

Intellectual property basics

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What is intellectual property?

Intellectual property is a creation of the intellect which is owned by an individual or an organisation who can then choose to share it freely or to control its use in certain ways.

Intellectual property is found almost everywhere - in creative works like books, films, records, music, art and software, and in everyday objects like cars, computers, drugs and varieties of plants, all of which have been developed thanks to advances in science and technology. The distinctive features which help us choose the products we buy, like brand names and designs, can fall within the scope of intellectual property. Even the place of origin of a product can have rights attached to it, as is the case with Champagne and Gorgonzola. Much of what we see and use on the Internet, be it a web page or a domain name, also includes or represents some form of intellectual property.

Why is intellectual property protected and who benefits?

Through a system of intellectual property rights, it is possible not only to ensure that an innovation or creation is attributed to its creator or producer, but also secure "ownership" of it and benefit commercially as a result. By protecting intellectual property, society acknowledges the benefits it contributes and provides an incentive for people to invest time and resources to foster innovation and expand knowledge.

The intellectual property system is designed to benefit society as a whole, striking a delicate balance to ensure that the needs of both the creator and the user are satisfied. Intellectual property rights usually allow the rightsholder to exercise rights over the use of his / her work for a limited period of time. In return for granting such rights, society benefits in a number of ways.

The intellectual property system contributes to society by :

- Maintaining fair competition and encouraging the production of a wide range of quality goods and services.
- Underpinning economic growth and employment.
- Sustaining innovation and creation.
- Promoting technological and cultural advances and expression.
- Enriching the pool of public knowledge and culture.

Where suitable or sufficient intellectual property rights are not available, or are difficult to enforce, innovators and innovative enterprises may need to rely to a greater extent on other means to protect themselves from unfair competition, such as through trade secrets,

contractual agreements, or technical means of preventing copying. Such means can be less effective in promoting the goals set out above.

How is intellectual property protected?

In general, intellectual property is protected by giving the creator of a work or an inventor exclusive rights to commercially exploit his creation or invention for a limited period of time. These rights can also be sold, licensed or otherwise disposed of by the rightholder.

Intellectual property rights are granted under the national laws of each country or region. In addition, various international agreements on intellectual property rights harmonise laws and procedures, or allow intellectual property rights to be registered at the same time in several countries. Different types of intellectual property-literary and artistic creations, inventions, brand names, and designs, to name a few-are protected in different ways:

- Creations in the fields of literature and the arts, such as books, paintings, music, films and records as well as software, are generally protected through copyright or so-called related rights;
- Technological inventions are typically protected by patents;
- Distinctive features - such as words, symbols, smells, colours and shapes - that distinguish one product or service from another, can be protected by trademark rights;
- The specific external appearance given to objects, such as furniture, car body parts, tableware, jewellery, may enjoy design protection;
- Geographical indications and trade secrets are also considered to be types of intellectual property and most countries provide some form of legal protection for them;
- Rules to prevent unfair competition in the commercial world also help protect trade secrets and other types of intellectual property;
- Specific legal protection is provided in some countries for plant varieties as well as for integrated circuits and databases. Such protection has helped spur the creation of diverse fields of business.

The same product can also be simultaneously protected by more than one type of intellectual property right in different countries.

Copyright

Copyright exists to encourage the production of original artistic, literary and musical creations from books and paintings to movies, recordings and software. The copyright system rewards artistic expression by allowing the creator to benefit commercially from his work. In addition to granting economic rights, copyright also bestows “moral” rights which allow the creator to claim authorship and prevent mutilation or deformation of his work that might harm his reputation.

To qualify for copyright protection, the work has to be an original creation and expressed in a certain fixed form. Copyright is automatically vested in the author once the work is created, though a few countries maintain registration systems which provide additional benefits. It can then be licensed or assigned, often to a publisher or a producer. Copyright protection gives an author exclusive rights of a certain duration, generally from the time of creation of the work until fifty or seventy years after the author's death.

Copyright law allows the copyright holder to control certain uses of his work. These uses, which the author can authorize or prohibit, typically include reproducing, distributing, renting, recording, communication to the public, broadcasting, and translating or adapting the work. In some countries, the author does not have the right to prevent certain uses of works but still has a right to be remunerated for its use. In every country, exceptions exist that allow the public to make certain uses of works without either remunerating or obtaining the authorization of the author. An example of this could be the use of limited quotations for illustration or teaching.

