



B&B Bulletin

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„Over and out“ – Brexit update on trade marks and designs after the end of the transition period

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The transition period expired December 31, 2020 and UK now finally left the EU. Even though the negotiating parties came to a free trade and cooperation agreement on December 24, 2020, the rules from the Withdrawal Agreement remain in place and will regulate the covered IP rights going forward. We provide a refresher and update as to what this means for trade marks and designs.

Even though the EU Commission and the UK government agreed on the outlines of a [free trade and cooperation agreement on December 24, 2020](#) which has been confirmed by EU and UK, respectively, in the meantime, this does not change the fact that, as of January 1, 2021, EU rights such as, in particular, EU trade marks and Community designs have lost their effect in the UK. The same applies to their counterparts under WIPO administration, i.e. International Registrations under the Madrid Protocol and the Hague Agreement. We have already provided detailed information about this [on other occasion](#).

Here now, very briefly, are the main and updated implications since January 1, 2021, as they follow from the Withdrawal Agreement.

Cloning of registered EU rights

Registered EU trade marks and Community designs will be copied – cloned – completely, fully automatically and free of charge into the national register of the United Kingdom. In this respect, nothing further is required. The same applies to collective marks and certification marks. In view of the large number of IP rights, the process will take some time. We will keep the owners of IP rights represented by us apprised of any development and details.

Right of refiling for pending applications

Until September 30, 2021, it will be possible to file a fee-based national application for a pending IP right as a trade mark or design, and in particular to claim the priority of the EU application. The effect of this is that no third party could have acquired an IP right with better priority in the UK since the EU application was filed. We will work out a suitable IP strategy with the owners of IP rights represented by us.

International registrations of trade marks and designs

If international registrations designate the EU, the process described above will generally apply the same way. The IP rights are cloned into the United Kingdom or establish a refiling right in the national register. In any case, this means that these rights will initially leave the international regime under the administration

of WIPO and become purely national rights. We will work with the owners of IP rights represented by us to find solutions to any related problems.

Unregistered IP rights

Unregistered Community designs will continue as „Continuing Unregistered Designs“ for their remaining term of protection. In addition, a „Supplementary Unregistered Design“ will be established for first publications in the United Kingdom, which will only be valid there. Unregistered trade mark rights are generally not recognized under EU law. However, the United Kingdom, like some other national legal systems of the EU member states, offers a fallback option, the so-called „passing off“, which, however, regularly depends on use in the United Kingdom („goodwill“).

Continued identification of a clone

IP rights derived from EU rights will remain permanently identifiable by their registration numbers. They will continue in the UK with the original registration numbers and add national prefixes.

Ongoing proceedings and contracts

Pending proceedings in the UK based on an EU right will continue with the clone. The reverse does not apply: National UK rights lose their protection against EU rights. Proceedings are concluded automatically.

Existing treaties concerning the EU may have to be interpreted as to whether they continue to apply to the UK. We advise on how to avoid pitfalls and how to share any financial burdens between the parties appropriately.

Genuine use and reputation

Use of an EU trade mark in the UK will no longer maintain an EU right as of January 1, 2021. If there is no genuine use in the EU, the EU trademark will be subject to cancellation at the end of 2025. The reputation of an EU trade mark in the UK will already be definitively disregarded in the EU as of January 1, 2021.

Renewal and representation in the register

National clones are subject to the same expiration dates as EU rights. They can be renewed, and in some cases must be renewed in the short term. This also applies to those EU rights for which the fees have already been paid before the expiration of protection, but the expiration of protection is not until 2021. The fees must be paid again for the clones. The moderate costs for renewal have already been fixed by the UK Office. We will inform the owners of the IP rights we represent about deadlines and payment dates.

We will continue to represent the clones in the UK Register. This also applies to refilings.

Opt-out and strategic advice

IPR owners are not obliged to make use of the above options. Cloned IP rights can be abandoned by simple declaration („opt-out“) free of official fees. The deadline for filing a subsequent application can remain unused. However, it is useful not only to consider each individual case but to develop an overall strategy for the UK. This may include adjusting the filing strategy overall. We advise with the aim of optimizing the administration and costs for the owners of IP rights.



