PLAIN WORDS

Intellectual Property Rights

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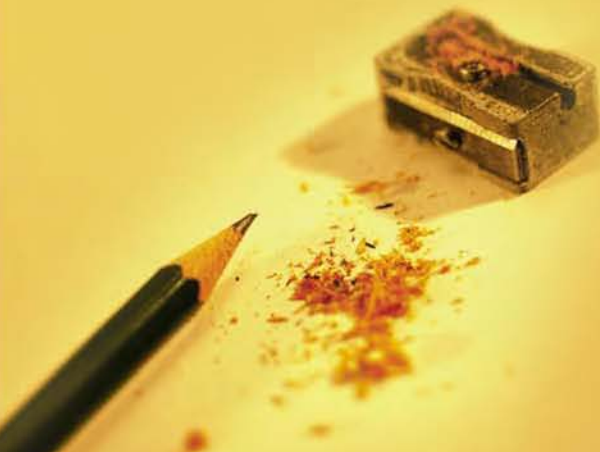
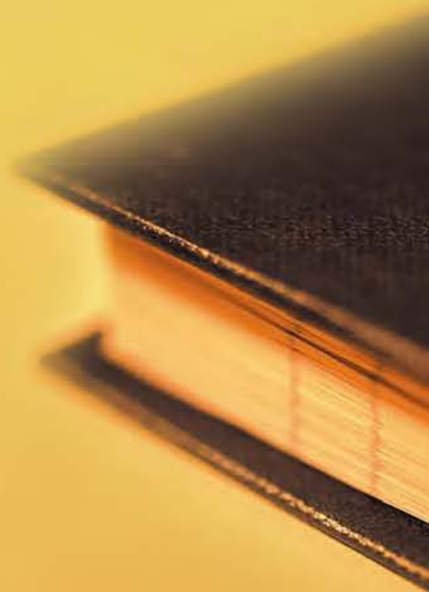




Intellectual Property Rights

By Nick Percy-Griffiths

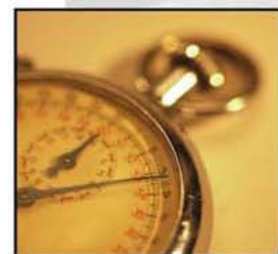
The term 'Intellectual Property Rights' (IPR) refers to copyright, patents, trade marks, and design rights.

The subject is extensive and complex and this complexity is further increased by the fact that legislation is created at national and at European level. There is also a vast amount of case law that has resulted in legal decisions which too many normal people might not appear to be entirely logical. Another factor that has made IPR more complex is the introduction of various technologies, in particular information technology, which has resulted in additional legislation that certainly does not simplify things. Also, because of the nature of intellectual property rights, information from different sources may occasionally appear to conflict and not make sense.

The following information provides an introduction to intellectual property rights and the issues that can arise so that readers can be aware of the type of risks that they may be faced with. However, because Intellectual property rights are so extensive and complex it is not possible in a text of this nature to provide anything other than an introduction to the subject. The onus is therefore on the reader to undertake further research or to obtain professional advice as may be necessary. Some further sources of information are provided at the end of this text.

This text refers to intellectual property rights legislation from a UK point of view, except where the European Community or other countries are referred to.

Background



Intellectual property legislation has a long history. In the 16th century efforts to control the book trade eventually matured into today's copyright law. The originals of the patents system go back to the 17th century and trademarks are thought to have their originations over 6000 years ago, when they were used as brandings to identify livestock as belonging to a particular owner.

Changes to these rights in the early days were infrequent. However, in the last 100 years all areas of intellectual property rights have undergone considerable change, and the rate of change has increased as the years have passed, and particularly as technology has developed. Currently the rate of change of the legislation is quite excessive

Originally the legislation was based on the national law. Now, however, we have well established national intellectual property rights legislation throughout the world coordinated by the World Intellectual Property Organisation, and in Europe we have the European Community issuing legislation in the form of Directives which must be implemented by all

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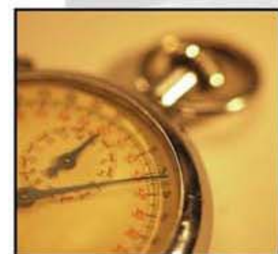
European Community member countries. It is useful at this stage to briefly remind ourselves of the nature of the legislative environment that we, in the UK, currently exist within.

