



# **Abstract Intellectual Property: An Introduction**

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# Module 1: Introduction

## 1 Introduction

### 1.1 Policy Issues

Intellectual Property tries to protect public goods. These are goods that are non-excludable (technologically not easy to exclude others) and non-rival in consumption (consumption by one person does not deplete supply for others). Decentralized or market provision of these goods often fails. Intellectual property solves this by making the goods legally excludable but there are also other solutions (e.g. government / non-profit provision, prizes, pre-purchase commitments, volunteers, ...)

Secondary products are products or services that are used together with the complementary primary product, but often purchased after the primary product (e.g. coffee capsules, ink cartridges, razor blades, etc...). Companies have various ways to control these secondary markets:

- Refusals to deal, tying and bundling
- Incompatibilities
- Rebates in order to prevent remanufacturing markets
- Property
- IP
- Technological control

There are potential welfare losses because firms may have incentives to raise prices on the secondary markets above marginal cost and abuse their dominant market position. On the other hand, there are also potential welfare gains when employing price discrimination / ramsey pricing because the number of consumers can be increased and higher profits can increase the incentives to innovate.

#### 1.1.1 Asymmetric Information

Asymmetric information occurs when one party to an economic transaction possesses greater material knowledge than the other party. A policy instrument to address asymmetric information are trademarks, but other exists (e.g. reputation). Asymmetric information creates a problem for buyers, but also for sellers of goods with a higher quality as they can't communicate their higher quality to the customers.

The “market for lemons” thesis claims that if the buyer cannot distinguish between high-quality and low-quality products (i.e. if there is an information asymmetry between the buyer and the seller), he will assume that there will be an equal probability of receiving either a high-quality or a low-quality product. In such markets, high-quality products will not be traded which leads to market failure. Potential solutions to this problem are brand-name goods and chains, licensing

(e.g. a university degree or licensing of doctors, lawyers), guarantees / warrantees / liability laws or trademarks.

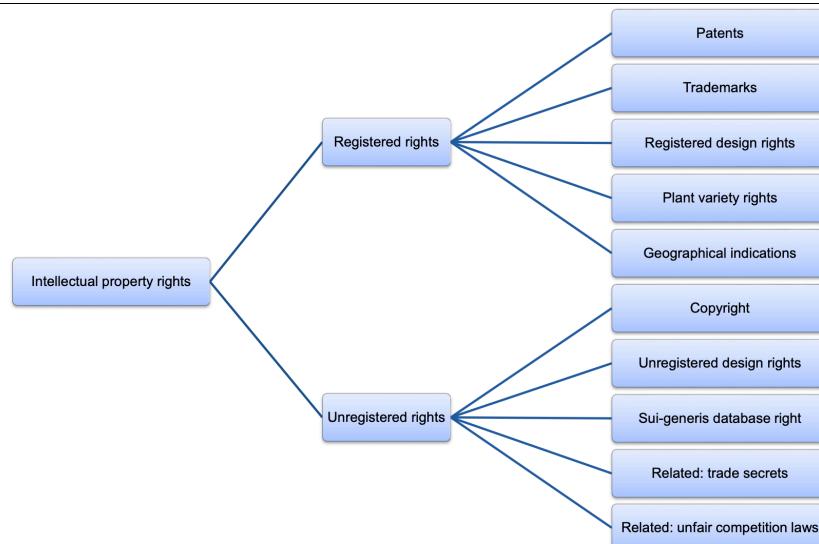
## 1.2 Policy Rationale

Intellectual property is a legal concept, it conveys exclusive rights recognized for creations of the mind. The form of ownership is the right to exclude. The most important IP rights are:

Legal right	What for?	How?	
Patents	New inventions	Application and examination	
Copyright	Original creative or artistic forms	Exists automatically	
Trade marks	Distinctive identification of products or services	Use and/or registration	
Registered designs	External appearance	Registration*	
Trade secrets	Valuable information not known to the public	Reasonable efforts to keep secret	

Two potential downsides of IP protection are the right to exclude and potential limitation of competition, as IP rights may confer the ability to charge supra-competitive prices which result in a form of “deadweight loss” for society. Potential measures are limiting IP rights, compulsory licensing, alternatives to IP protection, etc...

## 1.3 Specific IP Rights



### 1.3.1 Patents

A patent is a legal title that grants the holder the exclusive right to prevent others from making, using or offering for sale, selling or importing a product that infringes his patent without his authorization in countries for which the patent was granted for a limited time (up to 20 years). In

return for this protection, the holder needs to disclose the invention to the public. An invention generally needs to be *new* to the world (i.e. not available to the public anywhere in the world), *inventive* (i.e. not an “obvious” solution) and susceptible of *industrial application*. In many countries, patents aren’t granted for:

- Business methods (in Europe not at all, in the US there are restrictions)
- Discoveries, scientific theories, mathematical methods
- Aesthetic creations
- Rules of games
- Methods of treatment, diagnostics and surgery on the human or animal body
- Computer software

Advantages of patents are:

- Exclusivity enables investment and higher returns on investment
- Strong, enforceable legal right
- Makes invention tradeable

Disadvantages are:

- The invention is revealed to competitors (after 18 months)
- It can be expensive
- The grant may take 3-5 years
- A patent is only enforceable after the grant, the proceedings can be costly

Alternatives are disclosing the information (which is cheap and prevents others from patenting the same invention, but does not offer exclusivity and the invention is still revealed to competitors), keeping it a secret (also cheap and invention is not revealed, but no protection against reverse-engineering / duplication, it’s difficult to enforce and secrets often leak quite fast) or doing nothing (which requires no effort, but doesn’t offer exclusivity and competitors will often learn details).

