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Brexit: A Working Draft

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On 28th February, the EU Commission published the *Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (the “Draft”), as can be viewed [here](#), with commentary [here](#). In a week of weather warnings, plunging temperatures and de-icer fume related headaches, the preliminary position as presented in the draft provides us much to be positive about here in the UK.

As the name suggests, this document is a draft and not a final document. It sets out the EU Commission’s proposals for what the Brexit treaty might look like, in the same sort of language that we can expect to see in the final treaty. However, it is perhaps better seen as a codification of the proposals which the Commission has made over the last few months, rather than providing clarity on what the final position might look like – that’s still up for negotiation.

Nestled in amongst 119 pages of discussion, the Draft features a brief section relating specifically to intellectual property, beginning at page 30. Despite its relatively short length, there is a lot of information to unpack. This post will focus on the implications for trade marks, in particular with regards to preservation of rights, only. A further post shall follow, addressing the implications for design right holders specifically.

Before delving into this explication, a brief overview of the other IP issues raised by the Draft are set out below, for reference:

- Holders of Community plant variety rights will become rights holders in the UK relating to the identical plant variety, where this earlier right was granted before 31st December 2020

- Holders of Registered Community Designs shall become the owner of a registered design in the UK also.
- Equivalent rights shall be created for those currently entitled to exercise rights in the EU relating to Community plant varieties, geographical indications or traditional specialities, offering at least the same level of protection as afforded by EU law
- The term of design rights and plant variety rights in the UK, established as per the points above, shall be equal to the remaining term of the equivalent EU rights
- The date of filing or priority in relation to the design rights and plant varieties detailed above shall be the same as the equivalent EU rights
- No administrative burden shall be placed on the rights holder to generate these new rights
- International Registrations designating the EU shall enjoy protection in the UK in light of these International Registrations
- Unregistered Community designs generated prior to 31st December 2020 shall generate an equivalent domestic right.
- Rights which were exhausted in both the EU and UK before 31st December 2020 shall remain exhausted in both the EU and UK.

Trade marks: preservation of rights

The Draft proposes that the holder of an EUTM or Community Design, registered or granted before the end of the transitional period (31st December 2020), shall become a holder of an equivalent right in the UK, by way of an automatic conversion process, which will hold the same renewal/filing/priority date as the EUTM.

There are several key terms in this article which warrant further discussion. Of particular note, the resulting right is to arise *without any re-examination*. The right which arises in the domestic system will also consist of the *same sign*. The interplay of these two terms may yield interesting results, as marks which have been rejected in the UK but accepted at the EUIPO will be automatically registered domestically. In the UK Trade Marks Act 1994, which has not yet been amended in accordance with the new EUTM Directive, it is still a requirement that a trade mark should be a *sign capable of being represented graphically*, a provision without equivalence in EU law. As a result, the automatic assumption of registrability in the UK may result in a large number of non-traditional marks making their way onto the UK register, that otherwise may not have done.

The Draft goes on to propose that Applications which are under opposition, or any other threat of revocation/invalidation, at the end of the transitional period will be revoked in the UK if revoked in the EU. This means that a large number of EUTMs will

have their equivalent right generated in the UK, only to then be declared invalid or revoked in line with the EUTM.

Of considerable importance is the reference to non-use periods, as detailed below:

Art 50 (5) (b)

[the resulting domestic trade mark] shall not be liable to revocation on the ground that the corresponding European Union trade mark had not been put into genuine use in the territory of the UK before the end of the transition period.

The upshot of this position is that the automatically generated domestic protection shall enjoy a 5-year non-use period in the UK. This means that an enormous number of marks would hit the UK register despite being vulnerable from a use point of view, only to perch there for 5 years until the grounds to cancel them arise. This development would surely alter the fabric of the register considerably.

Finally, of considerable importance is the Draft's reference to the registration process: specifically that there ought to be no administrative procedure for the rights owner, including no need for a domestic mailing address. The administrative burden that this position would generate for the UK Office, then, would be extensive. A huge number of rights would be afforded to EUTM rights holders, at no cost to the rights holders, with the resulting onslaught of registration related correspondence being sent all across Europe, once again, at the cost of the UK Office. Whilst it ought not be surprising that this Draft places much administrative burden on the UK, given its origin, we will need to await further negotiations before these points can be conclusively settled. One possible counter balance could be the increase of renewal fees for these automatically generated rights, in order to retrospectively counteract the cost implications.

To conclude, then, the EU Commission is prioritising the preservation of all rights currently held by the owners of unitary rights, following Brexit. The Commission is of the opinion that the cost and administrative burden of this development ought to be borne by the UK, which may be logical given the circumstances. In addition, the Draft proposes preferential treatment of the equivalent rights with regards to revocation. The true impact of this position will only be clear once negotiations are finalised, but certainly it would appear that the Commission is aware of the implications of a gap in protection for those who currently own unitary rights.

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