First we should look at the concept of legislation throughout Europe, or rather, the way in which it is used. Within most European countries the law is used as a tool. It is normally applied with a specific purpose in mind, to achieve an objective. At the same time, there are many instances in Europe were the law could be applied, but it is not applied because it does not make sense to do so.

Within the UK the law is used in quite the opposite manner. It is applied on every occasion that it can be applied, regardless of the justification of doing so, and regardless of the consequences of doing so. Because the law is applied in the UK in this manner many individuals and businesses suffer unnecessarily from the unjust application of the law while for others the benefits are not always realised.

The other thing we should be aware of is the way in which European Community law works. There are within Europe, four main forms of legislation: Regulations, Directives, Decisions, and Recommendations and Opinions.

- Regulations, apply to all member states and override national legislation where there may be conflicts.
- Directives, direct member states to take some form of action, usually in the form of implementing national legislation. Directives are the main legislative tool within the EU.
- Decisions are directed towards individual member states, organisations or even certain individuals, and may impose financial obligations.
- Recommendations and Opinions have no binding force, but are simply statements of opinion.



One of the problems that arises from all this is that while the British will implement European Directives at national level and enforce the subsequent legislation in the most stringent and extreme manner, other countries will implement and enforce the equivalent legislation with flexibility and in a manner that provides them with the maximum benefits.

Copyright

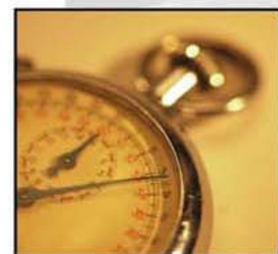
Copyright protects those who create written work, songs, photographs, films and other artistic products. While copyright protects artistic works it also provides protection for things like computer code and data in electronic form residing on computers, including databases.

Copyright does not exist in an idea or concept, it comes into existence only when that idea or concept is recorded in written or graphic form or in electronic form. Copyright occurs automatically when the writing, the recording, or other material is produced. It is not necessary to register it in any way to create copyright. However, there are instances when copyright material that is valuable could be exploited by others, and there may be no evidence to determine the true owner in a positive manner. Therefore, there may occasionally be times when it is worth recording a copy of the work, particularly material such as written work or computer code, with a third party as evidence of ownership.

It should be remembered that copyright protects the written or recorded work. It does not protect facts, ideas, plots, or news presented in that written work. Therefore copyright material can be used as reference material, and facts extracted, and placed in new written material and freely used in this form by others. However, such facts, depending on what they were, could theoretically be protected by other rights such as patents, or if they were recorded in the form of a database.

Ownership of copyright is normally the property of the person who creates the work. Simply because a person or organisation possesses the work does not imply that they own the copyright. For example, any copyright in a letter belongs to the person who wrote the letter, not to the person who it was sent to. However, copyright created by a person within their terms of employment will automatically belong to their employer. Copyright created outside their terms of employment will normally belong to the individual creating it.

Where a computer is used to create copyright work such as the automatic translation of text, the person operating the computer, or their employer, will own the copyright.



Occasionally, where more than one person creates a copyright work, such as in joint authorship where the work of the individuals is not clearly defined, there will be joint ownership of the copyright.

The protection provided by copyright is:

- Copyright in written, artistic, dramatic and musical work lasts for 70 years from the death of the author.
- Copyright existing in the above work, but where the author is unknown, lasts for 70 years from the date that the copyright was created.
- Copyright in computer generated material lasts for 50 years from the date that the copyright was created.
- Copyright in sound recordings lasts for 50 years from the date that the copyright was created.
- Crown and Parliamentary copyright lasts for 50 years from the date that copyright was created.
- Copyright protection of databases is initially for fifteen years but this can be extended, apparently indefinitely.

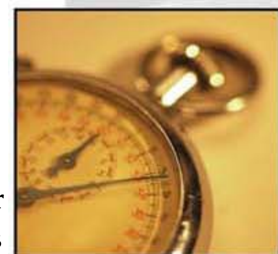
There are also other timescales for other copyright material such as radio and television programmes (50 years) and typographic arrangements (25 years).

Superficially these categories and timescales look quite straightforward but in reality there are many deep and murky grey areas. For example, someone who provides the graphic design for a publication would own the copyright elements in that design, but whether these came within the category of typographic material, or artistic work or even something else is not clear, and probably never will be.

