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Subject:	Croatian Presidency conference 'Intellectual Property for the European Union in a World of Challenges' (Zagreb, 19-20 February 2020) - Final report

Further to the summary report in document 6895/20, the Presidency has prepared a comprehensive report on the expert conference 'Intellectual Property for the European Union in a World of Challenges', held in Zagreb on 19-20 February 2020, and which delegations will find at annex.

ANNEX

INTELLECTUAL PROPERTY FOR THE EUROPEAN UNION IN A WORLD OF CHALLENGES

Conclusions from the Croatian Presidency Conference, Zagreb, 19 – 20 February 2020

INTRODUCTION

As a contribution to setting the agenda for further activities in the field of intellectual property in the new institutional and strategic cycle of the European Union, the Croatian Presidency organised a conference entitled "Intellectual Property for the European Union in a World of Challenges" in cooperation with partners from the European Union and international organisations in the field of intellectual property. The conference was held in Zagreb on 19 and 20 February 2020, at the dawn of the pandemic of Covid-19 disease that might have an influence on future EU priorities in the field of intellectual property.

The conference brought together eminent experts in the field of intellectual property and other stakeholders from the public and private sectors and representatives of the Member States.

At the opening, the participants were addressed by high representatives of the Croatian government, the European institutions and international organization: Ms Ljiljana Kuterovac, Director General of the State Intellectual Property Office; Mr Darko Horvat, Minister of Economy, Entrepreneurship and Crafts; Ms Nina Obuljen Koržinek, Minister of Culture; Ms Blaženka Divjak, Minister of Science and Education; Ms Amaryllis Verhoeven, Head of Unit for Intellectual Property at the Directorate-General for Internal Market, Industry, Entrepreneurship and Small and Medium-Sized Enterprises of the European Commission; Mr Christian Archambeau, Executive Director of the European Union Intellectual Property Office (EUIPO); Mr Francis Gurry, Director General of the World Intellectual Property Organization (WIPO); and Mr Antonio Campinos, President of the European Patent Office (EPO).

Opening speakers underlined the challenges that the transition to the digital economy and that technological changes are bringing to every aspect of life and society, and consequently to the intellectual property system. In such a world, many policy questions are being posed and the boundaries and applicability of the existing concepts of the intellectual property system are being put to the test. Continuous adjustment of the system is needed so as to ensure that it is still fit for purpose.

The conference dealt with two overarching themes: 1) Global and Single Market Challenges and Opportunities, and 2) Digital Economy Challenges and Opportunities.

1) Global and Single Market Challenges and Opportunities

Under this theme, special attention was given to small and medium-sized enterprises (*Think Small First*) as one of the top priorities of the Croatian Presidency, and in particular on finding more effective approaches to (existing) support activities intended to improve the use and management of intellectual property by SMEs. Furthermore, the challenges of the 4th industrial revolution in the field of patent and design protection were discussed, as well as the possibilities for the intellectual property system to contribute to the goals of the European Green Deal (*Think Big* and *Think Green*).

2) Digital Economy Challenges and Opportunities

Under this second theme, it was discussed whether it is time for a new 'governance' for data, and what issues the European data economy is facing today (*Dial D for Data*). Furthermore, in the field of copyright infrastructure (*Dial C for Copyright Data*), discussion focused on the obstacles and the best direction to take with regard to the further development of copyright infrastructure. Finally, a spotlight was put on trade secrets protection in the digital economy (*Dial 007 for Trade Secrets*), where both European challenges were tackled as well as the global dimension of this topic.

Video broadcasts of both days of the conference, all presentations and the conference programme are available at the following link: http://www.dziv.hr/en/eu2020hr/ip_conf/

PRESIDENCY CONFERENCE CONCLUSIONS

The main conclusions of the conference can be summarised as follows:

Think small first

Recent studies[1] indicate that there is strong evidence on correlations between protection of intellectual property rights and growth of SMEs. In bringing their patented inventions to the market, SMEs often opt for partnerships. Even though it is in the Single Market that they mostly look for partners with complementary resources, most often, finding such a partner in Europe turns out to be challenging.

Having an IPR is a clear signal of a firm's ability to create assets and profit from those assets in the future. Different types of IPR have different impacts in different sectors. However, using IP for access to finance is still challenging due to the difficulties in valorisation of the results of R&D and due to the legal obstacles for using intangible goods as collateral. Therefore, usually, SMEs have to sell a capital share which is mostly done by legal entities outside of the EU.

- A shift should be made from the perception of IPR as a legal issue to seeing IPR as an instrument for the growth of a business and maximisation of its assets.

