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Europe: “me too” or unique in its own strength?

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Property – common misconceptions

- "I made it so I own it"
- property of things
  - comprehensive legal protection
  - *droit inviolable et sacré*
- property of knowledge and other information
  - fragmentation of legal systems
    - copyright/patents/trademarks/designs ...
  - to be "completed"??

Patents are considered a form of "intellectual property". But what is "property"?

This slide highlights some common misconceptions. An obvious – but incorrect - thought is: "I own what I have created".

Indeed, for physical goods, things you can see and touch, the ancient Romans already knew this form of property creation: *specificatio*. In later centuries, property rights were not always acknowledged, especially in feudal times. But during the French revolution property was firmly established as a *droit inviolable et sacré*: an "inviolable and sacred right".

However, for "immaterial goods" such as knowledge and other forms of information, there is no such comprehensive legal protection system. Instead, especially from the 19th century on, several specialised systems were developed for legal protection, starting with copyright and patent law, and ending (so far) with semiconductor topography and database law.

Still, it is an incomplete and fragmented system. Don't we need a pro-active approach to complete this "building" of legal systems for the protection of information, in its various forms and shapes? Isn't this part of the infrastructure needed in a modern, competitive Europe, in today's "knowledge economy", in view of the Lisbon strategy?

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Property of Information - reality

- A matter of efficiency rather than principle
- fundamental
  - information can be *shared*
  - information is *culture* (incl. science, trade etc.)
  - exclusive rights can block
- implications for the law
  - restrictive approach (*fundamentally* “incomplete”)
  - specialised systems geared to specific needs
- property of information is the exception

In reality, “information” by nature is essentially different from material goods. Therefore, it needs a very legal different approach.

Unlike physical goods, information can be shared: it can be employed by multiple users at the same time. And information does not deteriorate by being used. Apparently there is no reason to impose legal constraints on the use of information.

On the other hand, there are reasons to conclude that information ought to be free whenever possible, in particular information created by the “human brain”, because such information is essential for the continuous development of human culture, be it in science, politics, trade or even entertainment.

Consequently, *purposely* the law only protects information in specific cases, to a specific extent, if and when a specific need is perceived, as an *exception* to the rule of freedom of information.

Dichotomy

- copyright law (analogy)
  - ideas are *free*
  - expressions of ideas can be *protected*
- patent law
  - mere theories and ideas are *free*
  - inventions can be *protected*
  - technical designs typically are *not* inventions
- patents protect *research*, not *development* investment

Where should the line be drawn between information that should be free and information that needs some form of legal protection?

It may be helpful to compare copyright law and patent law for that purpose. In copyright law, the “idea-expression dichotomy” is a well-known concept. For instance, the story in a book as it is written is copyright protected. But someone else may write a book on the same topic, in his own words. Isn't that plagiarism? No, normally not. Clearly, the distinction is rather subtle. But over time, courts have developed criteria how to draw the dividing line between the two. There is no doubt that it should be somewhere between unprotectable ideas and protectable “expressions” of ideas.

In patent law a similar distinction can be made. There is no doubt that laws of nature can not be patented, only their applications (if any) may be patented (if the requirements are met). But can patent law protect *ideas*? It is often stated that “software patents are needed to protect the *underlying ideas* because copyright law only protects direct copying (piracy)”. This is a serious mistake: not every idea, and not every design qualifies as an *invention*. Of course, commercial software development companies may want to fence every idea, every design they made. But patent law is only destined to protect *research*, not routine craftsmanship, not regular development.

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Business Models for knowledge

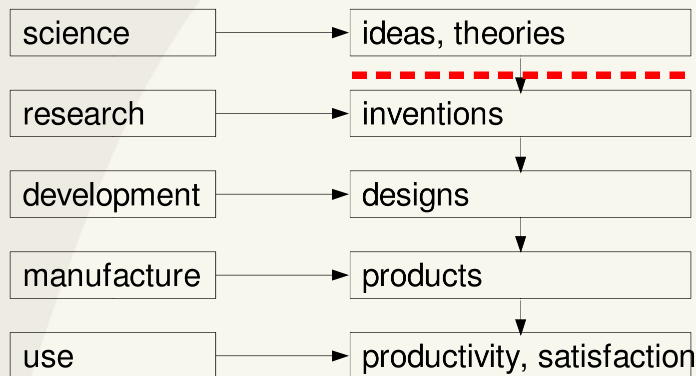
- commercial business model
  - sell the knowledge you have (or keep it)
  - buy the knowledge you need
    - huge transaction & litigation cost
  - "strategic" behaviour: compete with inferior products
- "cultural" business model
  - share (and obtain) your knowledge for *free*
    - stimulus for creativity
  - earn a living by *application*
    - lawyers, Open Source Software developers, etc.

From the above, it may seem reasonable that not all ideas can (and must) be legally protected. But – on a less abstract level – don't software development companies deserve some legal protection for their development investment - in addition to copyright?