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The never-ending Unitary Patent saga continues ...

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The efforts to create a unitary EU patent and a pan-European patent court have experienced both setbacks and new impetus in the eventful past year. 2021 is likely to bring further important decisions.

In the B&B Bulletin, we have already repeatedly reported on the unitary patent project. While the European patent system has so far only provided for a centralized granting procedure that results in a bundle of national patents, in future the European Patent Office shall also grant a pan-European patent with unitary effect in all participating member states (currently all EU members with the exception of Spain and Croatia). In addition, these patents are to be enforceable in the future before a Unified Patent Court (UPC) against patent infringers with effect for all participating member states.

The ideas for such a unitary patent already existed when the European Patent Office was founded in the 1970s. Efforts have intensified over the past ten years, and since 2013 the relevant agreements to implement these ideas have been in place and have already been ratified by numerous EU member states. However, German ratification, which is essential for entry into force, was held up in 2017 by a constitutional complaint. In March 2020, the Federal Constitutional Court ruled that the German bill for implementing the ratification would have required a two-thirds majority in parliament. In fact, the approval in the parliament had been unanimous, but too few parliamentarians had been present for the vote.

Another setback in 2020 was related to Brexit: While the UK under Theresa May's government had always announced that it would stick to the unitary patent and

the Unified Patent Court, Boris Johnson's successor government announced in February 2020 that the idea of a unitary European patent system was incompatible with Brexit, and in July 2020 it withdrew UK ratification. It was thus clear that the unitary patent would start without the UK, if at all.

The fact that one of the economically strongest European countries will not participate in the unitary patent system is a burden on the acceptance and significance of the unitary patent, especially since the UK was originally one of its most ardent advocates and also contributed greatly to the realization of the project before Brexit. In addition, the UK's withdrawal creates significant organizational and legal challenges, not the least because London (along with Paris and Munich) is explicitly designated in the agreements as one of the three seats of the Unified Patent Court.

Despite the withdrawal of Great Britain, the remaining member states have declared their intention to move ahead with the project. Several countries have already signaled their interest in taking over the London seat. Italy, for example, has put Milan into play. France has stated that the tasks of the London branch could also be taken over by Paris, and Germany has proposed a split between Paris and Munich. It is to be expected that, despite the apparent continuing political will to proceed, we will see controversial discussions over the course of the year about how to move ahead. The agreements may also need to be amended to reflect the UK's withdrawal.

In Germany, the legislative process restarted relatively quickly after the negative decision by the Federal Constitutional Court. In November 2020, the German parliament passed the bill again, this time with the necessary two-thirds majority, and the Bundesrat chamber followed unanimously in December 2020.

However, before the bill could enter into force, two new constitutional complaints were received by the Federal Constitutional Court on December 18, 2020. It is not yet publicly known who the plaintiffs are this time and on what arguments they rely. Depending on whether the Federal Constitutional Court accepts the constitutional complaints for decision, German ratification could be delayed once again. In this respect, 2021 will most likely be a year of important decisions that set the further course for the unitary patent project. We will keep you informed of all developments.



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Update on the planned reform of the German Patent Act

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The planned modernization of German patent law is progressing. Since the first draft for the reform of the German Patent Act was provided in January 2020, two further drafts have been presented. Significant changes have been made, particularly with regard to the reform of injunctive relief, which continues to cause controversy.

The first draft for the reform of the German Patent Act was provided already in January 2020 and has been the subject of an article from May 2020 which can be found [here](#). In our first article, the streamlining of patent nullity proceedings and the inclusion of a proportionality requirement with respect to injunctive relief were already identified as key aspects of the reform proposal. Concerning these essential points, there have been some developments with regard to the latest drafts and their discussion among experts, which we summarize below.

Reform of the Right to Injunctive Relief

The most recent draft includes some changes regarding the proportionality requirement with respect to injunctive relief. The legal repercussions of these changes have already become the subject of debate.

