INTELLECTUAL PROPERTY

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INTELLECTUAL PROPERTY

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COPYRIGHT

Why a meme ban could put freedom of the internet at risk

As the law plays catch-up with the digital revolution, experts have raised concerns over impending copyright rules and their potential impact on sharing information online

David Cowan

The internet of things, smart devices, digital assistants, social media and apps are all supposed to bring us, the digital citizens, a new free world. We are in an era of sharing and internet freedom. However, while the means to engage in the digital world proliferate, there are equally growing concerns that internet freedom is being curtailed by proposed regulation and vested interests.

The problem revolves around European copyright rules. It's not a subject that tends to get people's blood up, but in many quarters there is a clamour of voices objecting to planned regulations. Everyone accepts there is a pressing need to update current regulation to account for the digital revolution, as the law plays catch-up. Proponents say new rules are needed to break down silos and the objective is to free up digital access.

Speaking at a European Parliament plenary session in 2014, as candidate for president of the European Commission, Jean-Claude Juncker set out his agenda. "I believe that we must make much better use of the great opportunities offered by digital technologies, which do not know any borders," he said. "To do so, we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law", thereby ensuring full consumer access in a digital Europe.

In copyright, the means to achieve this ambition come in the form of the European Union Directive on Copyright in the Digital Single Market. The draft of the directive places greater responsibility on platforms, the biggest being Facebook, Twitter and YouTube, to ensure copyrighted material isn't shared illegally online. To date, the onus has been largely on the copyright holders to enforce their copyright.

However, controversy has dogged the directive these past two years with claims that it goes too far and risks greater censorship, inhibits innovation and curtails internet freedom. The reason it has become problematic comes down to two key articles, 11 and 13, which have been drafted in a way that opponents argue may seriously threaten our freedom of expression. Opposition quickly erupted from various quarters, including the major social media platforms, internet creator Sir Tim Berners-Lee and a raft of NGOs.


Sefa Karacan/Anadolu Agency/Getty Images

Trouble really kicked off last spring when German MEP Axel Voss, taking over as EU copyright rapporteur, sought to bring back articles 11 and 13, which had previously been put aside. This raised fears that memes would be effectively banned and platforms would need to pay publishers when people link to their websites. Despite a vote in favour, trilogue talks between the European Parliament, the Council and the Commission resulted in compromise wording that finally passed last month. However, not everyone is happy with this either.

The compromise struck on article 11, dubbed the "link tax", is, although retained, it has a carve-out that it will not apply to hyperlinking or the reuse of "single words or very short extracts". However, uncertainty remains around what constitutes a very short extract, which may lead online service providers to wait for further guidance from the Commission or the courts.

The bigger problem is article 13, dubbed the "meme ban", which has also been retained, but imposes weaker obligations upon platforms. Rather than being required to implement technical measures to prevent copyright infringement, platforms will instead have to conclude licensing agreements with rights holders for use of their works or use their "best efforts" to uphold copyright through some specified provisions.

Opponents believe platforms will still need to upload filters to comply with these obligations, and the increased costs and regulatory burden will make it harder for smaller platforms to compete with the internet giants.

Ronan Kennedy, law lecturer at the National University of Ireland in Galway, who spent much of the 1990s working as a programmer, analyst and webmaster, says: "For private users, litigation is too expensive, so they will just decide to take the content down." This will restrict internet freedom by default.

These concerns are overstated, according to Gerhard Pfennig from Germany's Copyright Initiative. Mr Pfennig says a filtering system would only be necessary for content not already covered by copyright contracts with agencies that collect royalties on behalf of rights holders. He hits out at the "myth of uncontrolled filters as if a fence were being erected online" when "the aim of this directive is exactly the opposite".

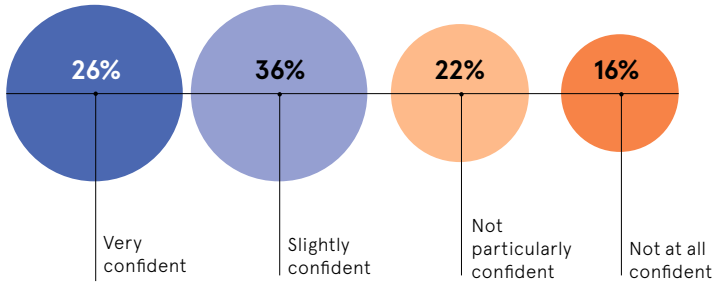
The EU directive now awaits a final vote at the end of March, but critics fear it may be expedited and threaten internet freedom by such alacrity. Allison Davenport, technology law and policy fellow at the Wikimedia Foundation, is blunt when she says: "The final text of the directive will harm access to knowledge and unduly benefit large corporations and rights-holder industries. Despite the text's carve-outs, Wikimedia cannot support a reform that, at its core, aims to radically control the sharing of information online."

If passed, EU member states would have two years to incorporate the directive into domestic legislation and police it. Zoey Forbes, technology, media and entertainment associate at Harbottle & Lewis, says: "If the new directive does become law, there is no doubt that it will have a significant impact upon all stakeholders, from individual authors and artists to major record labels and big tech companies. But will it break the internet? That remains to be seen."

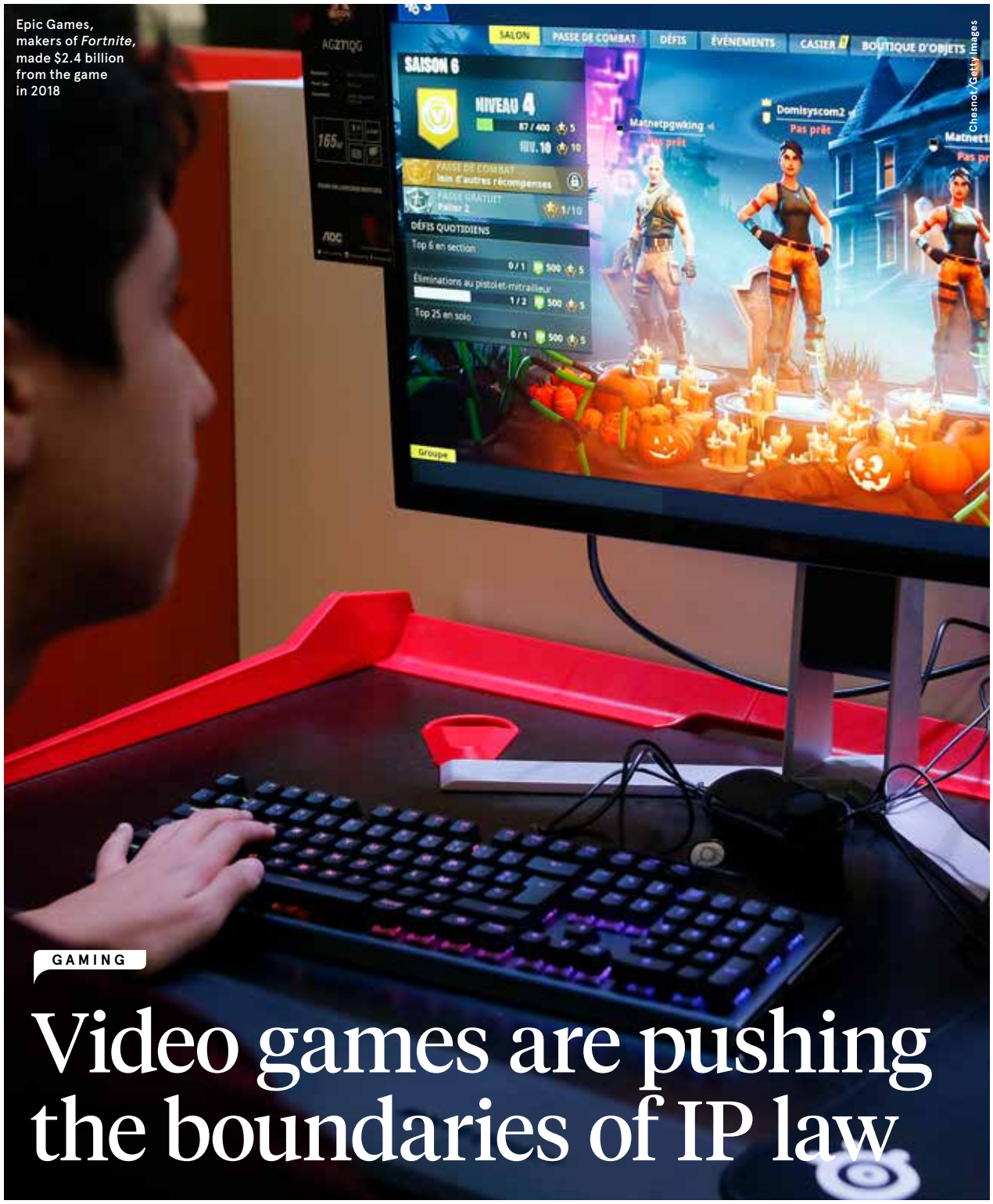
Dr Kennedy concludes: "The real challenge is the practical implementation. I expect we will see unintended consequences. It won't be the death of the internet. People have predicted that for a long time, but it's not happened yet. However, things will definitely change."

CONSUMER CONFIDENCE IN KNOWING ONLINE LAWS

UK internet users were asked about their confidence in knowing what is legal/illegal in terms of downloading, streaming/accessing and sharing content through the internet?

