

Brexit: The UK Government Issues Guidelines on the Future of Intellectual Property Laws in the Event of a ‘No Deal’ Brexit

As has been widely reported in the recent weeks, the UK government is currently trying to progress negotiations on a withdrawal agreement and a framework for its future relationship with the EU. However, uncertainty remains as to whether such negotiations will be successful. If an agreement is not reached by 11pm GMT on 29 March 2019 (**‘exit day’**), the UK would be treated by the EU as a ‘third country’.

In preparation for this possible outcome the UK government has recently published guidance explaining the UK government’s approach to how a ‘no deal’ scenario would affect UK intellectual property law. This guidance covers four key areas, trade marks and designs, patents, copyright and exhaustion of IP rights.

This guidance has been issued against the backdrop of the UK government’s earlier papers on the ‘Great Repeal Bill’ (the proposed UK statute intended to effect the UK’s departure from the EU). These papers indicated that any EU IP laws that are recognised in UK domestic law immediately before Brexit will continue to have direct effect in UK domestic legislation following Brexit coming into effect.

Trade marks and designs

The government paper confirms that in a Brexit situation the UK will continue to guarantee protection to EU registered trade mark and design rights by creating new UK equivalent rights.

Any pending applications for EU trade marks or Community designs will have nine months from the date of exit to apply for the same protections in the UK. Any such applications will retain the priority date of the relevant EU application.

The process for new applications for both UK trade marks and registered designs and EU trade marks and Community designs will remain unchanged.

Information regarding the status of legal disputes involving EU trade marks or registered

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Community designs which are ongoing before the UK courts will be provided prior to Brexit by the UK government.

Unregistered Community design rights provide up to three years protection for the holder from the date that the design is initially made available to the public in the EU. The UK has a separate design right which lasts for a period of up to fifteen years. As with registered Community design rights, all unregistered Community designs rights which exist at the time of Brexit will continue to be protected and enforceable in the UK for their existing period of protection. The UK government intends to create a new unregistered design right which mirrors the characteristics of the unregistered Community design right.

Patents

As much of patent law has a basis in UK domestic legislation, the existing systems (including conditions, legal requirements and application processes) will remain in place but will operate independently from the EU. EU legislation relevant to patents and supplementary protection certificates will be retained in the UK law and will form the UK's own supplementary protection certificate regime on exit. Any existing rights and licences in force in the UK will remain in force after exit day.

The Unified Patent Court ('UPC') has not yet been established as it still needs ratification by Germany (the timing of which, vis-à-vis Brexit, is unknown). The UPC is intended to be a single international forum established by 25 EU countries to provide businesses with a streamlined process for enforcing patents. The UK government has stated that it wishes to remain part of the UPC and unitary patent system on exit day if possible. If the UPC is ratified and comes into force, the UK will explore whether it would be possible to remain within the UPC and unitary patent systems following Brexit. Following Brexit it may be that staying within the UPC and unitary patent system is unworkable. To do so would mean that the UK has to accept the supremacy of European law in these matters and this is most likely not acceptable to certain UK political circles who regard the supremacy of any form of outside law and of forum as objectionable.

Copyright

The paper notes that while much of the UK's copyright legislation is underpinned by EU rules there is a body of EU law (including cross-border mechanisms) that goes beyond this. The good news is that many of the EU rules have been directly incorporated into UK law and so it is envisaged that protection for copyright works will remain largely unchanged in the UK. The wider cross-border mechanisms include reciprocal protections and benefits which apply between EU member states only. These reciprocal rights include, among others, sui generis database rights, portability of online content services and country of origin principle for copyright clearance in satellite broadcasting along with cross-border transfer of accessible format copies of copyright works (which the UK intends to ratify after Brexit). The papers indicate that the UK will continue to recognise the reciprocity of these rights following Brexit. However, without a deal following Brexit it is highly likely that the EU may not recognise the UK's reciprocal rights

in respect of these matters.

Exhaustion of IP rights

The UK is currently part of the EEA exhaustion scheme which means that once a protected product is put on the market in the EU the rights-holder loses the right to control distribution of such product. The paper indicates that the UK will continue to recognise this regime following Brexit for an undefined period of time. However, without a deal, the EU may impose restrictions on the import of goods from the UK to the EEA and permission from EU rights holders may be needed. The UK government is presently investigating how an applicable exhaustion scheme could work post-Brexit.

In the immediate term, the UK's enforcement framework will remain unchanged, such as the process for intercepting counterfeits and other infringing goods at the border. The UK is prepared to establish a framework for enforcement cooperation between the UK and the EU which will facilitate trade in goods and avoid a 'hard border' between Northern Ireland and the Republic of Ireland. The UK will also continue working with the EU Observatory on infringement of intellectual property rights and to be part of the Commission's work on tackling commercial-scale infringement.