

Protection of an idea or a concept

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I. Introduction: what is an idea?

Looking up the word *idea* in a basic dictionary, one can find several different definitions: 1. Abstract representation of something; 2. Opinion, way of thinking; 3. Original elaboration of thoughts in the artistic and literary domains; inspiration; 4. New conception of something, find, invention.

Ideas can be protected, once they have been materialized, as the result of a human intellectual effort.

European doctrine agrees that intellectual property rights do not protect ideas as such. They cannot be appropriated. Nobody can claim ownership and, thereby, protection of an idea as such, but only its concretisation in the real world.

The material concretisation as such of an idea can certainly benefit from intellectual property rights protection. An idea is materialised when it is perceptible to the senses.

Nevertheless, intellectual property rights demand that specific criteria be met.

In this briefing paper, we are going to analyse to which extent and on which conditions ideas may be protected by intellectual property rights and other forms of protection.

II. Intellectual Property Right Protection

A. Copyright

Copyright protects many different types of works: literary works (novels, poems, stories, etc...), musical works (songs, operas, etc...), artistic works (drawings, paintings, sculptures, etc...), maps and technical drawings, photographic works (portraits, landscapes, etc...), motion pictures, computer programs, databases, etc...

Copyright protection is independent from the quality of the work and the author's purpose in doing such a work, in the sense that its final objective is not related to its protection.

In order to enjoy copyright protection, a work needs to fulfil two conditions regarding its form of expression and originality.

1. Form of expression:

By form of expression, we understand materialisation, whatever may be the mode or form of expression. It could be a piece of choreography, a book, a compact disc, a computer program, and so on.

Copyright never protects ideas as such. In an abstract way, ideas form part of thoughts. As far as they have not been materialized into a certain form, copyright does not protect them. The initial stimulus of a potential later work is not protected. Once this idea is made perceptible to the senses, this concretization may receive protection.

For instance, the idea of painting a tree or a story for a book is not protected. Therefore, if somebody steals the idea, no copyright infringement occurs. However, if a person takes a picture of a painting, and reproduces it for commercialization without the consent of the author, it will be considered an infringement.

2. Originality:

The originality concept has not been harmonized in Europe, except for database and software protection. In continental countries, a work is original if it is *marked by the personality of its creator*. This supposes that the creator has played a decisive role in determining the form of the work. On the contrary, in the United Kingdom the concept of originality is more linked to a special skill or labour.

Originality does not imply protection of the idea as such. Two persons can have the same idea and even if they represent it in the same way, their works may be protected as long as they reflect each one's personality. In this case, we must point out that both authors must have created their works independently one from another. For example, two authors paint a big tree on a green hill with a blue sky, but one of the authors is established in Spain and the other one in Japan. Even if they have painted the same picture, both will receive copyright protection because it is not the idea of painting a landscape that is protected, but its materialisation. Two persons can express themselves in the same way, without this meaning that they will not be protected as it is the materialisation of the idea which is indeed protected, and not the idea of painting the landscape.

For detailed information on copyright, please consult our guide on [copyright](#).

B. Patent

Patents are considered to protect technological inventions, either products or processes. A patent provides the patent holder with the right to exploit the invention during 20 years in an exclusive manner. He can also prevent others from producing, offering, selling or using his invention, without his permission. Society benefits from the inventor's contribution (the invention) thanks to its disclosure through the patent.

1. The concept of invention

An invention is defined as "*a creation, an intellectual effort that produces a result, in the technical domain*"¹. It is a technical solution to a technical problem. This solution can be qualified as an idea: this person has made an intellectual effort in order to determine precisely the technical problem and a way to resolve this problem. This person builds up an apparatus, a scheme, [...] something that materializes his idea in the "*concrete world*". Patents protect ideas once they have been materialised and fulfil the three patent protection requirements. In fact, it is the materialisation of the idea, which enables the idea to be protected.

The European Patent Convention² does not explicitly provide a definition of invention. It just enumerates a non-exhaustive list³ of things that are excluded from patentability such as discoveries, scientific theories, mathematical methods, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business, and computer programs and presentations of information. The main argument for the exclusion of discoveries is that they are already part of the physical world. But for the others it is their lack of technical character.

