

A short introduction to intellectual property (IP) law

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Possibly you are unaware of what could be the impact of intellectual property law on your business or, you simply miss a global view of what is IP. This short introduction will attempt to give you a simple “big-picture” roadmap of the matter. It does not cite other contributions or examples since it refers to common ideas that anyone can verify or contest, nor does it pretend to be exhaustive or accurate.

Outline

I. The unified legal concept of “intellectual property” may be difficult to understand as it is traditionally divided between two very different regimes - artistic rights and industrial rights,

II. The definition of intellectual property may remain useful to show how its objects may be evaluated,

III. Or appreciated in an international context.

IV. “Le panier”: some miscellaneous items yet to be resolved

I. The unified legal concept of "intellectual property" may be difficult to understand as it is traditionally divided between two very different regimes - artistic rights and industrial rights.

This "summa division" is the main legal distinction in IP law and corresponds to radically different purposes.

While artistic rights tend to promote the personality of an author ("express yourself"), industrial rights, as an exception to the fundamental principle of freedom of industry and commerce, protect the investment of those who contribute to the technical and basic welfare ("improve the common welfare").

Artistic rights ("literary and artistic property", "author right" "copyright")

Artistic rights protect authors against the unauthorized copying or alteration of their creations and performances. The idea here is more or less that an author and his creation deserve protection not really because said creation is interesting or useful but because it reveals and identifies an author. It is the emanation of the personality of the author, specific and unique, like a human being. Industries ("the cultural industries") which serve these artistic creations are protected by specific rights, called "neighboring rights", derived from the author rights they serve.

These rights aim to protect industrial interests and commercial circuits, but not directly the personality of an author. To this extent, they are comparable to the "industrial rights", described here below, which protect industrial activities.

However, "performers' rights", even if they are qualified as "neighboring rights", are rather comparable, in their philosophy, to authors' rights, since they protect the performance of an actor, and, indeed, this performance is closely bound to the personality of the actor.

Duration: (Time periods indicated below give an idea of the duration of protection; they do not correspond to accurate delays, which vary according to the various situations and starting points):

*Author rights duration: long delays, classically 70 years, and 50 years, with different points of origin;

*Databases: 15 years.

Industrial rights ("industrial property") (patents, trademarks, designs)

"Industry" is understood here as the activities which are "useful", those which are meant to support, to bring added value, to other "useful" or common activities. Its purpose is to render life a minimum degree of comfort, make activities easier, work less hard, and to satisfy the basic needs of human beings and of their enterprises.

"Industry" is the world of causalities and effects, of efforts and needs, a trade-off between contributions and rewards.

One may find in the word "industry" a hidden reference to the dream of the robotizing of the society, (cf. the robot series of Isaac Asimov), where basic welfare (clothing, alimentation, health...) is provided to everybody, and where the "standardized", the "automatic", the "common" is left to robots. Though humans are not robots, there is a risk that the more humans try to create an automated world, the more they imitate it and the more they become like it...

Industrial property refers to very different types of protections:

Patent rights (on inventions)

Patent rights protect the holders of technical inventions in preventing others to use these inventions without authorization of said holder.

When this invention is attractive and valuable, “useful” for the community, patent rights allow remuneration to its holder. This holder is, most of the time, not the inventor itself, but the investor, who has taken the risk to bet on an innovative effort without having assurance of a profitable result.

Designs, trademarks, origins, domain names rights (on reputations and on esthetic forms)

Signs and designs identify, embellish and characterize the reputation of products and services; they signal their expected quality and are then able to procure attractiveness to said products or services.

Trademark rights, domain names rights, designs rights, protect the holder of signs and designs against their unauthorized use by third parties, and then protect the whole chain of economic agents who intervene in the process of developing, manufacturing, distributing, marketing... those products and services.

They are of primary importance since they associate reputation with a name or a look, possibly during an unlimited period if maintained, (while patent rights are very limited in time, 20 years).

While patent rights address new and inventive products, agents, processes, trademark and design rights, together or apart from patent rights, address the original forms of products or their packaging, the names of products and services.