In the discussion of the various drafts, it is recognized that injunctive relief is already limited in certain cases. For example, according to the “Wärmetauscher” (“Heat Exchanger”) decision of the Federal Court of Justice of May 2016 (case reference BGH X ZR 114/13), the patent infringer is to be granted a grace period in exceptional cases. However, opinions differ considerably as to what scope should be sought for such a restriction and what scope the intended wording of the law will actually lead to.

According to the present draft provided by the government, the right to injunctive relief is excluded to the extent that enforcement by the patent owner would lead to disproportionate hardship for the infringer or third parties not justified by the exclusive right in view of the particular circumstances of the individual case.

Thereby, it is now explicitly clarified that the circumstances will be assessed for each individual case.

Additionally, according to the latest draft, possible hardships for third parties can also lead to a restriction of the right to injunctive relief. This may, for example, apply to customers of the patent infringer who are dependent on the infringing products and for whom no alternative supplier is available, provided that this results in unjustified hardship in the individual case. According to the explanatory memorandum of the draft, in addition to the already existing possibility of a compulsory license, this creates the option of ordering a less intensive measure, for example by limiting the injunctive relief only for a limited period of time.

Compared to the first draft, however, there is no longer any explicit reference to considering the interest of the patent holder. Discussion is ongoing about whether such interest is already sufficiently taken into account by the fact that only hardships not justified by the exclusive right can lead to the exclusion of the right to injunctive relief, considering that such exclusive right justifies the patent proprietor imposing restrictions on other market participants under normal circumstances.

Furthermore, it is now provided that the infringed patent proprietor may demand monetary compensation in the event of a restriction of the right to injunctive relief, to the extent that such compensation appears appropriate. This claim for compensation is independent of any damage claim. In particular, it shall be possible to demand monetary compensation even if a claim for damages is ruled out in cases in which patent infringement is not negligent.

Reform of the Patent Nullity Proceedings

Concerning the streamlining of the patent nullity proceedings, there are no substantial changes compared to the first proposal. In particular, the time limit for the patent proprietor to submit his defence arguments against the nullity action is still set at two months and can be extended to three months only in exceptional cases. At the same time, the Federal Patent Court shall prepare its preliminary opinion, if possible, within six months after service of the nullity action.

Further proposed amendments

Among the further amendments, a new provision provided for in the present draft is notable in view of the current pandemic situation. According to such provision, it shall in the future be possible to conduct hearings and interrogations before the German Patent and Trademark Office by video conference.

Conclusion

The procedure for the planned patent law reform is already well advanced. However, in view of the ongoing discussion with regard to the restriction of the right to injunctive relief, possibly decisive details remain to be determined. We will keep you informed of further progress.



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Things to come – what to expect from Germany’s current copyright reform?

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By 7 June 2021, the EU Directive 2019/790 on Copyright and Related Rights in the Digital Single Market must be transposed into German law. For the wider public, it is only associated with the keyword “upload filter”. In fact, the directive consists of a whole bundle of highly diverse regulatory issues, some of which will have a direct impact on the daily practice of companies dealing with copyright-protected works or services.

Introduction

It has not been long since the Copyright Act was last amended. The second reform of copyright contract law dates from 2016, the amendment on copyright and the knowledge society from 2017 and the implementation of the Marrakesh Directive for the benefit of persons who are blind or visually impaired from 2018. Nevertheless, this field of law does not come to rest. Another copyright reform is due in Germany in 2021. It will transpose the so-called DSM Copyright Directive (2019/790) from April 2019 on copyright and related rights in the Digital Single Market (hence the acronym) into German law. Time is of the essence: by 7 June 2021, the transposition must enter into force.

Overview of the regulations to be transposed into German law under the Directive

Although this Directive is basically a whole bundle of copyright directives with highly diverse areas of regulation, it was only a year before its adoption that it was noticed by a broader public because of the debate about the so-called ‘upload filter’ contained in Art. 17 of the Directive (at that time in Art. 13). In fact, only the word ‘upload filter’ was new. The regulation transposes into a formal law an existing legal situation which European and German case law had long since formulated in a binding manner: that of ‘notice and staydown’ (as the ECJ first stated back in 2011 in Case C-324/09 – L’Oréal/eBay, para. 131): It concerns operators of online platforms where users can upload content (the Directive speaks of ‘online content-sharing service provider’), i.e. the YouTubes and Facebooks of this world. If a rights holder notifies the operator of such a platform of an infringement committed by an uploading user, the operator must not only ensure that access to such infringing content is blocked, but is also obliged to prevent similar content from being uploaded again.

