The Good, the Bad and the Ugly of Brexit for Intellectual Property Law in Fashion

December 20, 2016 / TFL

image: Gucci

It is proving difficult to not feel perplexed as we anticipate the outcome of Brexit. It is however, not impossible to formulate a possible road map of the impact of Brexit on the major forms of intellectual property law affecting the fashion sector in the United Kingdom ("UK") and European Union ("EU"). Indeed, with this road map we can try to prepare ourselves for the good, the bad and even the ugly that could be to come.

Beyond trade marks, there are two key areas of intellectual property law that will be most affected by Brexit that are of importance to the world of fashion, these are Unregistered Design Rights and the impact on the principle of the exhaustion of intellectual property rights in the UK and EU.

Unregistered Design Rights

Unregistered design rights are particularly important in the fashion industry because the lifetime of clothing ranges are often short and do not justify the cost and process of registering design rights. As a result, in addition to copyright protection, which in the main will not be radically affected by the prospect of Brexit, Unregistered Design Rights are the main form of intellectual property protection relied on in the fashion world in the UK and EU. Currently, it is possible for business or individual, depending on nationality, to

avail themselves of both UK and EU protection for Unregistered Design Rights in the United Kingdom. However, with Brexit comes potentially major changes to this structure of protection of such rights in the UK.

In both the UK and EU these rights arise automatically on the design concerned being made available to public. Although EU Unregistered Design Right protection has no qualifications as to nationality, UK Unregistered Design Rights are only to be available to UK and EU nationals and a select band of nationals which provide reciprocal protection to UK rights holders such as nationals of New Zealand and Hong Kong. In the UK the attractive quality is a maximum term of fifteen years, whereas in the EU the term only extends to three years from the date when the design was first made available to the public in the EU. However, given the short life of most clothing ranges, this isn't the most significant difference between the rights for the fashion industry.

Of key significance is that in the UK, only appearance arising from a design's shape or configuration is protected, whereas in the EU, unregistered design rights also protect the appearance of a product resulting from its colour, lines, texture, surface decoration, materials and/or ornamentation in addition to those of shape and configuration. The scope of EU protection is thus clearly much wider and applies to more characteristics of clothing and other fashion items such as bags and eyewear than UK Unregistered Design Rights. Further, EU Unregistered Design Rights are not dependent on the nationality of the rights owner.

A number of cases have demonstrated the value of these EU Unregistered Design Right provisions to fashion and indeed have highlighted the superior IP

protection for fashion products in the EU compared to the United States. In Superdry v Animal, whilst the shape of the clothing was examined for protection, so was the surface decoration of the buttons and the decoration created by the stitching. Further, in John Kaldor Fabricmaker v Lee Ann Fashions the similarities of lines, contours, colours, shapes and dimensions of the fabric were examined. These features would not be evaluated under UK unregistered design rights and are undeniably imperative to the fashion industry because the extent of variation of clothing shapes are limited, what adds design character and value to clothing are most certainly features encapsulated within EU unregistered design protection.

And what would Brexit bring to such EU rights? Well in the absence of any legalisation to the contrary, EU Unregistered Design Rights are unlikely to apply to the UK at all. The United Kingdom will be no longer be a part of the EU and thus such rights will simply disappear in the UK. Although, there may be some form of transitional protection for designs post Brexit, unless the UK Government legislates for a new form of Unregistered Design Right in the UK, or extends existing UK protection for such rights, a 'hole' will be created in the protection of designs with regards colour, lines, texture, surface decoration, materials and/or ornamentation. Further, given the present nationality requirements applying to UK Unregistered Design Right protection, Unregistered Design Right protection in the UK will simply no longer be available to the nationals of most of the globe. Therefore, Brexit puts at stake this wider scope of Unregistered Design Rights. With this context we can try to paint a picture of the future of unregistered design rights.

The good? To start positively, the picture may not be entirely bleak. We may see recognition of this loss and

the limits of our protection and expansion of our UK scope of protection for unregistered design rights by the UK government to cover features beyond just shape and configuration and possibly to nationals beyond the present limited range. It seems unlikely that UK Unregistered Design Rights would be restricted away from EU nationals in the future, as UK Unregistered Design Right eligibility is presently based on reciprocal protection which arguably could still be available to UK nationals post-Brexit under European Union Unregistered Design Right protection.

The bad? To try and not deny all possible realities, the situation may be that the UK maintains this narrow scope and the extent of protection is only afforded to the shape or configuration of clothing. Unregistered Design Right protection in the UK would also simply not be available to nationals beyond the UK and a limited range of nationals, meaning that once again such nationals would have to rely on the relatively limited protection afforded by copyright.

The Ugly? If pushed, the pessimistic view would have to be that unregistered design rights become devoid of use in the UK for the fashion industry. This perspective would perhaps be melodramatic when we consider the recent G-Star Raw v Rhodi case where the shape of jeans having been cut with an asymmetric tapered leg, to turn around the human leg, was granted unregistered design protection. This clearly demonstrates that fashion innovation is clearly not yet restricted to just patterns and textures, shape protection will continue to be of fundamental importance for fashion protection in unregistered design rights.

