DRAFT REPORT

on an intellectual property action plan to support the EU’s recovery and resilience
(2021/2007(INI))

Committee on Legal Affairs

Rapporteur: Marion Walsmann
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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on an intellectual property action plan to support the EU’s recovery and resilience (2021/2007(INI))

The European Parliament,

– having regard to the Commission communication of 25 November 2020 on Making the most of the EU’s innovative potential – An intellectual property action plan to support the EU’s recovery and resilience (COM(2020)0760),

– having regard to its resolution of 9 June 2015 on ‘Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan’ 1,

– having regard to its resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organisers in the digital environment 2,

– having regard to the European Union Charter of Fundamental Rights, in particular Article 17 thereof,

– having regard to the Agreement on a Unified Patent Court 3,

– having regard to the Geneva Act Of The Lisbon Agreement on Appellations of Origin and Geographical Indications of the World Intellectual Property Organization (WIPO), which entered into force on 26 February 2020 4,


– having regard to Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs 7,

– having regard to the Commission’s evaluation of EU legislation on design protection (SWD(2020)0265),

– having regard to Rule 54 of its Rules of Procedure,

having regard to the opinions of the Committee on Development, the Committee on the Internal Market and Consumer Protection, the Committee on Agriculture and Rural Development and the Committee on Culture and Education,

having regard to the report of the Committee on Legal Affairs (A9-0000/2021),

A. whereas strong protection and enforcement of intellectual property rights (IPR), which play a huge role in the European economy, are essential;

B. whereas knowledge-intensive industries are source of growth and prosperity; whereas between 2012 and 2016 they generated almost 30 % of all jobs and almost 45 % of total economic activity (GDP) in the EU, as shown in the 2019 industry-level analysis report by the European Patent Office (EPO) and the EU Intellectual Property Office (EUIPO)\(^8\);

**General**

1. Supports the Commission in the implementation of its intellectual property action plan of November 2020, as strong, robust IPR protection at national, European and international level which enables return on investment is particularly important for the economic recovery from COVID-19 as well as the creation of a digital and globally competitive sustainable economy in Europe;

**SMEs**

2. Highlights that IPRs have many benefits for small and medium-sized enterprises (SMEs), since SMEs that own IPRs have 68 % higher revenue per employee compared to SMEs that do not; is therefore concerned that only approximately 9 % of SMEs own IPRs; welcomes, therefore, the IP vouchers, the IP-Scan and other initiatives of the Commission and the EUIPO to help SMEs make the most of their intellectual property (IP) assets;

3. Is convinced that support for SMEs, including financial and non-financial measures, is the right way to provide them with better access to IPRs and that the Union’s financial instruments are of the utmost importance in this context; calls on the Commission and the EUIPO, therefore, to continue implementing IP management support measures for SMEs in the context of the economic recovery, including the provision of one-stop shop access to information and related services and advice about IP;

**Unitary Patent package**

4. Stresses that the Unitary Patent package (UPP), which includes the European patent with unitary effect (unitary patent) and the Unified Patent Court (UPC), will make patent protection and dispute settlement across Europe less complex, less costly and more efficient; asks the participating Member States which have not yet done so, therefore, to conclude the ratification of the Agreement on a Unified Patent Court

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(UPCA), as well as the Protocol to the UPCA on provisional application (PPA), as soon as possible, or by other means to declare that they are bound to the PPA in order to allow for a rapid entry into operation of the UPP;

5. Encourages the Member States that are not yet participating in enhanced cooperation for the creation of unitary patent protection and/or have not yet acceded to the UPCA, to do so;

6. Welcomes the one-stop-shop alternative dispute resolution system to be established under Article 35 of the UPCA; asks the Member States to enable the quick roll-out of the patent arbitration and mediation centre and calls on the Commission to assess whether the centre could, in the long term, deal with all IP disputes;

**Supplementary protection certificates**

7. Stresses that the supplementary protection certificate (SPC) regime within the EU, while of great practical relevance, suffers from fragmented implementation across the Member States;

8. Acknowledges that the UPP does not provide for a unitary SPC title and calls on the Member States to support the establishment of such a title as a logical extension of unitary patent protection;

9. Asks the Commission, in the absence of a unitary SPC title, to ensure coherence between the upcoming Unitary Patent and current SPC regimes within the EU by clarifying that national SPCs may be granted by national patent offices on the basis of a Unitary Patent;