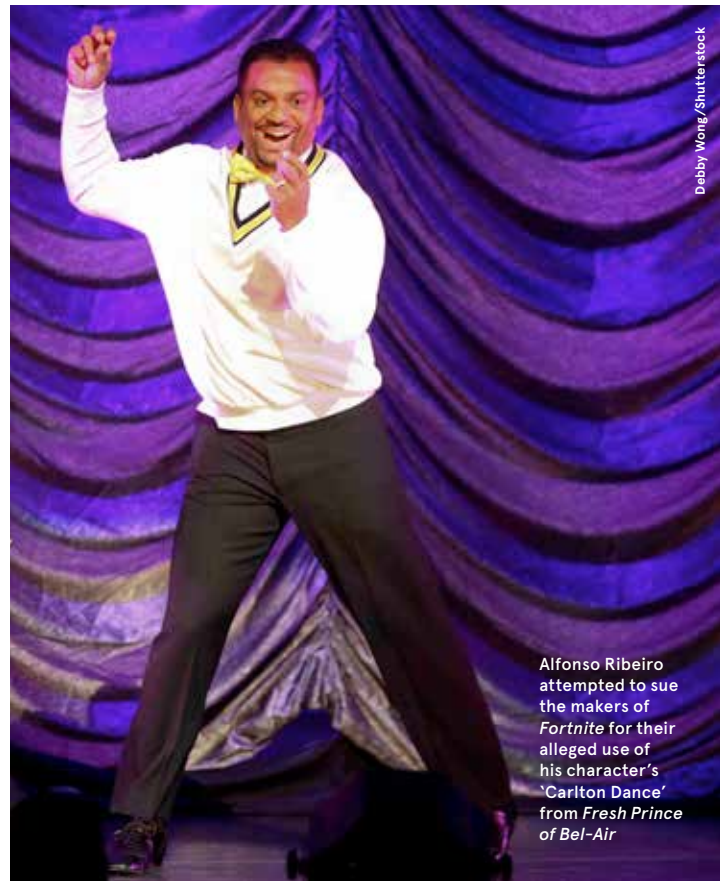


Kantar Media/Intellectual Property Office 2018



Epic Games, makers of *Fortnite*, made $2.4 billion from the game in 2018

Chesnot/Getty Images



Debby Wong/Shutterstock

Alfonso Ribeiro attempted to sue the makers of *Fortnite* for their alleged use of his character's 'Carlton Dance' from *Fresh Prince of Bel-Air*

GAMING

Video games are pushing the boundaries of IP law

Video games are a fast-moving medium, so much so that they're outpacing some aspects of copyright law

Duncan Jefferies

For a certain generation the Carlton Dance, named after the character who performed it in *The Fresh Prince of Bel-Air*, is as iconic as Lara Croft or The Spice Girls. But is it subject to copyright law?

This question is at the heart of a lawsuit Alfonso Ribeiro, who played Carlton in the hit 90s sitcom, recently brought against Epic Games, the company behind the hugely popular online game *Fortnite*. Although the game is free to play, players can buy a Battle Pass to gain access to exclusive challenges and in-game rewards, including an emote called Fresh that bears a striking resemblance to the Carlton Dance.

Mr Ribeiro claimed that Epic Games, which made $2.4 billion from *Fortnite* in 2018, had violated his pending copyright and right of publicity, and sought monetary damages. Although the US Copyright Office recently ruled that the Carlton Dance isn't copyrightable – Mr Riberio has since dropped the lawsuit – it has certainly demonstrated that the video game industry often creates new challenges for copyright law.

"A video game is literally a bundle of intellectual property (IP) and contractual rights," says Jas Purewal, digital entertainment lawyer and business adviser at Purewal & Partners, who specialises in video games, esports and technology. As with TV, film and music, these rights are applied in a variety of ways, and cover everything from the game's soundtrack and artwork to the code underpinning the gameplay.

> **Copycat games that piggyback on the success of popular titles in an attempt to make a quick buck often cross the line between idea and expression**

"However, the one thing that really distinguishes the video game industry from other creative industries is how fast it's moving and how it pushes the boundaries of the IP law system, which on the whole was designed before the advent of video games," says Mr Purewal.

The idea behind a video game cannot be copyrighted, just the particular expression of it. Nintendo, for example, owns the copyright for the way Mario looks and sounds, but that does not give it a monopoly over all Italian plumber-themed video game characters. However, copycat mobile games that piggyback on the success of popular titles in an attempt to make a quick buck often cross the line between idea and expression, a practice that can actually be traced back to a Pac-Man clone called K.C. Munchkin, which triggered one of the first video game copyright lawsuits in 1982.

As video game technology has advanced, characters based on real people rather than plumbers have also spawned lawsuits, most famously when the former Panamanian dictator Manuel Noriega attempted to sue Activision over his depiction in *Call of Duty: Black Ops II*. More recently, digital versions of sports stars' tattoos may have breached copyright law: the tattoo artist, rather than the person whose skin bears the ink, generally owns the copyright, and some claim they did not give their permission for their work to be used.

The rise of video game streaming and Let's Play videos, where someone plays through a video game while providing commentary, has also created further copyright complications. The most popular streamers earn millions from paid subscriptions to their channel, donations, advertising, sponsorship and merchandise sales. Richard Tyler Blevins, who's better known as Ninja, claims he made nearly $10 million in 2018 playing *Fortnite*.

"Some developers take the view that the more people who stream their game the better," says Dr Richard Wilson, chief executive of TIGA, a non-profit trade association representing the UK's games industry. "Some developers explicitly allow streaming in their end-user licence agreement. However, this could be a problem for other companies which want to restrict or control streaming."

NakaTeleeli and Helloween4545 host their own Let's Play channels on YouTube, and both feel that streaming and Let's Play videos are a legal grey area. "It could easily fall that the developers and producers of the games have the rights to them [Let's Play videos], much like showing privately owned movies in a public place," says NakaTeleeli. "But they could also be considered transformative." Under US law, a derivative work is considered transformative if it uses a source work in completely new or unexpected ways.

Helloween4545 says he's been asked not to feature certain titles on his channel. "Some companies contact you and say, 'Hey dude, not super keen on you doing this for our game'. Others are pleased with the publicity, so it kind of depends on the developer," he says. Helloween4545 understands why some companies may not be keen on the idea of their game being streamed or Let's Played, "especially if it's a more narrative-driven game" as, although it's not exactly the same as playing it yourself, "you're pretty much getting the same experience".

Both Helloween4545 and NakaTeleeli support the right of developers and publishers to control how the content of their games is used, and would welcome more clarity on what they can feature on their channels. "One way or the other we are often times making money by using someone else's work," says NakaTeleeli. "I want to show them as much respect as possible and, if they make their opinions clear, I'm all the more happy to oblige."

As the streaming and Let's Play scene evolves along with video game technology, it seems likely that further interesting IP issues will arise. "You just don't know what the next hot topic is going to be until some creative game developer comes up with an idea that sends everyone rushing to their law textbooks," says Simon Sellars, founder and director of Sellars Legal. "That's what makes this such a fascinating industry."

Delivering tangible outcomes from intangible assets

Companies will increasingly adopt a commercially driven, strategic approach to the management of their intangible assets

Ever since it was recognised a decade or so ago that the majority of a company's value is attributable to its intangible assets (IA), there have been calls for intellectual property (IP) to become fully integrated into corporate strategy and for intangibles to be managed as business assets. However, confusion and practical challenges remain for IP to become fully embedded into corporate decision-making and strategy.

IP specialists have wished for the business and financial communities to better grasp the significance and value of IAs. But Josue Ortiz, director at ClearViewIP, believes the onus should be on IP professionals to bridge the gap.

"It needs to work both ways," he says. "Of course, people from an IP background would want the C-suite to better understand its benefits, but IP practitioners need to articulate the contribution to the business of the IP assets they create and manage. At the end of the day, this requires IP operations to be measured and reported on a similar basis to other parts of the organisation, that is with key performance indicators, including specific return-on-investment (RoI) and budgetary targets."

While much of the IP industry has resisted making the first move in this direction, ClearViewIP has strived to do just that since its inception in 2007.

With an initial vision to provide business-driven advice on IP matters to UK companies, the business has since evolved to provide services across the full breadth of IP rights to a global client base, including Fortune 500 and FTSE 100 multinationals and prominent startups.

"While it is not surprising that start-ups would gain substantial benefits, it is perhaps unexpected that sophisticated multinationals rarely have a full picture of their intangible assets, so it's very much a gap that needs filling," says Mr Ortiz. "Only a robust understanding of the actual interlocks between the IAs of a company and its products and services enables companies to optimise and leverage their IP portfolio for commercial advantage."

He goes on to describe the process of integrating IP into corporate strategy as a continuum, a cyclical journey from discovering and capturing IP, all the way to value realisation, always in reference to specific business goals that the IP function has to support.

"Deep discovery of intangibles and systematic IP capture underpin the strategic management of IP. These activities enable reporting dashboards through which IP can be managed in line with predefined objectives. IP dashboards are effective in communicating to the C-suite how IP is contributing value to the business. Furthermore, ongoing evaluation of a company's portfolio enables the possibility for continuous improvement," and increase value, says Mr Ortiz.

"Assets that are no longer beneficial to the business, for example because of a change in product strategy, could be divested or abandoned. Most companies can achieve substantial cost savings, without detriment to the competitive position provided by their IP portfolio, by implementing commercially driven evaluation processes. In our experience, cost savings of 30 to 40 per cent are not uncommon. Perhaps more importantly, a business-driven evaluation of the IP estate can identify strategic gaps that need to be remedied, either through organic IP creation or acquisitions."