Lee Curtis, a Chartered Trade Mark Attorney at HGF commented, “The removal of EU Unregistered Design

Right protection in the UK post Brexit would undoubtedly reduce design protection in the UK and would have a disproportionate impact on the fashion sector, given this right was specially designed with the fashion sector in mind. Given the importance of the design and fashion sector to the UK economy, I suspect it likely the UK Government would bring forward new legalisation to fill this 'hole' in protection."

The Principle of Exhaustion of Rights

The principle of the exhaustion of rights in the EU has often been a controversial and well litigated concept over the years, intrinsically associated with the free movement of goods across the single market in the European Economic Area ('EEA') and the prevention of IP rights partitioning that market.

The principle of exhaustion means that once a given product has been sold under authorisation of the intellectual property right owner in the EEA, the relevant rights in relation to the reselling, renting, lending and other third party commercial uses are said to be 'exhausted,' namely the rights holder cannot prevent any further free movement of the goods within the market. There are certain qualifications to this principle, notably if the physical condition of the product has been affected and indeed in the Copad SA v Christian Dior couture SA case, it was held that where the repute or 'aura of luxury' was impacted by the parallel trade, resale could be prevented by the rights holder. Further, what the principle of EEA wide exhaustion allows, is the prevention of the parallel importation of branded goods from outside the EEA, notably the US, even if the brand owner had put those products on the market in the US.

Currently, under Section 12 of Trade Marks Act 1994, with regards trade mark law, the UK explicitly applies the principle of exhaustion to the European Economic Area (EEA), therefore rights are exhausted within the single market. However, if the UK were to leave the EEA, this Section of the Act would appear to have become redundant and thus open to change post Brexit. It seems unlikely the UK would allow exhaustion for EEA distributed goods in the UK, if that courtesy were not applied to its goods, if the UK were not part of the EEA. The debate as to whether the UK will remain part of the EEA is ongoing, and indeed if the UK were to remain part of the EEA this debate would be largely academic and little impact would ensue in this area post Brexit. However, what would happen if UK were leave the EEA?

The choice for the UK government will be whether to adopt the principle of only UK exhaustion or an international exhaustion structure. Both these structures would differ to the 'fortress Europe' principle of EEA wide only exhaustion in place now. The former UK exhaustion model meaning that rights holders may be able to restrict imports coming into the UK from the EU, the globe and vice versa. The principle of exhaustion fundamentally serves to balance the public interest in the free movement of goods and the private interest of intellectual property right holders in the remuneration for their goods. Based on the two models that the government could adopt, we can again try to predict the possible forthcoming state of this principle for intellectual property law in relation to fashion in the UK.

The principle of the international exhaustion of rights being applied might be very attractive to free marketeers and indeed in a post Brexit world with a UK government intent on increasing trading links with the

world as a whole and following a policy of de-regulation, it is not beyond the realms of possibility such a policy would be followed. However, if it were this could have major impacts on the fashion world and in particular, fashion retailing in the UK.

The good scenario has two faces, dependent on which perspective of the fashion industry you are reading from. An international exhaustion regime provides the ultimate free market regime in the UK, meaning the intellectual property right holder themselves would have much less control over price. This is attractive from a consumer's perspective in the fashion industry, but less so from the brand holder's perspective. The argument being that global parallel trade would depress prices in the UK for branded fashion goods. From a brand holder's perspective, a 'fortress UK' approach to exhaustion provides them with better control over the price and their distribution channels in the UK and therefore maintains control that they are likely to desire. One only has to look back to the legal cases of the late 1990s and early 2000s in the UK, when major supermarket chains in the UK were intent on importing cheap Levi Strauss jeans into the UK from outside the UK, such as the US.

The bad side to this coin is that adopting a UK exhaustion model could impact the appeal of the UK fashion industry because of the likely subsequent restriction on trade.

The ugliest part so far is the uncertainty surrounding whether we will remain a part of or leave the EEA. This situation therefore remains harder to predict, if we do remain then any of the above considerations will be inconsequential. If the alternate materialises we shall await with bated breath the future of Section 12 of the Trade Marks Act 1994 and our approach to the

principle of exhaustion. Similar reasoning applies to the exhaustion of all IP rights, beyond trade marks, in the fashion sector.

Rebecca Field, a Chartered Trade Mark Attorney at HGF noted, "Whilst we do not currently know if the UK will remain a part of the EEA, some form of principle of exhaustion will live on. The UK Government will be under strong pressure from rights holders to ensure goods have an appropriate trade channel to enable businesses to grow and that companies are taking the benefit of sales of their goods. It is my view that an International exhaustion regime may not be good news for fashion designers and houses because they may lose control of pricing and where the product ultimately ends up for sale, which could lead to brand tarnishment".

Whilst we cannot determine what the outcome of each of these intellectual property law matters will be, we can at least visualise that there are still potential positives for the fashion industry, which is important to highlight in the largely negative abyss of opinions and discussions surrounding Brexit as we await the outcome of negotiations. Whether we face the good, the bad or the ugly, there is still potential for development in our law and the most important thing will be to focus on enabling the fashion industry to flourish.

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