However, we have to point out that in the case of an existing thing, there can be a patentable intellectual creation if the inventor uses a commonly known technique with a practical aim and in order to solve a problem. An example of a thing which already exists in human nature is DNA sequences. These are already present in life, but in the moment that a sequence is isolated using different technical methods involving human intervention, the possibility arises that it may be patentable. This can then be assessed in the light of the relevant patent requirements.

2. Requirements to grant a patent

Three requirements must be fulfilled: 1. The invention must be new; 2. It must imply an inventive step and 3. It must be susceptible of industrial application.

a. Novelty:

The European Patent Convention defines this requirement in article 54: "*an invention shall be considered new if it does not form part of the state of the art*". The state of the art is "*everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application or the priority date if the application has one*".

b. Inventive step:

The invention must not be obvious to a person "*skilled in the art*", who is a practitioner who knows the technical field in which the invention falls.

c. Industrial application:

The invention must be susceptible to be used in any kind of industry, including agriculture.

3. Patent Application

In order to be granted a patent, some formal documents need to be provided in the patent application phase. These documents are not linked to the invention itself, but are necessary to proceed with the prior art search and the substantive examination of the patent requirements.

Please note that this procedure can be expensive and it can be useful to carry out a cost/benefit analysis.

If you are planning to patent your invention, you should consult specialised firms or law firms who can help you to develop your invention and then to apply for a patent.

Due to the territorial nature of patent rights, you should consider the geographical protection you wish to obtain with the patent before applying. There are three options:

- To obtain a national patent, valid for the territory of the country in which you have filed the application (the patent is granted by the national patent office),
- To obtain a European patent with validity in several European member countries of the European Patent Organisation (at the moment 27 countries and 4 extension countries), granted by the European Patent Office,
- To obtain an international patent via the Patent Co-operation Treaty, with validity in several signatory countries of the PCT Convention (about 127), granted by national patent offices. For further information, please consult our guide on [patents](#).

C. Trademark

A trademark is any sign used to individualize the products and services of a given enterprise and differentiate them from its competitors. Its characteristics are distinctiveness and graphical representation, though audible and olfactory signs are accepted as well. A mark is a marketing tool, which allows consumers to identify and recognise the products and services offered by a certain trader.

A mark can be represented in a wide variety of ways: letters, or numbers, words or word combinations, drawings, designs, colours, signs, [...]

A trademark does not protect ideas, except if the idea has been materialised and fulfils the legal requirements that trademark protection demands.

For example, a person thinks of a green rectangle with a red circle inside of it for his products (tins of vegetables) in the market. As long as the idea of the green rectangle with the red circle inside distinguishes his tins of vegetables from others tins of vegetables, we could say that a trademark can protect this idea. Once the idea enjoys trademark protection, nobody else can use it for products belonging to the same product category.

The key element of a trademark is its distinctive character. A trademark can acquire distinctive character through use. In other terms, a trademark, which is not distinctive can become distinctive by use. This right belongs to the first person who has used a sign in an effective way to differentiate his products or services in the market. A trademark will be protected by registration. The registration usually has a specific application form depending on the country. This application form must be presented to the competent national authority. Trademarks are only valid in the territory where the person has applied for trademark registration.

Please note that at European level, there is a Community trademark valid for the whole EU territory. With a single application submitted to the Office for Harmonization in the Internal Market (OHIM), the holder has a trade mark valid for all Member States in the European Union. A person can apply for the registration of a national or a Community trademark. A Community trademark does not affect national trademark systems, so a company can apply for a national trademark, a Community one, or both.

For more details, please consult the IPR Helpdesk guide on [trademarks](#).

D. Design

This industrial property right has been defined by the Council Regulation on Community Designs⁴ as *"the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation"*. It can be deduced from this definition that the design represents the aesthetic or ornamental character of a product. Technical features or functional characteristics do not fall under the design. Its main function is to attract consumers' attention by making the product more attractive.