Referring to practical examples of the benefits of this approach to IP management, he describes two types of client engagements. "We worked for many years with a London-based venture capital-backed company to set up their IP processes and align their evolving IP portfolio to their product and strategic objectives. The company achieved a nine-digit trade sale to one of the largest tech companies in the US. The relevance of their IP was evident, IP due diligence sailed through and company executives believe at least 10 per cent of the value was directly attributable to the approach we had taken to develop their IP," says Mr Ortiz.

"We have also supported several companies in acquiring IP assets to address gaps in their portfolio. These gaps have a direct link to profitability in that the lack of defensive IP meant having to pay substantial licence fees, incur legal expenses to defend incoming IP lawsuits or an inability to scale up out-licensing opportunities. IP acquisition programmes typically deliver a higher RoI in terms of cost savings or revenue generation versus acquisition costs."

Direct revenue generation from IP would seem the Holy Grail of viewing intangibles as valuable business assets. However, Mr Ortiz offers a different perspective.

"For many companies, the most significant opportunities to contribute directly to the bottom line have to do with leveraging IP in commercial negotiations that take place on a regular basis in most innovative businesses," he explains. "This will include partnerships, collaborations and joint-venture discussions, but also supplier relationships. There are also significant opportunities related to legitimate tax incentives related to IP, such as Patent Box.

"What all these opportunities have in common is the need for the IP estate to be well understood, actively managed and for the IP function to have strong relationships with other business functions."

ClearViewIP's ability to integrate IP into a traditionally reticent business world stems from the firm's almost unique positioning as a management consultancy for IP strategy and transactions. This positioning balances the view of the IP function as a cost centre-focused on risk management, while recognising the value creation and value realisation opportunities innovative companies have in their IP.

"That's a key differentiator," says Mr Ortiz. "The systematisation of all the stages of the IP journey into a turnkey portfolio of services has culminated in a track record of delivering direct and measurable commercial outcomes. It's about delivering tangible outcomes from intangible assets."

So, what does the future hold for IP? Mr Ortiz believes companies will increasingly adopt a commercially driven, strategic approach to the management of IAs.

"While the appreciation of IP's importance as an asset has increased and the role of intangibles is becoming more talked about, this hasn't resulted in IP processes being changed that much," he concludes. "But IP teams are under budgetary pressures and their value-add is under scrutiny. Those IP departments that can demonstrate their contribution to the bottom line and to strategic corporate objectives will be highly valued.

"Innovation will help in this respect, with semantic and AI techniques helping companies mine their IAs and discover links to products and services. This will lead to IP assets being more frequently understood, leveraged; this will create more reference points that will eventually make IP less difficult to value."

For more information please visit www.clearviewip.com

ClearViewIP

STRATEGIC MANAGEMENT OF INTANGIBLE ASSETS

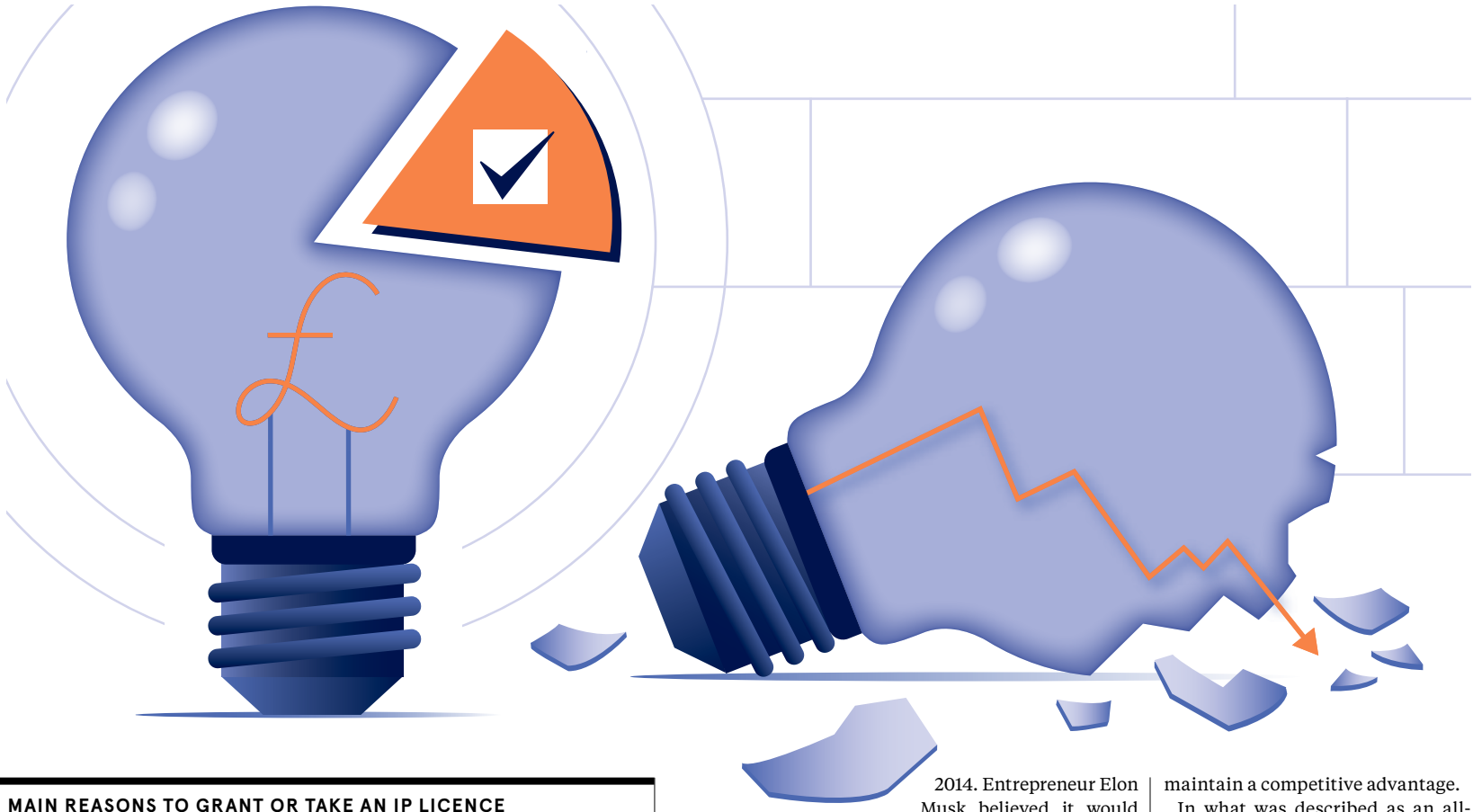
Need for holistic view of assets	DISCOVER	Intangible assets captured and dashboard reporting
Understand relevance and value of assets	EVALUATE	Portfolio evaluated and assets understood
Align intangibles and manage costs	OPTIMISE	Portfolio optimised to ensure assets bring value
RoI from intangible assets	LEVERAGE	Portfolio exploited across full spectrum of opportunities

> **Only a robust understanding of the interlocks between the intangible assets of a company and its products and services, enables companies to optimise and leverage their IP portfolio for commercial advantage**

INNOVATION

Determining the right way to share ideas

Companies are collaborating in an effort to drive innovation, but sharing intellectual property is more complicated than it sounds



Rich McEachran

When nuclear energy startup Transatomic Power, a Massachusetts Institute of Technology spin-out, announced it would be suspending operations, the company blamed its molten salt reactor technology for not scaling quickly enough. Despite this, the startup's co-founder and chief executive Leslie Dewan wanted to support future nuclear reactor innovation and open sourced its intellectual property (IP), including patents both granted and pending for private and public research purposes.

The energy sector has been "far more secretive and disinclined to engage in an ethos of sharing" than other sectors, says Colin Hulme, partner and IP specialist at Scottish law firm Burness Paull, which provides a range of services to exploration and production companies. However, given the rapid technological advances being made, he adds, the sector is under pressure to adapt and innovate to survive.

"To deliver the efficiencies that are necessary for survival, better planning is critical. Sharing information and IP can lead to the power to predict and insights that can turn unviable plays into cash returns," says Mr Hulme.

There is another reason why companies in the energy sector might want to open source IP, to build towards a greener and sustainable future. It's for this exact reason that Tesla open sourced all its patents in 2014. Entrepreneur Elon Musk believed it would help grow the electric vehicle industry more rapidly and establish his Tesla brand as the market leader.

While most key players in the energy sector are unlikely to take Tesla's total open book approach, says Mr Hulme, they are likely to take positive steps to increase collaboration and innovation, while being careful to maintain clear ownership of the IP.

On the face of it, sharing IP may sound altruistic and straightforward. In reality, it's profit-driven and is no easy process. No matter their size and the industry they're operating in, companies need to protect themselves so they can maintain a competitive advantage.

In what was described as an all-time high, the European Patent Office received nearly 166,000 patent applications in 2017. Closer to home, there were more than 22,000 patent applications in the UK in the same year and just over 6,300 were granted, according to analysis conducted by the UK's Intellectual Property Office.

Without patents, companies run the risk of their technology being exploited. Applying for and then securing patents puts them in a stronger position when it eventually comes to sharing their IP, says Peter Arrowsmith, patent attorney at one of the UK's leading IP law firms Gill Jennings and Every.

"Sharing might seem like the antithesis of patenting IP, since the latter is about restricting the rights of other companies and making sure technology remains proprietary. But forward-thinking companies also need to consider how their technology can be more readily adopted," says Mr Arrowsmith.

