

DIGITALEUROPE 



**Intellectual Property:
BUILDING BLOCKS OF THE FUTURE**

Rudy Provoost, Executive Vice-President, Royal Philips Electronics:

“The high-tech industry employs more than two million people in Europe and invests tens of billions of euro in research and development each year. Intellectual property is at the core of our business and is crucial to the future success of our company, job sustainability and our ability to compete internationally.”

Intellectual Property: BUILDING BLOCKS OF THE FUTURE

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Why is intellectual property important?

Intellectual Property (IP) is the foundation on which the knowledge economy is built, as Europe and other economies continue to evolve from low-value manufacturing to high-value technology, information and services in the digital age.

A knowledge-based, connected, greener and more inclusive society is the foundation of the European Digital Agenda. To position Europe as a leader, a high-end competitor and to ultimately prosper in the global economy, the EU 2020 strategy should take into account the critical elements required to build a knowledge-driven society. To remain competitive and to conduct their activities effectively at home and abroad, Europe's innovative entities including universities, SMEs, individuals and large industry participants depend more than ever on appropriate IP protection. Policymakers should always be extremely cautious in considering any proposed changes to the European IP system, which generally works extremely well in promoting, rewarding and facilitating innovation.

Intellectual Property Rights (IPRs) are legal rights that give the developers of innovative technologies and creative works a better opportunity to decide whether and how their innovations are put on the market or licensed to others for further development or manufacturing.

The international trading system, overseen by the World Trade Organization and specialised UN agencies such as the World Intellectual Property Organization, and almost every individual country in the world, all have well-developed and balanced systems for granting and enforcing IPRs for a number of important reasons:

- **Incentive to innovate:** IPRs allow the people who innovate new technology and creative content to earn a living—to make a return on their time and investment. This provides incentive individuals and commercial enterprises with the financial incentive to undertake innovation in the first place and encourage investment.
- **Reward for innovation:** The market determines the usefulness and value of inventions and creative works protected by IPRs, and rewards them

through sales and licensing revenues. This provides financing for further innovation and creativity—a virtuous circle.

- **Jobs:** Intellectual property creates high-value economic activity and jobs. The information, communication and consumer-technology (ICT) industries rely heavily on intellectual property protection as a basis for research and development, as well as financial and job growth. DIGITALEUROPE's own members represent more than 10,000 enterprises in these sectors in Europe, with two million employees, and revenues of more than €1 trillion euro.
- **Competitiveness:** Europe's advantage in the global economy is not cut-price manufacturing, but rather creativity, invention, technology and other innovation-intangible in form, but valuable because of the protection that intellectual property rights provide. Virtually every successful and growing sector in Europe depends on intellectual assets. IP protection allows not just major companies, but individual inventors, universities

as well as small- and-medium-sized enterprises (SMEs), to benefit from their innovation and creativity.

- **Societal benefit:** Every intellectual property regime reflects a balance between the commercial interests and other legitimate expectations of rights owners, and the broader public good. This balance is reflected both in the objectives of intellectual property law to promote creativity and invention for the general good of society, and in the careful delineation of rights and reasonable exceptions in intellectual property laws and treaties.

What does intellectual property cover?

Intellectual property rights protect a diverse range of inventions, creations and other intangible property. This White Paper looks at four main types of IPR:

Patents: Protection of new inventions. An invention is a technical creation; patents for inventions are obtained through a registration process at the relevant patent office of a particular country or region. Such registration

includes a search and an examination process to check the invention is new.

Copyright: Protection of creative and technical 'expression', which includes not only books, music and films but also the code and other forms of software. Copyright plays an increasingly important role in the digital economy.

Trademarks: Protection of distinctive names, trademarks (e.g. logos) and trade dress that the owner has registered with a relevant trademark office.

Industrial designs: Protection of the aesthetic or ornamental appearance of a product, complementing its technical design or function.

It is noted, however, that in addition to the rights described here, there are other ways in which intellectual assets can be protected, for example:

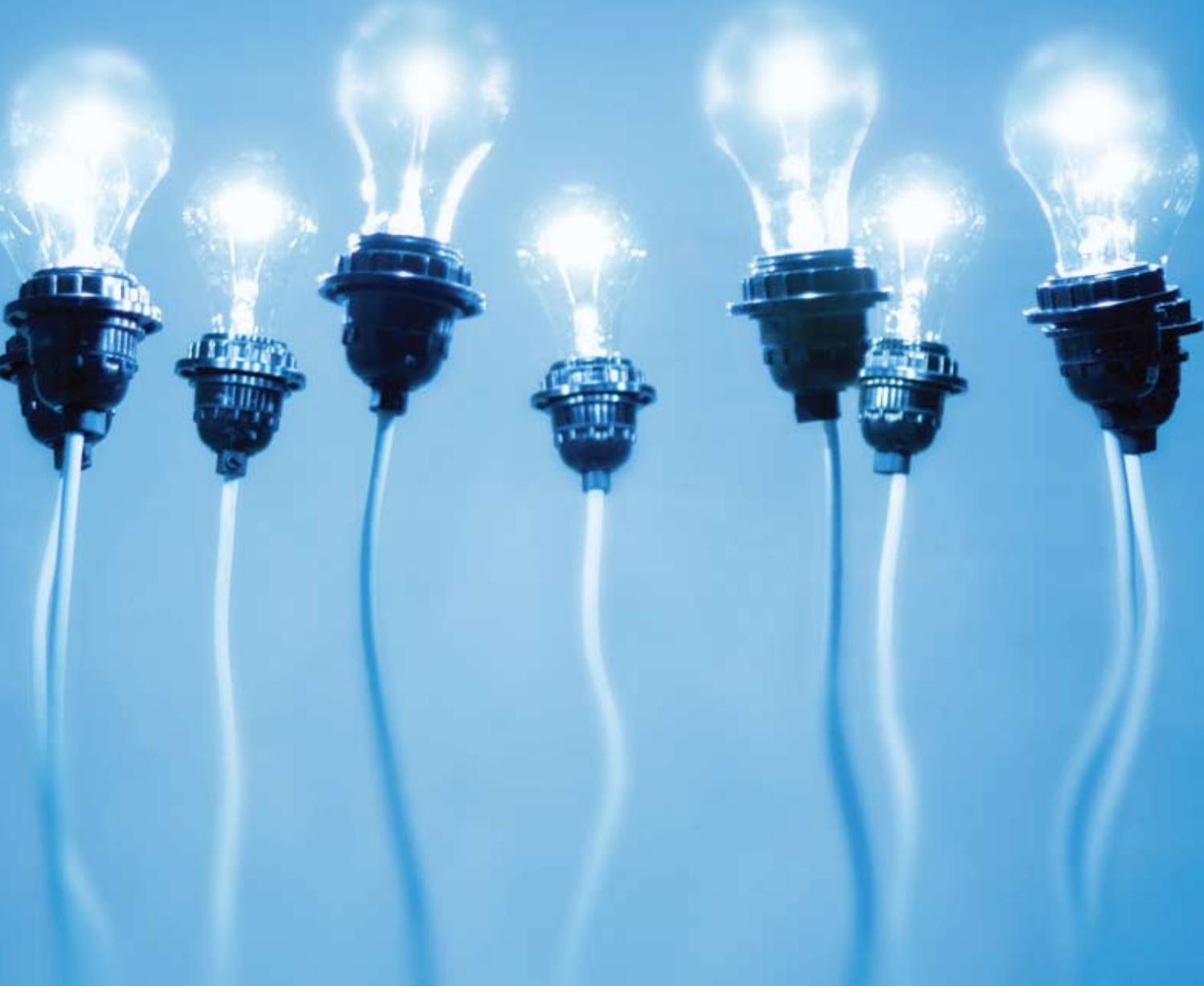
Trade secrets: Protection of methods, formulas, specifications and similar information that has economic value because it is kept confidential to enhance the competitive position of its owner. When business needs require