Copyright can be assigned from one owner to another. When this is necessary the assignment should always be agreed and recorded in writing to avoid any future problems.

One of the main objectives of European Community legislation relating to intellectual property rights is to reflect the requirements of the single market and to remove, or at least to minimise, legislative distinctions between member states. In the early days of the single market the European Court of Justice established the fact that copyright had become a European Community right, and that it was no longer a right within a single country belonging to the European Community.

Within this context European legislation has rationalised and standardised things like the period of protection provided by various intellectual property rights, and other aspects of the legislation.



In spite of this progress it is still common for many commercial writers to be offered First British Serial Rights (FBSR). These rights are generally offered for newspaper and magazine articles. There is considerable lack of clarity in this area. One argument, or what others might see as an excuse, is that these are first English-language serial rights. Well, they never used to be, and if they are now, writers are certainly not being paid what they should be for world-wide or even European-wide English language rights. Another argument is that these magazines and newspapers are published in the UK but this argument ignores the fact that these magazines and newspapers are available in airports and major cities throughout Europe and the rest of the world. Although the UK has not signed the Schengen Agreement which mandates free trade within the European community this does not detract from the fact that First British Serial Rights are no longer realistic.

Patents

A patent provides the owner with commercial rights for a period of 20 years. A patent is granted on application to the patent office provided that it is considered to be patentable. A patent can be obtained for the UK by applying to the UK Patent Office, or for selected European countries by applying to the European Patent Office.

Patents provide protection from others copying the invention, and from those who may genuinely reinvent it a later date, or at an earlier date but did not register it. This means that if an invention is not patented,

someone else can patent it and claim patent rights and in this way steal an invention. This sort of thing happens frequently within the software industry with computer code.

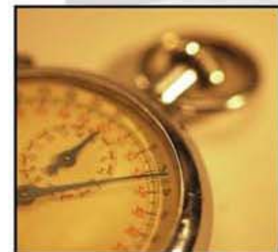
Trade Marks

A trade mark is virtually anything that is used to identify or distinguish a business. It includes designs, words, letters or numbers, shapes, colours, sounds, or the distinctive design of things such as a vehicle or retail frontage. Trade marks may be registered or unregistered but legal protection is ensured only by registration either with the UK Patent Office for UK protection, or with the Office of Harmonisation in the Internal Market (OHIM) when the trade mark granted is valid throughout the EU. Registered UK and EU trade marks provide protection for ten years and registration may be repeatedly renewed for further ten year periods.

Design Rights

Design rights under UK law are visual features that appeal to and are judged by eye. Within European law they are items (components) intended to be assembled into a complex product. They also include symbols and typefaces, but exclude computer programmes. Design rights can be registered but they can also be protected by copyright.

Design rights protected by copyright are protected for 25 years. Other design rights provide the owner with protection for 15 years, unless it is an unregistered design right in which case it is for ten years from the date of the first marketing, or fifteen years from creation, except where it is subject to licences of right during the final five years…



IPR Complexities

It should be clear from the very basic information above that the degree of complexity afforded by intellectual property right legislation mainly benefits the legal business. No one can conceivably know what is protected, by what legislation, or for what period.

A technical drawing of a piston, for example, for a bus engine will be protected by copyright. It might also be subject to a patent or two, and a design right, and it may also carry a trade mark. And that is just the drawing. What rights exist in the prototype forged by a sub-contractor, and what rights were created by those that turned it and machined it to perfection. Who would argue that such acts do not embody elements of artistic skills that few of us can achieve. And is the hard copy drawing protected by the same rights as the electronic copy?

The application of copyright protection to databases also tends to undermine the traditional concept of copyright protection. To paraphrase the legal jargon, a protected database must be the result of the author's intellectual creative skills and it must be a collection of data or other material arranged in a methodical way and which is accessible

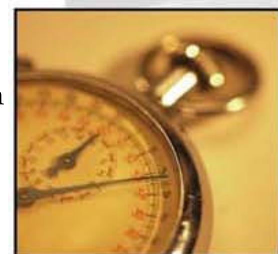
by electronic or other means. The owner may then alter it, distribute it, and publish it. Many might consider that such a description might well apply more to a technical manual than a database. Certainly, in an electronic form with automated search mechanisms, certain electronic documents could in this respect be regarded more as databases than as books. This sort of thing leaves us slowly scratching our heads when we realise that the terms of protection provided for the electronic and the hard copy forms of the same information are vastly different.

