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IP and the draft Brexit Agreement: no surprises (except maybe in Northern Ireland?)

Alan Johnson (Bristows) · Saturday, November 17th, 2018

Whilst it is highly debatable whether the EU Withdrawal Agreement will get through the UK Parliament, the chances are that if any revised deal is struck later, the IP provisions will remain unchanged. (The Johnson brothers, and even Jacob Rees-Mogg are unlikely to be terribly exercised about matters such as the continued application post- 31 December 2020 of EU Regulations concerning SPCs applied for during the Transition Period.) In fact, the views of the EU and UK were well aligned on IP matters from the outset, with each side agreeing that there should be no loss of rights and a painless transition from the present regime to the new one. Hence there are no surprises in the draft Agreement, but simply more detail, much of which, in fact, was foreshadowed in the “no deal” Technical Notices published a few weeks ago.

Looking at individual rights, as a brief reminder, copyright rights and patents are more or less unaffected. In the case of copyright, relevant EU legislation has been in the form of Directives already implemented into UK law; whilst patents, of course, are based on the EPC system (but more about the unitary patent aspect later). SPCs have been dealt with: as national rights based on EU law, necessary transitional arrangements have been set out. But it is trade marks and designs which are primarily affected by Brexit. In both cases, the agreement provides for existing / granted EU rights to be maintained in the UK by conversion into UK national rights. The position for pending applications for registered rights is a little more complicated. Any applicant with a pending application for an EUTM at the date of exit will have a period of 9 months from the date of exit to file a national application for UK protection. Such applicants will be able to claim the priority date of the original EUTM application. Similarly, any applicant with a pending application for a RCD at the date of exit will have a period of 9 months from the date of exit to file a national application for UK protection, and again such applicants will be able to claim the priority date of the original RCD.

In relation to ongoing disputes in the UK and in member states in situations involving the UK, the jurisdiction provisions of the relevant EU regulations will continue to apply to legal proceedings which were started before exit. Any representative who was representing a party before exit can continue to represent that party at all stages of proceedings before the Court of Justice, the General Court and the EU IPO, with the draft agreement taking care of issues such as the application of the Brussels Regulation (Art 67) and ongoing representation before the CJEU (Art 91) and the EU IPO (Art 97), all of which are essential matters in terms of ensuring smooth transition. If an EUTM or RCD is declared invalid/revoked in proceedings that were ongoing at the time of exit, then such equivalent rights will also be declared invalid/revoked in the UK (except where such ground does

not apply in the UK).

There is also clarification (as expected) that IP rights which were exhausted both in the EU and the UK before the end of the transition period shall remain so.

What then of the UPC and unitary patent dossier? From that perspective, the important point about this draft agreement is the expected Transition Period. Union law still applies to the UK in this period including, of course, the unitary patent and translation Regulations. These Regulations require that unitary patents are litigated in the UPC, and hence the effect of the Withdrawal Agreement is implicitly to sanction the UPC Agreement coming into force with the UK as a participant. “All” then that is required is for the Bundesverfassungsgericht to deal with the Stjerna Complaint – which rumours suggest might happen this year. Hence, if this Brexit deal goes through in some form, and if the BVerfG delivers the hoped-for rejection of the Complaint, we could actually see the UPC start in 2019 – a mere 60 years since a pan-European patent court was first seriously mooted and a mere 20 years since the Paris Intergovernmental Conference of the EPC which started the latest efforts (your author attended his first meeting with the UK IPO on this topic on 18 November 1999).

Finally there is Northern Ireland. As part of the Protocol solution to the Irish border question, a raft of EU law will continue to apply in Northern Ireland unless and until the Protocol is replaced. These are mainly in Annex 5 to the NI Protocol and include certain IP provisions (mainly relating to GIs and customs enforcement) and perhaps most interestingly from an IP perspective, the EU pharma Marketing Authorisations and Medical Device regimes. It would appear that if this Protocol remains in place in the longer term (post- the expiration of the Transition Period), MAs granted by the EMA will continue to apply to Northern Ireland whereas the UK will have its own separate national regime (unless the UK is permitted to continue as a part of the EMA). This in turn could give rise to potential anomalies regarding the period of SPC protection in different parts of the UK, depending on what date of first marketing the new UK SPC legislation refers to. Hopefully this will not occur, but this will certainly be one issue to consider down the line.

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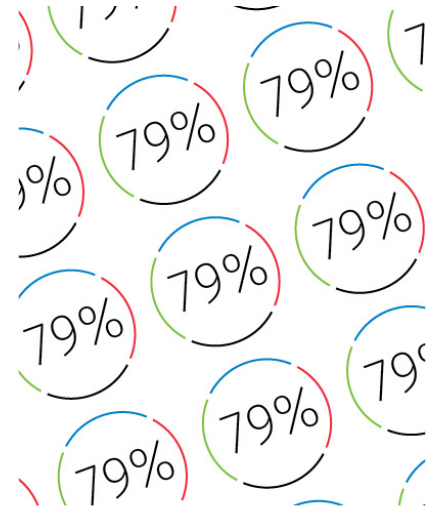
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