disclosure to a business partner, the discloser can bind the recipient by means of contractual non-disclosure obligations. In addition, statutory law foresees criminal sanctions for secrecy breaches in certain cases. Without patents, industry would need to rely more broadly on the protection that secrecy offers while negotiating and vigorously enforcing non-disclosure agreements. The protection afforded by secrecy depends on knowledge successfully remaining undisclosed. In contrast, the mechanisms of the patent system ensure that innovative knowledge is shared with the public, which facilitates further progress in innovation.

Utility models: Protection of inventions that may have a lesser 'inventive step' than needed to secure a patent, but which otherwise meet the criteria for patenting. Utility models are generally granted more quickly than patents, without examination.

Semiconductor topographies: Protection for the layout (design) of a semiconductor device, commonly known as a silicon 'chip'.

Patents: Incentives for Innovation



Brenda Hopkins, Chairwoman FeONIC plc

"IP, and in particular patent protection, trademark, copyright and associated design rights, is very close to our heart as FeONIC develops new smart material technology for consumer devices. Through IP-licensing agreements, this smart material technology is incorporated into various consumer products. Without the protection of our IP, we would have no commercial bargaining power when dealing with our manufacturing and distribution partners, especially given the fact that we are a relatively small company with only eight employees."

What are patents?

Patents are rights granted for inventions that are technical creations typically incorporated into products or processes and which provide a new technical solution to a problem or a new way of doing something.

In order to qualify for a patent, an invention must be:

- **New:** It must not form part of the state of the art, which is the body of existing knowledge often called the 'prior art'. This 'newness' characteristic is called '**novelty**'.
- **Inventive:** It must not be obvious to a person skilled in the art and must make a **technical contribution**.
- **Industrial application:** It must be capable of industrial application.

Patents only come into force if they are **registered** with the relevant

patent office of a country or region, for example the European Patent Office or one or more national patent offices in Europe or elsewhere. The process starts when a patent application (containing a written description of the invention and any drawings as well as a written definition of the scope of protection claimed) is filed with the patent office. The patent application is then examined by the patent office to ensure that the relevant patentability criteria (see above) are met before a patent is granted. If the patentability criteria are not met, the patent application will usually be rejected. Patents are published when granted and, in most countries, pending patent applications are published after 18 months of filing in order to provide information about the invention to the public.

Granted patents give the patent owner the right to control use of the claimed invention by others—that is, the patent owner is given the right to prevent others from doing certain things in relation to the claimed invention. For example, the patent owner is entitled to prohibit others from making, using, selling, offering for sale, or importing any goods or services that include the patented technology. However, patents do not necessarily grant the right to the patentee to use his own patent without restrictions (e.g., patented products must still comply with EC regulations on product safety or they may even depend on someone else's prior patent).

Patents can be—and regularly are—**transferred or licensed** to others, so, for example, small companies or inventors without large manufacturing or marketing operations can obtain a

return on their investment in research and development, by either selling or licensing their patents to other entities for financial or other compensation. This is the essence of technology transfer. Alternatively, patents can be used to protect one company from its product being copied by another company. For example, small companies or inventors without large distribution chains can use their patents to prevent a larger company from taking their idea and beating the smaller company to larger market distribution.

Patents are generally granted for a period of up to **20 years** from their effective filing date, but are subject to the payment of annuity fees to keep them in force. Most patents are not kept alive for the full term. There is a disincentive to keep less important patents alive because the annuity fees generally become progressively more expensive as the patent gets older.

What do patents cover?

In Europe, patents are available to cover inventions in **all fields of technology**.

The **ICT** field is the most active area in creating patentable inventions at

present. According to the OECD, ICT-related (computing, communications and consumer electronics) inventions accounted for **31.5% of all patent applications** filed in the European Patent Office in 2008.

Other sectors are also very active in patenting their inventions. Basic electrical industries, pharmaceutical companies, engineering firms and the automotive industry, for example, produce a large number of patentable inventions each year.

Certain subject matter is not patentable under the relevant patent laws—for example, scientific discoveries, mathematical methods, plant or animal varieties, or medical-treatment methods (as opposed to medical products). In Europe, software and business methods are not patentable as such.

The EPO received 227,000 patent applications in 2008, and in the same year it granted around 60,000 of the applications in its pipeline.

Note that utility model (sometimes called petty patent) registration offers similar but quicker protection, typically for mechanical inventions, but provides less legal certainty and can be

problematic because no patent-style examination takes place. Utility model protection is only available in a few countries. There is no such thing as a European utility model.

Why is patent protection important?

Patents provide three major benefits for Europe—they encourage innovation, they promote the flow of information concerning new technologies, and they underpin technology transfer.

1. Encouraging innovation: European companies spend billions of euro annually in research and development (R&D) in ICT and other technology development. It is inconceivable that they and their investors would undertake such investment if others could simply free-ride on the fruits of their endeavours. Patents—which, for a limited period of time, provide protection for inventions arising from R&D—are a key mechanism for enabling a fair return on such investment. For this reason, they help attract funding for R&D and promote innovation generally.

Good patent protection in Europe is essential for European competitiveness

2. Promoting the flow of information:

Patents stimulate the dissemination of innovative technologies. Without the protection made possible by the patent system, many companies would choose to keep their inventions as trade secrets to avoid others from free-riding on the fruits of their endeavours. The patent system encourages companies to disclose their innovative technologies, thereby enabling collaborative, follow-on R&D. By filing for patent protection, companies are able to share information about and promote their innovative technologies with others, safe in the knowledge that legal protection will be forthcoming provided the criteria for patentability are met. In addition, patents and patent applications are published by the relevant patent offices, and this provides a rich source of technical knowledge for public study. For example, the European Patent Office maintains a database of more than 60 million patent documents, accessible to everyone and searchable through

sophisticated research tools (e.g. Espacenet) at no charge over the internet.