- The lack of knowledge and lack of time by the SMEs indicate a need for more simplified and accessible IP information services dedicated to SMEs; the information on IP needs to be integrated into SMEs' business plans and better structured.

- At every point the information must be consistent, must be provided at the right time of the business development cycle and in a very short time; for that, it is necessary to train as many intermediaries as possible, who should speak with the same voice to achieve consistency.

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[1] EPO and EUIPO (2019) *High-growth firms and intellectual property rights: the IPR profile of high-potential SMEs in Europe*, by available at: http://documents.epo.org/projects/babylon/eponet.nsf/0/F59459A1E64B62F3C12583FC002FBD93/$FILE/high_growth_firms_study_en.pdf or at https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2019_High-growth_firms_and_intellectual_property_rights/2019_High-growth_firms_and_intellectual_property_rights.pdf;
EPO (2019) *Market success for inventions – Patent commercialisation scoreboard: European SMEs*, available at: http://documents.epo.org/projects/babylon/eponet.nsf/0/981A954C6D692D4DC125849A0054C147/$File/Patent_commercialisation_scoreboard_European_SMEs_2019_en.pdf

- Furthermore, IP advice and support should be integrated within other business support measures for SMEs. It is very important to invest into business people's education in IP matters because they are the ones best placed to integrate IP into their business strategy.

It should be noted that SMEs sometimes consider that, instead of acquiring an IPR which takes time, the fast roll-out of the product in the market is more important, to obtain market advantage in these times where changes in business are observed on a daily basis.

These conclusions reinforce the conclusions from the 2019 SMEs conference organised by the European Commission and the Finnish Presidency indicating a need to ensure that the IP system works better for SMEs in terms of easier use of IP as a lever to gain access to finance, easier commercialisation of IP externally and effective and local support to make IP part of SMEs business strategies.

Think big – an intellectual property system for a globally competitive European industry

It should be considered how to align future European Union IP policy with the new industrial strategy for the 4th industrial revolution. The conference put emphasis on patents and design in the 4th industrial revolution environment.

The aim of the new EU industrial strategy is to secure switch to green and digital economy that works for people and to secure EU global competitiveness and strategic autonomy (sovereignty), which should be mirrored by the appropriate IP framework and tools.

Numerous horizontal as well sector-specific challenges were identified. At the horizontal level, the barriers which prevent the full functionality and potential of the Single Market are, for example: insufficient degree of IP literacy and commercialisation (especially with respect to SMEs, as they are the backbone of EU industry); obstacles regarding access to and sharing of data and key technologies,;the rise of IP theft (counterfeiting, piracy and cyber theft); and divergence in respect of the global level playing field. There is also a need for improving IP governance, improving cooperation when working on common sets of priorities. At the sector specific level, a lack of initiatives and projects of common European interest and key strategic value chains to create industry alliances has been identified.

In order to tackle these challenges, the following actions could be undertaken:

- Upfront information and education need to be ensured, as well as quality strategic advice on IP management at local (national) level. In this sense, tools and systems for upgrading national level expertise should be developed and, as it has already been highlighted in the SME context, it is necessary to focus on agents from whom the SMEs seek initial IPR information (e.g. accountants).

- To improve IP governance, the EU should speak with one voice and improve cooperation when focusing jointly on EU priorities at the policy level as well as at the level of implementation; also, it is important to continue to include IP in debates on industrial policy and for IP not to be considered or dealt with in isolation.

- It is necessary to invest additional efforts in EU projects and to set up a system which enables match-making between inventors/creators, industry and the public sector, especially for EU key technologies.

Specifically in relation to standard essential patents (SEPs), reported challenges and issues which represent obstacles regarding access to and sharing of data and key technologies comprise: lack of transparency (holders declare SEPs at their own standards-development organisations (SDOs) without systematic scrutiny, and there is considerable asymmetry of information between holders and implementers); disagreement on FRAND licensing principles (diverging views on royalty calculation and licensing conditions, lack of predictability and possible abuses (hold up/hold out)); and increased (sometimes abusive) litigation.

To face these challenges, it would be useful if user-centric, online, up-to-date and complete databases of declarations at SDOs were promoted. This being said, using Artificial Intelligence (AI) as a technical tool for the first step of an essentiality analysis calls for caution; namely, preliminary experiments showed that human supervision and intervention is needed. This area will develop in the future although there are some concerns whether sufficient quality can be achieved, bearing in mind high complexity and specific expertise that is required.

Regarding design protection, there is insufficient awareness of business potential of industrial design as an intellectual property right compared to other rights and this issue needs to be addressed.