Most countries provide similar protection for phonogram producers, performers and broadcasters. In some countries, performers, producers and broadcasters of copyrighted works are protected by copyright just like authors; in other countries, they are instead protected by neighbouring or related rights. Copyright has become increasingly important with the development of digital technology and the internet, where it is a major form of intellectual property protection for content distributed on-line-and where it faces difficult enforcement issues.

Several international agreements on copyright protection and related rights exist. These include the Berne Convention for the Protection of Literary and Artistic Works (1886), the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (1961), the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971), the WIPO Copyright Treaty (1996), and the WIPO Performances and Phonograms Treaty (1996). The last two address the protection of authors' rights in the digital world. The World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)(1994) is the first multilateral trade-related intellectual property agreement. It covers most types of intellectual property and includes copyright and related rights.

Patents

A patent gives the inventor the right, for a specified period of time, to prevent others from using, making, selling, offering for sale, or importing his invention without his authorization. In return, the inventor must disclose the details of his invention in a patent document that is made publicly available. In this way, patents represent a social contract between society as a whole and inventors. An innovation which the inventor prefers to keep secret is known as know-how or a trade secret. These are protected under different rules.

In most countries, patent protection lasts for 20 years counted from the filing date and is issued by national or regional government patent offices, to which the inventor has to submit an application.

In order to be granted the patent, the invention must fulfill three conditions:

- It must be new-it should never have been published or publicly used before;
- It should be capable of industrial application-it must be something that can be industrially manufactured or used;
- It must be “non-obvious”- it should not be an invention that would have occurred to any skilled person in the relevant field.

Patent systems have been adopted by many countries over the years because:

- They encourage the disclosure of information to the public, increasing the public’s access to technical and scientific knowledge. Without the assurance of a patent, an individual or corporate inventor may choose to keep the details of an invention secret;
- They provide an incentive and reward for innovation and investment in R&D and future inventions;
- The limited duration of a patent encourages the rapid commercialisation of inventions, so that the public receives a tangible benefit from the invention sooner rather than later;
- By encouraging the publication of details of inventions, patents help avoid duplication of research and stimulate further research, innovation and competition;
- Patents are perceived as a sound intellectual property title, granted after a rigorous examination process.

Several international agreements on patent protection exist. For substantive issues, the most important are the Paris Convention for the Protection of Industrial Property (1883) and the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (1994), while the main patent treaties for procedural issues are the Patent Cooperation Treaty (1970) and the Patent Law Treaty (2000). The European Patent Convention (1973) sets out rules for obtaining European Patents which, when granted, split up into national patents in the designated countries.

Trademarks

Trademarks allow consumers and businesses to differentiate between goods and services from different producers, and to select products by manufacturers whose reputation they trust.

For manufacturers or service providers who have invested the time, effort and money to build up a good brand image, trademarks are a way to prevent others from unfairly taking advantage of their reputation. This ensures fair competition between competitors in the

marketplace and encourages producers to invest in the quality and reputation of their products or services.

Trademark protection can apply to brands, names signs, symbols, and even colours, smells, sounds and shapes. In short, almost any distinctive feature attached to a product or service which distinguishes it from another can be protected as a trademark.

In most countries, a trademark has to be registered in a national or regional government trademark office for use with specific goods or services to be protected. A trademark holder can prevent others from using his trademark or a similar mark for the same or similar goods or services, if doing so is likely to cause confusion in the minds of the public. In many countries, famous or well-known trademark also enjoy protection against uses that are considered to disparage, dilute or take unfair advantage if the reputation of the famous mark.

Almost all businesses, large and small, rely on trademarks. Trademark protection is used more than any other form of intellectual property, and in developing as well as developed economies. Trademarks serve to guarantee origin to local consumers, and readily searchable trademark registers allow businesses to avoid selecting new marks which could be confused with existing ones.

Many trademarks are now also used as domain names on the internet. Problems relating to the coexistence of the domain name and the trademark systems are still being addressed; abusive registrations of others' trademarks as domain names are dealt with through on-line dispute resolution procedures based on the policy initially set out by ICANN (Internet Corporation for Assigned Names and Numbers).