3. Underpinning technology

transfer: Patent licensing is at the heart of technology transfer and is the process by which a patent owner allows others to use its patented technology in making, selling, distributing and using goods and services. Typically, patents are licensed for financial compensation or other business value, such as a license to the other party's own technology (cross-license). The patent owner may grant an exclusive license to a single entity or may grant non-exclusive licenses to one or more entities. Licensing non-exclusively enables and encourages the broader commercialisation of goods and services that implement the patented technology than would be possible if the patent owner or a single exclusive licensee were to implement the technology.

Europe is prominent in creating patentable inventions: Approximately

54% of the patents granted by the European Patent Office (EPO) each year, and 20% of all patents issued world-wide, are issued to European businesses and residents. Europe is a prominent player in inventions in many areas, including computing, telecommunication, mobile phones, healthcare, motor vehicles, aviation and consumer electronics. Large parts of today's industries in Europe protect their inventions by patents. Companies in the US, Japan, China and Korea, for example, also use the patent system very actively - especially in the ICT sector.

Patent quality and cost-effectiveness

are vital: For the patent system to work effectively, it is important that patents that are granted cover inventions that are truly novel and include an inventive step, which is what the European system for examining patent applications seeks to ensure. Invalid patents devalue the patent system generally. There is therefore a need to maintain a balance between providing the financial resources necessary for

the various patent offices to examine patent applications effectively, and keeping the costs for companies to obtain patents at a reasonable level. The cost of patents needs to be kept under control, translation requirements kept to a minimum, and fees possibly even reduced for individuals and SMEs, in order to maintain accessibility of the patent system for all. There is scope for improvement in all these areas.

Can software be patented?

In Europe, software as such cannot be patented. However, since the early days of computer technology, the EPO has granted patents on new and inventive technical solutions to technical problems, irrespective of whether these technical solutions involve a computer or other programmable device. These are not patents on software as such; they do not cover the code or other expression of a computer program in its own right.

It is the *inventions* that reside in or are otherwise implemented by computers and software that are patentable. Simply because they happen to be

implemented by a programmable device rather than another method does not mean that they do not qualify for patent protection. What matters is whether an invention, however implemented, distinguishes itself from the prior art in a non-obvious manner as a result of technical features.

This is consistent with the WTO TRIPs Agreement requirement that patents be available for inventions in all fields of technology.

Tens of thousands of such computer-implemented invention patents have been granted in Europe, and elsewhere, mainly in the ICT sector. Approximately **20%** of CII patents each year are granted to **small- and-medium-sized enterprises** (SMEs).

The patent system in Europe

There are two alternative routes for obtaining patents in Europe. One is to file a separate patent application in each of the **national patent offices** where protection is required. The other is to file a single application at the **European Patent Office** (EPO) based

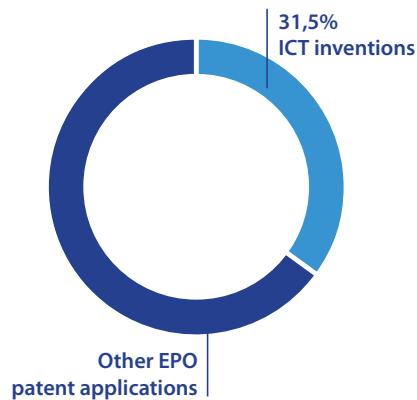
in Munich, indicating the countries where protection is required. Proposals are now being discussed in the EU for a truly European patent, the so-called EU-Patent, a patent of unitary character that is valid in the entire EU. The EU-Patent would be obtained via the EPO. At present, however, there are no supranational patents.

The **EPO route** is more cost effective if protection is required in several European countries, because the process for obtaining a patent can be carried out essentially in one language¹ and in a single procedure. Once a European patent has been granted, it becomes necessary to file **translations** in each of the languages of the countries where the patent is to take effect. This translation phase is an expensive, and arguably unnecessary, part of the European patenting process, because most translations are never used or even consulted. The **London Agreement**, currently in force for 15 states, does away with many translation requirements and so dramatically reduces the cost of obtaining a European patent.

¹ The three official languages of the EPO are English, French and German. Applicants from countries with a language other than English French or German are entitled to a 20% reduction in fees.

ICT-RELATED INVENTIONS (COMPUTING, COMMUNICATIONS, CONSUMER ELECTRONICS) CONSTITUTED THE LARGEST PROPORTION (31.5%) OF PATENT APPLICA- TIONS FILED IN THE EUROPEAN PATENT OFFICE IN 2008

SOURCE: EPO, 2009



On average, it takes **several years** to be granted a patent. This may seem a long time, but the Patent Office has to **examine** the application carefully to ensure that the invention is patentable. This involves the Patent Office carrying out a comprehensive search of the **'prior art'** and entering into a dialogue with the applicant to better understand and define the invention. Only when the Patent Office is convinced that the invention meets all the criteria for patentability is a patent granted.

One hallmark of the European patent system, which helps to balance the interests of the public against those of the patent owner, is that it is possible for anyone who is interested to make observations to the EPO during the patenting process or to oppose a patent they think may have been wrongly allowed at any time up to

nine months after the patent has been granted.

The EPO was established in 1977 after a long political process that began in 1947 and concluded in 1973 with the European Patent Convention (EPC). The EPC has been ratified by **36 states**, extending beyond the EU, while three further States also recognise European patents. The EPC underwent its first significant revision in 2000 following preparatory work lasting several years and an intergovernmental conference in order to bring it up to date for the 21st century.

The European patent system has established a world-class reputation over its more than 30-year existence, and the national patent laws of all EU Member States are harmonised with the EPC. The patent laws of most

countries outside Europe, most notably China and Japan, are modelled on the EPC.

Whereas there is a common system (the EPO) for granting European patents, there is **no common system for enforcing** them. To enforce a European patent, it is necessary to go to the national courts that have jurisdiction only for the country concerned. However, as one of the highest priorities of the European Commission, proposals are now being discussed in the EU for introducing a single, common procedure for enforcing European patents, called the European & EU Patent Court System (EEUPC) which would provide a consistent legal approach across Europe, reduce duplicated lawsuits and improve litigation certainty.

Patents and Europe's Sustainable Future

Patents and other IP rights are also critical to Europe's sustainable future. They help to encourage the development of technologies to address climate change and sustainable energy, give innovative companies a means to distinguish their products from those of their competitors and allow inventors and manufacturers to capture the value of their innovative investments.

Green technology innovation and deployment are critical to achieve the global climate-change goals and to ensure a clean, sustainable future for Europe and the world. Because of the central role that innovative sustainable technologies are likely to play in the new green economy, IP rights in green technology will also be key drivers of competitiveness, job creation and long-term economic growth in Europe.