Think green – intellectual property for a new Green Deal

Transforming the EU economy with a view to an environmentally sustainable future implies a big industrial transformation and investing in green technology. In terms of patents, Europe and European investors are at the forefront when it comes to clean technologies, but their share is diminishing.

To ensure success in developing clean technologies in Europe:

- Smart policies should be set to ensure fast commercialisation in Europe, e.g. public funding should be accompanied by strategic IP advice in order to make sure that companies developing new technologies get the right protection, but also that they commercialise that IP in Europe.

- A co-creation of new (clean) technologies/innovation poses a question what kind of IP management needs to be put in place and this should be addressed.

- The focus should also be placed on the demand side of green technology (e.g. on the WIPO Green Platform[2], for every observed need there are more than 10 technologies). In this respect, more should be done to sensitise citizens about the fact that alternatives exist and are important in order to promote a demand for green technology.

- To enable the circular economy, the IP system should facilitate repair and remanufacturing.

- To address the environmental risks that counterfeited goods often entail, the focus should be placed on how to fight counterfeited goods that are particularly hazardous and on how to deal with them. This calls for rethinking of anti-counterfeiting measures whilst at the same time including the green perspective.

[2] WIPO GREEN platform - is an online market place for the green technology exchange. It connects those seeking environmentally sustainable solutions with technology and service providers. Partners that are involved are large multinational corporations, SMEs, NGOs, IP offices, environmental ministries, universities, etc. This platform constructively contributes to global policy dialogue. https://www3.wipo.int/wipogreen/en/

Dial D for data

Data is the "new oil" in this very challenging and transformative world, and the handling of data calls for caution. Due to a very broad and dynamic notion of personal data, having two data regimes, i.e. for personal and non-personal data, instead of a single regime for all types of data that would be GDPR compatible, might be problematic and not a workable solution, especially in cases of mixed datasets (combining both personal and non-personal data)[3]. Since the emphasis is being put on the potential of machine-generated data to stimulate the economy, it should be well discussed and analysed whether there is a need for a new, separate regime for machine-generated data and how it should be set out in order to be a suitable solution for the digital age.

Principles for a human-centric, thriving and balanced data economy were considered and set by the Finnish Presidency. These principles enshrine access to and re-use of data by default, managing data sharing while respecting the individual right to access and manage the use of personal data, building trust between different stakeholders and promoting innovation and societal change and up-scaling of personal and organizational skills. Future steps could consist of continuing discussions and working together with all the stakeholders in order to implement these principles in different sectors, finding new governance models and concrete solutions that are already present in different sectors.

In relation to data governance, all relevant legislative tools and policies must be coordinated and be interoperable to achieve a frictionless functioning of the Digital Single Market and to find a good balance of many conflicting but very important interests. For example, the general principle of open data policies, promoted by Directive (EU) 2019/1024 on open data and the re-use of public sector information, interferes with the concept of exclusive rights encompassed by intellectual property, in particular copyright and related rights.

[3] See more in Inge Graef, Raphaël Gellert, Martin Husovec: *Towards a Holistic Regulatory Approach for the European Data Economy: Why the Illusive Notion of Non-Personal Data is Counterproductive to Data Innovation*, European Law Review, vol. 44, iss. 5, (2019), pp. 605-621.

While this might not seem so problematic for public authorities, it might affect public undertakings competing on the market that are subject to the above-mentioned regime i.e. they must make available the data for any kind of commercial and non-commercial purposes and not exercise the right of the maker of database as provided in Article 7(1) of Directive 96/9/EC, e.g. this is especially important in the case of high value datasets which can create great additional value, but which entail huge costs of collecting and producing and in which public authorities have copyright and related rights (especially database rights).

Approaching the data economy without the participation of experts from different fields of expertise is likely to cause new or maintain existing impediments to the Digital Single Market. Therefore, in order to address all conflicting interests, a holistic approach must be taken when creating new policies and/or finding new governance models.

Although there is a broad consensus that no protection of data through an exclusive right is needed, there must be incentives for collecting/investing in data since the costs of collecting or producing them might be very high. However, undertakings that collected and/or invested in data – and therefore are controlling the data – might cause big problems in the market (e.g. foreclosure of competitors or leveraging of market power to other markets if datasets under their control are important for market entry and competition), which could ultimately lead to less competition, innovation and consumer choice.

Data governance problems could be solved to a certain extent by competition law. Nevertheless, competition law is only one policy instrument. Sector-specific regulatory regimes can solve many data access and data sharing problems in specific sectors, as they are likely to allow for much better tailored solutions based on ex-ante rules rather than on ex-post control.

