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# DESIGN RIGHTS RELATED TO SOFTWARE AND OTHER FEATURES OF THE INFORMATION SOCIETY

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## TO REMIND OURSELVES: WHAT IS INTELLECTUAL PROPERTY?



- Rights given to persons over the creations of their minds - ideas as such cannot be protected, only the expression of them
- The property is intangible
- It gives the creator an exclusive right over the use of his/her creation for a certain period of times
  - Economic and moral rights

# WHY PROTECT INTELLECTUAL PROPERTY?



- Encourage creativity and innovation
- Allow creators to trade with their property (licence it, use it in different ways, etc.)
- Ensure that despite the intangible nature of the property it can fit into the legal system
- Harmonise rules to enable global trade

## WHAT IS NEW IN RELATION TO NEW TECHNOLOGIES?



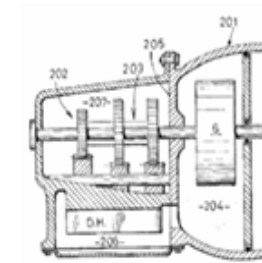
- The special nature of information and communication technologies means that many issues of how the new technologies and services fit with intellectual property protection are not yet decided.
- There are borderline issues between different intellectual property rights as well as differences between different parts of the world (notably between Europe and the US)

## Legal right

## What for?

## How?

Patents	New inventions	Application and examination
Copyright	Original creative or artistic forms	Exists automatically
Trade marks	Distinctive identification of products or services	Use and/or registration
Registered designs	External appearance	Registration*
Trade secrets	Valuable information not known to the public	Reasonable efforts to keep secret



Source: <http://www.epo.org/learning-events/materials/kit/download.html>

# THE DIFFERENCE BETWEEN DIFFERENT RIGHTS



- Copyright (and neighbouring rights) occur automatically, exist from the moment of the creative effort, do not need any extra measures by the creator.
- Patents and other industrial property rights, including design rights, need action by the right-holder to come into existence: registration.
- Trademarks are normally registered - some possibilities in some jurisdictions that they are protected by use.



# THE RELATIONSHIP BETWEEN DIFFERENT RIGHTS

- Different intellectual property rights may apply to the same thing
- The process for determining if there has been an infringement or violation of a right differs; what is protected differs.
- Usually one or the other element will be predominant and determine the procedure to be followed – this is decided case by case.
- Examples:
  - aspects of a design may be copyright protected as creative effort, but this is different than the core concepts of industrial design

# INDUSTRIAL DESIGN



- Industrial design is protected under industrial property treaties (same treaties as for patents/trademarks + special provisions)
- The mandatory requirements of both design registration and validity are:
  - the applied design must constitute a design;
  - the design must be novel;
  - the design must possess individual character;
  - there must exist no circumstances excluding industrial design protection;
  - the applicant shall have a right to apply the design under the law of the state concerned.



# DEFINITION OF SOFTWARE



- The main question of intellectual property in the information society is if and how to protect software
- The term "software" is ambiguous - it may refer to a programme listing written in a programming language to implement an algorithm, but also to binary code loaded in a computer-based apparatus, and it may also encompass the accompanying documentation.
- Instead of software “computer-implemented invention” is sometimes used for an invention which involves the use of a computer, computer network or other programmable apparatus, where one or more features are realised wholly or partly by means of a computer program.

Source: <http://documents.epo.org/projects/babylon/eponet.nsf>

# SOFTWARE PROTECTION



- Software can be protected by intellectual property rights but which of those rights is still open for discussion.
- Copyright and its related rights apply to the expression of creative effort, which can include software.
- Databases are protected sui generis (neighbouring right of copyright) and software may be related to such rights.
- Trade secret protection may include software.
- Patents may provide the strongest protection but include registration, a lengthy and potentially costly process and in addition it is not clear that software meets the relevant criteria (software as such excluded from protection in Europe, computer-implemented inventions may be covered if they meet the criteria).
- Some aspects may be industrial design.