Several international agreements on trademark protection exist. For substantive issues, the most important are the Paris Convention for the Protection of Industrial Property (1883), the Trademark Law Treaty (1994), and the TRIPS agreement (1994). The Singapore Treaty on the Law of Trademarks was adopted on March 28, 2006. For procedural issues, the main treaties are the Madrid Agreement concerning the International Registration of Marks (1891) and its Protocol (1989), and the Nice Agreement concerning the international Classification of goods and Services for the Purpose of Registration of Marks (1957). In Europe, Regulation no 40/94 on the Community Trade Mark (CTM) allows a trademark holder to obtain a single trademark Registration covering the 27 European Union Member States. The link made on October 1, 2004 between the CTM and the Madrid Protocol provides trademark owners with greater flexibility for obtaining international trademark protection.

Designs

Design rights protect new and original visual aspects of a product or its packaging. Requirements for protection typically borrow concepts from patent law (novelty) and copyright law (originality). The design eligible for protection must display aesthetic features and must not be predated by a known overall identical or similar design. Designs can be expressed in two-dimensional (drawing) or three-dimensional (model)

formats. Designs contribute significantly to the marketability of goods and are crucial assets in several industries, for instance textiles, fashion, automobiles and furnishing and decoration.

The regime for design protection differs from one country to another, although harmonisation has been achieved within the European Union, leading to the introduction of Community design rights effective in all 27 EU Member States. In most countries, design protection is subject to registration, although there is a trend to extend protection for a short term to unregistered designs, e.g. for 3 years in the EU. Registered designs can generally benefit from protection for 25 years.

The owner of a protected design may prohibit the making, selling, importing or exporting of products incorporating or applying the design. Depending on the countries, the owner may concurrently avail himself of the protection of copyright, trademark, and patent law. Design protection is an area which had benefited lately from significant and promising harmonisation. The Hague Agreement (1925) concerning the international deposit of industrial designs, as amended by the WIPO Geneva Act allows centralised design application filing for protection in the various countries party to the Agreement (which includes the EU). For procedural issues, the classification of goods is governed by the Locarno Agreement (1968).

Trade secrets

Trade secrets encompass various types of business information, whether technical, commercial, financial, which is not known or ascertainable by the relevant public and which gives a business a competitive edge (for instance, manufacturing processes, techniques and know-how, customers' lists and profiles, distribution methods, financial information, ingredients, etc.). In general, information is eligible for trade secret protection if it is identified, substantial and secret, as reflected in Article 39 of TRIPS.

Trade secret protection is afforded without registration and can last without limitation in time, generally so long as confidentiality is maintained. When the trade secret is patentable know-how, the scope of legal protection respectively granted by patent law and trade secret status has to be carefully compared before deciding whether to patent the invention or to keep it secret. This decision will also depend on the kind of know-how involved, its contemplated use, the term of the expected competitive lead and the capability to ensure secrecy in the long run. A distinctive feature of a trade secret is the impossibility of erasing or overriding the effective transfer of knowledge once disclosed. This is why, when transferring a trade secret, its holder usually pays great attention to confidentiality provisions and to the efficiency of interim court injunctions that can be obtained locally to prevent unauthorised dissemination.

Businesses, having become more aware of the value of trade secrets, confidentiality and non-disclosure agreements, and non-compete agreements in employment contracts, now use them widely in the course of business dealings as well as in the context of employment relationships in an attempt to limit unwanted leaks and uses of valuable business information. However, trade secret protection remains weak in many countries,

due partly to the lack of specific protective legislation and partly to the lack of awareness by the judiciary and other administrative bodies. Sanctions against procurement, use or disclosure of a trade secret, through application of the laws on unfair competition or practices - a branch of tort law - are also provided by Article 39 of TRIPS. Violation of a confidentiality undertaking can also be treated as a breach of contract. In limited cases, misappropriation of trade secrets can be a criminal offence such as theft or business espionage.

Communication of know-how as such, or as part of mixed patent and know-how licence agreements, is a well-known way of exploiting trade secrets of a technical nature, which are now less hindered by national restrictions affecting crossborder transfer of know-how.