Brexit: Approaching escape velocity (part i)

Kluwer Trademark Blog
November 20, 2018

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Please refer to this post as: Julius Stobbs, Cameron Malone-Brown, 'Brexit: Approaching escape velocity (part i)', Kluwer Trademark Blog, November 20 2018, http://trademarkblog.kluweriplaw.com/2018/11/20/brexit-approaching-escape-velocity-part-i/

As set out in our previous post, the UK Government recently published a series of White Papers, detailing their envisioned protocol for the treatment of IP rights, following a no deal Brexit. Shortly after this development, the United Kingdom Government published the Withdrawal Agreement, as has now been agreed by the Cabinet. This document will now be put to Brussels for consideration at an emergency summit on 25 November 2018, and then put before Parliament, if agreed, for final backing.

The Prime Minister has been unequivocal in her depiction of the present position, claiming that the options are 1) this deal is accepted by both the EU and the UK, 2) the UK leaves with "no deal" or 3) some kind of rescission on leaving the EU altogether.

Last year, when Britain voted in favour of leaving the EU, many of us postulated that hasty refiling for UK national rights may not be an efficient use of resources, for those who currently rely on unitary rights for protection in the UK. It seemed likely at the time that 1) a withdrawal arrangement with the EU would stipulate for the continued protection of unitary rights in the UK, or 2) the UK would arrange its own conversion procedure to ensure continued protection for owners of unitary rights. Either way, an immediate and irrevocable loss of protection for holders of

unitary rights seemed unlikely. Having now seen the expected IP framework for a no-deal Brexit, as well as this new withdrawal document, do we need to change our tune and behave any differently? This first post will discuss the position surrounding a *no deal* Brexit.

No deal scenario

The White papers published by the Government repeatedly toe the party line, summarised thus:

> *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.*
>
> *(Trade marks and designs if there's no Brexit deal)*

If the Government takes this position in the event of a *no deal* scenario, one needn't expect a loss of rights in the UK following Brexit, where one is dependent on unitary rights at present.

Parties who are expecting to rely on this conversion process will still have unanswered questions, however. It is possible, for example, that the administrative burden faced by the UKIPO in generating these converted rights may lead to a delay on day one, post Brexit. If the negotiations come down to the wire, the new system may not be ready for implementation on Monday 1 April 2019. In this case, how long will the administrative backlog interrupt protection in the UK? If the prospect of this delay is sufficiently concerning, a UK filing prior to March 2019 may be a preferable option. That said, this remains very much a belt and braces approach which will not suit all parties.

The White Papers have, in many respects, improved the prospects of a no-deal scenario for the preservation of IP rights. We can now reasonably anticipate the automatic* generation of an equivalent UK right for all EU based unitary rights. Whilst a number of questions remain, this is a positive step forwards in our view.

Clearly, the political landscape in the UK remains volatile, with the PM doubling down on the Chequers deal, describing it as the only deal on the table, whilst members of her own party appear to be set on denigrating it. There are bound to be further hurdles and twists between now and March 2019, but we take cautious assurance from the White Papers and propose that the owner of a unitary right may do so also.

The position that the UK will face in the event of the Draft Withdrawal Agreement being codified is set out in a separate post, coming shortly.

*subject to concerns above re administrative delays