Brexit Is Upon Us (well, almost)

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by Ron Moscona

Now that the political rollercoaster of the past 3 years over Brexit has drawn to a close with the UK electorate falling firmly behind Boris Johnson and a Conservative Party determined to leave the European Union (EU) with no further delays, the new withdrawal agreement reached between the UK government and the EU is being signed by the EU and will shortly be ratified by the UK government. The UK will accordingly cease to be a member of the EU from midnight on 31 January 2020.

Legislation has been passed by Parliament, known as the European Union (Withdrawal) Act 2018, which will bring to an end, from a domestic UK law perspective, the application and supremacy of EU law in the UK, as of the “exit date”. The legislation will convert EU law, as it exists on the exit date (and which forms a significant part of existing law in the UK) into domestic UK law. This will guarantee continuity of the law as it applies domestically in the UK.

In many areas, the exercise of transposing EU law into domestic law will require significant amount of detailed secondary legislation, much of it has already been developed over the past few years.

In the context of intellectual property rights, legislation will address important (and potentially complex) issue such as the continued protection of EU trade marks and

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registered designs in the UK.

The process the UK government announced in this respect will involve a requirement for the owners of EU rights to notify the UK intellectual property office of their desire to maintain protection in the UK, but not a requirement to re-file their trade marks and designs in the UK. More complex arrangements will be put in place in relation to pending applications before the EU Intellectual Property Office (EUIPO) and to address issues such as priority rights, non-use challenges and trade marks with a reputation (issues where geographical considerations may apply).

But in fact all this will not take place on 31 January 2020.

The key element of the Withdrawal Agreement between the EU and the UK is the establishment of the “transition period”. That period, which will continue until 31 December 2020, is designed to give the parties a period of time to negotiate a new trade deal or trading arrangements for the future.

From a UK law perspective, the transition period is implemented through another piece of legislation known as the European Union (Withdrawal Agreement) Act 2020. The effect of this legislation (which received royal assent on Friday 24 January) is to suspend the effect of the European Union (Withdrawal) Act 2018 until 31 December 2020. So in actual fact (at least from the domestic law point of view) the UK will remain subject to EU law and to the jurisdiction of the Court of Justice of the EU until the end of the transition period, notwithstanding that it will no longer be an EU member from 31 January.

Many consider that an 11 month period is woefully inadequate for negotiating a complex trade agreement and believe that the transition period should be extended from time to time to allow time for the necessary discussions to take place. The UK government however is adamant that the transition period will not be extended.

One possible and perhaps not unlikely possibility is that a trade deal of some description might be reached by the end of 2020 but it will probably be partial and may well include transitional arrangements in many different areas to allow the status quo to continue for an additional period whilst further agreements and arrangements are being discussed and put in place.