### 1.3.2 Copyright

Literary and artistic works in a broad sense are protected by copyright (e.g. software, web sites, photographs, architecture, jazz improvisations, etc...). The work must be original (an imprint of the author’s personality). Copyright only protects the expression of ideas but not the idea itself (e.g. not protected is the idea to tell the story of the American Civil War from a Southern states’ point of view, but the expression of the idea in “Gone with the Wind”). It lasts 70 years (50 years for software in Switzerland) post mortem auctoris (after the author’s death).

### 1.3.3 Trademarks

A trade mark is any sign which distinguishes the goods and services of one undertaking (company / organization) from those of another. There are many different types of trademarks (word, figurative, color, shape). A trademark needs to be capable of graphic reproduction, it needs to have distinctive character and there shouldn’t be any absolute grounds for refusal. It lasts 10 years and can be renewed indefinitely.

### **1.3.4 Registered Design Right**

A design is the outward appearance of the whole or parts of a product, resulting from its features. It can be two-dimensional (design) or three-dimensional (model). It needs to be the appearance of a product which is new and have individual character. If the form is imposed by technical function, no protection is possible. It lasts 5 years from the filing date and is renewable for 4 times (i.e. up to 25 years).

### **1.3.5 Know-How, Trade Secrets and Confidential Information**

This deals about information that is not generally known / easily discovered, has a business / commercial or economic value (actual or potential) because the information isn't generally known and is subject to reasonable efforts to maintain secrecy. The duration is potentially unlimited. There are no intellectual property rights as such to protect it, but practical (limited access / encryption / monitored entry), contractual (restrictive covenants / non-disclosure agreements) or other legal tools (criminal code / unfair competition statutes / employment agreement acts) can be used for protection.

## **1.4 Importance of Intellectual Property**

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IP is an essential business asset in the knowledge economy and increases funding for innovative projects. It protects small innovative firms (e.g. Gore-Tex) and can generate significant revenue for artists.

# Module 2: Obtainment

	Patents	Copyrights	Trademarks	Designs	Trade secret
Subject matter	Inventions	Works	Signs	Designs	Information
Formal requirements	Registration & examination	None	Registration & examination	Registration, no examination	None
Substantial requirements	1. Novelty 2. Non-obviousness 3. Industrial application 4. Disclosure	1. Intellectual creation 2. Originality	1. Sign 2. Distinctiveness 3. No grounds for refusal	1. Design 2. Novelty 3. Individual character 4. No grounds for refusal	Efforts to keep information secret
Duration of protection	up to 20 years	70 years after death of the author	10 years, but can be renewed without limits	up to 25 years	No limit

Intellectual Property	Examination
EPC Patent Application	Substantial examination concerning novelty and non-obviousness
PCT Patent Application	Optionally, non-binding examination
Swiss Patent	Ex post examination: No substantial examination of patentability requirements (novelty / non-obviousness), validity can be contested after the patent has been granted.
Community Trademark	Refusal on absolute grounds, but not on relative grounds (third parties can raise relative grounds in opposition / cancellation proceedings)
EU Community Design Swiss Design	Ex post examination: No substantial examination of absolute / relative grounds for refusal

## 2 Patents

### 2.1 Contents

A patent consists of:

- **Bibliographic information**
  - Inventor
  - Proprietor

- Date of filing
- Technology class
- etc...
- **Abstract**
- **Description**
  - Summary of prior art
  - The problem that the invention is supposed to solve
  - An explanation and at least one way of carrying out the invention
- **Claims**
  - Define the extent of patent protection
- **Drawings**

## 2.2 Legal Requirements

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Four requirements have to be met:

- **Novelty:** An invention is new when it's not state of the art (everything made available to the public before the date of filing) at the date of filing. The first to file a patent application will be entitled to the patent. Public disclosure (anywhere in the world in any form) before the filing of the patent application will invalidate it. Mere hypothetic possibility of knowledge of the invention by experts is sufficient.  
Disclosures aren't taken into account (in Europe) if they occurred no earlier than six months before the filing and they were because of an evident abuse in relation to the applicant or the fact that the invention was displayed at an official international exhibition.
- **Non-obviousness:** In the US, an inventive step is required. Non-obviousness is judged by a fictional "person skilled in the art", a skilled practitioner in the relevant technical field that has access to the entire state of the art and is capable of routine work but has zero imagination. It is judged in relation to "prior art". The definition of non-obviousness is: "An invention that an average "person skilled in the art" cannot only come up with by rational thinking. There is an "information gap" that the inventor solves in an intuitive, creative, associative way"

