European policymakers need to keep abreast of technological changes if they are to draw up credible new rules on intellectual property, writes Ian Wishart

The ability to protect a creation, whether in the form of an invention, a design, or artistic expression, is part of the bedrock on which the Western economy rests. As technological networks bring the world closer together, being able to define that protection at a European level is becoming ever more important.

Many of the rules governing intellectual property (IP) have evolved over centuries, but have generally been peculiar to nation states. But now, as the same globally recognised brands tempt shoppers from Delhi to Dresden, as teenagers try to download or stream the same pop in London and in Limassol, as outward-looking businesses want to patent their inventions in every member state of the European Union, the pressure to have a common IP regime has become almost irresistible.

Some of the many challenges of regulating IP come under the spotlight in this special report. One front is the traditional fight at borders against counterfeit goods: T-shirts, DVDs, medicines. But fresh battles emerge with new technology: the mobile-phone and tablet-appetite for success

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But more needs to be done. Adapting copyright rules to the digital age, revising a 2001 law, remains a major sticking-point for the EU. Michel Barnier, the European commissioner for the internal market, has yet to propose legislation. “I want a copyright framework that passes the single-market test, making more content available to more citizens across borders,” he insisted in November. Yet legislation is unlikely to be proposed until next year at the earliest, if at all. The most significant question may be whether Barnier is prepared to put forward plans as revolutionary as those desired by Neelie Kroes, the commissioner for the digital agenda, who said in December that “artists, entrepreneurs and citizens [would] benefit from a borderless, digital single market, where accessing and distributing content is easy and legal, generating more value and more visibility”. Current indications are that he is not.

Some warn that the positions of hardware manufacturers, rights-owners and consumers, as well as groups lobbying for better data protection, are so far apart that satisfactory legislation will be impossible. “The Commission faces a significant challenge,” said Lisa Perks, a specialist in intellectual property at Covington & Burling, a law firm. “It needs to balance consumer interests in unfettered access to content online against the interests of the digital industries that have been, and remain, key to Europe’s economic growth.”

Telecoms companies, which would benefit from a joined-up digital single market, are pushing the Commission to come up with proposals. The European Telecommunications Network Operators’ Association (ETNO), which represents large firms such as Telefónica and Deutsche Telekom, its director, Daniel Patak, said that reform of the copyright systems and licence fees would ease access to content, which he regards as essential to encouraging the development of legal offers and stimulate consumer take-up of high-speed broadband.

He said that any reform should address the current fragmentation of copyright systems across the EU, which “hamper the development of pan-European offers”, and should “adapt licences and windows of release to the needs of online world”. With people and businesses becoming ever more connected, IP issues are in the limelight as never before. Their likely inclusion in EU-US trade talks suggests that in a brave new digital world, failure to join up even Europe’s IP rules could be a serious mistake.

The ‘app’ sector, driven by the huge growth in smartphone use, poses new challenges for regulators. The market in apps – from games to news content – is unpredictable, raising different concerns about data protection and the ability to give patent protection to new ideas across the EU.

The app sector was barely half as big as it is now even as recently as May 2011, when the European Commission launched a wide-ranging intellectual property rights strategy. Even back then, people were bemused by being unable to download the same song from one European country to the next. That problem remains and in the meantime the fast-moving nature of technology has only added to the challenges faced by legislators.

Initial successes

The Commission’s strategy encompassed almost every aspect of IP: patents, trademarks, geographical indications, multi-territorial copyright licensing, digital libraries, counterfeiting and piracy, and enforcement by customs officers. Officials can already point to some success: a deal on the unitary patent is a major breakthrough; the swift agreement reached between the European Parliament and the European Commission on ‘orphan works’ – which are protected by copyright though their creators cannot be found – is contributing to the creation of a joined-up digital single market.

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The number of counterfeit goods being seized in the EU is growing at an alarming rate, writes Ian Wishart

Customs officers in the European Union are seizing an increasing quantity of goods that they suspect violate intellectual property rights. While a great deal of discussion on intellectual property focuses on digital rights, the trade in counterfeit tangible goods remains a big business.

The European Commission, which published its latest figures on counterfeit goods last summer, reported that in 2011, the last year for which figures are available, more than 91,000 shipments were stopped by customs officers, a 15% increase on 2010. Those shipments contained an estimated 114 million articles worth more than €1.2 billion at genuine market prices. More fake medicines are detained by customs officers than any other product—they account for a quarter of all goods seized. Sizeable quantities of cigarettes, toys, electrical goods, shoes and clothing are also impounded. More counterfeit goods are seized from China than any other country.

In May 2011, the Commission proposed a revised regulation on the customs enforcement of intellectual property rights, as part of a wider IPR strategy. Once formally adopted by the European Parliament and the Council, it will replace the current regulation, which dates from 2003.

The purpose of the revised legislation is to widen the list of possible infringements that can be dealt with by customs officials. The Commission’s proposal would extend the list to include trade names and devices designed to circumvent anti-copying measures. Parallel imports and ‘overruns’ (goods produced in excess of those permitted under a licensing agreement) would still be excluded from the scope of the regulation.

The new law is also designed to tackle the increasing number of counterfeit and pirated goods bought over the internet and delivered in small parcels to customers’ homes rather than as part of large consignments. But there is concern that the legislation will not close a loophole that has, since 2011, allowed a significant quantity of fake goods to slip through the net.

