

Brexit: High Law Society

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In a recent communication, the organisations that represent the main UK IP professions have jointly reached out to the UK Department for Exiting the European Union with a series of recommendations. Essentially, the purpose of the communication was to list concisely the key areas of IP-related concern for rights holders and those who practise in the industry.

The key points of discussion were as follows:

Continuation of EU-derived IP rights

Under this heading, the communication offers two approaches to rights currently enjoyed in the UK by way of the EU:

Option A proffers a complete continuation of “existing substantive and procedural pan-European rights”, and the associated defences. This would be preferable from the point of view of UK-based rights holders, obviously, and could be based on a harmonisation model such as those adopted by jurisdictions governed by EU/EFTA treaties. This approach, whilst attractive from a UK-centric point of view, may well meet objection during the negotiation process given that it confers unfettered access to a market from which the UK is supposedly exiting.

Option B details the more realistic position wherein the UK government legislates for immediate and automatic continuation of EU rights in the UK, following March 2019. This would include, for example, the introduction of domestic UK rights equivalent to the EU rights that would cease to exist in the UK and maintaining the original priority dates of the EU rights.

Unitary Patent / Unified Patent Court Agreement (“UPC”)

It is requested that the UK confirms its intention to remain in the UPC and that there is a concerted effort to bring the UPC agreement into effect as soon as practicable.

Exhaustion of rights

Clarification is sought with regards to exhaustion of rights, that is, if or to what extent certain IP rights (a trade mark, for instance) can be enforced when goods are first sold in the UK, in the EU, in the EEA or internationally and then resold. The communication is not detailed in its proposal, but highlights the importance of consulting widely and publicising the agreed position post-Brexit, so that there may be much-needed certainty for industry.

Rights of representation

Whilst there are routes UK based practitioners can take in order to retain rights of representation relating the governing bodies of the EU, this remains a hot topic. The communication describes rights of representation as something that ought to be a priority for the UK government, describing the continued rights of representation as fundamental in ensuring the UK retains its position as a “global leader” in IP. The communication goes on to suggest that curtailment of these rights would not be in the interest of the UK nor of the EU. Whilst this latter point may well be correct with regard to the narrative of the UK/EU relationship generally, following the Brexit vote, this mutually beneficial arrangement may be lost in the complex negotiations (although this commenter remains positive that this need not be the case).

Mutual recognition of judgments

The communication notes that international businesses are apparently exhibiting a degree of caution when selecting the UK as a jurisdiction for agreements, due to uncertainty over enforceability of judgments from the UK in the post-Brexit world and stresses the need for the continuation of current arrangements under the Rome and Brussels regulations and urges the government to negotiate accordingly.

The list above is certainly non-exhaustive, if you’ll excuse the pun, it terms of areas wherein clarification is required prior to March 2019. That said, in addition to the Commission letter to the [EU27](#) and the [doomsday scenario](#) received from the

EUIPO, we are starting to see a picture emerge as to what the major governing bodies are anticipating and desire to have as the outcome of negotiations. Certainly, preservation of the unitary rights, continued systems of rights exhaustion and certainty around rights of representation are at the fore.

With the UK legal industry having now (internally) set out its position, one would hope that the UK's representatives are entering the relevant negotiations with a reasonable appreciation for the key areas of concern for the UK-based brand owner. As alluded to above, whilst there must be give and take with regard to the complex negotiations which will take place, this commentator remains cautiously positive that a mutually-beneficial middle ground will be reached.