It also raises a lot of questions. For example, is an SGML information system classed as a database or not. Indeed, what is a database, and when is a database not a database? And how does one find out? Intellectual property rights legislation consists not just of laws, but of very many elements of case law, and many of them are not entirely logical, either to those in business or even to those in the legal profession. The fact is that where electronic material of any sort is concerned the matter of intellectual property rights is a minefield.

Electronic Documents

Electronic documents are normally viewed on a computer screen, and are usually structured and presented in a manner suitable for this media. This means that on those occasions where hardcopy documents are converted into electronic form there will be various new elements of copyright created in the electronic document. There are also other electronic document issues that may arise from intellectual property rights and these can occasionally manifest themselves as business risks.

One of the underlying problems of electronic coding is that the application of intellectual property rights does not, in practice, work well. A simple sequence of software controlled events can be registered as an intellectual property right, preventing its use by other people or organisations. That means that that the sequence of events, even if it is in widespread use at the time, can no longer be used without the permission of the legal owner of the rights. The only way to prevent this sort of thing occurring is to ensure that all rights in your own code, whether it is part of an electronic document or otherwise, is registered in its entirety. Unfortunately this is not practical for most businesses or individuals. Furthermore, even if you did this, it may still be possible for someone else to find something that has not been registered and to claim it as their own property.



Where electronic coding is concerned, it is never clear whether it is protected by copyright, by design rights, or by something else, or by several different legislative elements. Neither is there a way of easily determining whether such protection exists or not. In many cases it is not until it is too late that this information becomes available.

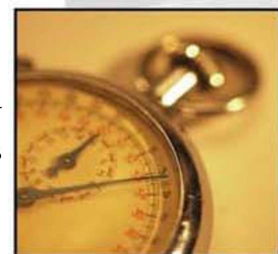
It is useful to remember that the computer industry is a vast industry with some big players and there is much money at stake. The risks that do arise can have far-reaching impacts. A good example of this was

when CompuServe produced the coding for GIF images, the compression algorithms used became the subject of a legal threat by Unisys, who had patented it. Now many applications cannot read GIF files because they are unable to reproduce this coding in their software. Another example was when a stylesheet adopted by the WWW Consortium with the encouragement of Microsoft, was subsequently patented by Microsoft, preventing its free use. There are many other events similar to these on record.

The problem is that no individual who is writing programming code knows if they are infringing intellectual property rights such as patents or copyright or any other rights. Large businesses can afford the overheads involved in securing intellectual property rights for patents and industrial design rights and the expensive legislative action that can result from court cases. Small businesses and individuals cannot afford these costs. The current application of intellectual property rights to software therefore inhibits software development and the provision of new functionality by all except the larger software houses.

Within the electronic documents themselves there may be elements of coding that are subject to intellectual property rights owned by third parties and these could result in issues that could impact software used to create the electronic documents, or to view them. There could also theoretically be other issues over intellectual property rights relating to the presentation or structure of electronic documents, or the way in which searches are implemented.

Another problem is that many of these technical issues do not appear as public news, although they are often presented as specialist news items in periodicals such as Computer Weekly. In this respect they remain technical issues and the business impacts are rarely made public.



How risks of this nature might be completely avoided is not at all clear. However, such risks should be minimised as much as it is possible to, by reviewing the software applications used and the documents themselves to ensure as far as possible that all elements may legally be used as required into the foreseeable future.

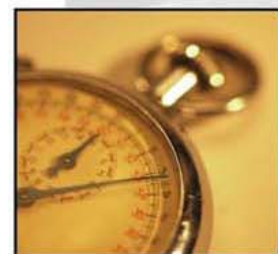
Because of issues of this nature, many people believe that the software industry suffers from the application of intellectual property rights considerably more than it benefits from them. As a result of this the EuroLinux Alliance has been established. This is a coalition of commercial companies working for what is described as a patent-free software market in Europe. Protection would be provided by copyright and this would avoid the stifling of software development and what they describe as a transfer of blood from the software industry to the patent litigation business.

Finding Further Information

There are many sources of information about intellectual property rights but few, if any of them, are completely comprehensive even within a single area such as copyright. For example, one might find a European database of copyright legislation but if what you are looking for is a green paper, this may be on the different database. Unfortunately you probably will not know that it´s a green paper until you have eventually found it. Even if you think you want a green paper it can be something completely different. You can also occasionally identify a document that is outside any formal system and unless you know someone working in the system, it may in practice be unobtainable.

