



How Could Brexit Affect Your IP?

Brexit- the UK leaving the EU- will fundamentally change the way that laws are applied and commerce is done across Europe. The effect on the management of IP rights is no different as much of the UK legislation is based on the harmonized approach across Europe that predated the Brexit referendum result. This briefing note focuses on what the repercussions of Brexit may have on the most common types of intellectual property portfolios – those comprised of patents, trade marks and registered designs. It is important to note that these are only some of the affected areas, for example Brexit will affect the UK life sciences regulatory framework and may have implications in the UK's participation in the European Digital Single Market. Other areas where a Brexit might affect intellectual property proprietors include copyright, exhaustion of rights, anti-counterfeiting measures (such as customs seizures) and the newly-adopted EU Directive on Trade Secrets.

Classical European Patents

The current European patent system, governed by the European Patent Convention (EPC), operates independently of the EU and will not be affected by Brexit. Non-EU countries Norway, Switzerland and Turkey, are already signatories to the Convention and participate in the system. The EPC provides a legal framework for the granting of a bundle of European patents via a single, harmonised procedure before the European Patent Office. Managed by the European Patent Office, which is not an EU institution, patent rights obtained under the EPC are nationally-enforceable and nationally-revocable. After Brexit, applicants from Ireland, the UK and other EPC participant countries will still be able to apply to the EPO designating the UK and, via that route, obtain national UK patent rights.

EU Unitary Intellectual Rights

The proposed Unitary Patent

Brexit might prevent the UK from participating in the long awaited "Unitary Patent" (UP) system. EU member states have, for many years, been negotiating the creation of a European patent with unitary effect and a unified European patent court with exclusive jurisdiction for litigation relating to European patents and European patents with unitary effect (unitary patents). The effects of Brexit are already being felt with delays in the UK ratification pushing out the start date to 2018 at the earliest. If ratified before the UK actually leaves the EU, is evident also that as the UP system is underpinned by the EU's legal framework, that once the UK leaves the EU, either the UK will no longer participate in the Unitary Patent system or the existing agreement may have to be re-written, if unitary patent rights are to be extended to the UK as a non-EU jurisdiction. There is much speculation at present and recent commentary by the EU's Brexit negotiator suggests that IP issues such as the possible location of the UPC Central Division Court in London may have to be reconsidered as part of an overall divorce settlement. The final outcome is far from certain at present.

EU Trade Marks and Registered Community Designs

What appears less speculative is the effect of a Brexit on the unitary EU trade mark and registered design. The EU Trade Mark and Registered Design is based in EU law and extends protection as a unitary right in every member state of the EU. In the aftermath of Brexit, the UK will not be part of this unitary collective and as a result neither new nor existing EU Trade Marks will offer any protection in the UK. Trade mark applicants and proprietors seeking trade mark protection in the UK will have to obtain a national UK trade mark in addition to their EU Trade Mark. It appears that for existing rights, a sensible approach would be to transpose via legislation those EU registrations on to the UK register. Going forward, rights in the UK and the EU will have to be maintained separately.

This will not only increase the cost and complexity of administratively maintaining these portfolios, but it will also be vital for proprietors of EU Trade Marks to ensure the use of their mark extends into both the UK and other EU member states in order to prove genuine use or prevent revocation on grounds of non-use in either the UK or the EU respectively.

What next?

Brexit has been referred to as a divorce, and not necessarily a happy one. With much negotiation to happen between now and the final settlement, it is evident that any forecasting on the alternative relationship that the UK will establish with the EU is mere speculation. Potential arrangements could follow the relationships between Norway and the EU or the World Trade Organization, WTO, and the EU.

Looking at the Norway model which probably is representative of what is being coined a “soft Brexit”, if the UK could negotiate a departure that facilitated it joining the European Free Trade Association and remaining a member of the European Economic Area (EEA) then while EU Trade Marks and Community Designs would cease to have direct effect in UK, other national rights would be unaffected and would probably remain harmoniously aligned with EU law since most relevant directives apply to the entire EEA. Exhaustion of rights apply EEA-wide, and so would be unaffected. It is evident that even in this “soft Brexit” option there are potential concerns with existing IP licences, security over IP rights, and judgments and injunctions in IP proceedings.

If, on the other hand, the UK left the EU without any form of free trade agreement, following the WTO model - the “hard Brexit” option - then the UK courts would no longer be required to interpret UK intellectual property law in the light of EU rules. This could result in a gradual divergence between how rights are interpreted in the UK and EU. Any major shift away from existing EU law is unlikely to happen quickly, as it would involve repealing individual aspects of domestic UK legislation. However, one relatively foreseeable consequence relates to exhaustion of rights. If the UK was not part of the EEA, trade mark and design rights in force in EU member states could be used to prevent goods first sold in the UK from being imported into, and resold in, the EU. Similarly, trade mark or design rights in the UK could be used to prevent goods first sold in the EU from being imported into and resold in the UK. Parallel trade in and out of the UK could decline and price differentials could arise between the UK and the EU. Because approximately 45% of UK exports go to the EU, this could become a very significant issue for the UK.

Watch this space

Although concerns over IP assets weren't likely to be foremost in the mind of an average voter in June 2016, it is apparent that there will be consequences for business including changes in managing intellectual property. The ultimate form of a post-Brexit landscape is not yet clear and will involve a transitional period punctuated by rounds of negotiations. What is clear, is that the management of IP rights will be more complex and those advising and owning IP portfolios will have to take affirmative action to maintain the value of these portfolios. Hanna Moore + Curley advises clients to consider their protection strategy in light of a Brexit.

If you would like further information on any aspect of intellectual property or to discuss the issues in this article, please contact us by e-mail: mail@hmc-ip.com or call us: +353 1 661 3930.

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