For Rockley Photonics, a company at the forefront of silicon photonics which manufactures chipsets for datacentres and sensors, sharing IP

MAIN REASONS TO GRANT OR TAKE AN IP LICENCE

According to recommendations from the Intellectual Property Office

Sharing risk	Where licensing the right to manufacture and sell products, licensers can receive royalties but with none of the risk of manufacturing, promoting and selling those products. Meanwhile, licensees can use the IP without the expense and risk of the research and development
Revenue generation	An owner of IP may commercialise the IP itself and obtain additional income through licensing to someone else to commercialise it in a different field
Increasing market penetration	An owner of IP may license another business to sell in territories that the owner cannot cover
Reducing costs	A business may 'buy in' innovation to reduce its research and development costs
Saving time	A business may get products or services to market more quickly by acquiring a licence to use existing IP, instead of re-inventing the wheel
Accessing expertise	By taking a licence, a business may tap into expertise that it does not have in-house
Obtaining competitive advantage	By acquiring a licence to use IP, a business may obtain an advantage over its competitors
Collaboration	Businesses may want to work together to develop new products and services

> **Even with patents in place, companies still have to be mindful that the IP they're sharing is not undermining their ability to compete**

Sharing IP worldwide

With an increasing number of patents being awarded, especially for artificial intelligence-related and driverless technology, companies are at greater risk of finding themselves caught up in patent litigation battles.

"The current situation has made it more expensive for manufacturers to bring products to market and has restricted inventors from pushing the boundaries of technological innovation," says Simon Baggs, co-founder and chief executive of Incopro, a brand protection software provider. "IP collaboration, partnerships and alliances are an ideal workaround."

Mr Baggs cites the example of Microsoft joining the Open Invention Network, an open-source patent group, towards the end of 2018, to protect one of its long-standing competitors, Linux, from lawsuits.

Open sourcing is a language creators, investors and researchers can speak around the world. It can foster cross-pollination. "People recognise that sharing is vital for innovation. It should be encouraged as long as it doesn't prejudice the IP rights in question," argues Dr Sean Jauss, partner at Mewburn Ellis in Bristol.

The problem is, when it comes to sharing IP, different jurisdictions can require that an IP application is filed in the country where the original inventor resides. If several countries demand this then it make open sourcing an expensive process that ends up being weighed down by red tape.

"It forces companies to file IP applications in countries where they have no commercial interest," says Peter Arrowsmith of Gill Jennings and Every. "International harmonisation in this area is badly needed so inventors can freely collaborate across borders."

This won't be easy though. Mr Baggs says IP collaboration may be important for innovation, but in some instances the use of IP by another company can damage the original creator's reputation, such as when copycat companies in China produce cheaper and poorly manufactured imitations.

Things are further complicated because territories have varying rules on when consent from co-owners of IP needs to be obtained for another co-owner to grant non-exclusive and exclusive licences. In the United States, for example, each co-owner can exploit a patent and grant an exclusive licence without the consent of co-owners, blocking them from personally using the patent.

To encourage innovation, Mr Arrowsmith believes there needs to be a liberal attitude to the movement of ideas and sharing IP. What this would look like on a global scale is open to debate.

is critical for successful manufacturing. While the company has an intimate knowledge of photonics manufacturing, it doesn't own any manufacturing facilities and instead contracts out the production, known as a fabless operation. This means the company has to share its IP in full with the partnering foundries.

One of the more effective ways to drive innovation through collaboration is by licensing IP assets. "Startups, in particular, underestimate the value of licensing. It doesn't get talked about enough," says Merlie Calvert, a former lawyer and founder of Farillio, a legal technology platform which aims to simplify the law for entrepreneurs by providing them with all the legal documents and guidance they need to grow their business.

"Experts will tell you to protect your IP, and you should, but it's only a step towards making real value out of creativity. When you license creative ideas, products and technology, you turn them into real assets, market testers and door-openers for bigger sales, orders and partnerships," says Ms Calvert.

According to Mr Arrowsmith, licensing is how university technology transfer departments can effectively commercialise the innovations developed on campus. The university itself is not in a position to implement the technology in a consumer product, so they collaborate with a company and provide them with a licence, enabling the university to share some of the financial rewards.

"When it comes to medtech, academic research is treated much like big pharmaceutical discoveries. The difference is that drugs don't need to be maintained, upgraded or compete in app store," says Shuhan He, a doctor and founder of Boston-based startup Conduct Science, which commercialises high-quality equipment and digital tools made by scientists for scientists. "An infrastructure has to be in place to rapidly innovate and be able to upgrade for every smartphone model, iOS release or new programming language. This requires a successful tech transfer."

The standard model of patenting and licensing can be a drawn-out process that involves lengthy negotiations and incurs high costs, which will often prevent academic discoveries from being commercialised, explains Mr He. His company aims to simplify the process. It offers to take on ideas and designs, and then pays the inventors and researchers royalties.

While inventors that don't have the resources to secure patent rights can still benefit from sharing their IP, failing to acquire a patent can often affect the technology's commercial viability and longevity; companies may be wary of disclosing technological developments in case third parties decide to take the invention for themselves. The World Intellectual Property Organization stresses that IP protection, especially patents, are crucial for acquiring technology through licensing.

Even with patents in place, companies still have to be mindful that the IP they're sharing is not undermining their ability to compete.

"It's impossible to have your cake and eat it," says Helen Scott-Lawler, partner at Bristol-based IP law firm Burges Salmon. "Most companies will take care in what IP they share. They won't give away unprotected crown jewels, or trade secrets, but they will share elements of their IP that don't encapsulate all their market differentiators."

WHEN GRANTING OR TAKING A LICENCE IS NOT ALWAYS APPROPRIATE

According to recommendations from the Intellectual Property Office

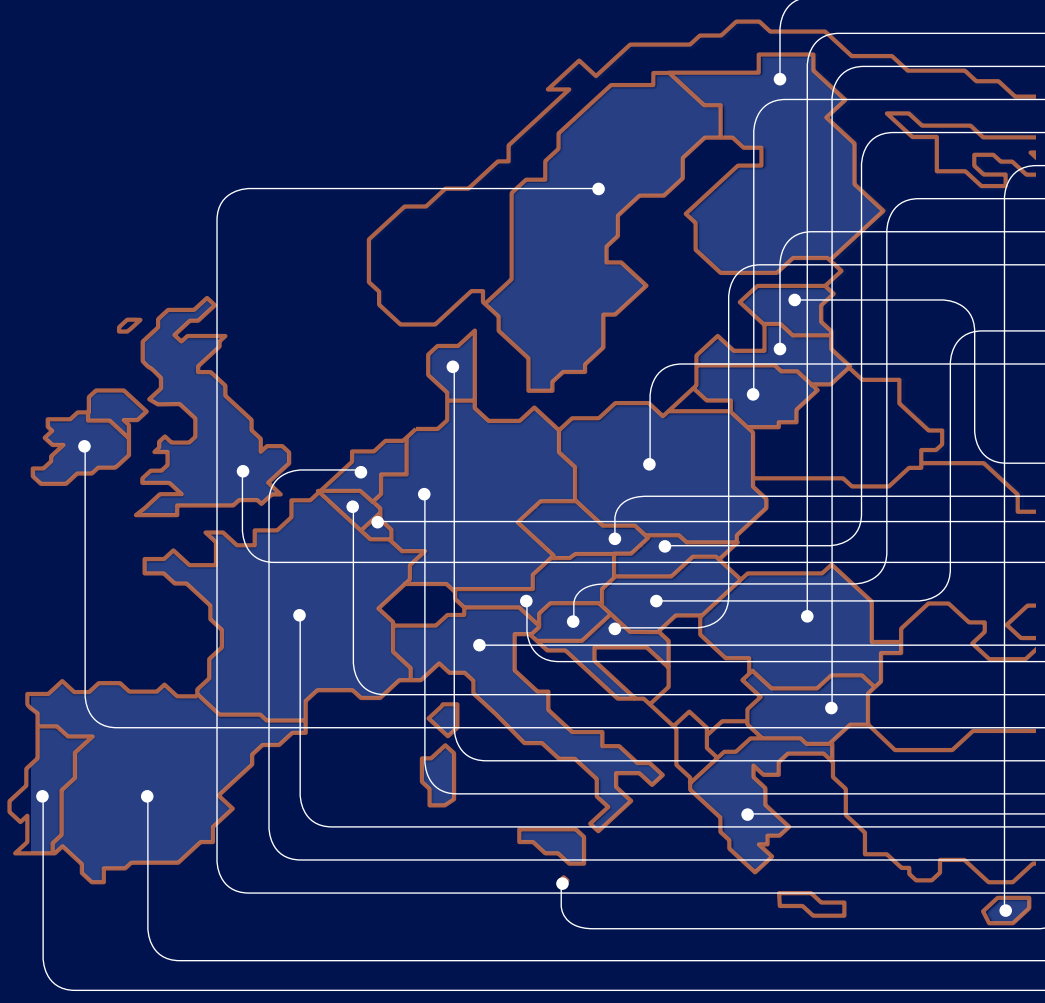
1. A business, which has the ability to commercialise its own IP, may better achieve its objectives by keeping that IP to itself
2. Businesses should be wary of licensing their IP in circumstances where the value of that IP may be diminished
3. The prospective licenser may want to charge royalties that are too high and may restrict the growth of the business
4. The IP to be licensed may be too weak – if a competitor could work round it and take away market share, it may not be worth investing in a licence
5. The IP to be licensed may not be valid, for example where a patent is open to challenge or because the prospective licensor does not own and does not have the right to license the IP

THE COST OF COUNTE

Globalisation and flourishing international trade has opened the door to economic growth, but also counterfeit goods. What is the bottom-line cost of fake goods to economies across Europe?

