



INTELLECTUAL, INDUSTRIAL AND COMMERCIAL PROPERTY

Intellectual property includes all exclusive rights to intellectual creations. It encompasses two types of rights: industrial property, which includes inventions (patents), trademarks, industrial designs and models and designations of origin, and copyright, which includes artistic and literary property. Since the entry into force of the Treaty on the Functioning of the European Union in 2009, the EU has had explicit competence for intellectual property rights (Article 118).

LEGAL BASIS

Articles 114 and 118 of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

Although governed by different national laws, intellectual property rights (IPR) are also subject to EU legislation. Article 118 TFEU provides that in the context of the establishment and functioning of the internal market, Parliament and the Council, acting in accordance with the ordinary legislative procedure, establish measures for the creation of EU Intellectual Property Law – in order to provide uniform protection of IPR throughout the EU – and for the setting-up of centralised, EU-wide authorisation, coordination and supervision arrangements. The legislative activity of the European Union consists chiefly in harmonising certain specific aspects of IPR through the creation of a single European system, as is the case for the EU trademark and design, and as will be the case for patents. The [European Union Intellectual Property Office](#) (EUIPO) is responsible for managing the EU trademark and design.

ACHIEVEMENTS

A. Legislative harmonisation

1. Trademarks, designs and models

In the EU, the legal framework for trademarks is based on a four-tier system for trademark registration, which coexists with national trademark systems harmonised by means of the Trademark Directive ([Directive 2008/95/EC](#) of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks). In addition to the national route, possible routes to trademark protection in the EU are the Benelux route, the EU trademark, introduced in 1994, and the international route. [Regulation \(EU\) 2015/2424](#) of the European Parliament and



of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the EUIPO simplifies national and EU trademark legislation and makes trademark registration in the EU cheaper, quicker, more reliable and more predictable, thus increasing legal certainty for holders.

[Directive 98/71/EC](#) of 13 October 1998 approximates national legislation on the legal protection of designs and models. [Council Regulation \(EC\) No 6/2002](#) of 12 December 2001 (amended) institutes a Community system for the protection of designs and models. [Council Decision 2006/954/EC](#) and [Council Regulation \(EC\) No 1891/2006](#), both of 18 December 2006, link the EU system for the registration of designs or models to the international registration system for industrial designs and models of the World Intellectual Property Organisation (WIPO).

2. Copyright and related rights

Copyright ensures that authors, composers, artists, film-makers and others receive payment and protection for their works. Digital technologies have profoundly changed the way creative content is produced, distributed and accessed.

a. Copyright

[Directive 2001/29/EC](#) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society adapted legislation on copyright and related rights to technological developments, but is out of pace with the extraordinarily fast developments that have taken place in the digital world, such as the distribution of and access to television and radio programmes, with 49% of European internet users in the EU accessing music, audiovisual content and games online (Eurostat estimate). Harmonised copyright legislation across the EU for consumers, creators and companies is therefore necessary.

[Directive \(EU\) 2019/790](#) of the European Parliament and of the Council on copyright in the Digital Single Market of 17 April 2019 provides for an ancillary copyright for press publishers and fair remuneration for copyrighted content. So far, online platforms have had no legal responsibility for using and uploading copyrighted content on their sites. The new requirements will not affect the non-commercial upload of copyrighted works to online encyclopaedias such as Wikipedia.

The '[CabSat](#)' [Directive](#) EU/2019/789 of 17 April 2019 aims to increase the number of TV and radio programmes available online to European consumers. Users increasingly expect to have access to television and radio content at any time, anywhere. Broadcasting organisations are therefore increasingly offering online services in addition to their traditional broadcasts. The directive introduces the country of origin (COO) principle to facilitate the licensing of rights for certain programmes that broadcasters offer on their online platforms (e.g. simulcasting and catch-up services). Broadcasters will have to obtain copyright permissions in their EU country of establishment (i.e. country of origin) in order to make radio programmes, TV news and current affairs programmes and fully financed own productions available online in all EU countries.



[Directive 2017/1564](#) of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled facilitates access to books and other print material in appropriate formats and their circulation in the internal market.