IP rights in green technologies can be found in a range of sectors, from public transport to intelligent electricity networks, low-carbon appliances, efficient business software and the technology to operate wind turbines, hydro-electric facilities and solar panels.

Proposals by some to require compulsory licensing or other weakening of IP, concessionary technology pricing, or centralised green technology purchasing on non-market terms in any new global climate-change agreement would be counterproductive. Such proposals would simply reduce investment incentives and otherwise jeopardise sustainable green-technology development, hurting the very European competitiveness and jobs that the patent system aims to promote.

FAQs

Q. Do patents increase costs for consumers?

A. No, consumers enjoy new products and services that would not have been available but for the investment in research and development (R&D) that has been stimulated by the patent system. The market (i.e. consumers) determines whether the price of such new products and services is acceptable. Patent owners have incentives to set licensing revenues at a level that permits the resulting products and services to be

attractive to the market. Moreover, new and improved technologies often enable significant performance enhancements and efficiencies in products and services and result in manufacturing or operational cost savings that outweigh the licensing costs for those technologies.

Q. Would patents hamper developments towards a more sustainable environment?

A. No. R&D in green technology needs to be funded like all other R&D. Abolishing or diminishing patent protection on green technology and thereby reducing or eliminating incentives to invest in R&D in green technology, would thus slow down rather than promote the development of green technology.

Q. What is the relation between patents and competition law?

A. Patent law and competition law have the common objectives of promoting innovation and efficiency in the marketplace. They accomplish this by carefully balancing the rights and interests of innovators, implementers, competitors and consumers.

Q. Didn't the European Parliament ban software patents?

A. No, the European Parliament vote in 2005 was not about banning software patents but concerned a proposal that sought to codify and harmonise EU rules on computer-implemented invention (CII) patents in Europe. The proposal to codify and harmonise these rules at EU level was rejected. This means that the law stays as it was, based on the European Patent Convention (EPC) and national laws.

Q. Aren't patents expensive, particularly for SMEs?

A. It can be costly, but nevertheless SMEs do participate in the patent system—for example, SMEs secure 20% of the computer-implemented invention patents issued in Europe annually. The ICT industry supports fee reforms and less onerous translation requirements and similar measures that would make patents more affordable and accessible, especially for SMEs. The ICT industry definitely supports the London Agreement and hopes that all EPC states join it, so as to further reduce unnecessary costs.

Q. Are patents incompatible with Open Source Software?

A. No. For example, several patent holders have announced that they will license their patents to Open Source Software developers. Other vendors offer Open Source Software alongside patented software or service offerings. Suppliers and customers can choose on a case-by-case basis whether to use an open source business model or a proprietary business model, or a combination of both. Yet, as another important example, in the context of the development and implementation of standards, patents on standards are generally available on reasonable and non-discriminatory conditions (royalty bearing or at times royalty free), which do not distinguish between implementations using Open Source Software and other implementations.

Q. Don't companies regularly make improper patent claims?

A. This is the exception, rather than the rule. The European Patent Office carefully screens out applications containing pre-existing technology ('prior art'), obvious inventions,

and technologies incapable of industrial application. Occasionally, a 'bad' patent may slip through the net, but anyone can challenge a patent application throughout the patenting process. Moreover, granted patents may be invalidated throughout their term by courts of law.

Q. Don't patents put Europe at a competitive disadvantage with its international trading partners?

A. Quite the contrary. European industry is exceptionally innovative, as is reflected by the large percentage of patents that are granted to European entities (20% worldwide and 54% in the EPO). Good patent protection in Europe is essential for European competitiveness abroad and to stimulate innovation in Europe.

Copyright: Promoting Creative Expression



“THE [EU] MARKET FOR COPYRIGHT GOODS AND SERVICES RANGES COMMUNITY-WIDE FROM BETWEEN 5 AND 7% OF THE GNP.”

European Commission: Follow-up to the Green Paper, *Copyright and Related Rights in the Information Society* (1996)

What is copyright?

Copyright provides a **supportive framework underpinning** the creation of new literary, artistic and scientific works and is a market-based **reward** for such creativity.

Copyright protects **creative expression** that is one's own intellectual creation (i.e. original), such as books, music, films, photographs, and similar works. Sound recordings, performances and broadcasts are also protected, sometimes by copyright itself and sometimes by 'related rights'.

Computer programs are one type of material that copyright protects. As software has become widely available since the 1970s, national copyright laws have been updated to make clear that copyright protection applies to software. The 1994 TRIPs Agreement requires all member countries of the World Trade Organization to protect computer programs as literary works under copyright. Copyright is at the

heart of new and evolving business models for distributing **legal digital content** such as music and video to consumers.

Copyright gives the creator of the protected material a set of **exclusive rights**, which are typically the rights to determine whether and under what conditions others **copy, modify, distribute, perform** and communicate the material.

In recent years, these rules have been interpreted and updated to include similar internet-based activities. So, for example, copyright now covers “**making available**” and copying material digitally over the internet.

Engaging in an activity covered by an exclusive right without owning the copyright or having a licence, and without qualifying for one of the exceptions to copyright, is **infringement**. Infringers can be subject to civil fines and injunctions and, in certain cases, criminal penalties.

Unauthorized downloading and file sharing on the internet are examples of copyright infringement.

For most works in Europe, copyright lasts for **70 years** (plus the lifetime of any identified author). Copyrights can be **transferred** to others, and any or all of the exclusive rights can be **licensed** for others to exercise.

Why is copyright important?

ICT products and services, and the other diverse sectors that develop and disseminate creative content, are extremely important to Europe's **technological and cultural development**.

Also, copyright is at the heart of new and evolving business models for distributing **legal digital content** such as music and video to consumers. It is increasingly recognised that copyright is central to the digital-knowledge economy.

Many of the goods and services in these markets only exist because of the underlying protection that individual countries, the EU and the international trading system provide through copyright.

These sectors are major contributors to **economic growth**, jobs and **competitiveness**.

According to the European Commission (based on a KEA European Affairs 2006 study), the cultural and creative sectors in Europe (from published content such as books, newspapers and magazines via musical works and sound recordings, to films, video on demand and video games) generates a turnover of more than **€650 billion** annually, contributes to **2.6%** of the EU's GDP and employs more than **3%** of the EU work force.

The UK government estimates that the copyright-based sector generates more than **1 million jobs**, **8%** of the **UK GVA** (Gross Value Added) (£56.5 billion), and **4.1% of UK exports** (£11.6bn).

Throughout the EU, copyright is one of the building blocks that underlie a vibrant 'knowledge economy', and

enables it to continue to grow and compete internationally.

Are there exceptions to copyright?

National copyright laws typically contain a set of **limitations and exceptions** that permit activities otherwise controlled by the copyright owner—such as copying, modifying, or performing a work—to be carried out without permission.