Duration: (time periods are indicated here to give an idea of the duration of protection; they do not correspond to accurate delays, which vary according to the various situations and starting points):

- *Patent rights: 20 years non renewable;
- *Utility models (no research report): 6 years;
- *Trademarks rights: 10 years renewable;
- *Designs: 5 years renewable up to 25 years;
- *Semiconductors topographies: 10 years;
- *Plant varieties: 25 years.

Industrial rights are antagonistic to artistic rights:

Industrial property has an antagonistic purpose to the one of artistic property.

Artistic property has the ambition to promote the uniqueness of the creative effort together with the authors' personality, and is granted widely. It may be implicitly understood that behind artistic rights there is not, as a rule, predetermined business plans and market outcomes, but before all a personality, which may, or not, attract revenue, in a more or less long period of time. I would say that the personality is the driver, and that the revenue is a possible consequence.

On the contrary, industrial property's main objective consists in remunerating the risk taken by the investors and entrepreneurs. Those investors and entrepreneurs have bet on an industrial project upon the consideration of business plans and market outcomes. Here the driver is revenue, and the risk to lose one's investment is the consequence of a bad or unlucky evaluation of this revenue.

This industrial property is granted more restrictively than the artistic property because the legislator wants to allow entrepreneurs faster access to innovations and signs, and avoid monopolistic situations. This objective to promote a faster access to innovations and signs is implied by the principle of freedom of industry and commerce, often inscribed in the Constitutions of the States and obliging the legislator.

The implicit idea is that “revenue” is a limited resource and cannot be monopolized by a group of entrepreneurs beyond what is normally necessary to cover their costs and reward their risk.

This explains why, in law, industrial rights are interpreted or thought on a restrictive basis, framed by unfair competition rules, as derogatory to the freedom of industry and commerce.

This explain why, in law, artistic rights are rather interpreted on an extensive basis, as the expression of a human personality, with variations depending on the type of the legal system concerned (for instance: roman author right / Anglo-Saxon copyright), and on the type of creations concerned (cf. the case of author rights applying to software in Europe), some being originally classified as artistic but having rather an industrial purpose (ex. neighboring rights of producers).

These concepts are a key to situate the political, economic and legal issues related to IP, since they allow answering the question: are we in a philosophy of recognition of personality or rather in a philosophy of contribution to the technical or basic welfare?

The answer, more or less nuanced, will help to apply adequate rules to such and to determine its economic impact. Author rights will be rather used to promote individuals and their creations, the “creators’ interests”, while industrial rights will be rather used to protect enterprises and their activities, the “investors’ interests”.

However each category borrows features from the other one.

For instance, today, there is a claim by inventors to receive a share in the revenue generated by their inventions. In that sense, inventors would borrow a feature usually relevant of the authors’ rights regime.

In the same manner, software programmers are already protected by the author right, even if they, and designers as well, intervene mainly in an industrial context and designers as well.

Neighboring rights derived from author rights, which apply to the cultural industries, are rather comparable to industrial rights when they protect the aforesaid “investors interests”, and vice versa. Inventors rights, and designers rights, may be classified as “creators interests”, and then borrow features from the author rights regime.

Patents, utility models, registered designs, authors’ rights on software, authors’, performers’ rights => dedicated to creators’ interests;

Registered trademarks, neighboring rights of producers and broadcasters, plant varieties protection, databases and semi-conductors’ specific regimes => dedicated to investors’ interests.

II. The definition of intellectual property may remain useful to show how its objects may be evaluated.

The definition of intellectual property shows that intellectual goods are specific as being not tangible goods.

“Intellectual property”: the word itself may appear as a floating flag improper to illustrate the various realities it pretends to cover.

An “intellectual” good is something intangible and for which a value is acknowledged, and which then deserves protection. It refers to these well known distinctions between the touchable and the untouchable, the visible and the invisible, the material and the immaterial, which triggers different considerations in various fields of knowledge.

Intellectual goods encompass a wide variety as they may be songs, books, movies, sculptures, databases, technology, know-how, signs, but also business methods, software, organization, ideas, doctrines, contracts (labor, industrial, commercial, financial...), inventories, strategies, valuations, advice, concepts, plans, designs, forms, processes, graphics, shares, money... in any fields, and generally speaking any intellectual thing which may be produced, created or revealed by the human mind, without consideration of the tangible media which embodies, reveals, such abstraction.

