



Dr. Christian Köster

Brexit: Sudden death for your IP rights?

Dr. Christian Köster, Denemeyer & Associates, Munich, discusses the impact the 'Brexit' decision could have on your Intellectual Property rights, looking closely at the patent protection.

On June 23rd, UK citizens decided to leave the European Union. Besides the economic effects, IP owners should start thinking about what implications this will have on first, the protections they already have in the EU that includes UK rights, and second what the new scenario for IP rights will be.

EU legislation

First it is important to highlight that this will be the first time a Member State leaves the EU, thus it is still not clear how this will work. Article 50 of the TEU states, "any Member State may withdraw from the Union in accordance with its own constitutional requirements." It is further stipulated in Article 50 that this Member State, i.e. the UK, shall notify the EU Council and both parties will conclude an agreement setting the arrangements and further relation between the UK and the Union. After the UK gives notice of its withdrawal, there is a two-year term for the treaties of the Union to cease its effects, unless the parties reach to an agreement before the two-year term. However, this term might be extended by both parties. As a result, EU treaties do not give much guidance on the exit of a Member State, making any possible scenario highly speculative.

Patent protection

It is worth highlighting that national Patent registrations

will remain unchanged. Further, Patent applications filed before the European Patent Office will probably also remain unchanged, since the European Patent Office is not an EU organization and hence not restricted to EU Member States. With the current political mood in the UK it can of course not be ruled out that the UK might even consider leaving the European Patent Organization. This would then have a significant impact on the patent protection available by European patents granted by the European Patent Office. However, like the EU, also the European Patent Organization has up to now not seen a member leaving, and such a scenario also seems to have not been part of the discussions about relations to Europe in the UK so far.

On the other side, things will most likely be more complicated for the approval of the Agreement on a Unified Patent Court. This future Court is an EU-project. With regard to the Central Division of the Court, Article 7 of the Agreement explicitly stipulates that "[T]he central division shall have its seat in Paris, with sections in London and Munich." It is hardly imaginable

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Résumé

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that an EU-Court will have a seat of one of its divisions in the capital of a non-EU state. Prior to the UK referendum, various alternatives to London have already been suggested. However, this will have to be re-negotiated and will certainly be a political issue. Accordingly, the exit of the UK from the EU will definitely slow down the implementation of the Unified Patent Court. This will of course also have an impact on the possibility to apply for unitary patent protection on the basis of an EP patent because this unitary patent protection would only come in a package together with the Unified Patent Court. The Brexit has the potential to bring the entire project of the Unified Patent Court to a standstill.

Additionally, Supplementary Protection Certificates for medicinal products including pediatric extensions and for plant protection products are regulated by EU Regulations, i.e. by EU law. Further national regulations are found in the UK Patent Act. Given that the UK has now decided to leave the EU, an amendment of the Patent Act will probably have to be made or a new act will be required that enables SPC protection in the UK, if still desired. Moreover, as with any other EU right in force at the time of the exit, transitional provisions might have to be negotiated in order to keep the protection of existing SPCs in the UK. It is also noteworthy that in order to obtain a Supplementary Protection Certificate, the applicant for such a Certificate requires a patent protecting the medicinal product and in addition a marketing authorization for this medicinal product. Such a marketing authorization can be a national authorization, or an authorization granted by the European Medicines Agency. This Agency is however an agency of the EU.

Trademark and design protection at the EUIPO

Regarding EU Trademarks and Designs filed with EUIPO, because of the Brexit protection in the UK will no longer be available under this regime. An applicant willing to file an EU application will no

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longer have protection in the UK and will have to file a national UK application as well. Additionally, the exit of the UK will leave current EU TM and Designs registrations under uncertainty, because there will most likely have to be transitional provisions for converting such rights into national UK rights, if the owner wants to keep protection of such rights in the UK. Further, there is the issue if the rights once converted into national UK rights will keep the EU filing date or not.

Copyright protection

Regarding copyright protection, the Brexit will probably have limited consequences, since copyright is not fully harmonized in the EU. Further, copyright is mainly territorial and the UK is member of International Treaties that protect copyright, thus they will keep applying their local laws based on international standards of protection.

As briefly mentioned, there are many uncertainties regarding the implications on IP which the UK's decision to leave the EU will have. For now, IP owners should be aware that there will most likely be some consequences that will change the protection they had for UK rights and owners will have to take additional measures if they want to keep such protections. For future IP strategies in Europe, the Brexit and its consequences will in any event have to be taken into account.