

Brexit – Best Practice for Designs

The UK left the EU on 31 January 2020. However the UK has now entered an 11-month transition which will push back the effects of Brexit until 31 December 2020. Many clients ask us how this will impact their intellectual property rights. This fact sheet aims to answer some key questions and provide useful hints and tips for post-Brexit protection.

What will happen to your Community registrations and applications?

Legislation provides for the automatic extension of any Community *registrations* to the UK at exit day.

In order to identify UK rights which arise from a Community registration (which will be called a 'comparable design (EU)'), the number allocated to the comparable design will be the Community design number prefixed with a "9".

In order to identify UK rights which arise from an EU designation of an International Registration (which will be called 'International design (EU)'), the number allocated to the comparable design will be International number prefixed with an "8". Please note that these new UK rights will sit outside of the main International registration going forward and will need to be maintained separately.

For pending Community *applications*, the legislation provides that if an application remains pending at exit day, applicants will need to file a fresh UK application within nine months of exit day to maintain the same filing/priority date as the Community application. We will docket this date on each case for you once you confirm that we should put the matters on to our records.

What will happen to your Community applications or registrations under invalidity proceedings?

In respect of invalidity proceedings pending against registrations, our understanding is that, because the design was registered as of exit day, it will automatically split off into a UK clone registration. If an applicant for cancellation wishes to cancel the UK clone registration then it will need to re-file the cancellation action separately.

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What will happen to your Community invalidity actions filed against third parties?

If you have filed an invalidity action against a third party's Community design then it will be necessary to refile this action against the clone UK application (if filed within the nine month period) or against the clone UK registration.

In addition, the EU IPO has taken the position that earlier rights must continue to produce their effects in the EU at the date on which a decision is taken by the EU IPO on the opposition or on the invalidity request (on relative grounds). It has stated that, as from exit day, any – pending or new – invalidity request based solely on a UK right will be dismissed.

For new designs being filed now do you need to file a UK national design application as well as a Community application or EU International designation?

Before Brexit: in principle – no. Community designs are often registered quickly, so whilst there are several months before Brexit, there is no need to file a separate UK national application as well as a Community design application. However, in the run up to Brexit where it is not certain when registration will occur, it may then be advisable to also file a UK national application in addition to the Community application. For an application claiming priority, obtaining and filing the required priority documents can slow the process, so this is another reason to consider filing in both the UK and EU in late 2020.

After Brexit: yes – filing both will be required.

For Community registrations or EU International designations with renewal fees due post-Brexit, should you renew early where possible?

No. Early renewals of design registrations which are due in the six month period after exit day will not avoid separate renewal fees. This is because the UK resultant right will not exist until exit day, and it is not possible to renew the right before it has been created.

It has also been confirmed that any overdue renewal fees due within six months of exit day will not incur any late fee surcharges.

What about Community unregistered design rights (CUDs)?

CUDs that exist when the UK leaves the EU will continue to be protected and enforceable in the UK for the remaining period of protection. For new CUDs coming into force after Brexit, these will not cover the UK.

The UK already provides a national unregistered design right (UDR), and a new supplementary unregistered design right (SUDR) that mirrors the scope of protection of the CUD will be available. Since current CUDs arise on first disclosure of the design in the EU, and the new UK supplemental right will arise on publication in the UK, some thought may be needed as to where, after Brexit, the first disclosure should be.

If you have any questions, you can email us at brexite@barkerbrettell.co.uk

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