[Regulation \(EU\) 2017/1128](#) of 14 June 2017 on cross-border portability of online content services in the internal market aims at ensuring that consumers who buy or subscribe to films, sport broadcasts, music, e-books and games can access them when they travel to other EU Member States.

b. Term of protection of copyright and related rights

These rights are protected for life and for 70 years after the death of the author/creator. [Directive 2011/77/EU](#) amending Directive 2006/116/EC on the term of protection of copyright and certain related rights extended the term of copyright protection for performers of sound recordings from 50 to 70 years after recording, and for authors of music, such as composers and lyricists, to 70 years after the author's death. The term of 70 years has become an international standard for the protection of sound recordings. Currently 64 countries around the world protect sound recordings for 70 years or longer.

c. Computer programs and databases

[Directive 91/250/EEC](#) required Member States to protect computer programs by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. It was codified by [Directive 2009/24/EC](#) of the European Parliament and of the Council. [Directive 96/9/EC](#) provides for the legal protection of databases, defining a database as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'. The directive stipulates that databases are protected both by copyright, which covers intellectual creation, and by a sui generis right protecting investment (of money, human resources, effort and energy) in the obtaining, verification or presentation of the content.

d. Collecting societies

A licence must be obtained from the different holders of copyright and related rights before content protected by such rights and the linked services may be disseminated. Rightholders entrust their rights to a collecting society, which manages those rights on their behalf. Unless the collective management organisation has objectively justified reasons to refuse management, it is obliged to manage these rights. Rightholders are free to entrust the management of their rights to independent management entities. These are commercial entities that differ from collective management organisations, inter alia because they are not owned or controlled by rightholders. On 26 February 2014, Parliament and the Council adopted [Directive 2014/26/EU](#) on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, laying down requirements applicable to collective management organisations, with a view to ensuring high standards of governance, financial management, transparency and reporting. This directive aims at ensuring that rightholders have a say in the management of their rights



and envisages a better functioning of collective management organisations by means of EU-wide standards.

Member States have to ensure that collective management organisations act in the best interests of the rightholders whose rights they represent, and that they do not impose any obligations which are not objectively necessary for the protection of the rights and interests of the rightholders or for the effective management of those rights.

3. Patents

A patent is a legal title that can be granted for any invention having a technical character, provided that it is new, involves an inventive step and could have an industrial application. A patent gives the owner the right to prevent others from making, using or selling the invention without permission. Patents encourage companies to make the necessary investment in innovation, and provide an incentive for individuals and companies to devote resources to research and development. In Europe, technical inventions can be protected either by national patents granted by the competent national authorities, or by European patents granted centrally by the [European Patent Office \(EPO\)](#). The latter is the executive branch of the European Patent Organisation, which now has 38 contracting states. The EU itself is not a member of that organisation.

After years of discussions among the Member States, Parliament and the Council approved the legal basis for a European patent with unitary effect (unitary patent) in 2012. An international agreement between Member States thus sets up a single and specialised patent jurisdiction.

The Court of Justice's confirmation of the patent package in its judgment of 5 May 2015 in Cases C-146/13 and C-147/13 cleared the way for a [truly European patent](#). The previous regime will coexist with the new system until the [Unified Patent Court \(UPC\)](#) is established.

Once granted by the EPO, a unitary patent will provide uniform protection with equal effect in all participating countries. Businesses will have the option of protecting their inventions in all EU Member States with a single unitary patent. They will also be able to challenge and defend unitary patents in a single court action through the UPC; it has been proposed that its seats will be in London, Munich and Paris. This will streamline the system and save on translation costs. However, following the June 2016 referendum in the United Kingdom on withdrawal from the EU, there are serious doubts as to whether a non-EU country can be a contracting state of the Unified Patent Court Agreement (UPCA). Moreover, the current wording of the UPCA clearly provides that the primacy of EU law must be respected (Article 20 UPCA) and that the decisions of the Court of Justice of the European Union (CJEU) shall be binding on the UPC and, therefore, also on the UK.

4. Trade secrets

The practice of keeping information confidential goes back centuries. Legal instruments to protect trade secrets, whether or not defined as part of IPR, exist in many countries. The level of protection afforded to confidential information cannot be compared to other areas of intellectual property law such as patents, copyrights and trademarks. The protection of trade secrets varies more from country to country than other areas



of IPR law, as do the approaches taken. There is a patchwork legal framework, but since 2016, there has been an EU legal framework, namely [Directive \(EU\) 2016/943](#) of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

5. Combating counterfeiting

According to estimates, imports of counterfeit and pirated goods into the EU amount to approximately EUR 85 billion (up to 5% of total imports). Worldwide, trade in pirated goods accounts for as much as 2.5% of trade and up to EUR 338 billion, which causes significant damage to rightholders, governments and economies.