DIRECT INFRINGEMENT ECONOMIC COSTS VARY BY COUNTRY

Percentage of sales from 2012-2015; latest available data



Romania
Bulgaria
Lithuania
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Latvia
Croatia
Greece
Hungary
Poland
Malta
Spain
Estonia
Czech Republic
Portugal
UK
Italy
Luxembourg
Austria
Belgium
Ireland
Denmark
Germany
France
Netherlands
Sweden
Finland

TOP COUNTERFEIT/PIRATED PRODUCTS

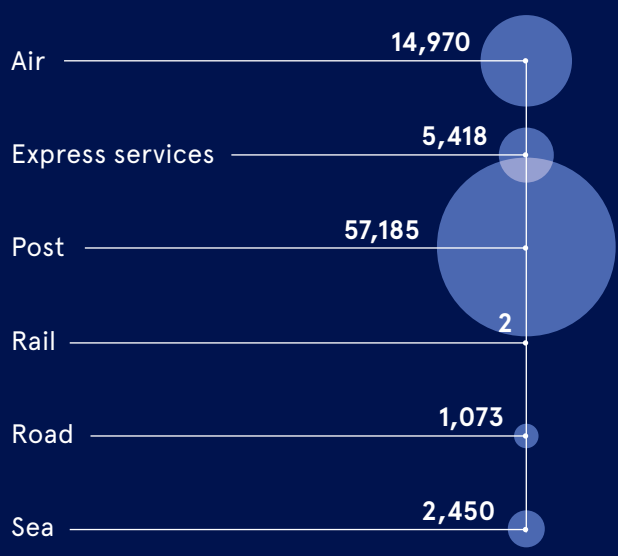
Percentage of UK trading standards authorities investigating the following

1	Cigarettes/tobacco	81%
2	Clothing	78%
3	Cosmetics/make-up	52%
4	Footwear	50%
5	Alcohol	44%
6	Watches and jewellery	43%
7	Perfume	39%
8	Electrical goods	37%
9	Toys	37%
10	Fake labels/packaging	23%

UK Intellectual Property Office 2018

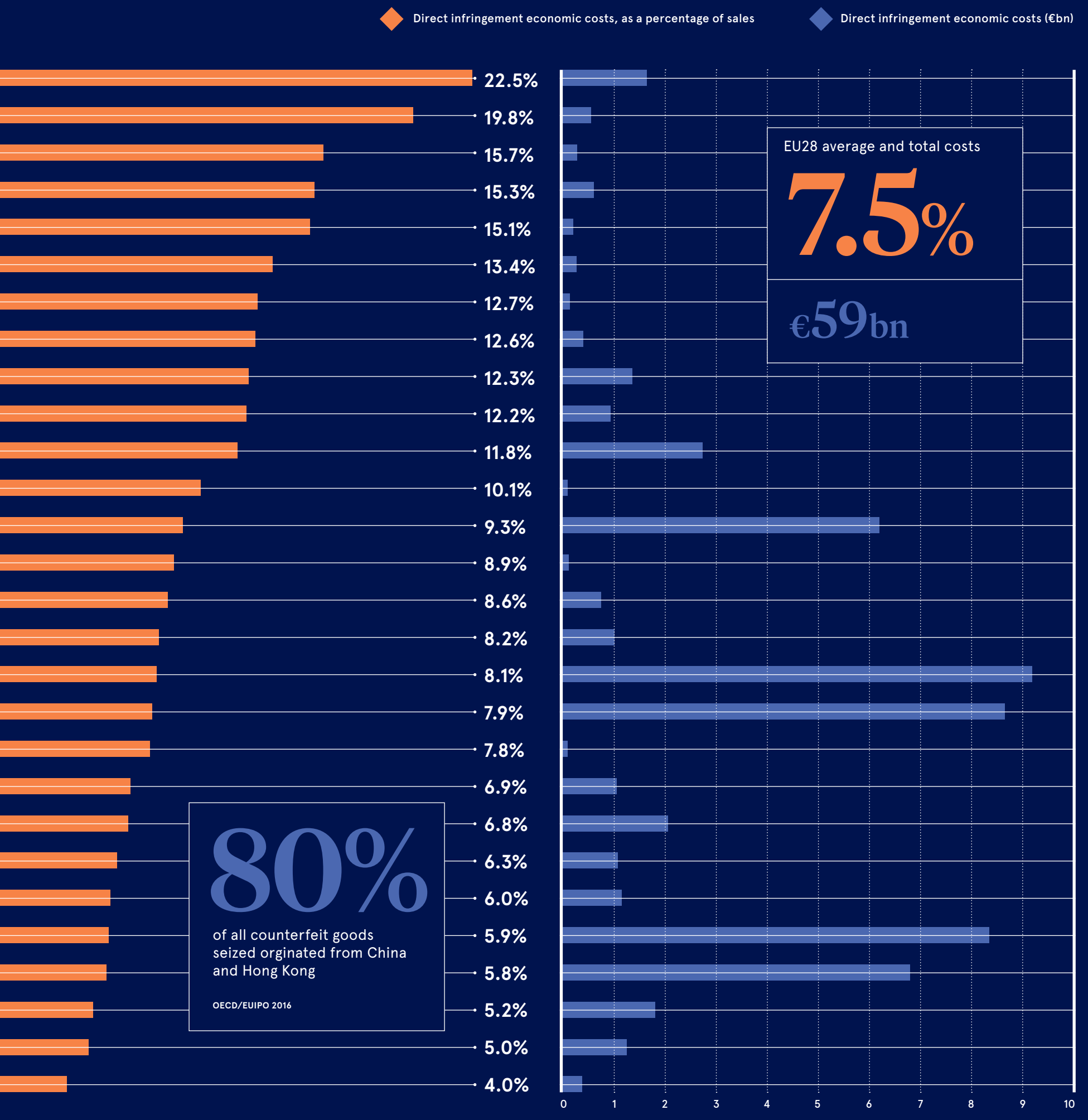
TRANSPORTATION OF COUNTERFEIT GOODS IN EUROPE

Number of seizures



European Commission 2015

RFEIT GOODS



80%

of all counterfeit goods seized orginated from China and Hong Kong

OECD/EUIPO 2016

EUIPO 2018

thevisualiza/Unsplash

ARTIFICIAL INTELLIGENCE

Machine-generated ideas raise questions over ownership

When artificial intelligence is deemed the source of a new idea or creation, it causes a legal grey area over ownership rights that will only become harder to define in the future

Emma Woollacott

In 2016 *The Washington Post* unleashed a new reporter on the world, an artificial intelligence (AI) system called Heliograf.

In its first year, it churned out 300 short reports on the Rio Olympics, followed by 500 brief articles about the presidential election, which clocked up pretty good engagement online.

Meanwhile, pharmaceutical companies are increasingly turning to AI to drastically speed up the process of discovering new drugs, analysing huge quantities of data to come up with new molecules that could potentially have a therapeutic effect.

It's moves like these that have led some to suggest that, one day at least, AIs might be deemed owners of copyright or other intellectual property (IP).

However, according to most legal and technology experts, this scenario is a long way off. "From my perspective, at present AI is little more than a tool that can be wielded by the creator of a creative work or inventor of a new technical innovation in the same way a paintbrush is wielded by an artist or a CAD [computer-aided design] tool by an inventor," says Jeremy Smith, chartered patent attorney and partner at IP law firm Mathys & Squire.

This is currently the way the law tends to see it, although different legal systems have different interpretations of who exactly is holding the paintbrush.

"The UK has a different approach to AI-generated copyright; the author is the programmer," says patent attorney Peter Finnie of law firm GJE. "In America, the person who conceives of the invention is the inventor; the programmer doesn't know what the answer is going to be."

In any case, say experts, it's not clear that AI could carry out all the currently understood rights and obligations of an IP owner.

"With patent ownership come certain obligations and responsibilities or at least opportunities to exercise these. For example, to enforce the rights awarded, the owner can sue for infringement or at least indicate a willingness to do so to maintain exclusivity," says Julie Barrett-Major, consulting attorney at AA Thornton and member of the Chartered Institute of Patent Attorneys' International Liaison Committee.

"To ensure this option is maintained throughout the exclusivity period, the patent must be renewed at regular intervals, and there are other actions that need to be taken to ensure the rewards are not diluted, such as updating the government registers of patents with details of changes in ownership details, informing of licensees and so forth."

Awarding IP rights to AI could lead to the question of whether an AI could then be liable for infringement of other IP owners' patents, including patents held by other AIs.

Currently, IP rights are restricted to "natural persons" and "legal entities" such as companies, and things look set to stay that way. Last year, after receiving a strongly worded letter from more than 150 experts in AI, robotics, IP and ethics, the European Union abandoned plans to consider the creation of a third type of entity, an "electronic personality".

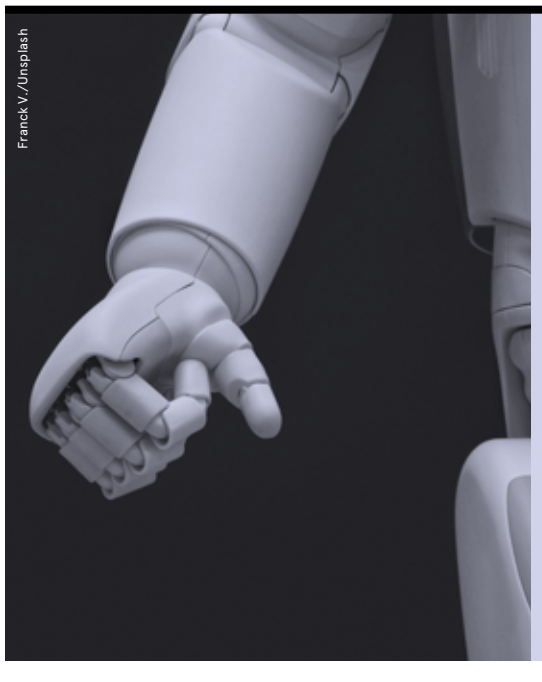
"I think that as things stand, an AI entity can only ever be considered a joint-inventor, as without human intervention on the training data and algorithms, it would churn out rubbish, like a thousand monkeys with typewriters," says Mr Finnie.

