



Intellectual Property Rights

Intellectual property rights (IPRs) refer to rights that are based on creations of the human mind. IPRs are divided into two categories: “industrial property” and “copyright and related rights”. Industrial property includes inventions, trademarks, industrial design and geographical indications of source. Copyright includes literary and artistic work. Related rights include the rights of performing artists, producers and broadcasters. The need to develop a harmonized EU legal framework for intellectual property rights stems from the differences that exist between national laws in this field, because differences in rules can create a barrier to the free movement of goods and services in the Single European Market (SEM) and can distort competition. Several European Union member states and the European Commission have long actively pushed for the adoption and reinforcement of an international protection of intellectual property rights, reflected in several conventions at the international level that govern the protection of various aspects of intellectual property. The most important ones in this context are:

- The Rome Convention (1961) providing for the protection of performers, producers of phonograms and broadcasting organizations.
- The Berne Convention, providing for the protection of literary and artistic works (1886, last amendment 1979).
- The 1996 TRIPS Agreement on trade-related aspects of IPRs, including, for example, the granting of patents for pharmaceutical products.

The World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) are responsible for implementing such conventions and treaties and maintain close relations. The result has been some degree of harmonization of national laws in specific areas of IPRs. However, it is the opinion of the European Commission and many other observers that international efforts to improve the protection of IPRs have not achieved the degree of harmonization necessary for the operation of a true European single market. The pressure for harmonized international standards has grown due to digital developments such as the use of internet and piracy the music and film industry as well as an increase in counterfeiting goods.

European Community Actions

From an economic point of view, much can be gained from an increase of IPRs. For example, as spelled out in a study commissioned by the DG Culture, societies in Europe collected more than €4.35 billion in 2004 on behalf of authors, composers and music

publishers. A better system of IPRs that would strengthen the fight against piracy in this sector could increase the revenue even more. An incoherent system of IPRs is damaging the EU's overall efforts to become the most competitive economy in the world. This explains the ongoing effort of the European Commission both to reinforce EU-level policy on this topic as well as to strengthen the protection of IPRs at a global level.

Within the EU, the DG Internal Market and Services (mainly Directorate D Knowledge Based Economies) is responsible for IPR related issues. This department conducts the EU negotiations on industrial and intellectual property within WIPO and is responsible for adapting the relevant EU *acquis* to new technological developments. European Union efforts to strengthen the protection of intellectual property rights at EU-level policy can be grouped into four categories: trademarks and designs, the patent system, copyright and related rights and counterfeiting and piracy. Efforts in these different areas have not been uniformly effective. Difficulties stem from (among other problems) disagreements over translation requirements and their costs, legal jurisdiction for patents, disputes about the need for a Community patent and an increase in counterfeiting.

Trademarks and Designs

In the category trademarks and designs, one important element of the European Commission's strategy to protect industrial property rights is harmonization of member states' national laws in order to avoid trade barriers. A second element of importance is the creation of Community trademarks and Community designs that guarantee EU-wide protection, in order to create a well-functioning unitary system. The official EU body for registering designs and trademarks throughout the EU is the Office for Harmonization in the Internal Market (OHIM), brought into existence in 1994 and based in Alicante, Spain.

With regard to national trademarks laws, a harmonization directive was established in 1988 (amended in 1991), in which EC members called for the approximation of the conditions for the registration of a national trademark and the rights conferred by this trademark. In December 1993 the member states adopted a regulation on a Community trademark enabling the holder of it to market his products throughout the EU, thereby benefiting from a common set of protection rules. A subsequent regulation, dating from December 1995, set the payable fees for the Community trademark. A third regulation created the procedure to be followed in cases brought before the Boards of Appeal of the OHIM. Registration of Community trademarks started in 1996 and the total of registrations was 410,156 by October 2007. There have been numerous difficulties in ensuring the effective operation of the Community trademark system, notably with the ability to search for prior rights. EU member states agreed upon a new regulation in February 2004, which has greatly improved this system.