**Standard essential patents**

10. Acknowledges that information on the existence, scope and relevance of standard essential patents (SEPs) is important for fair licensing negotiations allowing the potential user of standards to identify the scale of their exposure to SEPs and possible licensors; notes that although good faith negotiations between willing parties occur in most cases, SEPs are often litigated;

11. Stresses that many patent applications declared in standard development organisations during the standard setting process as potentially essential may eventually not be essential to the standard as finally adopted or after the granting of the patent, and that an appropriate scrutiny mechanism would enhance transparency and increase legal certainty; welcomes in this regard the pilot study for essentiality assessment of SEPs⁹;

12. Asks the Commission to further investigate, together with the relevant stakeholders, the requirements for an independent system of third-party essentiality checks by identifying the demand for, assessing the impact of and defining the role that resources such as emerging technologies like AI and/or technical expertise contributed by the EPO could

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play in that context, and to use the knowledge gained as input for the legislative initiative on SEP envisaged for the beginning of 2022;

13. Acknowledges the importance of a balanced licensing system for SEPs and insists on the importance of stable, efficient and fair rules in that regard; underlines that ‘fair, reasonable and non-discriminatory terms’ (FRAND) are vague legal terms that include legal uncertainty and calls on the Commission to monitor industry developments and provide more clarity on various aspects of FRAND, including through designating an observatory (a competence centre) to that effect, and to publish annual reports evidencing actual cases of non-compliance with FRAND and so-called patent ‘hold-up’ and patent ‘hold-out’;

**Geographical indications for non-agricultural products**

14. Supports the Commission in its initiative to establish EU sui generis protection of geographical indications (GIs) for non-agricultural products in order to align to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, which includes the possibility to protect GIs for both agricultural and non-agricultural products;

15. Takes note that some Member States have already established national sui generis protection systems for GIs for non-agricultural products, creating fragmentation, and that protection at Union level would bring the necessary legal certainty to all players;

**Revision of the EU legislation on design protection**

16. Welcomes the Commission’s willingness to revise Union legislation on design protection to better support the transition to the digital and green economy and calls on the Commission to update the registration procedure to allow for new forms of design to be protected in an easy and less burdensome way;

17. Points out that some Member States have already introduced a ‘spare parts exception’ or ‘repair clause’ into their legislation, allowing for component parts of complex products to be manufactured and sold without infringing on IPRs; notes that this creates fragmentation in the internal market and legal uncertainty; calls on the Commission, therefore, to include a ‘repair clause’ in its future proposal;

18. Stresses that while rights attached to trade marks are enforceable against infringing goods transiting though the EU, those attached to design are not; calls on the Commission to close this gap in the revision of the design legislation and make it possible for brand owners to put a stop to design counterfeits transiting through the EU;

**Counterfeiting and piracy**

19. Points out that counterfeit goods, in particular counterfeit medicines and fake personal protective equipment and masks in the context of the COVID-19 pandemic, can have serious impacts on the health of EU citizens and can cause serious harm to public
20. Highlights that in 2016, up to 6.8% of EU imports, or a value of EUR 121 billion, were fake goods and that IPR infringement entails a low level of risk in terms of both the likelihood of detection and the punishment if detected; urges the Member States to develop effective and dissuasive sanctions to fight counterfeiting and piracy;

21. Stresses that the Internet is significantly used to distribute counterfeit products and IPR-infringing services and welcomes the proposal of the Commission for a Digital Services Act; highlights the fact that proactive measures from intermediaries would contribute enormously to the fight against counterfeiting and that AI and blockchain could play an important role in detecting counterfeit and piracy and enforcing IPR in the whole supply chain; supports, therefore, the use of new technologies to combat IP infringements and welcomes publications produced by the EUIPO Observatory;

22. Points out the link between IP crime and organised and serious international crime; welcomes, therefore, the Council’s decision to put IP infringements back on the list of EU crime priorities in the framework of the European Multidisciplinary Platform Against Criminal Threats (EMPACT) for the forthcoming cycle 2022-2025, and asks the Council to maintain them on that list and to enhance cross-border cooperation between national authorities, the EUIPO, the EU Agency for Law Enforcement Cooperation (Europol), the EU Agency for Criminal Justice Cooperation (Eurojust) and the European Anti-Fraud Office (OLAF);

23. Highlights that IP protection related to AI technologies is important and that even though current rules on the protection of computer-implemented inventions by patents may cover AI technologies, clear criteria for the protection of inventions created with the help of AI technologies are necessary; asks the Commission, therefore, in cooperation with the EPO and EUIPO, to provide legal certainty on this subject and to follow the issue closely at international level in the WIPO;