It's possible to imagine a future in which AIs have achieved human levels of intelligence and self-awareness, but nobody thinks this will happen soon. In a book published last autumn, entitled *Architects of Intelligence*, futurist Martin Ford asked prominent AI researchers when they expected so-called "artificial general intelligence" to appear. And while Google's Ray Kurzweil suggested it could be as soon as ten years' time, most put the date at a hundred years or more away.

"We can all indulge in a little bit of science fiction and fantasising, and imagine a machine, the singularity, with genuine artificial intelligence, but the fact is that it's not here, so we don't have to deal with it," says Francis Gurry, director general of the World Intellectual Property Organization.

"I'm a great believer in not crossing bridges until we come to them. I don't see any reason why we should be attributing any rights that are associated with human beings to machines."

> **An AI entity can only ever be considered a joint-inventor, as without human intervention on the training data and algorithms, it would churn out rubbish**



Franck V./Unsplash

Will machines ever own IP?

While AIs currently can't own IP rights, there are some who believe the time may come when they do.

As Alexander Korenberg, partner at IP law firm Kilburn & Strode, points out: "An AI is not a 'person', so it cannot own IP any more than it can own any other kind of property, a house, possessions, whatever. But it can already invent, create music and art, even write books or at least short texts."

And it's certainly possible that, one day, the concept of "electronic person", thus far rejected by the European Union, might come to exist.

"I could envisage a situation, albeit unlikely, in which for public policy reasons it may be considered appropriate to legislate to allow an AI entity to be a named on a patent application as contributing to an invention to make it clear to third parties the invention was made using an AI tool," says Mathys & Squire's Jeremy Smith.

To hold IP rights, an AI would need to hold all sorts of other rights as well, legal and otherwise. And this has already happened, although it's not likely to start a trend. In late-2017, Saudi Arabia announced that it was awarding citizenship to a not particularly advanced robot called Sophia.

The announcement wasn't hailed as a step forward in human rights. As Twitter users were quick to point out, Sophia enjoyed rather more rights than the country's women or migrant workers.

However, the robot's inventor Dr David Hanson has claimed that other nations may follow suit in granting human rights to AIs, predicting: "There will come a tipping point when robots will awaken and insist on their rights to exist, to live free and to evolve to their full potential."

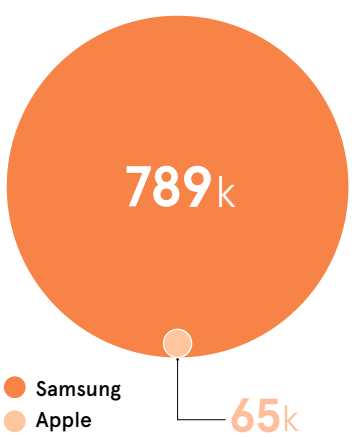
Commercial feature

Intellectual property for the financial sector

Up to 80 per cent of a company's value is made up of intangible assets, such as trademarks or copyright, which can be hard to identify or quantify. But there's one intangible that can provide a rich source of corporate information: patents

For more than 200 years, registered patents have built into an encyclopaedia of innovation across the world. Mining this intellectual property (IP) data can tell you where a company is going, what technology is worth an investment and who are the most prolific emerging inventors. It can tell you who your closest rivals are or find technology that could jump industries. It helps you to spot the failing companies or the startups with the brightest prospects. Patent data has predictive power for more than ten years into the future.

Number of patent applications per company



>134m

individual patent records

But patents are also notoriously messy to analyse, not only very data heavy, but also fiendishly complicated. Companies put a good deal of effort into disguising their patents by registering in different jurisdictions or under different subsidiary names. They dream up ways to hide what technology is being revolutionised, for example a pen is renamed a scribing device or a cylindrical ink delivery mechanism.

It takes time and effort to clean the data enough to use it. PatSnap, the IP platform created by its founder and chief executive Jeff Tiong in 2007, has more than 300 data scientists and engineers dedicated to this task. Mr Tiong's vision was to develop a database that demystified the complexity of the data and allow any business professional, scientist or research and development engineer fast, simple and direct access to global IP data.

The sheer quantity of information is astonishing; Apple has more than 65,000 patent applications and Samsung has over 789,000. Each patent will have up to 110 datapoints that need to be aligned and standardised. With more than 134 million individual patent records, and over 10,000 added a day, the scope of this dataset is vast. PatSnap enables you to search for highly specific data without any prior knowledge of IP using powerful advanced machine-learning and semantic and image-searching.

Patent data can yield astonishing insights. Looking at where patents are registered can help identify where a company's geographic focus lies or which locations it believes are set for growth. By focusing on the technology, it's possible to determine when a company steps outside its core competencies, which could indicate a strategic shift towards diversification or a move into a new tech space.

While patents can offer this insight, levels of knowledge about how to use the information to strengthen innovation remains low. To address this gap, organisations are encouraged to raise awareness and understanding of IP. It is one of the reasons why PatSnap offers an online academy available to everyone with an interest in this area.

Every patent has a globally recognised taxonomy, which enables you to see the exact industry areas which a company is moving into. For instance, 52 per cent of Glaxo's patents fall under medicinal preparations with organic active ingredients, whereas Pfizer has 67 per cent of its portfolio in this area. Patents bring clarity to a company's core competencies and help build a better picture of the business.

Dive a little deeper and you can find even more. A patent is legally required to cite the technology on which it was built, so you can map the connections between companies. Patent data can show which companies are close in terms of technology – invaluable information for investors trying to diversify a portfolio – or which patents are the most influential or have the furthest global reach.

> **When you are looking to invest or advise, patents are the information goldmine you need**

Following patent data over time can provide key business insights, such as preparing for an initial public offering or expanding into new markets. For example, Apple began filing patents for wearable technology in 2013; the Apple Watch went on sale in 2015. It took Dyson four years from its 2012 patent filing for hair dryers to launch the Supersonic Hair Dryer. Looking at patents can enable product trends to be spotted ahead of commercialisation.

Patent analysis is particularly useful when looking at startups. According to the US Patent and Trademark Office, startups that win a patent have, on average, 55 per cent higher employment growth and 80 per cent higher sales growth five years down the line. Winning a first patent facilitates access to funding from venture capitalists, banks and public investors.

Turn this on its head: for startups looking for funding, a strong intellectual portfolio can be a big tick in the venture capitalists' box. Showcasing a comprehensive IP strategy and being able to articulate how it stands up to the competition may be the difference between success and failure.

Sometimes creative patent analysis has cross-industry applications. Who would think that technology developed by a peanut butter manufacturer to stop oils collecting at the top of the jar would have an application in the paint industry? But that technology enabled one premium paint producer to develop a range of paints that did not need to be vigorously stirred before use.

The sheer wealth of information that can be gleaned from patent data is astonishing, but even more incredible is it is still an underutilised resource, particularly by the financial services industry. Although, according to Richard Edwards, financial services director at PatSnap, the level of standardisation that is possible through machine-learning techniques means this area is growing fast with both asset managers and sell-side researchers.

> **Mining this intellectual property data can tell you where a company is going, what technology is worth an investment and who are the most prolific emerging inventors**

"We have seen an increasing interest in the potential value of this virtually untapped resource among investors and data-hungry researchers," he says.

With so much information it's easy to see why it has been hard to slice and dice in the past, but with the development of PatSnap's machine-learning and the patient establishment of a global databank of patents, the analysis is simply a few clicks away. When you are looking to invest or advise, patents are the information goldmine you need.

For more information please visit www.patsnap.com

patsnap

GLOBAL IP

Five trends shaping the global IP landscape

From efforts to take down online fakes to political posturing over China's approach to intellectual property rights, here are some of the major issues affecting the world of IP

James Gordon

EU unitary patents are simplifying the system

The good news is the UK government has signalled its commitment to remain part of the Unified Patent Court (UPC), a new one-stop shop for patent litigation in the European Union, even after Brexit. However, post-Brexit there are doubts that EU member states will allow the UK to be in the UPC, while a separate legal challenge in the German Constitutional Court means the future of the UPC, which has yet to begin proceedings, is uncertain. But what does all this mean for the global intellectual property (IP) economy?

Professor Duncan Matthews, director of Queen Mary University of London's IP Research Institute, explains: "The UK is a global centre of excellence in the life sciences. The loss of the UPC would take away the opportunity to reduce legal costs. Without the UPC, life sciences companies would have no choice but to continue litigating their patents in national courts in the EU, which is expensive."

However, Professor Matthews thinks non-EU companies would actually be the big winners from the UPC and this would be good for the global economy. "The UPC and the new way of obtaining a unitary patent in the EU would simplify the system a great deal. That removes a key barrier to entry for non-EU companies," he says.

Collaboration is combating ecommerce counterfeiters

Ecommerce is booming. But sites, which transcend borders and are therefore very difficult to police, have also provided counterfeiters with an opening to peddle fake goods. Latest figures reveal that 70 per cent of counterfeit goods are sold online, which creates a headache for IP lawyers. So how serious is the problem?