A similar development to that of Community trademarks has taken place with regard to Community designs. In October 1998, the EU member states agreed upon a European directive to harmonize national laws on designs. In 2001, the EU Council of Ministers

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adopted a regulation to establish a single EU-wide system of Community designs. The OHIM has started registering Community designs in April 2003 and by October 2007 it had registered 272,865 of them. Holders of a registered design have European Union wide rights to use their design and to prevent any third party from using it. This protection can be renewed every 5 years and can last up to 25 years. In December 2006 the Commission adopted two regulations that approved the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs of the World Intellectual Property Organization (WIPO). This will allow EU companies to obtain - with a single application for a Community Design- protection of a design not only throughout the EU, but also in the other countries that are members of the Geneva Act. The rights provided by the Community trademarks and Community designs have automatically been extended in line with the 2004 and 2007 EU enlargements.

The Patent System and the Attempt to Create a Community Patent

In the field of granting and enforcing the rights provided by patents, two overlapping European conventions exist. In 1973, the Munich Convention established the European Patent and through a single application to the European Patent Organization (EPO), a patent can be obtained for up to 37 states that are part of EPO. This organization provides a bundle of patents which are, however, still subject to national law and today all 27 EU member states are party to this convention. The major problem with the European Patent is the language system used. The EPO works in English, French and German and the patent (description and claims) is published in one of these three languages, while the claims must be translated into the other two. Nevertheless, for the patent to take effect in a particular country, the patent holder must file a translation of the description and claims in that country's language within a set period established by national law (usually three months from the EPO's grant). As this is an expensive and time-consuming requirement, in October 2000 the so-called London Agreement was signed, aimed at waiving, entirely or largely, this requirement for countries that choose not to require translations in their national language (and thus take English, French and German to be sufficient). To enter into force, the London Agreement must be ratified by at least eight contracting states, including France, Germany and the United Kingdom. France ratified the agreement in October 2007 and the Agreement is expected to enter into force at some point in 2008.

The second convention dealing with patents in Europe is the 1975 Luxembourg Convention (amended in 1989). This convention called for unitary effect to all patents applied for in the EC, thereby establishing a system of European Community Patents, which would still be managed by the EPO. These patents would be legally recognized in all EU member states. Whilst it was signed by all the member states and is more than twenty years old, this convention has never been ratified. In the past ten years, the European Commission has been actively campaigning for the creation of this system of Community Patents. In 1997, the Commission produced a policy statement (green paper) on the Community patent and the patent system in Europe, advocating a single procedure

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and a single Community Patent Court with overarching jurisdiction as part of the European Court of Justice. The Commission, together with supporting member states, argues that such a system will have significant advantages. For example, in the existing system for issuing patents, disputes must be litigated separately in each country and each state requires a full translation of the patent. Thus, a Community Patent will simplify the protection of inventions throughout the European Union and will increase legal certainty (if a patent were successfully challenged, it would cease to apply throughout the entire EU). Additionally, there will be a significant reduction in patenting costs, especially in those costs relating to translation and filing. In August 2000, the Commission proposed a regulation calling for the establishment of a Community patent to coexist with the European patent and national patent systems. However, in April 2007, ten years after its initial green paper, not much has improved the European Commission's stance on this issue and recently it has had to send out another call for improving the patent system in Europe.

More generally, the Commission argues that the lack of a single Community patent system in effect creates a major competitive handicap for the European Union as the single market for patents can still be considered incomplete. The creation of a single system will stimulate private investment in research and development (lagging well behind the US and Japan). In the current system, a European patent designating 13 countries is still 11 times more expensive than a US patent and 13 times more expensive than a Japanese patent. Also, a Community patent would be far more attractive than the models under the present system which provides merely a bundle of national patents. The creation of a single patent would also make sense for organizational reasons, as it would correspond to the territory of the single market. Critics of this view argue that the existing European Patent System is more than sufficient, and that it will be even more so with the London Agreement in force. However, a broad consultation among stakeholders held in 2006 demonstrated that the majority of them still considers harmonization and simplification of the patent system an important issue to be solved.