Whereas for obviousness: "An invention that for an average "person skilled in the art" is logical, when systematically putting together "prior arts""

Potential indicators for non-obviousness are:

- The invention satisfies a need that was not satisfied for a long time
- The invention disproves a long as-true-believed principle
- The invention surprises (e.g. unexpected outcome)
- Expensive, time-intensive research was needed for the invention
- Several steps are necessary to get to the invention starting from "prior art"
- Simple answer to a problem that has often been worked upon

And potential indicators for obviousness:

- Collection and interpretation of already existing information/solutions
- Only size alterations

- **Industrial Application:** There needs to be the possibility of the invention being made or used in any kind of industry, i.e. it can be used to pursue a gainful, economic activity. It's not sufficient if the invention is only used for private use. This isn't fulfilled by aesthetic creations.
- **Disclosure:** The invention needs to be disclosed to the public after the patent was granted. A detailed description of at least one way of carrying out the invention must be given. The disclosed information must be sufficiently clear to a person "skilled in the art" and is published in the patent document so that everyone can benefit from it.

There are some exceptions / exclusions from patentability in the European Patent Convention (EPC):

- Inventions where the commercial exploitation would be contrary to "ordre public" / morality.
- Plant, animal varieties or essentially biological processes for the production of plants or animals (specific IP rights for plant varieties).
- Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body.
- Things that aren't regarded as invention, in particular:
  - Discoveries, scientific theories and mathematical methods.
  - Aesthetic creations.
  - Schemes, rules and methods for performing mental acts, playing games or doing business (systematic procedures, achieving theoretical / practical objectives, patents over "methods" or ways of doing business), and programs for computers (but not excluded from patentability if when running on a computer, it causes a further "technical effect" going beyond the "normal" physical interaction between the program (software) and the computer (hardware))
  - Presentations of information.

In the US, everything "that is made by man" is patentable subject matter. In Europe, there's the European Biotechnology Directive (with all member states of the EU) for biotechnological inventions, but there are some member states of the EPC that aren't EU member states. However, the EU Biotechnology Directive is incorporated into the EPC, i.e. has to be adapted by all EPC member states.

Furthermore, business methods can be patented in the US (patentability is determined according to statutory requirements), but the possibilities have been reduced with a supreme court decision.

## 2.3 Procedure

Most countries have a first-to-file (including the US since 2013, previously first-to-invent) system. First-to-invent systems reward the actual innovator, but first-to-file systems are easier to administer, provide more certainty, add additional incentive to disclose innovation early and provide international harmonization.

A European patent application consists of:

- Request for grant
- Description of the invention with:
  - Prior art
  - Drawback of prior art
  - Problem to be solved
  - Solution
  - Advantage of the invention
- Summary of the prior art
- Disclosure of the invention and what problem it is supposed to solve
- Claims, with two types of claims:
  - Independent claims: The invention in its broadest scope (e.g. technical features of the claimed invention)
  - Dependent claims: Any claim which includes all the features of any other claim (e.g. a product as claimed in claim 1, comprising further particulars of claim 1)
- Extent of protection conferred by a European patent
- Drawings (if any) referred to in the description or the claims (description and drawings are used to interpret the claims)
- Abstract

