



EU COMMISSION POSITION PAPER ON BREXIT AND INTELLECTUAL PROPERTY

On 6 September, 2017 the EU Commission released a position paper to the EU member states (excluding UK) on what it will present as the requirements to be met by the UK for intellectual property when the UK withdraws from the EU. The paper focuses on continuity of existing protection, without limiting the UK from making changes to its domestic laws (with prospective effect) in future. It reflects issues and concerns that have been widely debated among IP practitioners, while leaving the UK considerable leeway in areas of detail.

Key points of the position paper are:

- On the UK's withdrawal, holders of unitary IP rights such as EU trade marks, designs and plant varieties should retain comparable protection in UK
- This should also apply to EU protected designations of origin, geographical indications and other protected terms in relation to agricultural products. Since PDOs, GIs etc. do not currently have UK equivalents, the EU's position is that the UK will have to provide for comparable continued protection
- Protection should be automatic and cost-free for rightholders and give them minimal administrative burden
- The UK implementation of this principle should provide clarity around determination of renewal dates, priority and seniority. For trade marks it should adapt the current EU rules relating to "genuine use" and reputation so as, at the point of withdrawal, rightholders who have genuine use/reputation under the current test but are not using/do not have reputation in the UK are not disadvantaged
- Applicants for unitary rights with pending applications when the UK withdraws should not lose priority when applying for an equivalent national right (the paper assumes they will be required to re-apply, whereas continued protection of granted/existing rights should be automatic)
- Applications for supplementary protection certificates or pediatric extensions in the UK in accordance with EU law which are pending when the UK withdraws should be allowed to continue and on grant should provide for protection equivalent to that provided for by EU law
- The UK and the remaining EU member states should allow for continued protection under the EU database right for databases which had a qualifying maker prior to the UK's withdrawal (i.e. EU makers would retain protection for existing databases in UK, and UK makers would retain protection for existing databases in EU)
- Where an IP right is deemed to be exhausted in relation to products put on the market in the EU by the rightholder (or with the rightholder's consent) prior to the UK's withdrawal, the rights in relation to those products should remain exhausted across the EU and UK

European patent rights (which are not unitary in nature) are largely unaffected by Brexit, and so it is not surprising that the paper does not address those rights. However, the position paper is disappointingly silent on the future of the Unitary Patent and Unified Patent Court. It also does not address the issue of rights of representation in IP matters.

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