Before then, EU customs officials would routinely stop counterfeit goods in transit through the EU bound for other destinations. That changed after a European Court of Justice decision in 2011 on a case related to the seizure of counterfeit Nokia and Philips products bound for non-EU countries. The EUJ ruled that fake goods in transit could not be seized because there was no act of infringement taking place in the EU. As a result, customs officials who had for years been seizing counterfeit goods in transit through the EU were no longer able to do so.

The ‘goods in transit’ loophole will not be closed by the new regulation, although it could be covered by a review of the substantive law on trademarks (the community trademark regulation and the trademark directive), which is to be proposed by the Commission this spring.

Stuart Adams, a member of the International Trade mark Association’s anti-counterfeiting committee and a lawyer at London-based firm Rouse, said it was disappointing that the transit issue was not included in the revision of the customs enforcement regulation. “It is important because many countries look to the EU’s trademark rules and procedures and use them as best practice,” he said. “Dealing with the problem in the customs regulation was always going to be difficult, as it deals with procedures rather than the underlying law.”

He said he had hoped that legislators would have come up with ways to solve the problem. “We suggested trying to reverse the burden of proof, so that adequate evidence of the final destination would have to be provided by the people dealing in the goods, which is easy to do if it’s a consignment which really is going somewhere beyond the EU,” he said. “Unfortunately we could not convince the legislators.”

**Impounded medicines**

There is another concern: that any changes to the rules could affect life-saving medicines destined for the developing world. In 2008, after customs officers in the EU seized several shipments of legitimate generic medicines in transit to South America and Africa because they were believed to have infringed European patents, India complained to the World Trade Organization. MEPs and campaign groups have warned of the consequences for the developing world of detaining generic medicines.

The revision of the customs regulation does not change or add to the rules defining what an IPR infringement is, but it does try to offer “further clarification” of the procedures that customs officials will need to apply. However, there is a balance to be struck between being able to stop counterfeit goods in transit and allowing life-saving medicines to get through.

“The EU is trying to steer a path through these two competing ideas,” said Adams, who suggests that counterfeit goods in transit should be considered as infringing EU rules only if they are to be marketed in the Union and in either the country of origin or country of destination.

“[That would capture a lot of counterfeit goods, but would not have any effect on the trade in generic medicines—these may infringe patent rights but are not counterfeit unless, of course, they bear infringing trademarks],” Adams said.

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Asia picks up the pace in the patent race

The number of patent applications is one indicator of economic strength. And it suggests bad news for Europe, writes Ian Wishart

For an inventor or business, being able to protect ideas can mean the difference between success and failure. However, obtaining a patent is not just about safeguarding intellectual property. It is also one of the clearest indications of the health of a country’s economy and its level of competitiveness in relation to its rivals.

A growing, dynamic economy that makes it easy for businesses and entrepreneurs to flourish is likely to generate a great many patent applications, in contrast to those where inventors and industry are hampered by red tape and struggle under a bureaucratic burden.

So, as Europe looks to recover from the economic downturn, is it right to be worried that in 2012 the greatest number of European patents were filed by a South Korean company? According to the European Patent Office (EPO), which publishes its annual report on patent filings in Europe, 2012 was the first year in which an Asian company makes the top ten: Samsung, a German electronics and engineering company; BASF, a chemicals company; also based in Germany; Bosch, a German engineering firm; and Ericsson, a Swedish telecoms company. For the first time, a Chinese company makes the top ten: ZTE, a mobile-phone manufacturer.

On the increase

If that list gives some cause for concern, the overall number of patent filings provides some reason for optimism, according to Benoît Battistelli, the EPO’s president. The number of patents filed by European firms last year was 2.3% higher than in 2011 – a “clear indication”, he said, that European industry “has opted to innovate its way out of the economic crisis”.

But others beg to differ. While 2012 showed a degree of improvement on the year before, the worry is that Europe is beginning to lag behind. Half of the growth in patent filings in 2012 came from Asian countries.

Some countries warrant deeper investigation. Take France, where, according to the European Commission, household disposable income is falling, unemployment is rising and very little growth is forecast for 2013. Yet France saw a 4.7% increase in patent applications in 2012, almost twice the European average and ahead of the United Kingdom, which saw a 2.6% increase.

But even this increase might not be enough to keep France near the front in the competitiveness race. Two years ago, China, South Korea and France applied for almost the same number of patents. Now, both Asian countries have moved ahead, with China registering almost 50% more applications than France in 2012.

Europe’s leaders are pinning their hopes on the creation of a unitary European patent giving industry a boost by making it easier and cheaper to get protection for intellectual property across the EU. However, according to Bruno van Pottelsberghen of Bruegel, a Brussels-based think-tank, the unitary patent is “not likely to have any impact on innovation efforts in Europe”. He said that “prohibitive” costs, the “not particularly coherent” layers of national, European and unitary patent offices, and the messy compromise between member states that will see the unitary litigation court set up in Paris, London and Munich, are all shortcomings that need to be overcome if the full potential of the European patent is to be realised.

Many industries in Europe remain creative and competitive with the rest of the world, as the number of patents filed in 2012 shows. But if the emergence of Asia as the origin of a rapidly increasing number of applications is an early indication, the world economy could look very different in a few years’ time.

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