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 (TFEU) in 2009, the EU has had explicit competence for intellectual property rights (Article 118).

LEGAL BASIS

Articles 114 and 118 TFEU.

OBJECTIVES

Although governed by different international and 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 single 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 EU consists chiefly of harmonising certain specific aspects of IPR through the creation of its own system, as is the case for the EU trademark and design, and as will be the case for patents. Many of the EU instruments reflect the Member States’ international obligations under the Berne and Rome Conventions, as well as under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the 1996 World Intellectual Property Organization (WIPO) international Treaties.

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 (EU) 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to trademarks). 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) 2017/1001 of 14 June 2017 on the European Union trademark (the EU Trademark Regulation) codifies and replaces all earlier EC regulations on the EU trademark. The codification was carried out in the interests of clarity, given that the EU trademark system had already been substantially amended several times. The EU trademark has a unitary character and equal effect throughout the EU. The European Union Intellectual Property Office (EUIPO) is responsible for managing the EU trademark and design. The EU Trademark Regulation also sets the fee amounts payable to EUIPO. They are fixed at a level which ensures that the revenue they produce covers EUIPO’s expenses and that they complement the existing national trademark systems.


2. Copyright and related rights

Copyright ensures that authors, composers, artists, filmmakers and others receive payment and protection for their work. Digital technologies have profoundly changed the way creative content is produced, distributed and accessed. EU copyright legislation consists of 13 directives and two regulations which harmonise the essential rights of authors, performers, producers and broadcasters. By setting some EU standards, national discrepancies are reduced, a level of protection required to foster creativity and investment in creativity is ensured, cultural diversity is promoted and access for consumers and businesses to digital content and services across the single market is facilitated.

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 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.

The EU Copyright Directive (Directive (EU) 2019/790) 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 encyclopedias such as Wikipedia. Directive (EU) 2019/789 (the CabSat Directive) was adopted on the same day and aims to increase the number of TV and radio programmes available online to EU consumers.
Broadcasting organisations are increasingly offering online services in addition to their traditional broadcasts, as users expect to have access to television and radio content at anytime, anywhere. The directive introduces the country of origin 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 have to obtain copyright permissions in their EU country of establishment (i.e. country of origin) in order to make radio programmes, television news and current affairs programmes, and fully financed own productions available online in all EU countries. Member States had until 7 June 2021 to pass appropriate legislation to meet the directive’s requirements.

**Directive (EU) 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 single market.

**Regulation (EU) 2017/1128** of 14 June 2017 on cross-border portability of online content services in the internal market aims to ensure that consumers who buy or subscribe to films, sports 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 under the Berne Convention for the Protection of Literary and Artistic Works. It was codified by **Directive 2009/24/EC**. **Directive 96/9/EC** (the Database Directive) 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 obtaining, verifying or presenting content. On 23 February 2022, the Commission presented a proposal for a new regulation on harmonised rules on fair access to and use of data (the data act) aimed at ensuring fairness in the allocation of value from data among actors in the data economy and at fostering access to and the use of data. After intensive legislative work supported by academic research[^1], on 9 November 2023 Parliament’s plenary adopted at first reading a position on this proposal. On 30 May 2022, Parliament and the Council

adopted the Data Governance Act, which introduces mechanisms to facilitate the reuse of certain categories of protected public sector data, increase trust in data intermediation services and foster data altruism across the EU.

d. Collecting societies

A licence must be obtained from the different holders of copyright and related rights before content protected by such rights may be disseminated. Rights holders may entrust their rights to a collecting society, which manages those rights on their behalf. Unless a collective management organisation has justified reasons to refuse management, it is obliged to manage these rights. 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 lays down requirements for collective management organisations, with a view to ensuring high standards of governance, financial management, transparency and reporting. It aims to ensure that rights holders 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 must ensure that collective management organisations act in the best interests of the rights holders whose rights they represent.

3. Patents

A patent is a legal title that can be granted to 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 an 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. The latter is the executive branch of the European Patent Organisation, which now has 39 contracting states. The EU itself is not a member of this 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 the Member States thus set up a single and specialised patent jurisdiction.

The Court of Justice’s (CJEU’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 coexists with the new system with transitory measures in place.

Since entering into force on 1 June 2023, the EU unitary patent, which is granted by the European Patent Office, has provided uniform protection with equal effect in all participating EU countries. Businesses will have the option of protecting their inventions in all EU Member States with a true EU patent. They will also be able to challenge and defend unitary patents in a single court action through the newly created Unified Patent Court (UPC). This will streamline the system and save on translation costs. The UPC Agreement (UPCA) provides that the primacy of EU law must be respected (Article 20 of the UPCA) and that the decisions of the CJEU are binding on the UPC. The UPC
is a court that is currently common to 17 EU Member States. It is made up of a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance has a decentralised structure and comprises a central division in Paris with a section in Munich, as well as various regional and local divisions all over Europe. The Court of Appeal has its seat in Luxembourg and decides on appeals against decisions of the Court of First Instance and on requests for the rehearing of final decisions of the Court.