In addition to Art. 17, which has become highly controversial, the Directive also contains much less publicly discussed but nevertheless highly important regulations, namely

- on ‘text and data mining’ (TDM) in Art. 3 and 4,
- on use of works and other subject matter in digital and cross-border teaching activities in Art. 5,
- on the preservation of cultural heritage in Art. 6,
- on the use of out-of-commerce works and other subject matter by cultural heritage institutions in Art. 8 to 11,
- on collective licensing with extended effect in Art. 12,
- on access to and availability of audiovisual works on video-on-demand platforms in Art. 13
- on images of works of visual art in the public domain in Art. 14,
- on a neighbouring rights for press publications concerning online uses in Art. 15,
- the participation of publishers in levies for reprography and private copying in Art. 16, and
- on copyright contract law in Art. 18 to 23.

In addition, another directive is to be transposed at the same time, the so-called CabSat Directive (2019/789), which deals with the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.

On the transposition of the directive in Germany: The ‘online content sharing platforms’

At the time this article appears, it is still uncertain whether the deadline will be met for all parts of the Directive. Just as in the European debate, the complex around the liability of online content-sharing service providers is the most controversial in the German transposition. It is not yet foreseeable where the journey will lead here, as the draft bill currently on the table tries to get by without an ‘upload filter’ as far as possible, although the directive actually prescribes it as a rule.

In particular, it will play a role here how the new copyright exceptions (required by the Directive) in favour of parodies, caricatures and pastiches (Section 51a draft German Copyright Act – hereinafter UrhG) will be linked to the liability rules in future.

These new regulations have great economic significance for rights holders and platforms alike – both with regard to the question of which uses can be licensed by them and which may be used freely for mere statutory remuneration, and of course with regard to liability for unauthorised offers.

In future, it will be a matter for every rights holder to optimally adapt to the new situation in order not to fall by the wayside economically by third party uses of protected content on online content-sharing platforms.

Transposition into German Law – the Other Subjects of Regulation

In contrast, most of the other regulations are much less controversial, especially since many of them are already laid down in current German copyright law, such as rules for use in the context of digital teaching and learning (Sections 60a and 60b UrhG), text and data mining (Section 60d UrhG), uses by cultural heritage institutions such as libraries, archives and museums (Sections 60e and 60f UrhG), publisher participation in statutory remuneration claims (Section 63a UrhG, which has been suspended since a decision by the BGH in I ZR 198 / 13 – Publisher Participation) or out-of-print works (Sections 51 and 52 Collecting Society Act – VGG), although in each of these fields the looming changes have caused much debate among the respective interested parties.

The curious case of the neighboring right for press publishers

This also applies to the neighboring right for press publishers (Sections 87f to 87h UrhG), which has been enshrined in German law since 2013, but was recently declared null and void by the European Court of Justice in its current form (in Case C 299 / 17) because Germany had failed at the time to officially inform the EU about the legislative project. So here we have the strange situation that a regulation that already existed in Germany, even though it has been largely been ineffective, is abolished by the ECJ because of a violation of EU law, only to have it reintroduced it in a new form immediately afterwards due to a requirement of the EU legislator.

Collective licensing with extended effect

This is a legal figure (that has even in Germany come to be known under the acronym ECL for ‘Extended Collective Licensing’) that would not necessarily have had to be transposed into German law. The concept originates from Scandinavian law and has developed there in the same area in which statutory remuneration claims are applied in Germany, e.g. for the remuneration of private copying. One speaks of ECL when a collecting society is legally entitled to administer the rights even of those who have not signed an administration agreement with it. In fact, we know similar rules in Germany in the area of statutory remuneration claims. If a collecting society asserts such claims, it is also presumed under current German law (Section 49 VGG) that it administers the rights of all rightholders. According to the draft bill, ECL is now also to be introduced in Germany in connection with the licensing of online content-sharing service providers, because statutory remuneration is excluded there under the Directive. However, the European legislator has set very tight limits on the application of this model precisely because of the danger that ECL interferes with the free and individual exercise of rights. It remains to be seen whether the emerging legislative solution for Germany will stand up to these requirements. Rights holders will have to be particularly vigilant here.