In economy, the “intellectual good” has specific properties since it is unusable, may be used by several parties at the same time, in an unlimited number of times, which appreciation may increase with time (classical arts, technological standards) or depreciate with time with new and more attractive innovations or creations, but with transfer costs difficult to determine.

Property, in common language, refers to reservation, to protection, to ownership, and, economically speaking, to security, prosperity, responsibility, or redistribution.

Intellectual property is a right acknowledged by the laws to set up a specific reservation of some intellectual goods (not all), artistic or industrial, with the global objective to allow a use of them by the community, and, in the long term, a free use, but without discouraging the efforts, investments, genies and personalities which produced them.

Intellectual property (“IP”) is above all a legal instrument (no property without law) which provides its holder an award or reputation proportional to the attractiveness of the concerned good, by prohibiting the unauthorized use of this good by third parties.

IP is not the intellectual good itself, but the legal tool which, by describing an intellectual good and establishing a link with its holder, allows the negotiation of such intellectual good by its holder, comparably to what occurs with a title of ownership in the framework of transactions over real estate. However, by extension, IP is understood as comprising not only the title itself but also the intellectual good it covers. This is the definition which is used below to describe the economic discussions which determine the evaluation of IP.

If the legal concept of intellectual property concerns very different rights and objects it notwithstanding still reflects the fact that intangibles are too specific to be financially evaluated as tangibles are, and that they are evaluated in accordance with changing norms or criteria: first as a result of a discussion between investors and creators, and second as the result of a discussion between investors themselves, whatever the field, artistic or cultural.

IPs are intangible assets, and are not evaluated like tangibles

Contrary to tangibles, they may be used for multiple usages at the same time, by several parties. They are unusable, but they form sunk costs when they don't find outcomes.

Contrary to what happens for tangibles, the value of IP objects is not really determined by a market or precise costs, but depends mainly on the specific resources needed to commercialize these objects and on the available market outcomes.

Indeed, their market seems very imperfect, and not transparent. Their price seems, at least in the non-cultural industries, uncertain or insignificant. Their transaction costs are important.

These considerations lead one to say that:

The value of IP objects is first the result of a discussion between creators and investors

IP rights, for investors, either in cultural or other industries, represent the guarantee that their risk will be remunerated in the case where a creation generates revenue. They acquire these rights from the creators. No transfer of IP rights = no derivation of the revenue.

Investors bet in projects which gather various resources and functions and in which the creation act (song, invention, design...) in itself represent the normal result of the enterprise, or a part of the process, remunerated by them.

For creators (authors and performers mainly, developers, designers, inventors, in a least extent), IP rights represent a part more or less important of their personality and uniqueness. In that sense they may pretend to a share in the revenue generated by the creation, in addition to a fixed price or salary, and which would acknowledge their specificity.

The value of IP objects will depend on the confrontation of these perspectives. It will be the result of a more or less global discussion between creators and investors where the challenge is to acknowledge fairly what is the part of the personality / what is the part of the industrial effort and risk in the success or expected success of a product or service. Personality or risk? How to remunerate them?

Second, the value of IP objects is the result of a discussion between the investors themselves

Usually, the enterprises or processes surrounding IP objects are divided between those addressing their creation, their formation, their cost – of research, of development, of “production” in the cultural industries – and those addressing their commercialization phase– i.e. their incorporation in manufactured products, their distribution, their advertizing, their negotiation, etc...

Having these categories in mind, investors will deal with IP objects under different methods:

First, IP may be dealt with based on its cost: cost of research, of development (“production” in the cultural industry), of registration, of maintenance and of defense, cost of acquisition or cost of a license from a third party.

It may be also negotiated at its market price if there is a market of comparable IPs and transactions - rare in the non cultural industry.

It will be rather, more commonly, evaluated like a share of the revenue that the related (or parts of) products and services generate or could generate (income basis).

This means that, between investors, this price or share will balance between the IP cost and quality in one hand, and, in the other hand, the size of the manufacture and commercialization investment needed or expected to be used to convert this IP into a rent.

Cultural industries:

*IP Cost: For instance: Remuneration of the author or performer, "Production" costs...

