



THE IMPACT OF BREXIT ON IP RIGHTS

The United Kingdom's vote to leave the European Union has led to a period of legal uncertainty with the future relationship between the UK and EU not yet being defined. Intellectual property law is not safe from the immediate effects of Brexit and also faces an uncertain future. It is anticipated that for at least the next two years, the UK will remain a full member of the EU and will continue to apply EU intellectual property law. As no Member State has withdrawn from the EU before, the impact on IP rights cannot be precisely predicted and depends on the outcome of negotiations and agreements made between the UK and the EU.

Key issues

- Brexit has created a lot of uncertainty in the UK and across the EU
- While the EPC remains unaffected by EU membership, the UPC still requires ratification from the UK and may be delayed even further
- The EU Trade Mark system could undergo significant changes post-Brexit

PATENT RIGHTS

As the UK is a member of the European Patent Convention, which is not linked to EU Member State status, the status quo of European patents should not be significantly impacted by Brexit. The European Patent, which is a bundle of national patents accessed through a central application process, will still be available through the European Patent Office.

However, the supplementary protection certificate ("SPC") regime may be affected by Brexit. SPCs allow certain, limited types of inventions, primarily those from the pharmaceutical sector, to extend the term of patent protection beyond the usual 20 years. The rationale for this is that a product protected by these patents often has a very long approval process, which runs during the term of patent protection and effectively reduces the period of time during which the product is protected by the patent. SPCs are governed by an EU regulation that may not automatically apply after Brexit. If this is the case, and to ensure the protection granted by SPCs post-Brexit, the UK could implement a national SPC-equivalent right or opt into the European SPC regime if it becomes a member of the European Economic Area (the "EEA").

The largest and perhaps most critical impact that Brexit will have on patents is in the implementation of the Unified Patent Court (the "UPC"). The UPC arguably constitutes the biggest reform in the history of European patent law. Under the current UPC Agreement, ratification from the UK is required before the UPC can come into effect. In addition, one of the three central division courts was supposed to be based in London. It is unclear whether it is even possible for the UK to ratify the agreement following Brexit and participate in the system after it ceases to be an EU Member State. The politically charged nature of UPC Agreement negotiations only further complicates the matter. Further delays with respect to the UPC appear inevitable as the plethora of issues is sorted out.

REGISTERED TRADE MARKS AND REGISTERED DESIGNS

Registered trade marks and registered designs are the most harmonised forms of IP rights across the EU, but could undergo significant changes post-Brexit.

It is possible that the UK will no longer be party to the EU regulations that govern and implement the European Trade Mark ("EUTM"). These unitary rights automatically cover all EU Member States. Without any new, implemented agreements between the UK and the EU, existing EUTMs and Registered Community Designs would no longer be applicable in the UK. IP holders may still be able to obtain protection for trade marks and designs through the national UK Intellectual Property Office, but the impact on existing registrations will depend on the arrangements agreed upon by the EU and the UK (and/or unilateral implementation by the UK).

There has been much discussion on the various options for extending the protection which EUTM holders currently have in the UK. Potential scenarios could involve some system whereby EUTMs are converted into national rights or simply involve the UK unilaterally recognising and protecting EUTMs despite not being an EU Member State. The likelihood is that the UK will still protect EUTM holders' rights post-Brexit.

EUTM holders who primarily use those marks in the UK may find their EUTMs at risk of becoming vulnerable to revocation for non-use in the EU following Brexit. It is unclear whether EUTMs that undergo any form of conversion into UK rights, but are not currently in use in the UK, will be able to continue to rely on previous use elsewhere in the EU.

Another issue could arise if the UK does not maintain access to the single market. Trade mark owners may be able to restrict the trade of goods between the UK and EEA Member States as placing goods on the market would no longer "exhaust" the trade mark owners' intellectual property rights. At this time, trade mark owners cannot typically prevent the selling of their products if they have been lawfully offered on the single market previously. If the UK did not become an EEA member or reach an agreement with the EU to access the single market on equivalent terms as an EEA member, then placing the products on the market in an EEA Member State would not exhaust the trade mark rights in the UK (and vice versa).

Finally, the practical management of IP portfolios is open to change. IP owners domiciled in the EU or under EEA jurisdiction do not need professional representation in proceedings before the European Intellectual Property Office. In contrast, parties based outside the EU or under EEA jurisdiction must be professionally represented for most proceedings. The UK's approach to professional representation is yet another aspect to be considered.

COPYRIGHT AND DATABASE RIGHTS

Copyright is a national right, but it has been heavily influenced by international treaties and European legislation. The UK's membership in the EU significantly shaped and influenced the UK Copyright, Design and Patents Act of 1988 (as subsequently amended). It is unlikely that the UK will make significant changes to its copyright law. Even the aspects influenced by EU legislation are likely to remain, at least in the short to mid-term following Brexit.

In terms of database rights, the UK will need specific legislation for UK national database rights if the EU right no longer applies. Database rights are a unique European intellectual property right that is only available to EEA nationals. The status is unlikely to be affected if membership in the EEA is negotiated.

LICENCE AGREEMENTS

Brexit will have a more practical effect on licence agreements. Future licence agreements will have to take into account the political and geographical changes resulting from the UK leaving the EU. Current licence agreements, prior rights agreements and coexistence agreements often make the assumption that the European Union is a single territory and that the licence is granted for all countries in the EU. It is recommended to review any relevant licence agreement that has been concluded and check whether it is sufficiently clear, accurately indicating IP usage rights and territories. In addition, clauses such as those regarding payments or the right to handle litigation might need to be adjusted accordingly.

CONCLUDING REMARKS

The impact of Brexit on intellectual property rights depends on negotiations between the UK and the EU. The closer the relationship between the EU and the UK post-Brexit (for example if the Norwegian EEA model is adopted) the less scope there will be for impact on intellectual property rights. If the UK breaks away from the EU completely, there is a greater scope for the EU and UK approach to various intellectual property rights to diverge.

Rights holders should work hand in hand with their legal advisors to monitor developments over the coming weeks and months to assess the impact on intellectual property rights. In the meantime, rights holders can start to think about their reliance on unitary rights and their approach to licensing, so that they will be prepared to act once the nature of the post-Brexit relationship becomes clearer.

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