Intellectual property rights policy

According to policy-makers, intellectual property (IP) rights exist in order to give innovators a period of time in which to commercially exploit their inventions and protect themselves against copying and imitation by others. IP rights today address not only traditional patents, trademarks and copyright, but also databases and in future new rights may also address data ownership.

However, IP rights are a controversial topic for software developers and often they are fiercely resisted. Software patents were famously rejected in the European Parliament in 2005. A key issue for IoT concerns access to data, and protection against lock-in. Developers need to build new add-ons and applications for existing systems, which can be impossible if the software is patent-protected.

Internet of Things (IoT) systems are typically multi-layered in terms of both hardware and software, and as such there could be a multiplicity of IP rights in a single system. Even where developers are not concerned with applying for IP rights themselves, they may need to engage with IP rights registered by other vendors in the value chain. IP rights such as patents and trademarks, are traditionally granted on the basis of territoriality.

EU policy for patents, design rights and trademarks, is moving towards EU-wide rights, which mean that one right would cover all 28 Member States. So, rather than having to register a right separately 28 times, a business or individual can make one registration for all. The policy aim is to facilitate pan-European trade and break down the geographic barriers that can be created by territorial IP rights.

Developers who want to scale up into an international market and want to apply for IP rights, would generally find it more appropriate to acquire EU-wide rights, than solely British rights. In this regard, Brexit threatens to alter the IP landscape and will raise issues that will concern IoT development.
EU law and IP

**Trademarks and Community design rights**
are registered with the European Union Intellectual Property Office. An EU Trade Mark covers all 28 Member States with - a single Trade Mark registration. EU Community Design rights - may be registered or unregistered, and apply across all Member States.

**Patents:**
The patent system is governed by the European Patent Organisation,

1 established under an international convention, which means that it is not part of the European Union, and non-EU States can be signatories. However, that does not mean the EU is totally out of the picture. Currently patents covering all EU Member States may be registered at the European Patent Office, however, there is a change happening in the way that the patent is structured. The classic EU patent is actually a number of different validations for each Member State, whereas the incoming EU Unitary Patent - European patents with unitary effect - will be a single patent granted for the 26 Member States that have signed up to it.3 The Unitary Patent will be enforced, and disputes settled via a new Unified Patent Court. The Unified Patent Court is conceptually a Member State court, and it will have a division dealing with information technology patents.5 it has an obligation to refer questions of EU law to the European Court of Justice.6 The system of Unitary Patents and the new European Patent Court is not yet in force (as of September 2018). The benefit of the Unified Patent is in cases of enforcement, where one case can be filed to a single court rather than multiple cases in national courts, as under the ‘classic’ system.

**Copyright:**
Here we focus on the application of copyright to databases, although software code and other creative elements of IoT products, such as documentation, are also covered by copyright. EU copyright law includes rights that, under certain circumstances, protect databases, notably the sui generis database right7, to prevent extraction or re-utilisation of the whole or substantial parts of a database. The right protects the selection and arrangement of the content, not the content itself. It recognises that there has been a substantial investment in building the database. Sui Generis rights can only be claimed be database developers that are either EU nationals, or habitually reside in the EU, or are EU-based companies8.

However, it is not clear how far this right applies to IoT systems. A characteristic of IoT systems is the generation of large volumes of machine data. European Commission official documents state that machine data is not protected by existing database rights.9

**Emerging issues - data rights:**
The matter of access to machine data and protection of it, is being raised as a policy issue. In IoT systems, it may be the case that machine data is not personal but may be considered the property

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1 https://www.epo.org/about-us/governance.html
2 EU Regulations No 1257/2012 and 1260/2012
5 https://www.unified-patent-court.org/
6 Ibid (5); and https://www.epo.org/law-practice/unitary/upc.html#tab2
8 Ibid (7) Article 11
of the device owner. Device vendors also claim to ownership of such data. An example is the tractor used for precision agriculture, where tractor vendors claim ownership of the data that is generated, and the consequence may be to lock in the farmer to that vendor. The EU has floated the idea of a data producers right, which in an IP context, is controversial. It is likely that this issue will be considered by the new Commission after then 2019 elections.