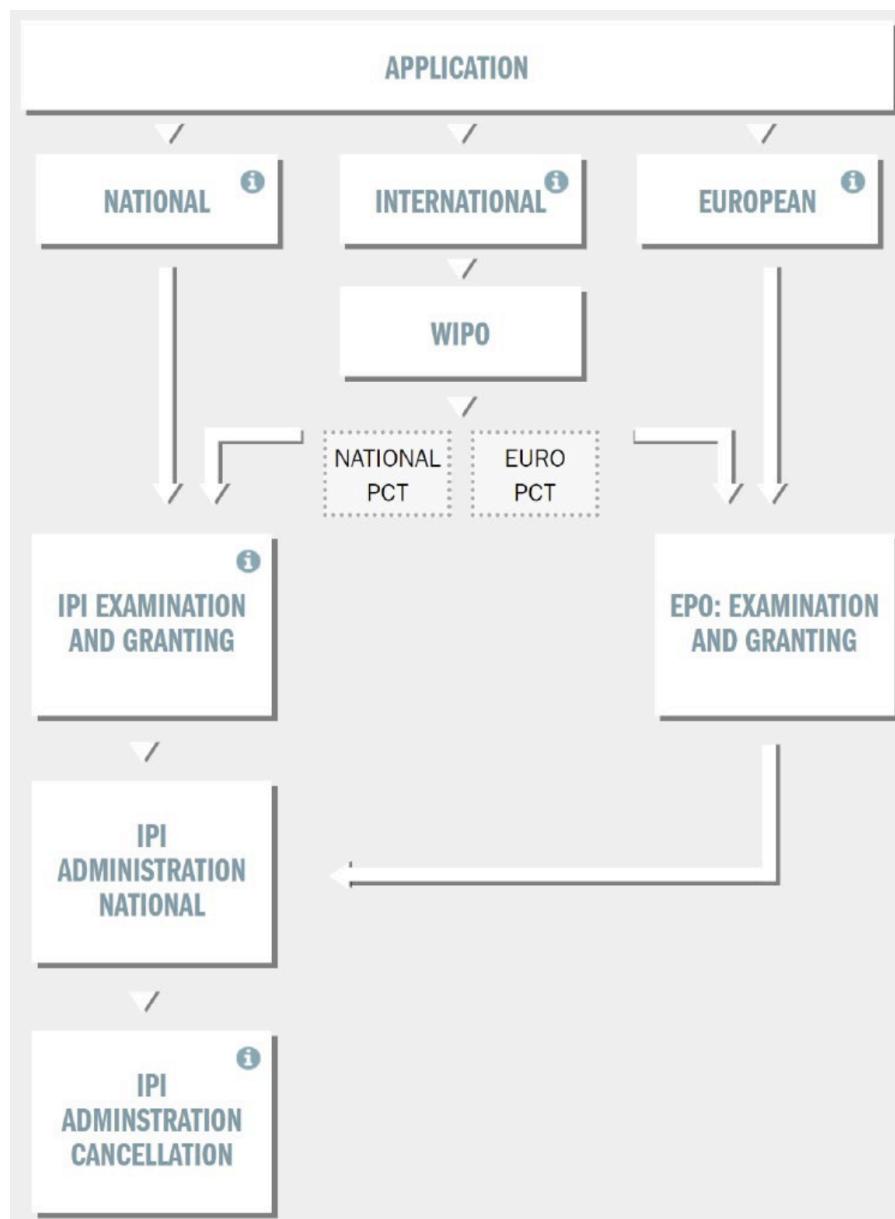
After the registration, there's a formal examination and a substantial examination concerning novelty and non-obviousness. The outcome of the examination is a patent grant or denial. The key people in the process are the applicant, the patent examiner and a representative (either a professional representative on a list maintained by the EPO or a legal practitioner entitled to act in patent matters).

The application designates the inventor and the rights conferred by a patent belong in general to him. Inventions by an employee are a special case, as inventions relevant to the employee's normal field of employment will generally be owned by their employer (but it depends on the patent and employment law of the respective country). The inventor has the right to be mentioned (also as an employee).

Applications are filed by natural (individuals) or legal persons (companies). Joint applications are possible. For the location, there is the territoriality principle. There is no such thing as an international patent, in Europe there are three different options:

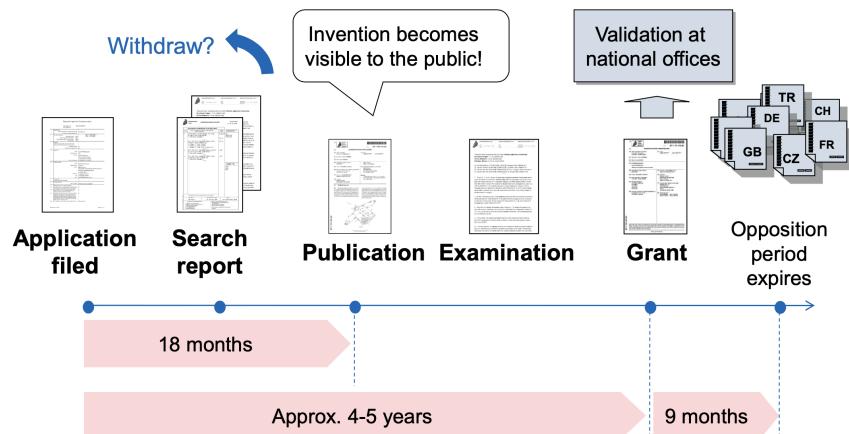
- The national route: Application at national patent offices where the procedures differ according to national law.
- The regional route: European Patent Convention. Only one application at one office is required to get patent protection in up to 40 countries. The applicants select the desired countries and it results in a bundle of national patents.
- The international route: Patent Cooperation Treaty (PCT): One single application for up to 153 countries. Provides a search report and opinion on patentability and after 30-31 months, the applicant can decide in which countries to proceed in (with the other options, but with a certain legal certainty by the optional preliminary examination).