To find optimal data governance solutions in a situation of the existence of different types of data, data regimes and ecosystems, the European data strategy discussion must continue and needs to encompass experts and stakeholders across different fields.

Dial C for copyright data

Continuing the copyright infrastructure discussion initiated by the Finnish Presidency, the conference brought together academia and industry representatives, national experts and European Commission, who considered what would be the next steps in the development of copyright infrastructure[4] and what should be the role of the public sector in this respect.

The reality of today is that most of the creative works are predominantly used digitally. Emerging technologies such as fingerprinting and blockchain hold out the promise of more precise and effective data identification and management.

The specificities in management of rights of various creative sectors have been recognised, which is reflected in their existing copyright infrastructures.

- While scientific publishers are already benefiting from copyright infrastructure and taking advantage of interoperability possibilities, creative sectors, such as music, visual and audio-visual, are experiencing more challenges.

- In the music sector, this is a consequence of the complexity of the sectorial ecosystems with multiple creators and layers of rights, but also a result of market friction and the reluctance of established players to take part in new initiatives.

- Visual sector initiatives – that were presented at the conference – facilitate management of rights in paintings and photography, however, data are not exhaustive and sometimes it is challenging to record it; therefore, the system has its limits.

- There are many systems of copyright infrastructure available, however, they exist in silos and for further growth it is important to achieve more collaboration.

There seems to be a consensus that data should be used to facilitate licencing and provide growth in creative industries, and particularly with the aim of benefiting individual creators, from whom the data originally stem.

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[4] 'Copyright infrastructure' is a term that is becoming widely accepted for rights management information (metadata) embedded in identifiers and connected to databases, which enable creators to communicate data on their works, e.g. credits or licencing conditions, preferably by machine readable means. Legal basis for it can be found in EU acquis, namely Article 7 of Infosoc directive (2001/29) and Article 17 of Copyright directive (2019/790).

- One of the first steps in achieving this goal is empowering the individual creator by means of raising awareness and education on copyright in general, and more specifically on the importance of registering their works. The predominant view of the stakeholders is that the development of copyright infrastructure should be voluntary, market led and decentralised, keeping in mind the specificities of different sectors.

- The role of the national public authorities and the Commission/EUIPO should be to make sure that the system as a whole works, and to encourage actions in the interest of common good.

- The next steps should be to conduct good analysis and open the policy discussion. Analysing the intellectual property and copyright aspects of the new European data strategy will be also very important in this regard. A further step in this direction is an ongoing call for tender for a study on metadata and AI by the Commission. The objective of this study will be to explore the economic impacts related to metadata management. This was welcomed at the conference as an important step in streamlining future discussions.

Dial 007 for trade secrets

Trade secrets is a tool for industries to build their competitive advantage on their innovative ideas. The importance of trade secrets is indicated by the estimated cost for Europe of their cyber-theft that amounts to about 60 billion EUR in economic growth[5]. However, this problem is global and for businesses with a global footprint it is important to have protection across borders.

Although the Trade Secrets Directive[6] comprises enforcement tools of which companies may avail themselves in case of misappropriation of their trade secrets, it still remains a challenge to prove the existence of a trade secret and the fact that it has been misappropriated. Therefore, in order to be protected, companies must undertake reasonable steps to retain the confidentiality of their information and to ensure they are being protected under the Trade Secrets Directive.

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5 ECIPE (2018) *Stealing thunder, Cloud, IoT and 5G paradigm for protecting European commercial interests. Will Cyber espionage be allowed to hold Europe Back in the global race for industrial competitiveness?*. Available at: http://ecipe.org/publications/stealing-thunder/?chapter=all

6 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, p. 1–18.

- It is essential to continue raising awareness of the existence of the enforcement tools from the Trade Secrets Directive and encouraging the companies concerned to undertake necessary measures that should include not just contracts but also adequate IP and IT policy, all of which needs to become part of their business strategy.

- It is necessary to cooperate and to assist with law enforcement globally.

It should be noted that the reality has changed and the change of technology has also profoundly changed the trade secrets environment. In today's digital world there are many players on the market who do not control the whole system of product production as they used to before. In order for companies to stay relevant and present on the market, they need to be open and to collaborate with each other especially if they are part of the same platform. It is a huge challenge in the world of the Internet of Things (IoT) to reconcile the need for companies to open up and share data in order to be a part of the ecosystem, but at the same time to be closed enough to protect their information from cyber-threats and similar illegal acquisition of their trade secrets.

- To reconcile the two needs, the discussion needs to be continued with experts of different profiles in order to better understand the problem.

In finding a solution, it is necessary to de-silo and to collaborate very fast, not just at the EU level but also globally.