As differences in national systems for penalising counterfeiting and piracy were making it difficult for Member States to combat those offences effectively, Parliament and the Council adopted [Directive 2004/48/EC](#) on the enforcement of intellectual property rights as a first step. It aims to step up the fight against piracy and counterfeiting by approximating national legislative systems to ensure a high, equivalent and homogeneous level of intellectual property protection in the internal market and provides for measures, procedures and compensation under civil and administrative law. [Regulation \(EU\) No 608/2013](#) concerning customs enforcement of IPR provides procedural rules for customs authorities to enforce intellectual property rights with regard to goods liable to customs supervision or customs checks.

B. Theory of the 'exhaustion' of rights

1. Definition

This is the theory that the proprietor of an industrial or commercial intellectual property right protected by the law of one Member State cannot invoke that law to prevent 'the importation of products which have been put into circulation in another Member State'. It applies to all fields of industrial property.

2. Limits

The theory of exhaustion of EU rights does not apply in the case of marketing of a counterfeit product, or of products marketed outside the European Economic Area (Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights — TRIPS). In 1999, the CJEU ruled, in its judgment in *Sebago Inc. and Ancienne Maison Dubois & Fils SA v GB-Unic SA* (C-173/98), that Member States may not provide in their domestic law for exhaustion of the rights conferred by the trademark in respect of products put on the market in non-member countries.

3. Principal legal acts in this area

- [Directive 2006/115/EC](#) of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property;
- [Council Directive 93/83/EEC](#) of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;



- [Directive 2001/84/EC](#) of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

C. Recent case law of the Court of Justice of the European Union (CJEU)

In 2012, the CJEU confirmed in the SAS case ([C-406/10](#)) that, according to Directive 91/250, only the expression of a computer program is protected by copyright and that ideas and principles which underlie its logic, algorithms and programming languages are not protected under that directive (paragraph 32 of the judgment). It stressed that neither the functionality of a computer program nor the programming language and format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program for the purposes of Article 1(2) of Directive 91/250 (paragraph 39).

In its judgement in [Case C-160/15](#) (GS Media BV v Sanoma Media Netherlands BV), the CJEU declared that the posting on a website of a hyperlink to works protected by copyright and published without the author's consent on another website does not constitute a 'communication to the public' when the person who posts that link does not seek financial gain and acts without knowledge that those works have been published illegally.

In its judgement in [Case C-484/14](#) of 15 September 2016, the CJEU held that making a Wi-Fi network available to the general public free of charge in order to draw the attention of potential customers to the goods and services of a shop constitutes an 'information society service' under the directive, and confirms that, under certain conditions, a service provider who provides access to a communication network may not be held liable. Consequently, copyright holders are not entitled to claim compensation on the grounds that the network was used by third parties to infringe their rights. Securing the internet connection by means of a password ensures a balance between, on the one hand, the intellectual property rights of rightholders and, on the other hand, the freedom to conduct a business of access providers and the freedom of information of the network users.

ROLE OF THE EUROPEAN PARLIAMENT

Intellectual property creates added value for European businesses and economies. Its uniform protection and the enforcement thereof contribute to the promotion of innovation and economic growth. Parliament is therefore committed to trying to harmonise IPR through the creation of a single European system in parallel with national systems, as is the case with the EU trademark and design, and the European unitary patent.

In various resolutions on IPR, and particularly on the legal protection of databases, biotechnological inventions and copyright, Parliament has argued for the gradual harmonisation of such rights. It has also opposed the patenting of parts of the human body. On 27 February 2014, Parliament adopted an own-initiative resolution on private copying levies (the right to make private copies of legally acquired content), as digital private copying has taken on major economic importance as a result of technological



progress. Parliament has also played a very active role in the drafting of the WIPO treaty [on copyright exceptions for the visually impaired](#) (the 'Marrakesh Treaty').

As preparatory work for the overhaul of EU copyright rules (see A.2.a), Parliament adopted, in September 2018, a report containing a number of important recommendations on all issues currently at stake. Throughout the legislative process, there was a heated public debate focused on Articles 11 and 13 of the draft directive on copyright in the digital single market. This debate culminated in a vote of Parliament backing efforts to create a new right for media publishers to monetise content on certain big news platforms and a new right making it easier to track copyright infringements on the internet. While the creative industry rejoiced, tech company representatives slammed the proposals. In the end, Parliament's vote once again set the tone for the negotiations with the Council and the final adoption of the directive on 17 April 2019.

Udo Bux
05/2019