Tania Clark, president of the Chartered Institute of Trademark Attorneys, says: "Our clients, who range from small businesses to multinationals, are telling us that thanks to a collaborative approach around IP protection involving both brands and the ecommerce platforms, it's becoming much harder for counterfeiters to flourish.

"Why? Because eretailers like Amazon have created highly sophisticated bulk take-down mechanisms which, providing the trademark is registered, can remove a counterfeit seller from the site in seconds, not just nationally but globally. This would, of course, be much more challenging in the brick-and-mortar retail world."

However, Ms Clark believes that to combat counterfeiters in the long term, all parties need to continue to be proactive. "Those selling fake goods are very innovative. They often try to escape censorship by copying a logo, but not the brand. However, this can be equally damaging for brands and provides evidence that take-down tools need to keep evolving."

Views are slowly changing on China

It is the world's largest manufacturer, but China's position as a world-class exporter is being threatened by Western governments, most notably the US administration which placed sanctions on China last year for an alleged breach of IP. But Gordon Harris, head of Gowling WLG's global IP division, thinks China's reputation for IP theft is now largely undeserved.

"China seems to be the victim of political paranoia right now," he says. "But the West should realise that China is a world economy, trading on the world stage, and a country with a burgeoning internal consumer market. It has substantially invested in its IP infrastructure, and has highly developed and sophisticated IP regulatory frameworks in place. There are three specialist IP courts in Beijing, Shanghai and Guangzhou, for instance, and unlike most Western countries, China also has a customs system adapted to stop counterfeit goods being exported."

With China fast becoming a leader in green technologies and artificial intelligence, Mr Harris thinks forging a collaborative information-sharing environment around IP makes much more sense than punitive trade tariffs. "By working together to spread best practice, the global IP economy will only benefit," he says.

Tomorrow's technologies will depend on commercial licensing

Digital technology is reshaping the world. In the future, 5G wireless networks will provide the bedrock for connected and driverless vehicles to talk to each other, to us and to the surrounding roadside infrastructure. But as the technology gathers pace, is there a danger that IP legislation won't be able to keep up?

Joel Smith, head of IP at Herbert Smith Freehills, says whether it is 5G or self-driving vehicles, IP regulation needs to evolve at the same time as the standards that will underpin the technologies.

"Why? Because the autonomous vehicle landscape is vast," he says. "It's not just the vehicle itself, but the surrounding intelligent infrastructure that needs to be taken into account. For passengers to be safe, it needs to work in harmony. From a commercial perspective, it can't do that if each company operating in the ecosystem enforces a patent that restricts others from using its technology.

"Global and regional legislators must encourage the value of commercial IP licensing on a fair, reasonable and non-discriminatory basis. Companies must understand that their technologies are interoperable and framing sensible licensing agreements is the best way to avoid log jams and expense in the courts, and to ensure innovation does not fall behind."

Blockchain may become panacea to heal all IP ills

In many sectors, including finance, transport, manufacturing and logistics, blockchain is heralded as a game-changer, but can the distributed database technology, which its proponents say creates a trusted single version of the truth, revolutionise the global IP economy?

Hayleigh Bosher, lecturer in IP law at Brunel University London, is hopeful, but says because IP is such a complex and nuanced field, she doubts it will be as effective as in the insurance industry.

However, Dr Bosher thinks blockchain could be utilised to good effect in licensing. "There are millions of copyright works around the world which cannot be used because nobody knows who owns them or when the author died. Given that these works can be utilised 70 years after the creator's death, in the future blockchain could help to establish this information much more quickly and efficiently than a human ever could, providing all the data was digitalised of course," she says.

Dr Bosher also believes that blockchain could help performance rights agencies that own blanket licences to collect royalties for their members. She says: "At a hotel, for example, blockchain could calculate how many times a music compilation has been played and a smart contract could pay each artist as and when their song is featured."

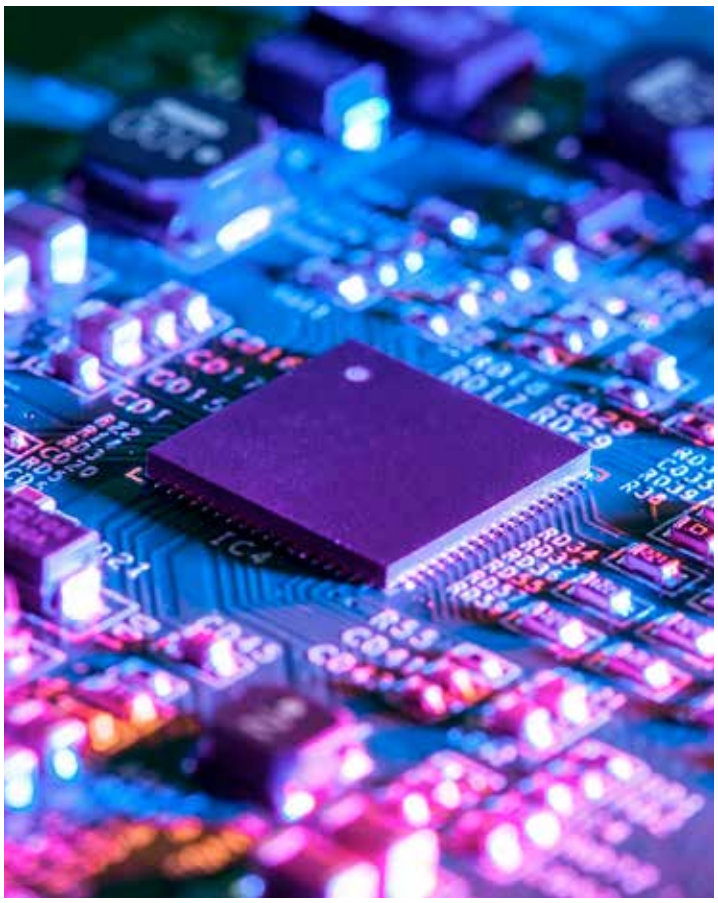
Rise of AI set to create unique IP challenges

Firms must develop a comprehensive intellectual property strategy for software platforms using artificial intelligence

There is no question that the proliferation of artificial intelligence (AI) and machine-learning is fundamentally transforming how many industries operate. From insurance to healthcare and manufacturing, embracing the potential of AI is no longer a competitive advantage, but rather a business necessity for survival in an increasingly competitive global marketplace.

Yet, there are considerable commercial challenges of actually using AI in practice, especially in the interaction between how and when users of AI-based solutions and their AI suppliers interact. The vast majority of standard software agreements simply don't cover many of the often complex areas AI reaches.

"The big difference is that with software you can explain to a developer what you want to do and they will create a piece of software to achieve that, which can be clearly identified, but with AI that isn't the case. Fully understanding what constitutes an AI solution and distinguishing it from the customer's own data is a much more complicated process," says Tom Lingard, partner and head of intellectual property (IP) at Stevens & Bolton, a full-service UK law firm.



Unlike traditional software, it is difficult to delineate clearly which aspects of the trained AI are brought by the developer and which are specific to the customer, as well as the extent to which those should be owned by either party. It is not easy to separate AI collaborations and interactions, leading to potential IP liability and ownership problems.

A multitude of IP issues are set to arise as AI continues to be instrumental in creating innovative systems and it becomes extremely difficult to discover what is being provided by each party to the transaction. If an AI platform or solution is being created as part of a collaboration then there is a question around to what extent the person or company providing the data should share ownership of the finished platform.

> **Enterprises are beginning to realise that AI contracts require a different approach to traditional software agreements**

Once the AI system is up and running, a wide-ranging conversation around which party is providing the data and training the AI needs to happen, alongside to what extent data and analytics can be extracted or taken away if the collaboration comes to an end. Only a few industries won't need to plan for the legal risks associated with IP and AI.

"In theory, AI platforms can be helpful to any type of industry. There are obviously some where it is going to be inherently more important, especially those operating in highly technical areas where AI is being used to analyse large amounts of data to support or generate patentable inventions," explains Mr Lingard.

There is also a risk in terms of where the data for training AI is coming from. Some AI solutions may make use of data mining to uncover relevant data from third-party sources, which may not have given permission for that work to be copied.

As the AI system itself can't incur liability, the parties involved in its creation and use must be clear about who would be liable for IP infringements as they surface. In this complex IP environment, Stevens & Bolton can help firms develop a comprehensive IP strategy for AI platforms, which helps prevent damaging IP breaches and protects innovative AI solutions as they are built.

"Some clients will be in the vanguard of AI projects with others being approached by firms offering AI platforms to improve their day-to-day business. We understand where clients are on this journey and equip them with the tools to recognise how these risks can apply to their business," says Mr Lingard.

Businesses will need advice on everything from how correctly to ascertain IP ownership to defining liability conditions and discerning which party is responsible for AI actions that are not 100 per cent controlled by direct human input.

"Enterprises are beginning to realise that AI contracts require a different approach to traditional software agreements. AI has the potential to be very useful for businesses, but its unique IP challenges need to be addressed or costly IP issues may arise," Mr Lingard concludes.

For more information please visit www.stevens-bolton.com

STEVENS&BOLTON

Saketh Garuda/Unsplash

TRADEMARKS

IP can make or break your brand

As arguably the most important assets a company can own, protecting trademarks must lie at the heart of a successful brand strategy

Dan Thomas

Trademarks can encapsulate all a brand represents in a single design or phrase. So how do you ensure you have the right legal cover in a world where firms must continually reinvent themselves to keep consumers engaged?