In a "commercial" business model, one is inclined to sell everything for money that meets a market demand, including knowledge. And, consistently, one must then be prepared to pay for someone else's knowledge, if needed. But is "knowledge" really so similar to other "raw material"? The reality from patents shows the opposite: the "trade" in knowledge can bring tremendous transaction and litigation costs. While conceivably it's impossible to "steal" material goods by mistake, one may reinvent an invention and infringe a patent inadvertently. On the other hand, a patent owner can play all kinds of games with patents to fight his competitors. Even with inferior products: the old saying is: *if you can't beat them, sue them*!

The Open Source business model follows a different approach. Is this software perhaps developed by *communists*, hobbyists or oversubsidised universities abusing taxpayer money? No! Actually, there is a striking similarity with – commercial - lawyers. They write articles in legal magazines all the time. Aren't they afraid to hurt their business by revealing their "secrets"? Not at all: they make a living by the *application* of their knowledge, very similar to IT consultants making a living by supporting their customers in the use of Open Source Software.

In sum, the free availability of knowledge and other information does not preclude professionals from making a profit. On the contrary, the free exchange of knowledge is the lifeline of "knowledge workers".



Freedom of knowledge versus ownership of patents – it seems contradictory. Let us have a closer look at the "food chain" of knowledge – from the inception of an idea until the realisation of a product that meets a market demand.

As is shown in the diagram, an invention is the result of research. Such research can be distinguished from pure science as it aims for *application*. Theories and ideas may lend themselves also for application, but only indirectly: they have to be developed into inventions first. Typically the research process of developing an invention is not straightforward, but a largely unpredictable process that may or may not be successful. In contrast, a development process is a matter of craftsmanship. It may still be laborious, but it is more or less straightforward, and unlikely to fail if only properly managed.

Businessmen may want legal protection for ideas. That would allow them to ask money for each and every application of their ideas. It seems excellent business: a huge "scope of protection" for (typically) a minor effort. But that is the very reason mere ideas are *not* protected by law. Only true inventions are legally protected. The research effort to accomplish an invention is larger, and the scope of protection is more in balance. Typically, software patents are more like patents on *ideas* than patents on *inventions*.

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Institutional Aspects

- patent offices tend to be "customer-friendly"
  - equated to inventor-friendly
  - society-friendly is something else
  - USPTO worse than EPO
- EPO Boards of Appeal
  - not a proper court
  - however no appeal to an independent court
- every grant of a patent is a withdrawal from the public domain!

From the above, it is clear that patents must only be granted for true inventions. Not for trivial inventions. And certainly not for mere ideas, for "non-inventions".

With all the fuzz about the directive we may forget that it is, and always has been the task of patent offices such as the EPO to examine patent applications whether all requirements are met for patentability.

But these offices play a complicated role. Do they acknowledge that the grant of every patent withdraws some knowledge from the public domain? The United States Patent and Trademark Office boasting of its "customer satisfaction" is a particularly bad example. Of course, I don't say the EPO is dishonest, just looking for more "business", but it may be against their natural habit to be restrictive in patent granting.

No system is perfect, and imperfect systems need proper feedback mechanisms. However, the EPO Boards of Appeal may not be too suited for that purpose as they are unmistakably part of the "patent system". However, there is no appeal to a court which is really external to the patent system.

Patent granting authorities should always acknowledge: the grant of a patent creates one winner, and potentially many losers. But this is not a game. This is very serious business! An infringer is not just a looser, he may even be considered a *criminal*.

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Conclusion

- Innovation thrives by freedom of ideas
  - Appropriation of knowledge kills creativity
- Europe should foster its strength
  - tradition of academic and scientific freedom
    - beware for undue commercialisation
- Compete
  - with Unique Selling Point
  - *not* with “me too” approach!
- European patents are patents *in Europe*
  - not patents (just) *for Europeans*

Finally, let's go back where we started: to the freedom of ideas, essential for the development of new ideas, and at the heart of culture in the broadest sense of the word. Appropriation of knowledge can be very dangerous.

Much of the policy of the European Commission seems to be geared to try to imitate the United States of America and its perceived prosperity: the “United States of Europe” against the USA. If that's the *Lisbon strategy*, it's a mistake. Now whether you are fond of American politics remains a matter of taste. But in the context of patents, and knowledge management in general, Europa should not adopt a “me too” approach once more. Instead, Europe should foster its own *unique selling points*, with its rich cultural and scientific heritage. Linux originated in Europe (in Finland). Should we now adopt legislation to help Microsoft to fight Linux?

Don't get confused: unlike the Commission says, European patents are *not* patents *for Europeans*, but patents *in Europe*! The Americans did not complain by mistake about the amendments “weakening” the directive! They want a strong European software patent directive, in order to fight European software on the legal battlefield!