What may change after Brexit?

UK-EU Withdrawal Agreement:

Articles 54-57 of the final agreement provide for a system of mutual recognition for trademarks, designs, registered plant varieties and detailed agreements on geographical indications. UK citizens and businesses who have registered EU Trade Marks may continue to hold the right for the EU27, provided they continue its use. The regime covers IP registered before the end of the transition period.

After the end of the transition period, EU Trade Marks and Community design rights (registered and unregistered) will no longer apply in the UK. It is not yet clear how the UK government proposes to address this situation. It could convert EU trade marks and design rights into UK rights, or it could require re-registration for the UK. The UK will have to leave the EU-IPO as this is an EU Agency.

UK business and citizens may apply for an EU Trade Mark or registered EU design right, but they would have to be represented in all proceedings at the European Intellectual Property Office by a lawyer or trade mark specialist from an EU 27 Member State.

The UK could remain a signatory to the European Patent Convention, although according to the European Patent Office, the Unitary Patent system will cease to apply in the UK. The EPO also states that ‘appropriate solutions are likely to be put in place’ to avoid loss of patent protection under the Unitary Patent in the UK. More clarity is needed as to what this means.

The UK’s position with regard to the Unified Patent Court is unclear. The UK has ratified the agreement on 26 April 2018, but if the UK insists that it cannot accept the possibility of questions referred to the European Court of Justice then the UK would have to stay out of this system. UK -based developers could still apply for Unitary Patents for the EU 27 but protection would not apply in the UK. UK nationals and companies will lose the possibility of sui generis database rights, which may only be held by EU nationals. UK institutions will be excluded from the EU policy process for any new rights regarding machine data.

Article 58 of the Withdrawal Agreement provides for continued mutual recognition of

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10 Advancing the Internet of Things in Europe, Commission Staff Working Document 19 April 2016 SWD(2016) 110 final, p21, footnote 64
12 https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf
14 European Commission Notice to Stakeholders, Withdrawal of the UK and EU rules for Trademarks and community designs.
15 https://www.epo.org/about-us/governance.html
17 Agreement on a Unified Patent Court (UPC) on 26 April 2018
18 Ibid R. Arnold et al
database rights created before the end of the transition period. UK nationals and residents will no longer be entitled to claim sui generis database rights after this period for databases held in the EU (unless they reside in the EU 27) and EU nationals will not be able to claim sui generis database rights for databases held in the UK.

The Withdrawal Agreement does not contain any clauses on copyright, but EU law will be incorporated in UK legislation. International copyright treaties – such as the WIPO Copyright Treaty – are incorporated in EU and UK law, providing for a degree of continuity and convergence. However, in the long term the UK could take a very different.

‘No deal’ / hard Brexit: If the agreement on the transition period breaks down, there will be no mutual recognition of new IP from March 2019. The Political Declaration18 contains vague commitments to continue mutual recognition of all IP, but the above analysis will apply if there is no long-term agreement between the UK and the EU.

Issues

British-based developers will have to make dual registrations or applications for rights, where under the current system, including during any transition period, they would make one application and have one enforcement process. Likewise, licencing agreements to use patented products will have to cover two jurisdictions instead of one. They will face additional costs for legal representation in pursuing such applications, and enforcement actions. Many businesses use the UK to register all of their EU IP rights and that will cease to be a practical option. The UK’s exclusion from EU agencies and institutions will exclude it from influence over emerging issues.

Open Rights Group (ORG) is the UK’s only grassroots campaigning organisation that works to protect your digital rights.

We believe people have the right to control their technology, and oppose the use of technology to control people.

We raise awareness of threats to privacy and free speech and challenge them through public campaigns, legal actions, policy interventions and tech projects.

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This brief is part of the VIRT-EU project, funded by the European Union’s Horizon 2020 research and innovation programme under grant agreement No 732027.

18 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758557/22_November_Draft_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_EU_and_the_UK__agreed_at_negotiators__level_and_agreed_in_principle_at_political_level__subject_to_endorsement_by_Leaders.pdf