# PROVISIONS ON SOFTWARE PROTECTION - PATENTS



- Disclosure requirements in the patent process may not fit well with software as the source code used to write software is often confidential
- Software is included in many inventions as an integral part
- Software *as such* is not patentable under the European Patent Convention
- **Article 52:** *(1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.*  
*(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:*
  - (a) discoveries, scientific theories and mathematical methods;*
  - (b) aesthetic creations;*
  - (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;*
  - (d) presentations of information.*

*Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.*

# WHAT IS A DESIGN?



- The definition is wide, normally no exhaustive enumeration in law
- A design may be fully integrated part of a product or an abstract design such as logo capable of application to any product
- Colour, material as such are not eligible for protection but special combinations may be when applied to a specific product.
- Design consisting of features dictated solely by their technical function cannot be protected
- Designs contrary to public policy or morality cannot be protected

## PROVISIONS ON SOFTWARE PROTECTION – DESIGN RIGHTS



- An industrial design is the two or three-dimensional appearance of a product which can be formed, either separately or in combination, from the shape, configuration, ornamentation, colours, texture etc. of a product.
- An outer shape or an appearance of a product can be registered as an industrial design if it is visible to the consumer (not part of another product).

## PROVISIONS ON SOFTWARE PROTECTION – DESIGN RIGHTS



- Registration of an industrial design does not provide protection to the technical solution of the product, the idea behind it or the way of manufacturing or use of it. Only the exterior design will be protected. *Source: <http://www.epa.ee/en/industrial-designs/what-industrial-design>*
- Software itself is unlikely to be seen as industrial design but graphical user interface, graphic symbols like computer icons, pull-down menus, pointers, fonts or screen displays may be registered and protected as design if it meets the requirements (the visual aspects - not the underlying code)



## WHO CAN APPLY FOR PROTECTION?

- The author of the design (or authors)
- The employer if it is created as part of work
- The person who orders the design
  
- The **owner** of an industrial design is the person who has full legal control (exclusive right) over a registered industrial design and is entered in the register as the owner of the industrial design.

# CONTENT OF DESIGN RIGHTS



- Moral rights:
  - the right to request the disclosure of the author's name;
  - the right to prohibit the disclosure of the author's name;
  - the right to revoke the prohibition on disclosure of the author's name.
- Economic rights:
  - the right to a fair portion of the profit received from the design.



# THE DESIGN RIGHT OWNERS EXCLUSIVE RIGHTS



- The exclusive right to manufacture products according to the industrial design; to distribute, sell, offer for sale, or import, export or store such products
- The right to prohibit others from manufacturing without authorisation products according to an identical or confusingly similar industrial design and from distributing, selling, offering for sale or importing, exporting or storing such products
- The right to demand from persons who violate the rights, termination of the violation, elimination of the consequences and compensation for damage

# PROVISIONS ON SOFTWARE PROTECTION - COPYRIGHT



- WIPO 1996 Copyright Treaty, Article 4:
- Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.
- In addition, any written material with a creative effort, like user manuals and software licences (in printed or electronic form) can be protected by copyright and in certain cases by database rights

# PROVISIONS ON SOFTWARE PROTECTION - TRADEMARK



- Trademarks are visible signs that distinguish a product or service from others
- A word or a combination of words, letters, and numerals can constitute a trademark. It may also consist of drawings, symbols, three-dimensional features (shape and packaging of goods) non-visible signs such as sounds or fragrances, or colour shades used as distinguishing features. <http://www.wipo.int/trademarks/en/>
- Computer icons, visible elements of software like fonts, displays and similar can be protected as trademarks if they meet the function of distinguishing the product/service
- Trademarks (with some exceptions) have to be registered to be protected

# OTHER TOPICAL ISSUES OF INTELLECTUAL PROPERTY PROTECTION



- Many issues are discussed without any clear answers or agreement:
  - Can traditional intellectual property protection apply to new technologies or should the protection be abandoned? (For example, music and film downloads from internet make it almost impossible to implement rules; works can be copied endlessly without any reduction in quality)
  - Should more material be freely available as there is such rapid development that intellectual property protection may stifle it?
  - Crowd sourcing and other modern ways to make innovations are not suitable for existing rules
  - It is difficult to fit new technologies (including software) into existing categories