24. Regrets the fact that the Commission’s 2016 study on patent assertion entities (PAE) in Europe did not provide a clear answer to the question of whether the business models of some PAE, consisting in acquiring patents from third parties and seeking to generate revenue by asserting them against alleged infringers by misusing litigation asymmetries, abuse loopholes in existing legislation and therefore constitute a problem that should be tackled; calls the Commission to carry out an in-depth study on this issue;

25. Notes that IPR protection is key in encouraging companies to invest in innovative products and processes and to produce new medicines, but is convinced that compulsory licensing of patents is important as a last-resort tool meant to allow life-saving interventions in the public interest; calls on the Commission, therefore, to analyse and explore possible options for ensuring effectiveness and better coordination of compulsory licensing in the EU, taking into account cases in which it has been used in

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the Union, the reasons for its use, the conditions under which it was granted, its economic consequences and whether it achieved the desired effect;

26. Suggests that an IP coordinator be established at European level in order to ensure a holistic and coordinated approach to EU IP policy and enhance cooperation between the different national IP authorities, the Directorates-General of the Commission and other bodies in charge of IPR, such as the EPO, EUIPO and WIPO;

27. Instructs its President to forward this resolution to the Council and the Commission.
EXPLANATORY STATEMENT

Intangible assets such as trademarks, designs, patents and data are becoming very important in today’s knowledge-based economy. Industries that make intensive use of intellectual property rights account for 45 % of the EU’s gross domestic product each year and around 63 million jobs. Businesses owning at least one patent, registered design or trade mark generate on average 20 % higher revenues per employee than firms that do not own such rights. In addition, pay at firms that own intellectual property rights is, on average, 19 % higher.

Developments such as the Internet of Things, Industry 4.0, networked vehicles and climate change mitigation technologies are shaping the technological landscape and ecosystems. Inventions in those sectors are helping the EU become more sustainable and more digital. Innovativeness will support Europe’s recovery from the effects of the COVID-19 pandemic. The rapporteur therefore stresses the need to support inventors and businesses in bringing new technologies to market by ensuring that they are given high-quality property rights in a timely manner and have the knowledge and tools to make effective use of them. That requires a robust, efficient, transparent and balanced system of intellectual property protection in the form of a coherent overall strategy ensuring both protection and fair access to innovations and addressing loopholes in the law or adaptations necessitated by technological refinements and developments.

The rapporteur therefore welcomes the intellectual property action plan to support the EU’s recovery and resilience, dated 25 November 2020, in which the Commission makes provision for such an overall strategy in order to make better use of the EU’s innovative potential.

She agrees with the Commission, the European Intellectual Property Office (EUIPO) and the European Patent Office (EPO) that small and medium-sized enterprises (SMEs) in particular still make virtually no use of that innovative potential despite the fact that it is smaller firms especially that can benefit most clearly from ownership of intellectual property rights. The main reasons for that are the costs associated with the relevant advisory services, but also linguistic challenges or simply a lack of information. The rapporteur welcomes the efforts of the Commission, the EUIPO and the EPO to address the challenges faced by SMEs in this regard, ranging from financial support in the form of IP vouchers through screening of intellectual property rights (IP scan) and/or help with fast-track filing of trade mark or designs. In the rapporteur’s view, this should be complemented by one-stop-shop procedures, as well as arrangements to manage intellectual property that is already registered. Further efforts, building on what has already been achieved, are essential.

With regard to patents, the unitary patent in conjunction with the Unified Patent Court is the best one-stop-shop approach and will remain so. Having a single registration procedure and obtaining a single patent which would be valid throughout Europe would radically simplify the current patent filing process, which has to take place in each and every Member State, and greatly reduce the costs involved. The Unified Patent Court would also remove the need for costly parallel legal proceedings and would increase legal certainty. The rapporteur is of the opinion that all Member States involved should make increased efforts to ratify the Unified Patent Court Agreement so that the unitary patent package can finally enter into force. She would also like to see all EU Member States joining the enhanced-cooperation process to
create a unitary patent in order to reduce red tape and costs across Europe and increase legal certainty.

The policy debate on patents gives rise to two other challenges.

