Brexit: Deal or No Deal

Kluwer Trademark Blog
September 26, 2018

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Please refer to this post as: Julius Stobbs, Cameron Malone-Brown, 'Brexit: Deal or No Deal', Kluwer Trademark Blog, September 26 2018, http://trademarkblog.kluweriplaw.com/2018/09/26/brexit-deal-no-deal/

With the likelihood of a *no deal* scenario increasing as March 2019 draws closer, the UK Government has now published a series of papers detailing the likely ramifications of a such a Brexit. Of particular note, the Government has published papers discussing the likely treatment of trade marks and designs, copyright, patents, and exhaustion. With the most recent withdrawal proposal having hit several road blocks, these papers serve as the strongest indication yet of what we might face in the (increasingly likely) event of a no-deal Brexit. Several key points are presented below.

Trade marks and designs

The government will ensure that the property rights in all existing registered EU trade marks and registered Community designs will continue to be protected and to be enforceable in the UK by providing an equivalent trade mark or design registered in the UK

The paper confirms that an equivalent UK right will be generated, to ensure continued protection for those who benefit from registered unitary design and trade mark rights at present. This is a welcome clarification, as the issue of continuation of protection of the unitary rights has been a key concern from the off. With regard to applications which are pending at the point of withdrawal, the Applicant will have nine months in which to apply for the equivalent UK right.

During this nine months, the government will recognise filing dates and claims to earlier priority, as well as UK seniority, recorded against the relevant EUTM.

The paper stresses that the generation of an equivalent right will take place with a minimal adminstrative burden on the right holder. That said, owners of pending applications will be required to refile for the equivalent right, and will bear the cost of refiling, in accordance with the UK application fee structure. There will be a cost incurred, then, in retaining the protection afforded by the right, however, there won't be negative implications from a filing/priority date or Seniority claim perspective.

Copyright

The UK's continued membership of the main international treaties on copyright will ensure that the scope of protection for copyright works in the UK and for UK works abroad will remain largely unchanged.

The EU cross-border copyright mechanisms extend only to member states of the EU or EEA. On exit, the UK will be treated by the EU and EEA as a third country and the reciprocal element of these mechanisms will cease to apply to the UK.

The headline of the Copyright paper is that the EU *Acquis Communautaire* regarding copyright and related rights will be preserved in UK law (referred to as *retained EU law*) under the EU Withdrawal Act 2018. This legislation will be amended if necessary to ensure applicability.

Clearly, as the UK will be viewed as a third country by the EU and EEA, regulations which require cross border reciprocity would no longer benefit the UK. It is likely, therefore, that additional permissions and licensing implications will impact copyright holders. An example provided in the paper is that of the Portability

Regulation, which allows consumers to access online content while temporarily in an EU member state. As this will no longer apply, providers will be unable to offer cross-border access to UK consumers under this Regulation. Accordingly, this may result in restrictions on UK-based consumers' access to online content when temporarily abroad.

Exhaustion

In this scenario the UK will continue to recognise the EEA regional exhaustion regime from exit day to provide continuity in the immediate term for businesses and consumers.

The headline with regards to exhaustion is simply that the UK will continue to recognise the present principles of exhaustion, as they apply to the EEA. The equivalent position will not be guaranteed in the EU, however, so goods placed on the market in the UK will not exhaust the intellectual property rights of the right holder, where they are then sold in the EEA. One upshot of this position, then, is that we may expect implications for goods imported from the UK to the EEA, as further permissions will likely be required.

Comment

Whilst a no-deal scenario still feels like a worrying development, we welcome the most recent clarification provided by way of these papers. As March 2019 draws closer, we hope to receive further updates on negotiations and possible legislative framework for the post-Brexit landscape.

In the meantime, however, it would be advisable to adopt a fall back strategy for use in the event of a no-deal scenario. This may include a filing for a unitary mark

at present, to ensure that the mark is registered in time to avoid the costs of refiling if the application is still pending upon the date of withdrawal. The UK Intellectual Property Office has not yet commented in any detail on how equivalent rights will be generated for existing EU registrations. This raises the prospect of a significant backlog as the UKIPO works to replicate every EUTM and RCD in their own systems. Brand owners wishing to be actively enforcing their rights in the UK at the end of March 2019 might wish to consider filing separate UK applications now, to avoid any gap in protection if there is a delay in the UK translating these EU rights into national ones.