There is a considerable amount of published material on intellectual property rights. Some of these reference books are quite large, but you should also be aware of new legislation and of proposed legislation that they do not cover. Making business decisions without this information is not a good business policy. Occasionally, some publishers produce very compact reference documents on these matters. Because of their brevity some of these documents can appear to simplify matters or to be ambiguous and in many cases further information will be necessary to gain the breadth of understanding and the detail required.

Finding the information about intellectual property rights that you need and which is relevant to your requirements can be very difficult. It is true that there is a considerable amount of information available but always remember that you do not know what you do not know, therefore you do not know what questions to ask to find out what you do not know. This means that you can come away from a library with a couple of books and assume that you have the information that you require. Not true! Also, those whose job it is to provide you with the information may be unaware of the extent of the legislation and of the information available.



When writing this article I called at the European information centre for some information on the intellectual property rights and a very helpful lady told me that European legislation had extended the term of protection from 50 years to 70 years, and directed me to a copyright notice stuck on the wall next to the photocopying machine. Cool!

IPR Related Web Sites

World Intellectual Property Organisation

The World Intellectual Property Organisation (WIPO), based in Geneva, monitors and reviews intellectual property rights issues and develops new initiatives.

www.wipo.org

World Trade Organisation

Trade Related Aspects of Intellectual Property Rights (TRIPs) is a reference to discussions within the General Agreement on Tariffs and Trade (GATT) organisation initiated in 1986. The negotiations were completed in 1993 and were signed in Marrakech in 1994 within the World Trade Organisation (WTO).

www.wto.org

UK Patent Office

www.patent.gov.uk

European Commission

www.europe.org

European Patent Office

www.epo.co.at

UK Patent Office

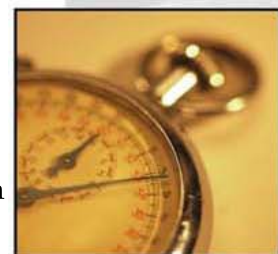
www.patent.gov.uk

EuroLinux Alliance

A coalition of commercial companies working for a patent-free software market in Europe. They make a good case for this and provide access to other interesting material such as the European Software Patent Horror Gallery.

www.eurolinux.org

Europa



An EU web site, ‘The Portal to European Law’ providing as a part of this, information about intellectual property rights and related issues, and much else. It incorporates an intellectual property rights help-desk for potential and current contractors participating in EU funded research and technological development on intellectual property rights and related issues.

www.europa.eu.int

Hard Copy

Intellectual Property Law

Published by the Oxford University Press - ISBN 0-19-876343-3

Over one thousand pages of recommended bedtime reading by Lionel Bently and Brad Sherman. Both authors are academics but in spite of this have succeeded in presenting this incredibly complicated and irrational subject in an informative and practical manner. Nevertheless, and it is a reflection on the subject matter, not on the authors, there are

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many occasions when the reader is searching for a simple fact that he feels he is digging through a galactic muck heap.

For other current reading material ask your bookshop or library for a reading list on the subject. Ensure that material is current and if possible review it before spending money. Books of this nature can be expensive and the approach varies and can present a point of view that is irrelevant to your own requirements.

About the Author

Nick Percy-Griffiths has extensive experience in technical writing and technical publishing which includes departmental management and consultancy and he has provided specialist material on intellectual property rights for the European Commission. He has also had press and magazine articles published on a variety of subjects and has completed a book on Project Management, and partially completed one on Technical Writing and Technical Publishing and is currently looking for interested publishers for both of these.

Any comments on this text or relevant information and details of other sources of information would be appreciated. Information about any issues arising from intellectual property rights would also be of interest.

Please email info@plainwords.co.uk

Disclaimer

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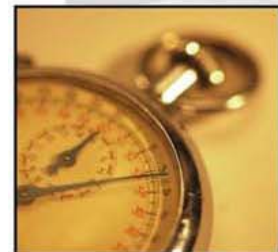

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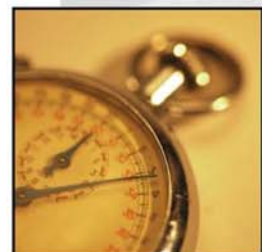

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