European copyright laws do not have blanket exceptions such as "fair use," a US concept, but contain lists of **specific exceptions** tailored to particular works and specifically defined activities.

To qualify for an exception, the person engaging in a protected activity must meet all of the conditions of the specific exception.

For example, private recording of broadcasts for time-shifting (a UK and Ireland exception) does not allow distribution of such copies; limited copying by educational institutions does not cover activities unrelated to such an institution; and private

copying of music or films for one's own personal use (allowed by some but not all European countries) does not allow internet uploading.

The permissible exceptions are set out in a series of directives adopted by the European Union, most recently the 'Copyright Directive' of 2001. However, the list of exceptions varies considerably by country because the exceptions are optional whereby Member States can choose whether to adopt them or not, and national law then applies.

International treaties provide for a balanced approach between copyright owners and users, by allowing countries to implement reasonable exceptions to copyright. The Berne Convention, WIPO Treaties and WTO TRIPs Agreement allow copyright exceptions in '**special cases**' that **do not interfere with the normal 'exploitation'** or market for the work, or unreasonably **prejudice the rights owners'** interests.

Private Copying

As mentioned above, the so-called private copy exception that allows

individuals to make certain limited copies, e.g. of legally downloaded digital content, for their own personal use—without infringing copyright. However, the scope of private copying is not harmonised so that what a citizen in one Member State may do legally, may count as an infringement for a citizen in another Member State. This is obviously confusing for consumers and not in line with the objectives of a **Digital Single Market**.

What is meant by the Digital Single Market?

All citizens of the 27 Member States of the European Union enjoy freedom of movement. When this freedom is exercised people expect to be able to access digital content from their home country and in their own language when living or travelling abroad. However, complex licensing regimes can lead to a situation where, for example, an Italian music lover living in Belgium cannot access her preferred Italian service, which may only be licensed for access within Italy. This illustrates why there is an urgent need for the completion of a Digital Single

Market, where content services can be offered easily and equally throughout the territory of the European Union.

Content Licensing (Legal Offers)

The digital market place is going through an extremely vibrant phase of experimentation with new consumer propositions and business models, aimed at delivering a rich and flexible digital experience—benefiting European consumers and rights-holders alike.

However, it is rather complex and cumbersome to negotiate commercial licences in Europe, because copyrights tend to be managed on a national basis by local Collecting Societies. More effective and efficient pan-European licensing would help bring legal offers to consumers equally across Europe.

An efficient commercial licensing regime, giving consumers a greater choice of attractive legal offers, will also be a very effective weapon against the culture of piracy.

Intermediary (ISP) Liability

A current hot topic is the role and liability of intermediaries (ISPs and other on-line service providers) when their subscribers infringe copyright. Some countries have proposed that ISPs should send warning letters or possibly even disconnect subscribers who persistently download infringing material. Making ISPs responsible for the behaviour of subscribers is a controversial topic. In June 2009 the European Commission DG Internal Market launched a stakeholder dialogue addressing the issue. A fragmented approach with different initiatives and/or codes of practice at national level would not be helpful, as it would result in new obstacles for the functioning of the Digital Single Market.

Are private copy levies fit for purpose in the digital era?

Private copy levies were introduced as a relatively crude remuneration model in the analogue era to reflect the fact that consumers were able (and permitted) to copy unlicensed content, notably onto blank cassette tapes. The

levy system was envisaged as a kind of compulsory private copy license. In today's digital environment direct voluntary licensing would seem to be a more appropriate and fairer system all round.

Unfortunately, claims for private copy levies are rapidly spreading to more and more digital products in ever-more countries across Europe.

Consumers generally do not realise that they are paying a private copy levy on digital equipment they purchase, nor how much it is, what it is for, or that the amount they pay varies significantly from country to country. In fact, consumers may be paying twice (or even more) because the same digital content is commonly exchanged between a network of different digital devices for convenience of access, but a copyright levy may have been paid on each device. There have been suggestions that the amount of the levy should be made visible to consumers at the point of sale.

The EU Copyright Directive introduced the concept of 'fair compensation' based on harm, with no compensation being due when there is less than

minimal harm. Many private copying activities of legally acquired content, such as platform or format shifting as well as time shifting, for personal use or within the strict domestic family circle, arguably cause no more than minimal harm to the right-holder and, as such, should be outside the scope of levies, which would mean that no compensation would be due. This European concept was intended to usher in a new way of thinking, but in practise Collecting Societies have tended to stick to traditional national models and consequently the levy regime remains an uncoordinated patchwork of divergent national systems. Further EU intervention is badly needed if we are to have any kind of European solution fit for the digital age which ensures that (a) rights holders are fairly compensated, and (b) European consumers have ready access to a rich selection of legal digital content.

What can I do with copyrighted software?

Commercial software is typically **licensed** rather than sold, so software

providers typically spell out users' rights to use the software in licence agreements signed individually or shipped in the package.

These licences may allow the person or company that legitimately acquires the software to install and run it on one or more devices, transfer the entire package and all copies, etc. In addition, the 1991 EU Software Directive harmonised all software copyright exceptions across Europe, so it is lawful even without a licence for the lawful acquirer to (1) **use** the software in accordance with its intended purpose (including error correction), (2) make a **back-up copy** for that purpose, (3) **observe, study or test** the functioning of a program that the acquirer lawfully runs, and (4) in certain cases, **decompile** the program to achieve interoperability of an independently created program with other programs. There are no other exceptions in Europe that allow unauthorised private copying, educational, library, trial, limited-time, or evaluation use of software. Only the exceptions in the 1991 Software Directive apply.

FAQs

Q. Is it necessary to register a copyright?

A. No, and most countries do not have a copyright registration system. Copyright protection becomes effective automatically upon the creation of a protected work.

Q. Is it necessary to choose between copyright and patent or other IP protection?

A. No, given that each type of intellectual property protects different things. A software developer thus can protect its technical inventions by patent, its 'expression' (e.g. code) by copyright, its brand by trademark, and its confidential information (eg specifications) by trade secrets.

Q. What bits of a computer program can be protected by copyright?

The 1991 EU Software Directive says that the 'expression in any form of a computer program' is protected. This obviously includes source code and object code. The directive also specifically mentions 'preparatory design material'. It is the 'ideas and principles which underlie any

element of a computer program, including those which underlie its interfaces', that are not protected by copyright.

Q. If I have paid for a download, don't private-copy levies mean I am paying twice?

A. Yes. Private copying is an exception to the rights owner's protection, for which EU law recognises that fair compensation may be due to the rights owner. If the download was paid for it means a consumer is often paying twice. If the content is copied onto a further device the consumer is paying several times.

Trademarks: Maintaining Quality and Fair Competition



Trademarks are powerful tools to prevent others from offering inferior, different or even dangerous items that falsely appear to originate from the brand owner.

