scotland already has its own devolved Parliament, with only one specialist exception relating to a Scottish Tribunal under the Plant Varieties Act 1997, IP law is a matter reserved for Westminster, meaning that the Scottish Parliament cannot legislate on substantive IP law. As Scotland is a separate independent legal jurisdiction within the UK, IP enforcement is carried out on a local level, primarily in the Court of Session in Edinburgh,

with specific IP judges and case management rules.

On the registration side, the UK IPO currently offers registered UK patents, trade marks and design rights that cover Scotland. As part of the UK, Scotland is also an EU Member State and subject to the EU's harmonising legislation, and to the provisions of various international treaties that relate to IP.

If Scotland decides to become an independent country, it cannot be assumed that the status quo would continue. In particular, membership of the EU and/or a whole host of other relevant and international treaties is unlikely to be automatic. Replicating the arrangements that apply currently to the UK will require negotiation and will take time to finalise.

It is also relevant to consider the timing of a transition to independence, to place matters in a practical context. A "yes" vote



in September will necessitate a transition period during which representatives from all relevant political parties will negotiate with the UK Government and/or relevant European or international bodies as to the terms upon which Scotland will become an independent country. This will include seeking to obtain membership of relevant organisations or treaties, as well as setting up any new institutions or infrastructure as required. It is the Scottish Government's stated desire to have that transition completed prior to the Scottish Parliamentary elections scheduled for May 2016. Many believe this to leave a narrow window for negotiation and, if required, the setting up of new institutions, such as a Scottish IPO.

## Issues to consider

### Existing UK IP rights

I am not aware of any detailed consideration having been given to the impact of Scottish independence on the scope and validity of existing national registrations, such as UK trade marks or patents. Irrespective of EU membership, Scotland would be separate from the rest of the UK.

Not surprisingly, the Scottish Government favours the continuation of the status quo. The recently published White Paper "Scotland's Future – Your Guide to an Independent Scotland", contains a commitment to ensure the continuity of the legal framework for protecting IP. This will require agreement to be reached, for example, with the UK Government and the UK IPO. It therefore seems likely that existing UK-wide registered rights would remain in play. Moving forward, it will be interesting to see if future UK-wide registered rights would still be obtained via the UK IPO or whether a Scottish IPO would be established. As the status quo is preferred, it seems unlikely that there would be any specific Scottish trade marks, patents or design rights, for example – but that is not something that could be ruled out for new registrations in future.

### Existing and future Community IP Rights

In the White Paper, the Scottish Government proceeds on the basis that, as Scotland will be an EU Member State, it will meet European regulations and directives on IP protection, as well as international patent and trade mark protections.

Most informed commentators take the view that Scotland would ultimately obtain EU membership – what remains uncertain are the terms and timings of membership.

Were Scotland no longer a member of the EU or unable to become a member until several years after independence, consideration would need to be given to the scope and validity of existing European-wide registered rights. Would they continue to have effect in Scotland or possibly convert to a Scottish or UK national registration only?

Given the continued heated debate around the new Unitary Patent and Unified Patent Court, consideration would also have to be given as to whether (again absent specific accession to the relevant agreement) the new Unitary Patent would or could have any effect in Scotland. If Scotland were no longer an EU Member State, then the practical result may be that its businesses could apply for Unitary Patent protection, providing protection only in other EU Member States. Again, would additional national protection be required?

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## Possible opportunities

There may, of course, be real opportunities arising out of a new Scottish constitutional settlement allowing substantive IP issues to be legislated upon from within Scotland. There could be the benefit of the status quo plus additional Scottish IP protection. For example, in the White Paper, the Scottish Government proposes that it will take steps to allow Scotland to offer a simpler and cheaper, more business-friendly model than the current UK system, which it is claimed can be expensive and bureaucratic for small firms. In particular, the Scottish Government has focused on the German utility model. A new type of registered IP protection based on this could introduce protection for technical ideas and petty patents, with generally a different and lower test than that applied to traditional patents, making such protection cheaper and easier to obtain.

In addition, the Scottish Government has indicated that it would amend existing restrictions that affect the ability of universities and colleges to attract international students and researchers. The aim is that a larger body of talent could be developed in Scotland to support high-growth companies in the creation of valuable research and IP.

## Advice to IP owners?

While the current opinion polls tend to indicate that a "no" vote seems likely, there is more than enough time for that position to change, leading the way to an 18-month transition period. IP owners and their advisers should ideally now be actively considering the IP portfolio that they have or wish to develop in Scotland and how a "yes" vote could affect them. This will ensure that they are best-placed to engage fully with the relevant parties in any post-independence negotiation to at least maintain, and ideally improve, their IP position.

1) [www.scotland.gov.uk/publications/2013/11/9348/downloads](http://www.scotland.gov.uk/publications/2013/11/9348/downloads)

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