This is illustrated for Switzerland in the following figure:



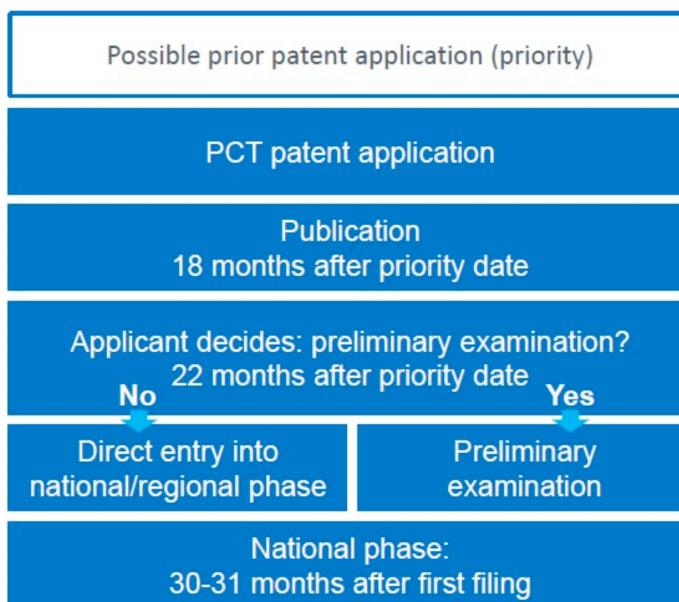
National patents are only valid in the country where they are granted, but non-residents can also apply for a patent. The first patent application for an invention establishes the priority. If you apply to patent the same invention in other countries within 12 months, these form a patent family. Until the patents are granted, the invention is only protected provisionally.

A European patent is equivalent to national patents in the countries where it is granted. The European Patent Office (EPO) is established under the European Patent Convention (EPC) with 36 member states, including Switzerland. The application is published 18 months after filing or priority date. After issuance, there's the possibility for opposition before the EPO. The revocation by the board of appeal is final, otherwise a revocation is still possible before national courts. The process looks like this:



After a European patent has been granted, it can be opposed, limited / revoked, there are renewal fees, and there can be invalidity or infringement proceedings.

A patent application via the Patent Cooperation Treaty (PCT) leads to multiple national patent examination procedures after the initial application phase. The decisions with cost implications (e.g. choice of countries to file in) can be delayed until 30-31 months after filing. The application is examined only optionally, and the examination is non-binding to member states. The application is published 18 months after filing / priority date:



There were / are developments toward a EU unitary patent system with a European patent (with unitary effect with protection in a single step for 25 EU member and unitary character for those 25 countries, i.e. limitation, transfer, revocation, lapse) and a unified patent court (exclusive jurisdiction for litigation relating to European patents). However, because of Brexit and a decision by the German constitutional court (which decided that the change requires a two-third majority in both chambers of the Parliament), the future is unclear.

Unlike under the European / U.S. patent system, the Swiss Patent Office does not engage in an ex-ante substantial (i.e. novelty / non-obviousness) examination of patentability requirements,

but the validity of a patent can be contested after the patent has been granted by other parties in court (ex post examination).

## 3 Copyrights

### 3.1 Legal Requirements

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Copyright protection covers works that are:

- Intellectual creations:
  - Made by a human being
  - Embodiment of an idea
- Original
  - Individual character making it unique (but no test of the qualitative / aesthetic merits of the work)

Therefore, protected are for instance:

- Literary works
- Music
- Theater, choreographic works
- Paintings, photography, sculptures
- Movies, sound recordings
- Architectural works
- Computer programs (both the source code and the binary code)

Less clear are databases. In the EU they are protected by the database directive, in Switzerland there's unfair competition laws.

Neighboring rights / related rights (which are rights of a creative work not connected with the work's actual author) protect the rights of performers, producers of phonograms, broadcasting organizations, film producers, database creators, photographers. The existence / scope differs across countries.

### 3.2 Procedure

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Copyright is automatically granted at the moment of creation. Neither a copyright notice nor a registration is required. Registration is possible in the US.

There are various international treaties concerning copyright law, but important principles are often directed to member states and it's still national protection.

## 4 Trademarks

### 4.1 Legal Requirements

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Conventional trademarks are words, letters, numerals, slogans, figurative elements, logos, three-dimensional shapes or colors. However, there are also unconventional trademarks like sounds, music, jingles, signs with movement, holograms, position marks, tracer marks or potentially even smells and tastes. Besides trademark, there are also other categories of protection like certification marks (TÜV, CE mark), collective marks, protected geographical indications (PGI; e.g. Ardennes ham), protected designation of origin (PDO; e.g. parma ham) or traditional specialities guaranteed (TSG; e.g. serrano ham).

A trademark needs to be capable of:

- distinguishing the goods or services of one undertaking from those of other undertakings (from the perspective of an average buying consumer)
- being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor

In the European Union, there's a European trademark directive and a community trademark regulation. A directive is addressed to all member states and sets specific objectives but leaves form and means to member states. Member states must comply within a given timeframe (i.e. implement into national law) and if this isn't done, the European Commission can initiate legal action, the directive can have direct legal force in those member states (where unimplemented / badly implemented) and member states can be liable to pay damages to individuals / companies that have been affected by the non-implementation. A regulation is immediately enforceable as law in all member states and overrides all national laws dealing with the same subject matter. The European trademark directive harmonized the trademark laws of the member states, but there is no harmonization of procedural trademark law (member states are free to protect trademarks acquired through use, regulate administrative procedures and clarify the relationship to unfair competition, tort and consumer law). The community trademark regulation is a unitary EU-wide trademark granted by the "European Union Intellectual Property Office" (EUIPO) and includes rules for granting, opposing and enforcing community trademarks. The trademarks are enforced in the courts of the member state, but the enforcement has pan-European effect. National trademarks and community trademarks coexist and we have:

Issue	Trademark Directive	Community Trademark
Scope	Harmonization of national substantive trademark law	Creation of an EU-wide substantive and procedural trademark law
Granting	Trademark is granted by national trademark office	Trademark is granted by the EUIPO
Registration disputes	National courts → ECJ	EUIPO Boards of Appeal → Court → ECJ
Enforcement	National courts	National courts
Overlap	Can co-exist	Can co-exist, CTM application can be converted into bundle of national applications with same priority date
Term	No harmonization	10 years, renewable

A trademark isn't granted if there are absolute grounds for refusal (general requirements for a sign to be a suitable trademark). Some of them are:

- No distinctive character (unless acquired distinctiveness through use)
- Descriptive character
- Sign has become customary ("üblich" / "unvermeidlich") in the current language
- Sign consists of the shape of the good with no distinctive feature / shape is technically necessary

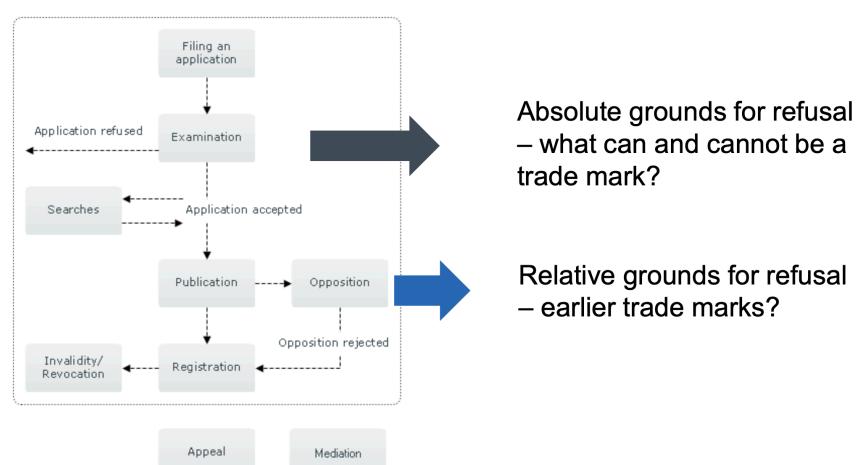
EUIPO doesn't refuse applications on relative grounds (based upon a comparison with prior rights), but third parties can raise relative grounds in opposition or cancellation proceedings. According to the trademark directive, relative grounds for refusal are (compared with an earlier trademark):

- Identical trademarks and identical goods
- Identical trademarks and confusingly similar goods
- Confusingly similar trademarks, identical / similar goods
- Similar trademarks, not similar goods, well-known earlier trademark with a reputation, sign takes unfair advantage of / is detrimental to the well-known trademark

## 4.2 Procedure

Trademarks are obtained through registration and must be used within 5 years of trademark registration, otherwise they can be revoked. They are registered for specific product and service classes as categorized in the Nice classification (therefore, no easy coverage of the entire potential value of a sign in all markets is possible). Registration is possible nationally, regionally and international (WIPO application that results in national trademarks) and these trademarks coexist.

The EU community trademark gives protection at EU level, i.e. only one application procedure is required. The procedure looks like this:



There's also the Madrid system for the international registration of trademarks. The offices of designation examine the application (either national marks or EU community trademarks, there

are no supranational marks). The system simplifies the subsequent management of the trademark.

The initial duration of the trademark is ten years, but unlimited renewal is possible. There's the requirement of genuine use after five years (and no usage breaks of more than five years are allowed). The trademark is cancelled if it's invalid or revoked because of lack of genuine use, because it acquired generic character or because of misuse.

## 5 Registered Design Rights

### 5.1 Legal Requirements

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Similar as in trademark law, there's the EU design directive and the EU community design regulation.

A design is the appearance of the whole or a part of a product. It consists of the lines, contours, shape, texture, material, ornamentation, combination of material or colors. It needs to be new (no identical design has been made available to the public before the date of filing), where designs are considered identical if their features differ only in immaterial details. Unlike patent law, novelty is not considered worldwide, but only for the territory of the EU. The design isn't novel anymore if it has been disclosed (however, there's a 12-month grace period), by use in an exhibition, in trade or publication (unless under condition of confidentiality).

Besides novelty, it needs to have individual character. This means that the overall impression on the informed user must differ from that made by any other design made available to the public earlier. But it doesn't have to distinguish products.

Absolute grounds for refusal are if the design is solely dictated by the technical function of the product (however, there's an interface exception if the design must fit with other products, e.g. Lego).

Relative grounds for refusal are conflicts with a prior design or a prior trademark, geographical indication, or copyrighted work.

