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BREXIT

Impact on intellectual property rights– an update on the current situation

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On 23 June 2016, within the course of a referendum, the United Kingdom voted to leave the European Union. Pursuant to Art. 50(2) of the Treaty on European Union (TEU), the United Kingdom subsequently, on 29 March 2017, handed over the application to leave to the President of the European Council. Since then there have been negotiations on the conditions of leaving between the United Kingdom, on the one hand, and the so-called EU27 – i.e. the remaining Member States of the European Union – on the other hand. The exit will affect various economic and legal areas. The latter also include the provisions in regard to intellectual property rights. There has, to date, been a great deal of speculations about how the “Brexit” may be designed in regard to such rights. On 7 September, 2017, the European Commission published a position paper which takes up the topic of the uncertainties of protecting intellectual property once the United Kingdom has left the EU, and explains the initial principles of the remaining EU Member States within the scope of the so-called Art. 50 negotiations with the United Kingdom (position paper transmitted to the EU27 on intellectual property rights, 6 September 2017).

The position paper primarily relates to intellectual property rights having a uniform effect throughout the EU. No comments are made about designing the (not yet existing) unitary patent.

One of the most important questions for holders of IP rights having a uniform effect throughout the EU is always the fate of the effect of such rights in the United Kingdom in a post-BREXIT scenario. In this respect, the primary demand put forward in the position paper is that the protection of holders of rights in regard to such rights that are uniformly protected throughout the territory of the European Union prior to the United Kingdom exiting the EU may not be undermined following the Brexit. Specifically,

the position paper provides for an automatic procedure, according to which the holders of any rights should also have the same rights for the territory of the United Kingdom after the BREXIT. This is to be ensured in the form of a national IP right in the United Kingdom, which provides the same scope of protection as the IP right having a uniform effect throughout the EU.

Summary:

In summary, the paper demands the following:

- Holders of rights having a uniform effect throughout the European Union (e.g. Union trademarks, Community Design Models) are, following the Brexit, to be deemed part of an automatic recognition, with holders of rights having a comparable scope of protection for the territory of the United Kingdom.
- This shall likewise apply in regard to protected geographic indications, protected indications of origin and protected signs in connection with agricultural products that, prior to the BREXIT, are protected under EU law.
- In regard to the costs, the position paper is in favour of not encumbering the holders of rights.
- The comparable scope of protection is also supposed to include extension deadlines, priority and seniority, as well as the prerequisites of use sufficient to maintain rights and also protection of notoriety.
- Also in regard to supplementary protection certificates for medicinal products and plant protecting agents (in line with Council Regulations (EC) No. 469/2009 and 1610/96), as well

as the extensions of them, comparable protection should exist.

- In regard to protection for databases, the position paper provides that holders of rights in the EU and the United Kingdom should continue to enjoy protection in the scope and in regard to such rights as existed as at the time prior to the Brexit. To be specific, Art. 11(1) and (2) of Directive 96/9/EU is supposed to be abandoned in regard to citizens and companies from the United Kingdom. In return, the United Kingdom should not be able to exclude citizens or companies of the remaining states of the European Union from the legal protection afforded by database law for reasons of nationality or registered office.
- The exhaustion of rights in accordance with EU law prior to the Brexit should, accordingly, remain the same for both the territory of the European Union and that of the United Kingdom following the Brexit.

Assessment and prospects

The position paper provides for automatic comparable protection for holders of rights held within the territory of the European Union following the Brexit for the territory of the United Kingdom. Further questions remain unsolved, such as questions concerning use, etc.

From a legal perspective, the position paper is probably in particular to be understood as a political statement within the context of the BREXIT negotiations, especially as the corresponding implementation primarily

needs to be provided by way of national legislation in the United Kingdom.

To be considered problematic are especially the administrative effort, as well as the anticipated costs incurred to the United Kingdom. For example, the automatic recognition of protection would increase the number of national intellectual property rights in the United Kingdom significantly.

Even if the position paper provides that costs be kept to a minimum for the holders of the rights, costs will also be incurred to the holders of the rights - at least in the long term, in so far as they wish to maintain their protection for the United Kingdom once an intellectual property right has expired. For extension fees would then have to be paid for both the territory of the European Union and for the United Kingdom. A corresponding reduction in the fees payable under EU law is probably not be reckoned with.

In summary, the proposal in regard to, for a start, having automatic recognition for existing EU law legislative positions for the territory of the United Kingdom does constitute a positive position, which is basically geared towards avoiding any loss of rights.

The position paper has already received acclaim from the Chartered Institute of Patent Attorneys in the United Kingdom (<http://www.cipa.org.uk/policy-and-news/latest-news/cipa-welcomes-ec-position-on-ip-rights-post-brexite/>).

It now remains to be seen what stance the United Kingdom will take.

The Commission's position paper is accessible online at: https://ec.europa.eu/commission/sites/beta-political/files/position-paper-intellectual-property-rights_en.pdf

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