Caution with contracts for copyright works and other protected matter

The large and important complex on copyright contract law is largely based on the model of German law (Sections 32 to 41 UrhG), but in parts even goes beyond it, so that here all companies that use copyright-protected works and performances on the basis of contracts should check what new legal obligations they will face in future, because some obligations also relate to existing contracts and, under certain conditions, even to those for which the parties have agreed on a non-European contract law to be applicable to their agreement.

Conclusion

Six months before expiry of the deadline, it is not yet clear how the German implementation will proceed. Major political decisions are only now being taken. Therefore, extreme vigilance is required for all companies whose business is in any way copyright related. For them, it will not least be a matter of adapting administratively to the changed requirements, especially of copyright contract law. In view of the immense economic importance that online content-sharing service platforms have acquired, companies that deal with copyright-protected content in particular will also have to assess the impact of the new regulations in this area on existing business models. This will require an analysis in each individual case.



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Act to strengthen fair competition – changes in the German Unfair Competition Act (UWG)

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After months of waiting, the “Act to Strengthen Fair Competition” was published in the Federal Law Gazette on December 1, 2020. The law contains far-reaching amendments to the German Unfair Competition Act (UWG), which are intended to provide better protection against abusive warning letters. Here is a brief overview of the most important new provisions:

1. Capacity to sue – Competitors

As of December 1, 2021, the capacity to sue of competitors will be restricted and specified. According to the new wording of the law, the right to bring an action is made dependent on the competitor selling or requesting goods or services to a not insignificant extent and not only occasionally. According to the previous legal situation, every trader could demand the cessation of an anti-competitive act who had a concrete competitive relationship with the person being warned as a supplier or buyer of goods or services. As a result, case law has so far been quite generous in assuming that a person has the capacity to sue. The amendment to the law is now intended to act as a restrictive corrective. According to the explanatory memorandum, it is no longer sufficient for a competitor to merely “offer” goods or services and not actually sell or demand them.

In the future, significantly higher requirements will be placed on the presentation of a competitor’s status. Mere references to alleged online offers of goods, for example, will no longer be sufficient to establish the status of a competitor. It remains to be seen how courts will apply this corrective in practice.

2. Capacity to sue – Trade associations

The capacity to sue of trade associations will also be newly regulated in the future. The new section 8 (3) no.2 UWG makes trade associations’ capacity to sue dependent on being registered on a list of so-called qualified trade associations. This new regulation in the law is a reaction to allegations of abuse. It will come into force on December 1, 2021.

Only those trade associations that fulfil the registration requirements of the new section 8b UWG will be admitted to the said list. These include, for example, that the trade associations have at least 75 entrepreneurs as members and that their activities are not primarily aimed at generating income from warning letters. Whether the registration requirements are met is to be determined by the Federal Office of Justice within the framework of an objective examination.

Whether this new mechanism will actually lead to curbing the abuse of warning letters by dishonest trade associations must be left with a question mark. It remains to be feared that “black sheeps” will ultimately find their way onto the list and that it will then be all the more difficult for companies to defend themselves against such warning letters of trade associations.

3. Mandatory information in warning letters

As in Copyright Law – section 97a (2) of the German Copyright Act (UrhG) – warning letters in unfair competition law matters must in future also comply with certain content-related requirements. The details are regulated by the new section 13 (2) UWG, which has already been in force since December 2, 2020. In addition to information that is actually self-evident, such as the name or company of the person issuing the warning letter or the reference to the claimed infringement, stating the actual circumstances (section 13 (2) nos. 1 and 3 UWG), the warning letter must also state whether and in what amount claims for reimbursement of costs are asserted or whether a claim for reimbursement of costs is excluded

(section 13 (2) nos. 3 and 5 UWG). In addition, the person issuing the warning letter must also submit information on the capacity to sue and thus regularly provide information on the status as a competitor, which means, at least as of December 1, 2021, that competitors must already show in the warning letter that they sell or request goods or services “to a not insignificant extent and not only occasionally” (new version of section 8 (3) no. 1 UWG).