Ostensibly, the member states are in favor of the Community Patent and have repeatedly pronounced the creation of the Community patent to be a priority. However, this regulation has yet to be adopted because of the repeated failure to agree on its precise contents (thus the best marriage with the existing European system). Similar problems as with the existing system have come to the fore, notably the costs of granting a Community Patent, the languages to be used in the process, the length of the period under which translations of claims can be filed and the question of jurisdiction – who is to decide on the legal validity of the translation and how to deal with the effects of a mistranslation. Regarding these patent jurisdiction arrangements, some member states support the draft European Patent Litigation Agreement (EPLA) in the context of the European Patent Convention; others favor the establishment of a specific Community jurisdiction for patent litigation on European and Community patents based on the EC Treaty.

Another ongoing problem the European Commission has sought to address in this area is the lack of harmonization of national arrangements on utility models. Utility models are close to patents and they are obtained more easily and cheaply, but also provide less legal certainty. The grounds on which the Commission decided to address these IPRs are spelled out in its green paper on Utility Models (July 1995) in which for example it states that non-harmonization in this area hampers the free movement of goods. In December 1997, the Commission proposed a Directive seeking harmonization and the establishment of a utility model system in those member states of the EU that did not yet have such a system (including the UK, Sweden and Luxembourg). Although approved by the European Parliament, this proposed directive has yet to be adopted by the member states for reasons similar to those behind the non-adoption of the Community Patent, and also because some of those member states without a utility model system do not see the need to adopt one.

The Commission has had more success in other areas of patenting intellectual property. The Commission's proposed directive on the legal protection of biotechnological inventions was adopted by the member states (in the Council) and the European Parliament in July 1998. The main objective of this directive is to clarify which biological material and biotechnologies are patentable and which are not. It confirms in particular the non-patentable processes such as those for modifying the germ-line genetic identity of humans and for cloning human beings, as well as any discovery of an element of the human body (including the sequence or partial sequence of a gene). Concern over these matters led the European Parliament in 1994 to veto a biotechnologies directive. In 2002 and in 2005 the Commission adopted reports on developments in the field of biotechnology and their patentability. The reports dealt, for example, with totipotent stem cells – those capable of developing into a human being. They have been excluded from patentability on the grounds of human dignity as set out in the directive. The evaluation of all ethical aspects of biotechnology is placed under the purview of the Commission's European Group on Ethics in Science and New Technologies. With regard to the state of implementation of the 1998 Directive, only four member states have not implemented the directive: Italy, Luxembourg, Latvia and Lithuania.

Copyright and Related Rights

The European Commission began to actively push for the development of common European policies on copyright of new technologies with the launch of the Single European Market (SEM) program in 1986. This push was based on the grounds that differences in copyright protection and legal uncertainty were disincentives to the exercise of rights in some countries and thus an obstruction to the SEM, but also on the grounds of the desirability of a high level of copyright protection throughout the EC / EU. In December 1986, the first European directive on copyright and related rights was adopted, concerning the legal protection of topographies of semiconductor products. In 1988, the Commission published a Green Paper on copyright and the challenge of new technologies, and in December 1990 it set out an action plan on necessary European

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legislation to achieve harmonization of national laws in this field. Several pieces of legislation were adopted in the 1990s, including directives on computer programs, computer databases, satellite broadcasting and cable transmission, rental and lending rights and the duration of protection. In September 2001, the European Parliament and the Council agreed a Directive on the harmonization of the resale right for the benefit of the author of an original work of art. In July 1995, the Commission produced a second Green Paper on copyright and related rights in the information society calling for further action in this area. After consultation with stakeholders, in November 1996, the Commission called for European legislation to catch up with information technological developments and to improve the protection of copyright within the context of the single market. With this aim in mind, in May 2001, the member states (in the Council) and the European Parliament adopted a Directive harmonizing certain aspects of copyright and related rights in the information society which also transposed into European law two new international treaties in the field (the Copyright Treaty and the Performances and Phonograms Treaty), adopted in December 1996 by the World Intellectual Property Organization (WIPO) and approved by the European Community in March 2000. This May 2001 Directive applies to the existing European legislation mentioned above. The Commission possesses an important watchdog power with regard to the implementation of these directives and is responsible for reporting to the member states (the Council) and the European Parliament on the transposition and application of European law in this area. In the last two years, the Commission has increased its focus on new internet-based services and broadcasting. The Commission in 2005 adopted a recommendation on the management of online rights in musical works. The European Communities and its Member States are also actively involved in negotiations on a WIPO Broadcasters' Treaty, which aims at creating an international instrument that protects the broadcasting organization's program-carrying signal from theft or other forms of unauthorized misappropriation.