4. Trade secrets

The practice of keeping business information (know-how) 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, but can, in principle, apply indefinitely, rather than for a limited period only. The protection of trade secrets varies more from country to country than other areas of IPR law, and can be even more advantageous and cheaper than seeking formal patent protection. Since 2016, an EU legal framework has existed, namely Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

5. IPR for plant varieties

Plant variety protection, also called the ‘plant breeder’s right’, is a form of IPR granted to the breeder of a new plant variety. The EU’s system of protection for plant varieties, based on the principles of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, contributes to the development of agriculture and horticulture. A system for the protection of plant variety rights was established by EU legislation. The system allows IPR to be granted for plant varieties. The Community Plant Variety Office implements and applies this scheme.

6. Geographical indications

Under the EU’s IPR system, names of products registered as having a geographical indication are legally protected against imitation and misuse within the EU and in non-EU countries with which a specific protection agreement has been signed. Product names can be granted a geographical indication if they have a specific link to the place where the product is made. This recognition enables consumers to trust and distinguish quality products while also helping producers to market their products better. Recognised as intellectual property, geographical indications are playing an increasingly important role in trade negotiations between the EU and other countries. On 31 March 2022, the Commission put forward a legislative proposal on EU geographical indications for wine, spirit drinks and agricultural products, and quality schemes for agricultural products, and Parliament adopted a position on the proposal on 1 June 2023. On 12 September 2023, Parliament adopted its position on a regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753. This gives geographical indications for industrial products that can be associated with their geographical area of production (such as Albacete knives,
Bohemian glass and Limoges porcelain) protection similar to that given to regionally produced food or beverages.


7. 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 is worth up to EUR 338 billion, which causes significant damage to rights holders, 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 single market and provides for measures, procedures and compensation under civil and administrative law.

Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights provides procedural rules for customs authorities to enforce IPR with regard to goods liable to customs supervision or customs checks.

B. Concept of the ‘exhaustion’ of rights

1. Definition

This legal concept or doctrine applying to all fields of industrial property means that after a product covered by an IPR (e.g. a patent) has been sold by the IPR holder or by others with the consent of the owner, the IPR is said to be exhausted. In the EU, the CJEU has always interpreted the EU Treaties as meaning that rights conferred by IPR are exhausted within the single market by virtue of putting the relevant goods on the market (by the rights holder or with their consent). 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.

2. Limits

‘Exhaustion’ of EU rights does not apply in the case of the marketing of a counterfeit product, or of products marketed outside the European Economic Area (Article 6 of the TRIPS Agreement). In 1999, the CJEU ruled, in its judgment in Sebago Inc. and Ancienne Maison Dubois et 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. Legal acts in this area

EU rules on exhaustion are largely the result of the jurisprudence of the CJEU interpreting Article 34 TFEU on measures having equivalent effect to quantitative
restrictions between Member States[2]. This jurisprudence is reflected in each of the relevant pieces of EU law relating to IPR.

C. Recent case-law of the CJEU

In 2012, the CJEU confirmed in the SAS case (C-406/10) that, in accordance with Directive 91/250/EEC, 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 constitutes a form of expression of that program for the purposes of Article 1(2) of Directive 91/250/EEC (paragraph 39).

In its judgment in Case C-160/15 (GS Media BV v Sanoma Media Netherlands BV and Others), 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 the knowledge that those works have been published illegally.

In its judgment 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 Directive 2000/31/EC, 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 IPR of rights 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

Intellectual property creates added value for EU 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 EU 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

[2]See Centrafarm and Adriaan de Peijper v Sterling Drug Inc (Case C-15/74), and Merck and Co Inc. v Stephar BV and Petrus Stephanus Exler (Case C-187/80).
Parliament 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 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 in 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 adoption of the EU Copyright Directive.

Research prepared for Parliament’s Committee on Legal Affairs and commissioned by its Policy Department for Citizens’ Rights and Constitutional Affairs indicates that artificial intelligence (AI) defies new frontiers of copyright protection, in particular with regard to the undisclosed training of AI on copyrighted material or protected data and the subsequent generation of content by this AI[3]. In addition, a number of contractual arrangements facilitate the washing away of intellectual property rights from data or allow subjects’ intellectual property rights to be taken over, on the basis that publication occurred on a particular platform or that creation/invention occurred within the framework of a service contract. Such arrangements include:

- Legal arrangements that deprive users of intellectual property rights or force them to give away non-remunerated licences with respect to content placed on digital platforms’ services and servers, and/or that transfer such rights to the platforms,
- Buy-out contracts through which platforms take over creators’ intellectual property rights,
- Legal arrangements that deprive employees, inventors or creators of intellectual property rights with respect to content created in the course of their employment or service, and/or that transfer such rights to the employer (‘work for hire’) [4].

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