Behind a design, there is an idea. This idea cannot be protected as such. Nevertheless, as has been said until now in this document, the materialisation of an idea can benefit from protection. In order to be protected by design, this materialisation will have to be revealed by the colours, shape and material, among other elements, employed in the elaboration of the design. These elements are important insofar as they help the design to fulfil its function, appealing to the consumer in such a way that he decides to buy the product. But the design will have to fulfil certain criteria as set out below, in order to be recognised and protected.

The design must be *new, original* or enjoy an *individual character*. To be new, the design must have not been made public before the date of the registration application. By original, we understand that the design must be its author's work and not

the imitation of another's work. Its *individual character* will be based on the consumer's impression when he sees the product. If his impression is different from his previous attitude concerning another product, the individual character will be satisfied. Some countries consider the product's *useful function* as another criterion. The product must be useful; it must have a function for which it has been created.

The Community design, which is valid for the whole territory of the European Union, must fulfil the criteria of *novelty* and *individual character* in order to be protected, according to the Council Regulation already mentioned.

For more details, please refer to the IPR-Helpdesk guide on [designs](#).

III. Other forms of protection

These mechanisms of protection apply in two types of situations: 1. When there is no intellectual property rights protection and 2. When the person having the idea decides not to make use of any IPR protection.

A. Contractual protection. Confidentiality Agreements

This type of agreement guarantees that the information, ideas or data revealed by one person to another will stay secret under the terms of the contract, and so will not be transmitted to third parties. This contract can take place in many different situations, such as in the contractual relation between the employer and his employee; two persons sharing a common project; a person who has an idea and looks for an enterprise to develop it [...]

As it regards the key elements to include in this type of contract, you should take the following into account: 1. The objective of the confidentiality agreement; 2. The signing parties; 3. A glossary of the terms inserted in the contract and 4. The disclosure of information.

For the drafting of the confidentiality agreement, you should consult a lawyer specialised in this domain.

More information about [confidentiality agreements](#) can be found in the IPR Helpdesk briefing paper.

B. Trade secret

The notion of secret has been defined by the European Commission's Regulation⁵ as "*the know-how package as a body or in the precise configuration and assembly of its components is not generally known or easily accessible, so that part of its value consists in the lead which the licensee gains when it is communicated to him; it is not limited to the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the licensor's business*". This secret keeps somebody's idea separate from the knowledge of his competitors in the market. Indeed, the secret represents an interest for its holder. This interest is often a competitive advantage with regard to his competitors. Know-how is defined as "*a body of technical information that is secret, substantial and identified in any appropriate form*"⁶. It is composed by a group of information with economic value, not accessible to the public, transferable and non-patented.

But, can ideas be considered as part of the information protected under an industrial secret? Ideas may fall under industrial secret and know-how protection in so far as they contain useful and technical information, required for the manufacture of a product or related to the enterprise, customers, etc., and which is not accessible to the public and not already patented.

Industrial secrets do not receive any protection from intellectual property rights, even though a doctrinal discussion exists on this issue and some authors consider trade secrets themselves as an IPR. In any case, they could fall under the scope of protection of civil law and unfair competition law (increasingly harmonised at European level in last years). Indeed, an industrial secret or know-how may be kept by including appropriate rules in an employment contract or by using specific confidentiality agreements (see III. A). In addition, some countries also provide penal sanctions for persons who fraudulently disclose an industrial secret.

Please read our briefing paper on the [legal protection of trade secrets for further information](#).

C. Unfair Competition Law

This legal discipline tries to ensure fair play in the market. It deals with practices in which someone takes undue advantage of someone else's work.

Unfair competition law does not necessarily apply to competitors. Many States apply the principle of good faith, so a practice would be unfair if it is contrary to this principle, without taking into account the condition of competitor or non-competitor of the person who commits such a practice. Nevertheless, some countries would qualify this behaviour as "parasitic" if non-competitors do the abuse.

In the case of an idea as such, this will be part of the public domain, and so known by everybody. The principle of *free competition* applies, everyone has the right to use that idea whatever the form may be. Therefore, nobody can claim against a third party arguing that it has stolen an idea.