Counterfeiting and Piracy

The European Commission has called for the development of a more effective collective approach to combating the growth in the illegal market for designer goods with a 'name' or a trademark (counterfeiting) and goods made without paying for intellectual property rights (piracy). A Commission Communication in 2005 demonstrated the explosion of counterfeiting in the past years. The Commission underlines the harmful impact of these activities upon the operation of the Internal market and the EU, as well as the attraction of international trafficking rings making massive profits by putting consumers' health and safety in increasing danger. Following various Commission efforts to stimulate debate on combating counterfeiting and piracy (including an October 1998 Green Paper and a November 2000 action plan), the EU member states and the European Parliament agreed upon a directive on the enforcement of intellectual property rights in April 2004 which seeks to ensure an equal level of intellectual property protection in the EU and align enforcement measures throughout the EU to create equal conditions for the

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application of intellectual property rights. The official objectives of this improved protection of intellectual property in the EU are to:

- Promote innovation and business competitiveness (in that counterfeiting and piracy can lead to a loss of confidence amongst operators in the Internal Market).
- Discourage creators and inventors from endangering innovation and creativity in the Community.
- Preserve employment in Europe (in that counterfeiting and piracy can damage business).
- Prevent tax losses and market destabilization (in that tax losses caused by counterfeiting and piracy are big and the loss in several industries such as multimedia products is already considerable).
- Ensure consumer protection (in that counterfeiting and piracy involves the sale of products of poor quality, lack of guarantee and after-sales care and may even endanger consumers).
- Ensure the maintenance of public order (in that counterfeiting and piracy infringe health, product safety, tax and labor legislation).

An active strategy was proposed by the Commission in 2005. The proposed measures for action in 2005 and 2006 were to increase the Community level of protection through improved legislation and operational controls, to strengthen the custom-business partnership and to reinforce international co-operation in this area. The latest ad hoc European initiative in this respect was “operation DAN”, a joint customs operation of the duration of three weeks (autumn 2006) on Chinese counterfeit goods. In this operation a total of 92 containers was seized filled with fake toys, fake sunglasses, counterfeit shoes; DVD players, knives, clothes, games, lighters and cigarettes

A worrisome development has also been the piracy activities in the music and movie sector. It is estimated that, in 1995, 37% of all CDs purchased globally were pirate (1.2 billion pirate CDs). Successful policies and joint counter actions have brought down the number of copyright infringing music files available online in recent years, however, the total number of files available, in 2005, was still estimated at 885 million and given the growth in the legal download market one can only assume this number has exponentially grown. Payment of copyrights on these goods would bring substantial economic gains and notable court cases in the Nordic countries provide ample evidence for this.

Summary

European efforts to develop a harmonized EU legal framework for intellectual property rights are rooted in the belief that differences in national laws in this field create a significant barrier to the free movement of goods and services in the Internal Market and that they distort competition. The incoherence in IPRs within the EU is a clear barrier for the EU Lisbon Strategy to overcome. The Commission underlines the need for a coherent, single system and advocates Community wide trademarks, designs and patents.

EU Trademarks and EU designs have been launched, but the Commission has not been successful in all segments of IPRs, and probably has made the least progress in the area of patenting. The main cause is the existence of a more established patent system and the EU has not yet been able to offer a viable alternative. The London Agreements, which will most likely come into force in 2008, will enhance the position of the European Patent (not the Community Patent) as it will facilitate the language requirements for those patents.

American companies have profited from the EU trademark regulations adopted in the 1990s, which provide a common set of EU protection rules, rather than a diversity of national rules, a single set of payable fees and a single procedure for cases of infringement. The further harmonization of the EU legal framework on intellectual property rights serves the interests of American companies given the reduced costs (in time and legal expenses) that would result from the establishment of a single European patent and a single utility model. The US manufacturers likewise profit from the increased protection offered by a strengthened common EU policy on counterfeit and piracy.