



Brexit update - unregistered designs and the fashion industry

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The potential impact of Brexit on unregistered designs could be significant to the retail and design industry, because the industry relies heavily on unregistered design rights. This is because of the fast turnaround of clothing ranges, which can sometimes make the cost and process of obtaining registered protection for fast moving fashion designs seem unfeasible.

Currently, a business or individual in the UK can benefit from two types of unregistered design rights: a UK unregistered design right and an EU unregistered design right. Both of these rights arise automatically, without the need for registration:

- The UK right can give up to 15 years of protection for designs; however, its scope is more limited than the EU right, in particular because it does not apply to surface decoration. By way of example, this meant that Lambretta Clothing Company were unable to claim an unregistered design right in the positioning of white stripes on a “retro-vintage” tracksuit top.
- The European right automatically protects qualifying designs for a shorter three-year period. It is available to anyone, regardless of nationality, provided the design in question is “first made available to the public” within the EU. Critically, the protection is broader than the UK right, and provides additional protection for the appearance of a product resulting from its hue, lines, texture, surface decoration, materials and/or ornamentation.

The worry is that, in a post-Brexit world, British designers will only qualify for the more limited UK unregistered design protection, unless they (i) make a positive decision to ensure that their designs are always first made available in the European Union (which will obviously, post-Brexit, exclude the UK) or (ii) seek (and pay for) registered protection.

The British Fashion Council has raised this as a particular concern in its recent written evidence provided to the British House of Lords European Union Committee in March 2017. The Committee was considering what would amount to a “good” free trade deal between the UK and the EU, for sectors other than the financial services sector.

In its evidence, the British Fashion Council argued: “London Fashion Week is one of the world’s leading international trade showcases for the country, which happens biannually for both womenswear and menswear. It contributes to London being one of the ‘big four’ fashion capitals alongside New York, Paris and Milan. LFW has a reputation for both established brands, entrepreneurs, future brands and as a launchpad for new emerging talent.”

It goes on to conclude: “Whilst UK-based designers will still be able to rely on [unregistered design protection] in the EU, this will only be on the basis that the relevant designs are first disclosed in the EU. Businesses will therefore be forced to show/disclose their designs first in the EU in order to rely on [unregistered design protection] in the EU, effectively closing down London Fashion Week as a platform to promote British businesses.”

Resolving this problem is not straightforward. The UK could expand the scope of its unregistered design right, but designers might still prefer to exhibit first in the EU (as the EU right is likely to be more valuable to them than the UK right due to the EU market being larger). A deal whereby the EU treats the UK, for design right qualification purposes, as part of the EU might be desirable for the UK industry, but would likely be politically very difficult to achieve.

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