Take Gillette's decision last year to update its famous "The best a man can get" slogan to "The best a man can be" to make its shaving products reflect a more modern view of masculinity in the age of #Metoo.

Or the way Channel 4 and Google modify their iconic logos on a regular basis to keep their brands feeling fresh.

"Brand protection and enforcement strategies are designed to create an exclusion zone around the brand to enable the client freedom within that zone to build and develop the brand and do what they want with the brand," says Lee Curtis, partner at law firm HGF.

"The problem is while the marketers like fluidity, the law likes certainty, so it's about finding a happy medium."

Firms considering whether to protect a new mark or logo, or amend an old one, should ask themselves if it is going to be around for a long time as protecting it will come with costs.

And you can only register a trademark if it is inherently distinct or has acquired distinctiveness through use, which makes it much harder to protect a phrase than a logo or brand name, as phrases tend to be more descriptive.

If a firm does want to register a trademark, it must first check no one else has the rights to prevent them using it, although companies often invest time and money in development only to find a mark has already been taken.

"It's about making a trademark effective commercially; you identify your target customer, then create a trademark that would resonate with them," says Jerry Bridge-Butler, chartered trademark attorney at Barren Warren Redfern.

"That's a creative job, but the important thing is the legal view: am I free to use this and can it be protected?"

The next, and perhaps harder, job is ensuring your rights are protected and any potential threats are headed off. Take the way many Premier League football clubs have changed their logos in recent years to increase IP protection, thereby bulwarking lucrative merchandise sales.

"Words like yo-yo and sellotape were trademarks once, but they became generic in various countries and the trademark holder lost their corresponding registered rights," says Kathy Berry, an intellectual property (IP) lawyer at Linklaters.

"And if an infringer takes your marks, but makes lower-quality products or has reputational issues, it can affect your brand."

You may have no choice but to take action against potential infringers, however it's worth remembering that a heavy-handed approach to enforcement can undermine your brand strategy.

Mr Curtis gives the example of supermarkets, which are often accused of making products that look similar to branded goods. The risk for those brands is that if they supply a supermarket and then they sue them, they may put their own businesses in jeopardy.

"Commercial reality comes into play and the supermarkets are experts at sailing close to the wind in terms of what is allowed," he says.

Firms must also think about what enforcement might mean for their public image. For example, if a big company takes action against a smaller one that infringes its IP, it may end up looking nasty in the eyes of its customers, and in the age of social media that can quickly turn into a backlash.

"If a big consumer brand name tries to stop a small local company using a name, that small company can immediately go on social media and say it's ridiculous. Due to the fame of the big brand, the media can pick up the story," says Mr Bridge-Butler.

"Legally there probably is a case, but to the public at large it can look silly, as most people would say they wouldn't confuse the two names."

The key, Ms Berry says, is to be strategic, keeping protection at the core of your brand strategy and taking action when necessary. The risk comes from underestimating the importance of protecting and defending your trademarks, something smaller companies are often guilty of partly because they lack in-house legal teams. "It usually ends up being a false economy," she says.

Mr Bridge-Butler points out that despite the challenges of protecting IP, companies can take cheer from the fact copying rarely leads to mass commercial success.

"Branding is the most important thing a business has and, if you get it right, it will maximise your growth," he says.

"But who would fall in love with a clothing brand that tried to protect a phrase which really has nothing to do with it? Or if you rip off something and tweak it slightly, is that really branding at the highest level?"

52%

of overall enterprise value for all publicly traded companies worldwide is attributed to intangible assets

Brand Finance 2018

74%

of trademark professionals working in-house or for external legal teams said they experienced brand infringement over the past year

40%

said levels of brand infringement had increased over the past 24 months

Brand Finance 2018

> **The problem is while the marketers like fluidity, the law likes certainty, so it's about finding a happy medium**

OPINION

‘Does the idea of a 20-year patent term still match the pace of technological and commercial development?’

In 1965 co-founder of Intel Gordon E. Moore proposed his famous law that the number of transistors on integrated circuits doubles about every two years. Moore’s law continues to hold true today and there are parallels across a wide range of technologies. With such an exponential increase in the development of technology, can the patent system keep up?

Since the 1970s, we have seen successive technical revolutions in fields such as organic chemistry, biotechnology, nanotechnology, information technology and now artificial intelligence. Lawmakers have responded to some of the legal, ethical and policy issues that these raise, for example with the 1998 European Union directive on the legal protection of biotechnological inventions or the development of case law to accommodate the increasing importance of data processing across all technical fields.

It is not only the law that needs to adapt. New fields of technology require patent attorneys with the scientific skill to understand and protect them. Combining science and law in the role of a patent attorney has in the past been a unique opportunity for scientists with a broad skillset, but the options for such people are also increasing.

Competition for graduates with the required combination of technical capability and linguistic skill that make a good patent attorney has increased as tech companies provide exciting opportunities that go way beyond the traditional research and development team. If we are to continue to provide strong legal protection for the fruits of technological development it is important that the patent attorney career remains attractive to the brightest and the best.

The term of a patent is 20 years from the date it is filed. The mighty Google was less than one year old 20 years ago. Does the idea of a 20-year patent term still match the pace of technological and commercial development? Patent owners decide each year whether to pay the annual renewal fee to keep their patent in force. According to data from the UK Intellectual Property Office, the payment of renewal fees peaks at ten years into the life of UK patents, which suggests that after ten years some patents start to lose their relevance to the business.

However, in fields such as pharmaceuticals, the time and investment required to develop a drug that is safe and approved for marketing can still require the full term of a patent to achieve the exclusivity and return that makes such development commercially viable. Across different fields of technology there is no one-size-fits-all patent strategy. Ten years is still a long time in technology; Twitter is only 12 years old.

Increasingly, products have become more complex. The ubiquitous mobile phone includes components developed and supplied by a range of often competing technology companies that combine to provide the powerful functionality we have come to expect. Patents can actually help foster such co-operation by clearly demarking the technology of each contributor; good fences make good neighbours.

For telecommunications standards, such as Bluetooth and 4G, patent owners declare their “standard-essential” patents to the group to receive a return for their technological contribution, while maintaining a service that will operate across the devices of all providers. Patent strategies like this have developed to accommodate increased technological complexity.

It took 75 years for the total number of granted US patents to reach one million in 1911. By 1991 the number had risen to five million. US patent 10,000,000 was issued in 2018, only 27 years later. It seems the rate of patenting is also increasing exponentially. The patent system is keeping up, at least for now. ●

Matt Dixon
Chartered patent attorney
and council member,
Chartered Institute of Patent Attorneys

Commercial feature

Brexit and a pan-European approach to brand protection

Whatever shape Brexit takes, brand holders should look for advisers with pan-European expertise

The continuing uncertainty over Brexit is causing a growing number of companies to rethink how they manage their brand protection. A no-deal exit on March 29, 2019 now looks less likely, but even if an agreement of some kind is reached, the UK’s departure from the European Union and the EU’s single trademark registration system will have a profound effect on British businesses.

Assuming that Brussels and London do manage to reach an agreement, UK businesses will still have to change the way in which they manage their intellectual property (IP) and brand ownership.

“At the moment you can file a European trademark which is valid across the EU,” says David Potter, head of the trademarks team at HGF, a pan-European IP law firm with offices in the UK, The Netherlands, Germany, Austria, Ireland and Switzerland. “This has been very popular because for one fee, at a relatively low cost, you can get registration covering the whole of the EU and all the member states including the UK.”

If a deal is reached, then from January 1, 2021 the UK will no longer be part of this arrangement. There is an agreed process that will allow UK rights to be created that mirror EU rights. However, this relatively simple exercise could be an administrative burden for brand owners with numerous EU trademark registrations.

After Brexit, both EU and UK trademark registrations will have to be filed, and brand owners will be well advised to identify, retain and brief law firms that have trademark expertise across the EU and the UK. As well as being more time consuming, it will also add to costs. And yet brand protection is arguably more important today than ever before.

“Trademarks are one of the most valuable assets that any company has these days,” says Mr Potter. “Because of the way businesses are changing, these intangible assets are becoming increasingly important. IP and in particular the goodwill and reputation associated with their brands accounts for a growing proportion of the value of many companies.”

The prospect, in a post-Brexit world, of the additional costs and management burdens required to protect their brands throughout the whole of Europe, including the UK, is obviously unappealing for any business leader or their in-house legal counsel. Already many law firms are trying to work out how to respond to this new challenge and to demands made by their clients looking to protect their brands across the whole of Europe.

Some law firms are aiming to create alliances and working relationships with IP specialist law firms in France, Germany, The Netherlands and other major European states. However, developing these arrangements will also take time and is likely to lead to higher cost, which could be passed on to clients in some way.

However, an alternative is already available. Mr Potter says: “Even before Brexit, because of the increasingly international dimension of IP and brand management, HGF was expanding its presence and expertise across the EU and Switzerland; more important for when the UK is positioned outside the EU.

“This one-stop-shop approach is proving increasingly attractive to a growing number of companies that are keen to get ahead of the game and protect their IP whatever the nature of the relationship that evolves over the next few years between the UK and EU.”

Mr Potter is conscious that Brexit has presented business leaders with a dauntingly large inbox. However, he argues that protection of their brands should be a priority. “Now is the time to find a law firm that can manage and protect brands seamlessly across the UK and EU,” he says.

123k
EU trade mark registrations were filed in 2018
EU IPO

Compared to...

84k
national UK trademark registrations in 2018
UK IPO

HGF was the biggest filer of EU registrations from the UK in 2018

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