European Intellectual Property Developments

Trevor Cook†
Bird & Bird LLP, 15 Fetter Lane, London, EC4A 1JP, UK

Received 18 August 2011

As an European intellectual property lawyer, the author is often struck by the amount of comparative analysis in the area of intellectual property which adopts US intellectual property laws, rather than European ones, as their point of comparison. This seems strange when in many respects US intellectual property laws have their own unique features and when European such laws are often more closely aligned with the laws of most other countries in the world. This series of articles aims to expand knowledge of and to explain something of European intellectual property laws; how they got to their present state, what are current hot topics in them, where they are heading and why they matter. This first article will provide an overview of some of these issues and subsequent articles will focus on specific areas of intellectual property.

Keywords: Intellectual property, harmonization, patents, copyright, trademark, TRIPS plus

The Intellectual Property Landscape in Europe

In Europe, which in this article implies the European Union (EU) and its 27 Member States, most national intellectual property laws (copyright, most related rights, trademarks, patents and registered designs) are now extensively harmonized;¹ in addition there are some unitary intellectual property rights with EU wide effect – not only the Community trademark and the Community design (both registered and unregistered) but also the Community plant variety right and the EU geographical indications regime. In addition, regulatory data protection for pharmaceuticals and agrochemicals has been fully harmonized for the national and centralized regulatory regimes for such products.

Harmonization, with the exception of that for patents, has generally been achieved through EU legislative measures called Directives (because they direct EU Member States to conform their laws to them); unitary rights have been established by EU legislative measures called Regulations, which have direct effect in the EU without in general the need for any Member State implementation. The advantage of unitary rights over rights that are harmonized is that they can be enforced in a single action brought in one national court, but with effect throughout the EU. Patent law has long been extensively harmonized under the European Patent Convention (EPC), a separate international treaty of which all EU Member States, and currently 11 other countries, are parties; although it has been further harmonized in the EU, as to inventions concerning biological material, being 'any material containing genetic information and capable of reproducing itself or being reproduced in a biological system'² and as to de facto patent term extension for pharmaceuticals and agrochemicals.³

But Directives, Regulations and Conventions cannot establish a consistent legal framework by themselves; in addition there must be courts at an appellate level able to develop a consistent body of law as to their interpretation. Thus in the EU, the Court of Justice exercises a supervisory role over national courts where these adopt diverging interpretations of Directives or Regulations. Under the EPC, the Boards of Appeal of the European Patent Office exercise a normative role as to matters of patent validity, and the divergences in national patent laws that were a feature of the early days of the EPC are now much reduced, as national courts in its Member States increasingly cite and adhere to the case law of such Boards of Appeal and also to each other’s case law, which latter trend also drives harmonization as to the law of patent infringement.

How This Came About

One of the earliest drivers for harmonization of intellectual property in Europe was the adverse effect of disparities in national intellectual property protection on the free movement of goods in Europe and thus on the single market which has from the very

†Email: Trevor.Cook@twobirds.com
outset been the fundamental aim of the EU Treaties and their predecessor treaties. Such disparities could not be addressed by the application of the principle of exhaustion of rights within the EU.\(^4\) These disparities existed for all types of intellectual property but good examples of such problems are provided by the references to the Court of Justice in relation to differences in the term of related rights protection\(^3\) and differences as to what constituted an act restricted by copyright.\(^6\) Another driver for harmonization has been perceived shortcomings in national intellectual property protection; for example the very first copyright harmonization measure in Europe addressed the failure of German copyright law in the 1980s to protect computer programs.\(^7\)

Harmonization has however always tended to be towards increased protection, or achieved by the introduction of new rights, because it is easier legislatively to increase or add extra protection than to take away already acquired rights, and it is not until relatively recently that policy arguments to the contrary have had much traction.\(^8\) The introduction of new unitary rights has complicated the intellectual property landscape as it has not been accompanied by the abolition of the corresponding national rights. Thus in the UK, a design can be protected by four different regimes (in addition to any trademark protection that it may secure at either a national or EU level) – unregistered and registered designs at both an EU and UK level, where the national UK unregistered design protection has not been harmonized. It is not surprising that some English judges have questioned this state of affairs.

**What the Future Holds**

Currently, at the top of the intellectual property agenda in Europe is the continuing quest for the unitary patent; developments over the last year, which at first sight would appear to have been adverse, have ironically provided an impetus to this which means that for the first time in its long and tortuous history the unitary patent for Europe (albeit perhaps without Italy and Spain) looks to be a realistic prospect.

New initiatives in the field of copyright and related rights have either been (as to orphan works) or are about to be (as to the governance of collecting societies) launched. Amendments to existing European legislation as to trademarks, enforcement (notably to create a framework allowing infringements of intellectual property via the Internet to be tackled more effectively) and as to border measures (to extend these to other types of intellectual property but to clarify their application to transhipped goods) are also currently under discussion. Preparatory research as to previously unharmonized areas of intellectual property in Europe, such as the protection of trade secrets and against parasitic copying, is also under consideration.\(^9\)

**Why What Happens in Europe Matters Outside Europe**

European intellectual property norms do not only affect those seeking to trade in Europe. They have no less potential than US intellectual property norms to affect such norms in the rest of the world. One example is the term of protection of copyright, where the harmonized European term of life plus 70 years had subsequently to be adopted by the USA if US works were to be protected for the same term in Europe. Another is Rule 39 of the Regulations under the Patent Cooperation Treaty, which excludes from the mandatory ambit of search a list of subject matter that matches the exclusions from patentability found in the EPC. There are also more direct effects. Thus members of the intellectual property community will be familiar with US bilateral trade agreements and the establishment by the intellectual property chapters of these of ‘TRIPS plus’ norms. Less well known are the bilateral trade agreements that the EU has also entered into with third countries, which also mandate TRIPS plus norms, including provisions which limit the flexibilities inherent in TRIPS.

One notable aspect of European harmonization has a wider, benevolent, and less controversial, potential international significance. Its new intellectual property norms are forged as a result of dialogue not just between interested parties and legislators but also in the context of a dialogue as between Member States, most with well established, but often very different, legal traditions, including both common law and civil law. Thus, those who look to harmonize intellectual property laws internationally have much to learn from the European experience, and should pay greater attention to what it has been doing in this area.

**References**

1. Harmonization also extends to Iceland, Norway and Liechtenstein, which although not members of the EU, align most of their laws with those of the EU by virtue of the European Economic Area (EEA) Agreement.
Directive 98/44/EC on the legal protection for biotechnological inventions.

Regulation (EC) 1610/96 concerning the creation of a supplementary protection certificate for plant protection products and Regulation (EC) 469/2009 concerning the supplementary protection certificate for medicinal products.

Namely, that rights owners could not use national intellectual property rights to partition the market, and so could not use such rights against goods first placed in the market, by or with the consent of the rights owner, in any EU country.

EMI Electrola v Patricia, Case C-341/87 (European Court of Justice, 24 January 1989).

Warner Brothers v Christiansen, Case 158/86 (European Court of Justice, 17 May 1988).

Directive 91/250/EEC on the legal protection of computer programs, (now replaced by Directive 2009/24/EC) which effected a change of German law as had originally been established in Inkassoprogramm (Federal German Supreme Court, 9 May 1985) as confirmed by Accounting Program (Federal German Supreme Court 14 July 1993).


A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe' at [3.4.1], COM (2011) 287 (European Commission), Brussels, 24 May 2011.