What are trademarks?

Trademarks are **distinctive signs** that identify **goods** or **services** as originating from a particular person or entity.

Trademarks can take any number of forms; **words, letters, numbers, symbols,** and **graphics** are the most common. Distinctive packaging, three-dimensional shapes, and even distinctive colours, smells and sounds potentially can be trademarks.

Trademarks must generally be **registered** for a particular country to benefit from registered trademark rights in that country, although other protections (such as “passing off” or “unfair competition” protection) may be available for unregistered marks. Some countries afford trademark protection to brands that are established by continuous use, regardless of whether a registration has been sought.

Virtually every country has a trademark

office that registers trademarks for use in that country. The EU’s **Community Trade Mark** office registers trademarks effective in all EU Member States. The World Intellectual Property Organization (WIPO) in Geneva maintains the Madrid Protocol system, a one-stop shop whereby a national trademark can be registered in up to 65 other countries.

Trademark owners have the exclusive right to use the trademark to **identify goods and services**. The trademark is generally enforceable only in those **classes** of goods and services (e.g. electrical and scientific apparatus, telecommunications services) in which it is registered. However, widely known marks enjoy protection beyond their registered product classes.

Trademarks are issued for a period of **at least seven years** (ten is typical), but can be renewed indefinitely. Trademarks can be sold or licensed to another person or enterprise.

Why are trademarks important?

Trademarks have benefits both for their **owners** and for **consumers**. For trademark owners, they provide a way of identifying and distinguishing their company, product and service **brands** from those of other enterprises.

This provides:

- **Support for a company’s individual reputation.** Successful companies are recognised by and associated with their trademarks. A positive reputation is rewarded by consumer purchases of these companies’ trademark-branded goods and services, and by goodwill in the companies’ valuation.
- **Protection against unfair competition,** such as from **counterfeits**. Trademarks are a powerful tool to prevent others from offering inferior, different or even dangerous items that falsely appear to originate from the brand owner.

- **Promote trade.** Allowing innovative companies to produce and offer goods and services on fair conditions facilitates healthy domestic and international trade in those goods and services. **For consumers,** trademarks provide a helpful indication of the origin of a product or service. This protects consumers against confusion. Recognised brands also can serve as an indicator of quality and reliability when the consumer is seeking new products and services.

FAQs

Q.What does “distinctive” mean with regard to a trademark?

A. In general terms, this means that the mark is not the same as (or confusingly similar to) another trademark, that it is not misleading or deceptive, that it is not a generic mark, and that it is not merely descriptive or laudatory of the goods or services (eg ‘Quality’ widgets). National trademark offices also may refuse to register trademarks deemed offensive to public policy or morality.

Q.How are the symbols TM and [®] used?

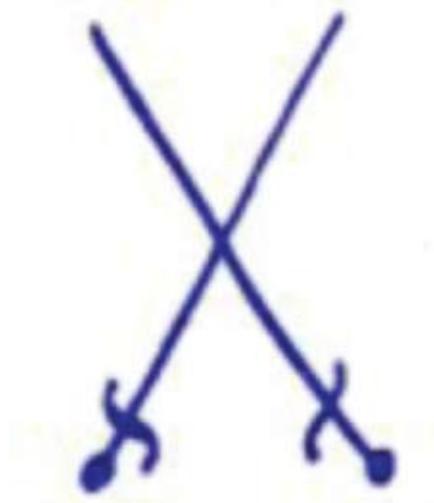
A. Usage varies, but typically the TM or SM symbol means that the mark is being used or claimed as a trademark (applied to goods) or service mark (applied to services), and [®] gives notice that it has been registered. It is helpful but not mandatory to use any of these symbols. Use of the [®] symbol with unregistered trademarks is illegal in many countries.

Q.What use of other entities’ trademarks is allowed?

A. Generally, consent is necessary to use someone else’s trademark. However, a trademark can be used in good faith to describe the goods and services to which it actually applies (e.g. Nokia mobile phones), so long as it is not used without consent to promote someone else’s goods and services, to imply the association or endorsement of the trademark owner, or to benefit from the trademark owner’s goodwill in the trademark.

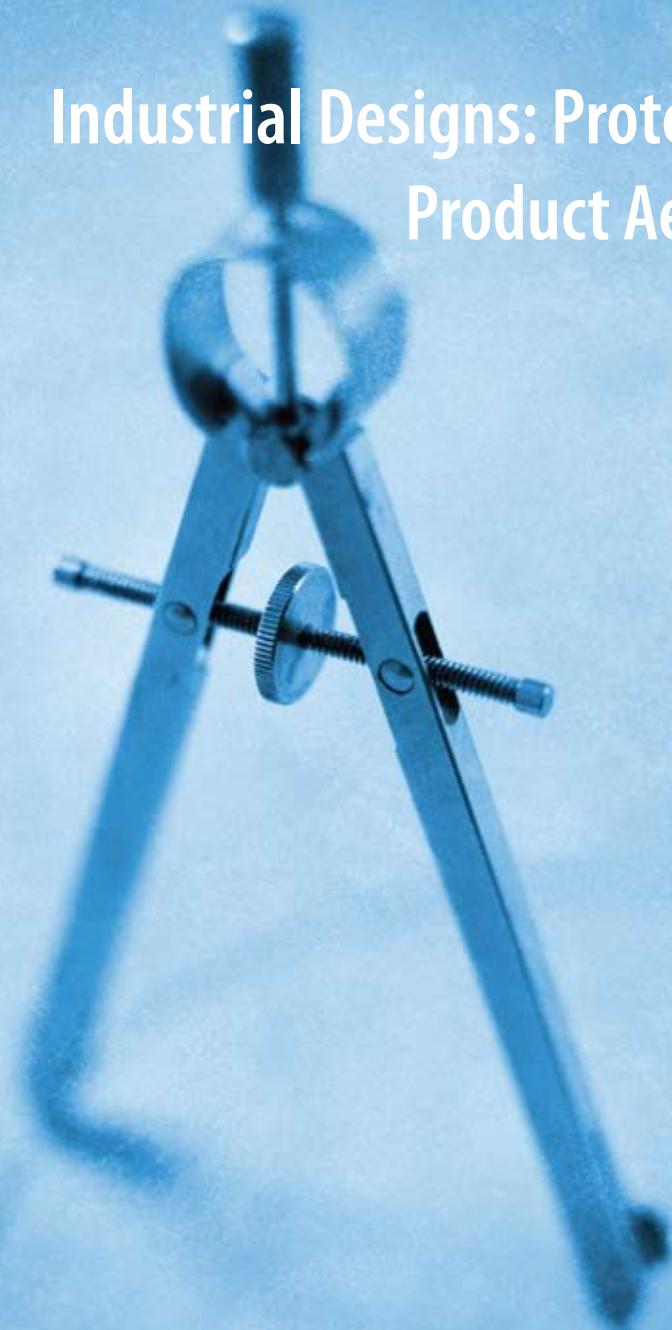


The Bass Red Triangle trademark was registered in Britain in 1876



Meissen porcelain is the first European made porcelain. Its signature logo, the crossed swords, was introduced in 1720. The swords were painted on the porcelain body after the first firing but before the application of glaze, using a special cobalt-blue colour.