The first challenge relates to supplementary protection certificates (SPC), which extend the term of basic patents that cover medicinal and plant protection products. One issue to be investigated in this connection is what role an SPC would play if the basic patent concerned were a unitary patent. The rapporteur believes that there should be a unitary SPC title; and even before the unitary patent comes into force, it should be made possible to carry out a European-level SPC assessment in order to avoid inconsistent implementation in Member States and the associated legal uncertainty. This substantive assessment could then be complemented by a formal assessment at national level.

The second challenge relates to standard-essential patents (SEP). No check at all takes place as to whether a standard patent is genuinely essential; the patentee simply makes a self-declaration. Many of the patents classified as essential are in fact not essential, resulting not only in inefficiencies, but also in legal uncertainties, including for the potential licensee. In order to counter legal uncertainty, the rapporteur believes that an essentiality assessment by a neutral and professionally competent body should be introduced. The EPO would of course be the obvious choice for that role, but the rapporteur leaves that up to the Commission to consider as part of its impact assessment. She welcomes the fact that the Commission has made provision for a proposal on SEP next year and regards that as the right framework for an appraisal with regard to an essentiality assessment.

In addition, there are a number of practical problems as a result of obligations to do with FRAND (‘fair, reasonable and non-discriminatory terms’). Firms should enter into negotiations in good faith and allow licensing without delay if a FRAND-compliant offer has been made.

However, the question as to whether an offer is in fact fair and proportionate and complies with the principle of non-discrimination has been brought before the courts on various occasions. Although there are rulings as regards interpreting what are vague legal terms, the extent of the problem should be determined in more detail. The rapporteur proposes, accordingly, that the Commission look more closely into industry developments; and a decision can then be taken on that basis, which, given that proceedings are confidential, will be no easy matter.

In addition, the Commission has the rapporteur’s backing for its plan to introduce an EU-wide protection system for geographical indications for non-agricultural products, in particular as provision has already been made for this at international level. The protection of regional products, such as handicraft, combined with specific regional production features or other know-how of local producers, can generate real added value for regional development, European cultural heritage and SMEs. As some Member States already provide for protection of geographical indications for non-agricultural products, while others do not, there is market fragmentation and, as a result, legal uncertainty. That challenge can be addressed on the basis of a single set of rules across the EU.

As regards design protection, existing tools need to be updated to take account of digital developments. In the process, the rapporteur would like to see the loopholes closed in the
rules on spare parts, given that in some Member States they are exempted from design protection and in others they are not. Furthermore, as regards enforcement of rights relating to goods transiting the EU, the enforceability of design protection should be brought into line with trade mark protection arrangements.

With regard to counterfeiting and piracy, the rapporteur takes the view that national enforcement authorities’ cooperation with the EUIPO, Europol, Eurojust and OLAF should be stepped up in order to make detection and prosecution more efficient. In many instances, organised crime is behind the circulation of counterfeit or pirated goods, meaning that these are not trivial offences. In addition, technologies such as artificial intelligence and blockchain could be used to a much greater extent to detect counterfeiting and piracy more efficiently.

With regard to other intellectual property policy challenges, the rapporteur takes the view that the use of compulsory licences should be explored in more detail. The Commission should investigate whether such licences have already been used in the Member States, and under what conditions, and whether they have produced the desired effect. These findings could be of significance in the debate on how to deal with pandemics.

The Commission’s action plan covers a host of issues, but the parameters laid down for this draft report have made it impossible for the rapporteur to go into all of them, and therefore in her draft report she has confined herself to making reference to upcoming revisions of legislation and planned Commission initiatives.
ANNEX: LIST OF ENTITIES OR PERSONS
FROM WHOM THE RAPPORTEUR HAS RECEIVED INPUT

The following list is drawn up on a purely voluntary basis under the exclusive responsibility of the rapporteur. The rapporteur has received input from the following entities or persons in the preparation of the draft report:

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<tr>
<td>ACT</td>
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<td>IP Europe</td>
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<td>INTA International trademark organisation</td>
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<td>Markenverband</td>
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<td>Security Robotic Development and Solution GmbH</td>
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<td>IP2Innovate Europe</td>
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<td>Commission DG Internal Market, Industry, Entrepreneurship and SMEs (GROW) Unit C4 / Intangible economy</td>
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<td>Permanent Representation Germany</td>
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<td>Fair Standard Alliance (FSA)</td>
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<td>European Patent Office (EPO)</td>
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<td>European Campaign for the Freedom of the Automotive Parts and Repair Market (ECAR)</td>
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<td>European Cancer League (ECL)</td>
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<td>Association of Commercial Television in Europe (ACT)</td>
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