These requirements must be carefully observed in the future. In the event of non-compliance, the person issuing the warning letter not only loses the own claim for reimbursement of costs (section 13 (3) UWG). If the warning letter does not comply with the above requirements, the warned party even has a counterclaim against the warning party, namely a claim for reimbursement of the expenses necessary for its legal defence (section 13 (5) UWG).

4. Exclusion of claims for reimbursement of costs

According to the new section 13 (4) UWG, in certain cases competitors may no longer claim reimbursement of their expenses from the warned person. The provision has been in force since December 2, 2020. According to the wording of the law, a claim is excluded if it concerns violations of information and identification obligations committed on telemedia (e.g. violations of the imprint obligation, information obligations in distance contracts, the obligation to provide information on revocation, etc.) or other violations of the General Data Protection Regulation or the German Federal Data Protection Act by small businesses with usually less than 250 employees.

The abuse of warning letters by competitors may actually be curbed by the restrictive new regulation, since in cases of minor infringements mentioned here, no reimbursement of costs can be claimed, which, according to experience, should reduce the incentive for competitors to send out warning letters at all.

5. Cases of abuse of rights

The new section 8c (2) UWG contains a catalogue of standard examples which determine when claims for injunctive relief under section 8 (1) UWG are abusively asserted. The provision replaced the predecessor standard on December 2, 2020 and adopts the essential case groups of the current case law.

Cases in which an abusive assertion of rights is to be assumed in case of doubt exist if:

- the assertion of the claims predominantly serves the purpose of incurring fees, costs and contractual penalties (no. 1),
- competitors assert a considerable number of infringements of the same legal provision and the number of infringements asserted is disproportionate to the scope of the own business activity (no. 2),
- the value in dispute of the warning letter is determined unreasonably high by the competitor (no. 3),

- an obviously excessive contractual penalty is agreed or demanded (no. 4),
- a proposed cease-and-desist obligation obviously goes beyond the infringement warned against (no. 5),
- several infringements, which could have been claimed together, are claimed individually (no. 6),
- or for an infringement for which several infringers are responsible, the claims against the infringers are not asserted together without objective reason (no. 7).

The wording “in case of doubt” could suggest that each of the listed standard examples in itself gives rise to the presumption of abuse of rights. However, one can hardly go that far and it remains to be seen how the courts will interpret the provision. In any case, it should be noted that section 8c (1) UWG continues to require a comprehensive overall assessment taking into account all circumstances to determine the abuse of rights. The standard examples will therefore in all likelihood only have an indicative effect, which can be refuted by the person being warned. It is not necessarily to be assumed that a fundamental change of the previous legal situation will accompany the amendment of the law.

6. Restriction of the “flying place of jurisdiction”

Since internet presences are usually accessible throughout Germany, acts of unfair competition on the internet are also committed nationwide. In cases of violations, it was previously possible for the claimant to bring an action before a Regional Court in Germany of his choice. This is referred to as “flying place of jurisdiction”.

The new section 14 (2) sentence 3 no. 1 UWG now considerably restricts this choice for the claimant. The “flying place of jurisdiction” for legal disputes arising from infringements in electronic commerce or telemedia has been abolished since December 2, 2020. According to the new law, the local jurisdiction of the court in the aforementioned cases is based on the general place of jurisdiction of the infringer.

The place of jurisdiction of the tort is thus no longer applicable for the large number of unfair competition cases. This will have a significant impact on enforcement of claims. This applies not only to the question of where main court proceedings can be brought, but of course also to strategies for interim relief. In many cases, it will no longer be possible to choose the known and experienced courts in unfair competition matters.



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