### 5.2 Procedure

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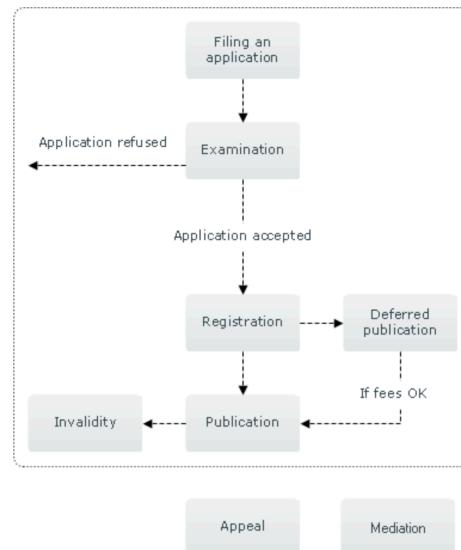
For registered designs, there are national design registration systems and the registered community design. For unregistered designs, there are national unregistered designs covered by national laws and the unregistered community design. The differences of the registered / unregistered community design are:

<b>Unregistered Community designs</b>	<b>Registered Community designs</b>
---------------------------------------	-------------------------------------

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• No application procedure</li><li>• No cost</li><li>• Protection against copying</li><li>• Protection for 3 years</li><li>• No grace period</li><li>• No priority</li></ul> | <ul style="list-style-type: none"><li>• Application with EUIPO</li><li>• Fees payable to EUIPO</li><li>• Full protection</li><li>• Min. 5 years, max. 25 years</li><li>• 12-month grace period</li><li>• 6-month priority period</li></ul> |
|--|--|

For designs under the EU design directive (i.e. national designs), the registration is by national IP offices and a question of national IP law. The directive doesn't impose any procedural provisions concerning registration, renewal or invalidity (i.e. examination isn't required).

For registered EU community designs, the design is registered and published if formal requirements are met. Substantial examination is only done ex post in proceedings for invalidity (before EUIPO) or infringement (before national courts):



In Switzerland, there's also no examination of novelty & individual character. On an international level, the application is managed by WIPO.

# Module 3: Rights

## 6 Patents

A patent gives the owner the right to prevent anyone from commercially making or using the invention (or a product directly obtained from a protected process) without his consent. Use includes, in particular, manufacturing, storage, offering, placing on the market, importing, exporting and carrying in transit, as well as possession for any of these purposes. Infringement is determined by the national courts or by the Unified Patent Court and the decisions may differ among countries.

Infringement is determined by the claims (which define the features of the invention, i.e. the matter for which protection is sought). The description and drawings are used to interpret the claims. The extent of the protection is everything that is literally covered by the claims and may also encompass equivalents.

Although the patent gives an exclusive right, it's not a right to use as the use of a patented invention may require permissions from public authorities and may infringe prior intellectual property rights. However, if a patented invention cannot be used without infringing a prior patent (dependent inventions) and is an important technical advance in relation to the prior patent, the proprietor of the later patent has the right to a non-exclusive license.

Patents are limited to the country / territory in which they were granted and are "commercial tools" (i.e. for commercialization / exploitation, licensing / cross-licensing, blocking patents, out of court settlements, reputation building or not used at all).

### 6.1 Remedies

- 
- Interim or preliminary injunctions (immediate termination of infringing activities)
  - Final or permanent injunctions (permanent termination of infringing activities)
  - Destruction/surrender of infringing products
  - Recovery of damages

For EPO patents, third parties can oppose the granting of the patent for 9 months and the patent owner himself may request the limitation or revocation of his patent. Furthermore, he has to pay renewal fees. The national patent is enforced by a national court (for infringement proceedings) and if a third party wants to challenge an EPO patent after 9 months, it must initiate separate court proceedings in each country of the patent.

Typical defenses for infringement cases are that the act falls outside the patent claims, is non-infringing (private / non-commercial purposes or experimental purposes relating to the subject matter of the patented invention), invalid (in which case it may be cancelled, however in some countries like Germany invalidity is not a valid defense, but subject to a separate proceeding) or that the rights conferred by the patent have expired.

## 6.2 License & Transfer

With contracts (private law agreed by the parties), patents can be licensed which is the principal mean to authorize the use of patents. The main elements of the contracts are the parties, subject matter, scope, royalties and warranties. Selling patents (permanent transfer of ownership) is also possible.

# 7 Copyright

Economic rights:

- Reproduction (including derivative works, i.e. adaption)
- Distribution
- Rental
- Performance and display
- Broadcast
- Making the work available to the public (including internet communications)

Moral rights (protection in Continental European “droit d'auteur” countries typically high, only limited protection in the U.S.):

- Scope:
  - Right to claim authorship
  - Right to object to distortions, mutilations or other modifications
  - Publication right

Neighboring rights (rights to performers, phonogram & film producers, broadcasting organizations): Separate from copyright in many countries, but in the U.S., some of these rights are granted as part of normal copyright.

The copyright is generally owned by the author, but assignment of copyright (excluding moral rights) to the employer is possible.