IV. Brief case studies

1. I have an idea for developing pottery in the market. How can I protect my idea before entering into contact with a marketing enterprise?

In principle, ideas as such are not protected by IPR as long as they are not materialised and do not fulfil the concrete IPR criteria. Once the pottery is created, normally you would fulfil copyright criteria (form and originality) and design criteria (novelty and individual character). While your pottery is not "real", it is just an idea, you should foresee the signature of a confidentiality agreement with the enterprise to whom you are going to explain your project. Under this agreement, you would prevent that enterprise from using your idea or communicating it to third parties.

2. I am interested in proposing the idea of a "reality show" programme to a television channel, but I would like to assure and protect my idea before contacting the television channel.

Your idea would not be protected, but its later development, i.e., the progress of the programme broadcast, the scenario, the decoration, [...] is susceptible of being protected by copyright. In other terms, its concrete materialisation can be protected. Copyright criteria are: 1. Expression in a form and 2. Originality. Your work would be original as long as it is marked by your personality, in other terms, all external factors affecting your work do not count when examining its originality. Before communicating your idea to anyone, please make sure that you sign a confidentiality agreement to prevent others from using and exploiting your idea before you. Do not forget that once you have made use of your idea in a concrete way, you cannot prevent others from using it, but from copying it.

3. I have developed a scientific method; if I explain the idea in writing (which I assume gives me copyright on it), may I prevent others from using my method without permission?

The documents in which you describe the scientific method you wish to later develop will be protected by copyright. You can prevent others from copying the documents you have written (*plagiarism*), but not from expressing the idea in another way. You may enjoy copyright protection thanks to the original and personal expression (in the documents) you have made of your idea. Nevertheless, copyright will not cover the use of your scientific method because, insofar as they respond to a technical problem, this type of work may be protected by patent.

In order to enjoy patent protection, the scientific method must be an invention – a technical solution to a technical problem – and fulfil the three requirements of *novelty, inventive step and industrial application*. If you are granted a patent for your scientific method, you will have the exclusive right of using and exploiting it for 20 years. As regards the territorial scope of protection, this will depend on whether you apply for an international, European or national patent. Nevertheless, you also have the right to sale or transfer your right to another person. If you sell it (assignment) you lose your *holder* title. But if you just want to allow another person to use your invention (licence), you will be still the patent holder. Assignments and licences are normally remunerated.

4. As an advertising agency, we are interested in protecting an advertising idea against clients who could develop our idea before us. Can we protect this idea?

Ideas as such cannot be protected by IPR. In this case, the idea has not yet been materialised, so the best thing is to sign a confidentiality agreement with your client. Through this agreement, he will not be able to communicate your idea to third parties nor to use it himself. Once your idea has been represented in some form, you will receive IPR protection if the criteria are fulfilled.

5. I am an individual who has developed several insurance, financing and banking models and would like to protect them. How can I obtain such protection?

Your idea of creating such models is not protected by any IPR. Your models will benefit from this protection if they are expressed in a concrete way. Concerning copyright, your schemas, texts, graphics [...] can receive protection. As regards patents, business methods are excluded from patentability (article 52.2.c of the European Patent Convention) because of their lack of technical character .

1. Buydens, Mireille. "Droit des brevets d'invention et protection du savoir-faire". Création Information Communication. Editorial LARCIER, 1999. Page 52.

2. The European Patent Convention was signed in Munich on 5th October 1973 in the context of the Council of Europe, and entered into force on 7th October 1977.

3. Article 52 (2) from the EPC and Chapter IV, Part C, page 50 from the European Patent Office Guidelines.
4. [Council Regulation \(EC\) No 6/2002 of 12 December 2001 on Community designs. Article 3 \(a\).](#)
5. Article 10.2 of the Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) (in the new version of the treaty is article 81(3)) of the Treaty to certain categories of technology transfer agreements. Article 81.3 sets out the exception to the antitrust prohibition of undertakings' agreements contained in its paragraph 1.
6. Article 10.1 of the EC Regulation on the application of article 81.3 to certain categories of technological agreements.