Industrial Designs: Protection of Product Aesthetics



What are industrial designs?

Industrial designs are the **aesthetic and ornamental** elements of a product, rather than its technical design or function.

Industrial-design protection can cover two- or three-dimensional aspects of a product. EU design law, for example, protects the **'appearance** of the whole or a part of a product' resulting from its ornamentation or features, in particular, its **'lines, contours, colours, shape, texture and/or materials'**.

Design protection covers a wide range of products and features in the IT, communications and consumer electronics sectors. The particular shape of computers and consumer products, handset layouts, typefaces, icons and other computer graphics elements and packaging designs are regularly protected.

Protection is available in the EU for **new designs** having an **individual character** whether the design is **registered** with the relevant agency or not.

In the **EU**, unregistered designs are automatically protected against

deliberate copying and use in other products for **three years**. Registration with the EU agency OHIM gives the rights owner longer protection—five years, renewable for up to **25 years** total—in all 27 EU Member States.

Registration also gives broader rights—it not only protects against copied products but also against similar designs that may have been independently developed.

Outside the EU, many countries protect designs, in a variety of ways. The **US** provides design protection by patent. **Australia** and **Japan** protect designs for 10 and 15 years respectively. Japan imposes an additional test that a design “should not be able to be easily created”.

International treaties (the **Hague System**) also provide a streamlined mechanism for a design to be registered in up to 42 countries by filing a single application with the World Intellectual Property Organization (WIPO) in Geneva.

Why are design rights important?

By protecting the aesthetic elements and appearance of products, design rights enable and encourage those that develop commercial products to:

- **Enhance and diversify the designs** of their products.
- **Obtain a fair return on investment** in developing and selling their products.
- **Protect their products against unfair competition** from those who have not made similar efforts and investment in product design.
- **Differentiate their products** from those of others, and bolster their brands.

**Community Design
No. 000473194-0001
For Cellular Phones
Registered 1 February 2005
NOKIA Corporation**



FAQs

Q. What is the difference between industrial designs, and patents, trademarks and copyright?

A. Patents protect an invention with technical effect; design rights do not. Design rights protect the appearance rather than the technical aspects or functioning of a product. Trademarks and copyrights can overlap to some

degree with design protection, but these are not the same. Trademarks associate a particular symbol with the identification of the source of a product or service (e.g. the Apple iPod). Design rights only protect designs themselves (e.g. the iPod shape and aesthetic features)—whether or not these are used or would qualify as trademarks. Copyright is concerned with the expression of an idea (i.e. words, drawings, works of art or music, computer programs). So, for example,

copyright would protect the drawing of a lamp, the lamp itself may or may not be protectable as a copyrighted work of art, but the lamp would qualify as an industrial design if it was new and had an individual character.

Q. Can design rights be bought and sold?

A. Yes. They can also be licensed. This can be valuable for developers that cannot manufacture and market their designs themselves, particularly small- and medium-sized enterprises.

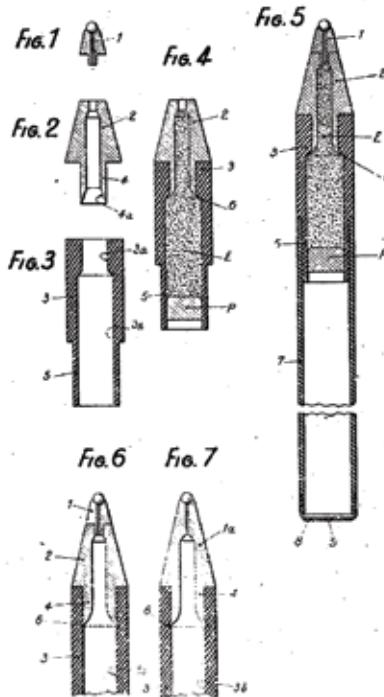


The distinctive green Perrier bottle was created by Sir John Harmsworth—he got the idea from the shape of a pair of old Indian exercise clubs that he used while recovering from a road accident. The Perrier bottle, now registered by Nestle Waters, is a 3D and colour trademark.

N° 1.047.340

M. Birch

Pl. unique



Pen design was registered as a trademark by M Birch under the name BIC.

Glossary of Intellectual-Property Terms

Computer-Implemented Invention (CII):

An invention that is implemented using a programmable device, which may include software elements. In Europe a CII must make a technical contribution to be patentable, as well as being novel and inventive. Software is not patentable in Europe as such.

Copyright:

Copyright protects the expression of a literary or artistic work, but it does not protect the functionality. Computer programs are automatically protected by copyright provided they are original. Copyright gives international (virtually world-wide) protection. There is no registration process.

Counterfeit:

A product which uses a trademark without authorisation, intended to make the consumer think it is an authentic product from the original manufacturer, or copy of a copyrighted work. A replacement cover for a Nokia phone, which uses the Nokia name, would be a counterfeit, as would commercial music CDs or software discs manufactured without the copyright owner's consent.

Cross Licence:

A two-way licence between two parties that each own IPR. Each party grants the other a licence under the IPR owned. The licence may be royalty free or one or both parties may make payments, or provide other business value, to the other.

Design Patent:

This protection is available in the US to protect the industrial design, i.e. the visual appearance, of a product. It does not protect the functionality. Outside the US, the equivalent form of protection is known as design rights or registered design.

Design Rights:

Design rights protect the industrial design, i.e. the visual appearance of a product. They do not protect the functionality. In the US the equivalent form of protection is known as a design patent.

Digital Rights Management (DRM):

Digital rights management is the technology used to manage access, copying or other use of digital content, data and services.

European Patent Office (EPO):

www.epo.org

The EPO, based in Munich, Germany, examines and grants European patents under the European Patent Convention (EPC). European patents are valid in as many of the 36 EPC member countries as the applicant designates in his application.

Infringement:

When a third party uses an intellectual property right without the consent of the rights owner or without a valid legal defence. The rights owner then has the right to prevent the infringer from continuing such activity and/or to obtain compensation for such use.

Intellectual Property Rights (IPRs):

Legal protection for intellectual assets, rather than physical assets or services. Commonly used to refer to patents, copyright, trademarks, registered design, design rights etc..

Licensing:

Licensing is the process by which an owner of IPR allows another person or entity to use its protected IP in making, selling, distributing and using goods and services. Typically, IPR is licensed

for financial compensation or other business value such as obtaining rights to use the other party's IP (cross-licenses),

Novel, Novelty:

One of the criteria for an invention to be patentable. It means the invention has to be new, and not already known from the prior art.

