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 European IPR in order to provide uniform protection of such rights throughout the Union, and for the setting-up of centralised, Union-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

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 European Union Intellectual Property Office 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 issues

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 now out of pace with the extraordinarily fast developments that have taken place in the digital world since 2001. Harmonised copyright legislation across the European Union has yet to be established, and this results in legal uncertainty for individuals and companies. On 14 September 2016 the Commission proposed a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016) 0593), and a regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions (COM(2016) 0594). The copyright proposal, responding to the Digital Single Market Strategy, would enhance the position of right holders, who should be remunerated correctly for the exploitation of their content by online services giving access to user-uploaded content. The broadcasting proposal seeks to offer wider online access to TV and radio programmes for users across the EU and is presented in parallel with a proposal for a regulation and a directive to implement the Marrakesh Treaty in order to improve access to format copies of certain works for the benefit of persons who are blind, visually impaired or otherwise print disabled.

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 (see Directive 2006/116/EC as amended by Directive 2011/77/EU - extension of the protection for performers in sound recordings from 50 to 70 years after their fixation in record). This narrowed the gap with the authors of music, such as composers and lyricists, whose term of copyright protection was also 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 requires Member States to protect computer programs and databases by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. Having been amended on several occasions, the directive was codified by Directive 2009/24/EC of the European Parliament and of the Council. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 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 contents.

d. Collecting societies

A licence must be obtained from the different holders of copyright and related rights before content protected by copyright and related rights and the linked services may be disseminated.

Right holders entrust their rights to a collecting society, which manages those rights on their behalf. Collective management organisations should continue to play an important role in promoting diversity of cultural expression, both by enabling the smallest and least popular repertoires to access the market and by providing social, cultural and educational services to their right holders and the public.

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 a high standard of governance, financial management, transparency and reporting.

Member States have to ensure that collective management organisations act in the best interests of the right holders 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 right holders, or for the effective management of those rights. Right holders may authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the right holder. Unless the collective management organisation has objectively justified reasons to refuse management, it is obliged to manage these rights. Right holders 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 right holders.

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 is susceptible of 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 for 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, in 2012 Parliament and the Council approved the legal basis for a European patent with unitary effect (unitary patent). Through the 'unitary patent package', the EU legislator seeks to confer unitary protection and to establish a unified court in this area. An international agreement between Member States thus sets up a single and specialised patent jurisdiction.

Following 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, the way is free 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, which will have seats in London, Munich and Paris. This will streamline the system and save on translation costs. After the

June 2016 referendum in the UK on withdrawal from the EU, the new system faces serious doubts as to whether a country which is not an EU Member State can be a contracting state of the Unified Patent Court Agreement (UPCA). Moreover, the text of the UPCA in its present wording clearly provides that the primacy of Union law must be respected (Article 20 UPCA) and that the decisions of the European Court of Justice (ECJ) shall be binding on the UPC and, therefore, also on the United Kingdom.

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

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. The directive 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. Directive 2004/48/EC provides for measures, procedures and compensation under civil and administrative law only. In 2014, Regulation (EU) No 608/2013 concerning customs enforcement of IPR provided procedural rules for customs authorities to enforce intellectual property rights with regard to goods liable to customs supervision or customs control.

B. Theory of the ‘exhaustion’ of rights

a. 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.

b. 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 Court of Justice 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.

c. 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 broadcasting and cable retransmission; and

— 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

In 2012, the Court of Justice 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 the logic, algorithms and programming languages are not protected under that directive (paragraph 32 of the judgment). The Court 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 Court declares that the posting of a hyperlink on a website 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 Court holds 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 right holders 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

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 WIPO draft treaty on copyright exceptions for the visually impaired. As preparatory work for the general copyright reform, Parliament adopted, on 24 June 2015, an own-initiative report containing a number of important recommendations on all issues currently at stake.

Parliament and the EU as a whole are engaged in trying to harmonise certain specific aspects of IPR through the creation of a single European system in parallel to national systems, as is the case with the European Union trademark and design, and the European Unitary Patent.

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