*Commercialization investment: Costs of advertizing, broadcasting, distributing...

Other industries:

*IP cost: Research and development costs, patenting costs...For a trademark: cost of the advertizing effort...

*Commercialization investment: Costs of manufacturing, advertizing, distributing, negotiating, ...For a trademark: infrastructure needed to sell a product under the trademark...

III. The definition of intellectual property is useful to show how IP objects may be appreciated in an international context.

A. The registration of IP rights is an international mechanism:

Intellectual property needs to be international, otherwise creations or signs, and the products and services they concern, could not circulate freely among different countries. International rules are needed because otherwise each country could replicate the creations and signs of another country, and prevent any creations and signs and corresponding products and services of such another country from entering its territory.

This internationalization tends to promote the distribution of intellectual goods within the worldwide community, and to avoid the duplication of the research costs or the copying.

On another hand the sovereignty of States remains the fundamental principle of organization of political communities, and no legal rule can be acknowledged and implemented without the intervention of the State, even in integrated regions such as in the European Union.

Where is the compromise today?

It is a mitigated one.

International rules try to harmonize national IP laws in order to allow a better circulation of the creations and signs among the States which ratify those international rules.

Artistic rights – historically based on the Berne convention 1886 –

By the effect of national law applying international treaties artistic rights appear without formalities, and on a quasi worldwide basis (i.e. between the numerous countries having ratified the same rules). In case of challenge, they are acknowledged based on evidence of originality and ownership of the concerned creation.

However their evidence or their impact may be limited if not registered with an independent party or official register. They are disputed at a national level as there is no international court specialized on this matter.

Industrial rights – historically based on the Paris convention 1883 -

In the field of industrial property, the international input resides essentially in setting up centralized administrative procedures of verification and registration of the creations and signs. These procedures end by the delivery of multiple national titles. The common objective is to avoid the multiplication of registration costs when several territories are claimed.

Some regional titles exist (OAPI, European trademark, designs and models, USA system...). Worldwide industrial titles are non-existent.

However, internet domain name registrations, even if they are not classically considered as IP rights, allow the reservation of names on a worldwide scale. They may be defeated partially or totally by anterior trademark rights, notably through agreed specific alternative dispute resolution methods.

National rules and bodies incorporate international and regional rules, or, if the country has not ratified an international rule, it may apply its own rules, especially those called “international private law” which concerns those of its own rules which applies to issues implying foreign aspects.

B. But the “intellectual” title is a national title:

i). Consequence n°1: A title difficult to contest

A dispute in front of a national judge will be the ultimate way to verify the quality of an IP right, at the occasion of expensive infringement cases or others. The disputes regarding the validity of these titles are mostly dealt with at a national level, sometimes at the regional level, for some industrial rights. There is not a worldwide super jurisdiction to try the matter.

This ultimate verification being, as a rule, quite rare, compared to the daily flow of registrations and creations of IP rights, one could say that the reservation of intellectual goods organized by IP laws, either artistic or industrial, seems then a quite sure process, not really challenged, like other legal instruments.

Nuances:

Industrial rights

Industrial rights are secured at a maximum during their registration process, where opposition time bars are quite long, allowing the interested parties or the offices to contest the application, and in order to precisely minimize potential future claims once the right is granted.

Once a patent is granted, its annuities increase, encouraging its abandonment.

This leads to say, once again, that industrials rights are actually granted with parsimony by the law, as a legitimate result of their confrontation with the freedom of industry and commerce. On the contrary, author (copy) rights, being destined to protect the personality of an author, are granted without formalities, on a large scale, in virtue of widely agreed treaties.

This parsimony contributes to the quality and security of industrial rights.

Artistic rights

Artistic rights do not benefit from such a procedure, as they appear quasi automatically, however their ground for dispute (copy) is more reduced than those of industrial rights where the notions of novelty, inventiveness, technical application, are more challengeable.

ii). Consequence n°2: A title difficult to contest but difficult to enforce

The protection of a creation or sign remains a hard task given that, even if a creation / sign is protected by a title in several countries, which is already in itself a quite onerous process as regards industrial rights, disputes here related are national, obliging, as a rule, as many costly disputes as countries concerned. Exceptions reside in some specific regional rules related to some industrial rights (for instance: European Union trademarks and designs, OAPI, USA) or in techniques of sound IP management.