OAMI/OHIM:

oami.europa.eu

Based in Alicante, Spain, the Office for Harmonization in the Internal Market (OHIM, whose acronym is OAMI in Spanish) is the EU body that registers Community Trademarks and Community Designs.

Open Source Software (OSS):

Open Source Software is the generic name for software where the source code is freely available and everyone is allowed to develop and distribute it. The open source model is based on licensing the copyright in the software. Although the original licence itself is free of charge, it imposes various obligations and may entail subsequent costs for the user.

Patent:

A patent protects a technical invention, e.g. a technical solution to a technical problem. Patents have to be applied for on a country-by-country basis. There is no such thing as a worldwide patent.

Patent Application:

A patent application is an official request for patent. It must be accompanied by a patent specification describing and claiming the invention. The patent application has to be filed with the various patent offices in the countries where patent protection is sought. There is no guarantee that a patent will be granted. A patent application cannot usually be enforced through the courts until the patent is granted.

Patent Claim(s):

The numbered paragraphs at the end of the patent specification defining the scope of the invention. The claims can be considered as being similar to the boundary around a piece of land, in that the claims can always be challenged, as with a boundary dispute between neighbours.

Patent Examination:

A patent examination is the process whereby a patent office checks that an invention claimed in a patent application meets all the statutory requirements for novelty, non-obviousness and industrial application.

Patent Grant (Issue):

Patent grant or issuance is the formal government approval of a patent application. Only when the patent has been granted can it be enforced in the courts. It generally takes several years for a patent to be granted, with some countries taking longer than others. The term "issued patent" is used more commonly in the US.

Patent Prosecution: This simply means the process of obtaining a patent through a patent office, and should not be confused with accusing someone else of infringement.

Patent Specification:

This is the legal document that formally describes the invention and ends with a series of claims.

Piracy:

Unauthorised manufacture, import, or sale of a product, which copies the design (visual appearance) or the copyrighted content (e.g. music, video, software) of an original product.

Prior Art:

All technical knowledge published before the date of a patent application (or-in the US -before the date of invention). Sometimes this is also called the “state of the art”. Prior art is relevant because, to be patentable, an invention must be novel and non-obvious over the prior art.

Royalty:

A payment from a licensee for using a patent or other IPR. Usually, a royalty is paid as a fixed amount or as a percentage on the selling price of every product sold. However, the term can also be used to mean a one-time or periodic lump-sum payment.

Software Patent:

A patent for an invention implemented at least partly in software. In Europe, the law prohibits patents on software “as such”, a stricter rule than in the US. However, an invention implemented

using a programmable device and which makes a non-obvious technical contribution is patentable in Europe, and are called computer-implemented inventions (CIIs)—see above definition.

Trademark, Service Mark:

Trademarks are distinctive signs that identify goods or services as originating from a particular person or entity. Trademarks must be registered in a particular country to benefit from trademark rights in that country. Trademarks applied to services are often termed ‘service marks’.

Trade Secret:

Information that is kept secret or confidential, also called “confidential information”. There is no registration process. A non-disclosure agreement (NDA) (sometimes called a confidential-disclosure agreement (CDA)) is used to protect trade secrets (confidential information) when there is a need to disclose them to other parties, but if the confidentiality is broken the secrecy is lost.

TRIPs Agreement:

www.wto.int/english/tratop_e/trips_e/trips_e.htm:

The World Trade Organization (WTO) treaty, Agreement on Trade-Related Aspects of Intellectual Property Rights. TRIPs sets minimum standards for intellectual-property laws and enforcement requirements that the 149-plus member countries of the WTO must follow.

Utility Model:

Sometimes called a petty patent, utility model rights are granted quickly and without substantive examination for inventions that might otherwise meet the criteria for patenting, but that may have a lesser inventive step than needed to secure a patent.

World Intellectual Property Organization (WIPO):

www.wipo.int

The specialised United Nations agency that deals with intellectual property. WIPO, based in Geneva, Switzerland, administers 23 international treaties in the IP area. More than 184 countries are members of WIPO.

ABOUT DIGITALEUROPE

DIGITALEUROPE is the pre-eminent advocacy group of the European digital economy acting on behalf of the information technology, consumer electronics and telecommunications sectors. We are dedicated to improving the business environment, and to promoting industry's contribution to economic growth and social progress in the European Union.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 60 leading corporations and 40 national trade associations from all the Member States of EU; altogether 10,000 companies with 2 million employees and €1,000 billion in revenues. You can learn more about our activities via <http://www.digitaleurope.org>

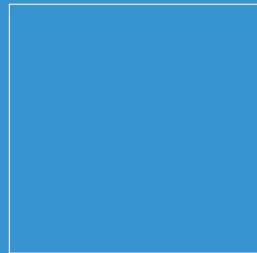
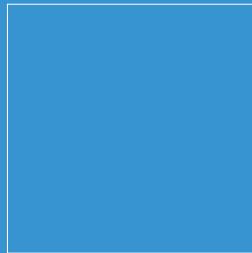
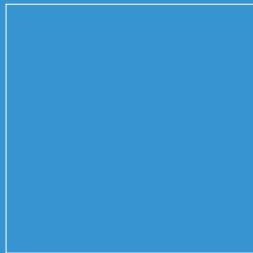
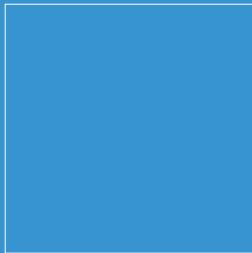
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NATIONAL TRADE ASSOCIATIONS:

Austria: FEEI; **Belgium:** AGORIA; **Bulgaria:** BAIT; **Cyprus:** CITEA; **Czech Republic:** ASE, SPIS; **Denmark:** DI ITEK, IT-BRANCHEN; **Estonia:** ITL; **Finland:** FFTI; **France:** ALLIANCE TICS, SIMAVELEC; **Germany:** BITKOM, ZVEI; **Greece:** SEPE; **Hungary:** IVSZ; **Ireland:** ICT IRELAND; **Italy:** ANITEC; **Lithuania:** INFOBALT; **Netherlands:** ICT OFFICE, FIAR; **Poland:** KIGEIT, PIIT; **Portugal:** AGEFE, APDC; **Romania:** APDETIC; **Slovakia:** ITAS; **Slovenia:** GZS; **Spain:** AETIC, ASIMELEC; **Sweden:** IT&TELEKOMFÖRETAGEN; **United Kingdom:** INTELLECT; **Belarus:** INFOPARK; **Norway:** ABELIA, IKT NORGE; **Switzerland:** SWICO; **Turkey:** ECID, TESID, TÜBISAD; **Ukraine:** IT UKRAINE



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