## 7.1 Remedies

Similar to patent law, depending on the national law but typically includee:

- Interim or preliminary injunctions (immediate termination of infringing activities)
- Final or permanent injunctions (permanent termination of infringing activities)
- Destruction/surrender of infringing products
- Recovery of damages

Similar work that is created independently does not qualify as infringement. Copies of parts of works can still constitute an infringement.

Because it's hard to monitor distributed infringement activities and buyers prefer one place where they can acquire licenses from multiple copyright owners, there are collecting societies (e.g. SUISA).

Other enforcement tools are criminal law provisions and customs enforcement / border control.

## 7.2 License and Transfer

In some “droit d'auteur” countries, copyright as such cannot be transferred. Economic rights may be licensed, but moral rights always stay with the author.

## 8 Trademarks

Trademark grants exclusive rights. Trademark infringement requires the use of the trademark “as a mark”. The scope of protection of a trademark is limited to those goods / services applied for and similar marks can coexist peacefully if they refer to different products. Trademarks with a reputation have a broader scope of protection beyond the limitations of the principle of specialty. An infringement occurs if the contested use of the sign is capable of taking unfair advantage of the earlier mark (e.g. blurring / dilution / free-riding).

## 9 Registered Design Rights

The design right owner has the exclusive right to prohibit the

- Making
- Offering for sale
- Putting on the market, importing / exporting
- Stocking

a product in which the design is incorporated.

“Any design which does not produce on the informed user a different overall impression” is protected and the freedom of the designer must be taken into account in assessing the scope.

# Module 4: Limitations

Intellectual Property	Exhaustion
<b>EPC Patent</b>	EEA-wide exhaustion
<b>Swiss Patent</b>	EEA-wide (including Switzerland) exhaustion, except for medicines, where national exhaustion applies.
<b>Copyright</b>	EU-wide exhaustion
<b>European Trademark Law</b>	EEA-wide exhaustion (except if the trademark owner has a legitimate interest)
<b>Swiss Trademark Law</b>	International exhaustion (except if the trademark owner has a legitimate interest)
<b>EU Community Design</b> <b>Swiss Design</b>	Exhaustion exists, scope not specified in slides (seems to be EEA-wide)

## 10 Patents

Patent protection may last up to 20 years, but the duration is shorter if renewal fees are not paid or the patent is revoked / withdrawn. Because the patent term is counted from filing date of the application, the de facto protection is shorter than 20 years.

There are supplementary protection certificates (SPCs) that extend the duration of certain rights associated with a patent (for medical and plant protection products). There is also market protection and data protection.

Exhaustion principle limits the intellectual property rights after the first unrestricted sale of the protected good: After the placing on the market, the good may be imported and used / resold commercially in the respective country. There's EEA/Community-wide exhaustion for patents, in Switzerland there's an exception for medicine (only national exhaustion).

Besides the already mentioned exclusions (ordre public, scientific theories, acts done privately, etc...) and compulsory licensing scheme for dependent inventions, there's also compulsory licensing due to public interest (which is important / controversial for access to medicine in developing countries). Furthermore, there's the Farmer's privilege (they are allowed to reproduce, on their own farm, the product from plant reproduction material).

## 11 Copyright

Nowadays, copyright term is harmonized in most countries to 70 years post mortem auctoris.

In the EU, there is an enumerated list of 25 limitations (private copy, use for teaching / scientific research, reproductions by public libraries, reporting of current events by the press, ...). In the US, there's the fair use defense: There are four factors, namely purpose / character of use (i.e. commercial or non-profit educational), nature of the work, amount and substantiality of the portion used in relation to the copyrighted work as a whole, the effect of the use upon the potential market for or value of the copyrighted work.

In Switzerland, published works may be used for private purposes (e.g. downloading).

There's an EU-wide exhaustion of distribution right, meaning that import / selling of the work is allowed after the first sale (similar to patents).

The other limitations (e.g. criticism / parody, limitations to computer software like back-up copies or reverse engineering) vary across European countries.

## 12 Trademarks

Trademarks may exist without time limit but are registered for 10 years and need to be renewed. There's the use requirement which states that the trademark needs to be used within five years after registration, otherwise it may no longer be enforced.

In Swiss trademark law, there is international exhaustion but in European trademark law, it's only EEA-wide. There is no exhaustion if the trademark owner has a legitimate interest (e.g. condition of the good is changed after having been put on the market).

Trademarks aren't allowed to prohibit third parties from using their name / address or signs / indications that are not distinctive (e.g. geographical origin, time of production, etc...).

Comparative advertising is allowed if it is not misleading, objectively compares similar goods / services, does not create confusion, take unfair advantage of the reputation or present goods or services as imitations.

## 13 Registered Design Rights

Registered design rights last five years but are renewable up to a total term of 25 years. There are countries with a repair clause (no protection available for spare part, only for the design of the entire car).

Features that are dictated by technical function and interfaces / compatibility requirements are excerpted from design protection. Use for private / non-commercial purposes is allowed, as well for experimental purposes, citation & teaching and there's also exhaustion.