IP rights are then difficult to enforce against infringers. This is obvious as regards author and copy rights within the information society, more nuanced as regards industrial rights.

This difficulty of enforcement leads to different strategies: lobbying for repression, royalty free or low royalty distribution. As regards patent rights, the following alternatives may be found less expensive or more adequate:

Alternatives to patents: the secret

Inventions are protected to the extent that they are made available for the public.

This protection is granted by the law to the extent where the invention is made available for all, since, as said, the first purpose of patent rights is to grant to the community access to the inventions, and, at the expiration of a certain term, free use of said inventions.

However protection through the secret may be preferred.

The secret applies to all kind of intellectual goods, notably know-how and software, and brings, as a rule, a worldwide and unlimited in time protection, while the protection granted through patent rights is limited in time, and in space.

However the secret may be very expensive to manage, physically and legally, especially in the long term, as soon as it needs to be shared. Its violation is difficult to detect, to demonstrate and to punish. Its content and its ownership may be difficult to proof. It may be disputed by third parties who would have acquired patent rights on a similar creation.

Alternatives to patents: unprotected publication

Unprotected publication such as academic papers leaves the invention in the public domain. It may be preferred especially in cases where it is difficult to detect or to punish an infringement (industrial processes for instance), or to keep a creation confidential. The creation published without protection may be easily shared and distributed, and becomes, sometimes, a standard; It may incite further developments by third parties, without depriving its former holder from the right to develop and commercialize it.

Open source software is protected by author right or copy right. However it is shared free of charge. In that extent it pursues the same objective than an unprotected publication.

Alternatives to patents: The time to market

The short life cycles of certain products do not need the extended protection of a patent, but rather an ability to market those products at the right time. Secret, utility models, designs, marks, author or copy rights may complete judiciously this capacity to market.

Artistic rights

As regards artistic rights, the problem is different; their enforcement faces, over the internet, a wide public , and requires a specific approach in order to avoid a voluntary or involuntary boycott by consumers (On the contrary, the enforcement of industrial rights concerns almost B to B cases).

Uncertainty exists regarding the repression of illicit copies (piracy) of songs, movies, books, programs, etc. protected by copyright or author right. This should change with the current movement of elaboration of legal and technical counter measures (cf. for instance, in France, the HADOPI mechanism used to discourage unauthorized behavior).

IV. "Le panier": some miscellaneous items yet to be resolved :

*Art: is protected by Author rights, based on Roman systems, which are oriented on the consideration of the creator's personality, and by Copyright, based on Common law systems, which are oriented on the consideration of the creation's utility, especially for the investor. This distinction has a limited impact on the regime of employees' creations, where, depending on the system chosen is the right will be more or less easily transferable to the employer.

*Internet: Author rights and Copyrights have faced the uncontrolled dissemination of music, movies and software over Internet. While, in a first period, such dissemination has been allowed by governments to allow development of Internet (let's say between the 90'S and 2005) it is now challenged, at the initiative of the concerned cultural industries.

*Software: At the frontier between the patent protection and of the author right protection, between the worlds of industry and of arts. Opposition, simple combination, complicated combination?

*Patents: pharmacy or tech. industry? Pharmacy and health is the domain of excellence of the patent, for which the duration and the concept is adapted to the long times of development and commercialization. The technology industry uses patents but in a more cross-intricate manner, more for negotiation and advertizing purposes than for enforcement actions.

*IP management: is a key discipline to face the complexity of IP and to evaluate and align legal instruments to the market position, development and partnering objectives of a company.

*Patent: USA or Europe, which model? USA prefers the wide patenting of inventions which may appear like a kind of paper frontier against foreign basic products. Europe prefers a restrictive

patenting and qualitative approach, with the risk to not encounter the same reciprocity in other regions of the world.

*Freedom of enterprise and industry, Competition rules and IP, the European example: Europe makes competition law and the free circulation of goods predominant over the IP law, i.e. private parties cannot restrict competition, by contract, beyond what is strictly necessary to protect their IP rights.

*Public health: Is IP compatible with healthcare of developing countries?

*Eastern markets and IP: which future?