



Intellectual property rights – what does the future hold after Brexit?

Recent publications from the European Commission and the UK Government shine some light on the future of IP rights after the UK's departure from the EU

On February 28 2018 the European Commission published its [draft withdrawal agreement](#) setting out its proposals for the arrangements surrounding the United Kingdom's departure from the European Union, including in relation to EU IP rights. A number of provisions have already been agreed in principle (though are still subject to further technical legal revisions and/or drafting clarifications) as a result of the negotiation round with the UK held March 16-19 2018.

The draft agreement provides a transitional period until December 31 2020, during which time EU law would still apply in the United Kingdom. EU IP rights should be unaffected during this period. The draft agreement also describes what would happen to EU IP rights at the end of the transition period.

The IP provisions in the draft agreement reflect the repeated assurances of EU and UK authorities that rights holders should not be disadvantaged because of Brexit and that no rights should be lost. To that end, the European Commission proposes that registered EU trademarks, registered Community designs and registered plant variety rights be automatically duplicated in the UK.

The provision for the continued protection of unregistered Community design rights in the UK, at least in the short term, is welcome news. There are also proposals relating to the continuity of other IP rights such as geographical designations of origin, database rights and supplementary protection certificates.

There are no provisions relating to patents, which is unsurprising as the existing European patent system is not administered by the EU. The European Patent Office (EPO) is a separate international body, so UK patent protection will continue to be available through the EPO regardless of how Brexit proceeds.

Overall, the draft agreement looks like a promising start, but these proposals are far from set in stone. The draft agreement is still subject to revision by the European Council and the European Parliament and further negotiations with the UK authorities. However, there is cause for cautious optimism. In her March 2 2018 speech on the UK's priorities in Brexit negotiations, Prime Minister Theresa May mentioned the need for any agreement to cover intellectual property "*to provide further legal certainty and coherence*".



Moreover, the Government's [technical note](#) of March 6 2018 suggests that:

- the UK and EU positions are closely aligned;
- there will be a strong ongoing relationship after Brexit; and
- the Government will set new schemes in place where there is no existing UK legislation relating to certain types of right.

The technical note also states that “the UK’s overall objective is to provide maximum clarity and legal certainty for users, applicants and right holders by agreeing arrangements appropriate to each of the different types of right”.

Below is an overview of the main provisions of the draft agreement relating to EU IP rights together with an indication of whether or not the provision is agreed in principle.

Trademarks

- Where an EU trademark right has been registered before the end of the transition period, the owner will automatically be granted a comparable registered and enforceable UK trademark for free. No re-examination is required and the resulting UK trademark will share the filing, priority and renewal dates of the original EU trademark and seniority claims where appropriate. **(Provisionally agreed, save that the UK has not agreed to the EU’s proposal that the relevant UK entities carry out this process free of charge.)**
- The resulting UK trademark will not be liable to revocation on the ground that the EU trademark had not been used in the UK before the end of the transition period. Moreover, where the EU trademark enjoys a reputation in the EU, its owner may exercise equivalent rights in the UK in respect of the resulting UK trademark. **(Provisionally agreed)**
- Where an EU trademark application has been filed but not granted before the end of the transition period, the applicant will have an *ad hoc* right of priority for nine months following the end of the transition period in which to file a corresponding UK application. The priority date of the EU trademark application will count as the filing date of the UK application. **(Provisionally agreed)**
- International trademark registrations filed through the Madrid system before the end of the transition period and designating the EU will continue to enjoy protection in the UK. **(Provisionally agreed)**

Designs

- Where a registered Community design has been granted before the end of the transition period, the owner will automatically become the holder of a comparable registered and enforceable UK design at no cost. No re-examination is required and the resulting UK design will share the filing, priority and renewal dates of the original registered Community design. **(Provisionally agreed, save that the UK has not agreed to the EU’s proposal that the relevant UK entities carry out this process free of charge.)**
- International design registrations filed through The Hague system before the end of the transition period and designating the EU will continue to enjoy protection in the UK. **(Provisionally agreed)**
- The holder of an unregistered Community design which arose before the end of the transition period will be granted an equivalent, enforceable right under UK law with a term of protection that is at least equal to the remaining term of protection of the corresponding unregistered Community design. **(Provisionally agreed)**



Other provisions

- Provisions are also made for the continued protection in the UK of:
 - EU plant variety rights;
 - geographical indications;
 - designations of origin;
 - traditional specialities;
 - traditional terms for wine; and
 - database rights.
- If an EU IP right is cancelled (i.e., revoked, declared invalid or declared null and void) because of administrative or judicial procedures that are ongoing on the last day of the transition period, that cancellation will also apply to the corresponding UK right (although the UK is not obliged to declare invalid or revoke the corresponding UK trademark or design right where the grounds for cancellation do not apply in the UK). **(Provisionally agreed)**
- Where rights conferred by an IP right were exhausted in both the EU and the UK before the end of the transition period, they will remain exhausted both in the EU and the UK. **(Provisionally agreed)**
- The draft agreement provides that applications for UK supplementary protection certificates (SPCs) that are pending at the end of the transition period will be governed by the existing EU SPC legislation (both whilst pending and once subsequently granted). It seems likely that the Commission intends that all granted SPCs that are not yet in force also be governed by the existing EU SPC legislation, which would be in line with the UK's stated objective that no rights would be lost following Brexit. **(Not yet agreed)**

The EUIPO recently published a Q&A guide setting out what might happen in the event that no deal is reached between the UK and the EU before the UK's exit date of 30th March 2019. Our recent report on that can be seen [here](#).

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Need advice?

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