

**UNITED STATES  
MISSION TO THE  
EUROPEAN  
UNION'S TOOLKIT  
FOR INTELLECTUAL  
PROPERTY RIGHTS**



# United States Mission to the European Union Intellectual Property Toolkit

## Welcome

Welcome to the [United States Mission to the European Union](#)'s toolkit on intellectual property rights. The [Department of Commerce](#) designed this toolkit to provide general information about intellectual property rights protection in the European Union and an overview of the steps you can take to protect and enforce those rights.

If your business conducts any of its activities in any one of the twenty-seven EU Member States, or if there is a possibility that it might do so in the future, we hope that this toolkit will help you start thinking about how to best protect your intellectual property.

## Disclaimer

The information provided in this toolkit by no means constitutes legal advice and should not be a substitute for advice of counsel. Its intended purpose is to provide an overview of the European Union's IPR environment, available enforcement mechanisms and European Union government offices sharing IPR jurisdiction. We recommend that US companies seeking to do business in the European Union, or facing IPR infringement issues, retain qualified US and/or EU legal counsel and pursue their rights through the European Union's IPR enforcement regime.

## Introduction

Intellectual property rights (IPR) are an important part of a company's value and international competitiveness. Companies must take specific steps to protect their IPR in the European Union (EU) because United States trademark, design and patent rights *do not* provide protection outside of US territory. This IPR toolkit is meant to help businesses understand their intellectual property rights in the European Union's twenty-seven Member States and take measures to protect those rights.

The [World Intellectual Property Organization](#) (WIPO) divides intellectual property into two categories: (1) copyright, which includes literary and artistic works such as novels, poems, plays, films, musical works, drawings, paintings, photographs, sculptures, and architectural designs and (2) industrial property, which includes inventions (patent protection), trademarks, industrial designs, and geographic indications (GI) of source. This toolkit discusses both types of IPR beginning with copyright protection in the EU. Next it covers EU patent, trademark, design, GI, and trade secret protection. It also discusses why and how to obtain protection at EU trade fairs. The most important point to take away from this toolkit is that preventing IPR infringement in the first place is better than trying to remedy an infringement that already occurred.

## **The Intellectual Property Rights Environment in the European Union**

The EU considers intellectual property protection as a fundamental right, noting that IPR shall be protected in the [Charter of Fundamental Rights](#). As major trading partners, the EU and the US work together to expand IPR. The EU, which consists of twenty-seven Member States (EU-27) and is the world's largest economy, presents many business opportunities. In 2006, US exports of goods and services to the EU's twenty-five Member States (prior to Romania and Bulgaria joining in 2007) were valued at \$213 billion, while US imports from the EU-27 were valued at \$330 billion. Companies doing business in the EU, however, must take pro-active steps to protect their intellectual property rights.

The 27 Member States of the EU are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

### ➤ General IPR Environment in the EU

As mentioned, the US and the EU continue to work together to enhance and enforce international IPR and facilitate international trade. In June 2006, the EU adopted the [Action Strategy for the Enforcement of Intellectual Property Rights](#) at the US-EU Summit in Brussels. The strategy establishes cooperation in customs and border controls, joint actions in third countries, coordination on enforcement issues in a multilateral forum, and public-private partnerships on enforcement.

The United States and the EU have disagreed on some areas of IP enforcement including GIs, enforcing World Trade Organization (WTO) panel reports on intellectual property, and when to grant intellectual property rights (although the United States uses the "first to invent" system for patents, the European Union follows the "first to file" approach). The [United States Special 301 Report](#) Watch List identifies those countries where there is not sufficient IPR protection. Some EU Member States are on this list including Hungary, Italy, Lithuania, Poland, and Romania.

Member States do, however, work to provide adequate IPR to companies with Germany and France leading the EU-27 in addressing counterfeiting issues. For example, Germany's Economics Ministry and Professional Federals will produce an IPR guide to advise Small and Medium Sized Enterprises (SMEs). In France, companies may request what is known as a pre-diagnosis under the IP Genesis scheme to allow companies to evaluate their industrial portfolios.

The challenges that the EU faces when addressing IPR reflect its size, rapid growth, and diverse Member State economies. As the EU harmonizes IPR and adopts competent and consistent enforcement mechanisms throughout Member States, it provides the market with clarity and international businesses with the necessary tools to protect their IPR. As long as businesses take steps to ensure that their IPR are protected, the EU market can be both dynamic and profitable.

### ➤ Taking a Proactive Approach in Enforcing Your Company's IPR

As international trade continues to develop, attempts at copying others' works become more

sophisticated and businesses must proactively protect their IPR. A recent [study](#) commissioned by the EU on the effects of counterfeiting on SMEs confirmed that IP infringement in the marketplace could be a problem.

If businesses, however, take steps to protect their IPR, they can reduce chances of infringement. Companies can help avoid or confront IPR problems by understanding their IPR and the forms of protection available. Ultimately, it is the company's responsibility to ensure that its IPR are properly protected.

## Legal Authority & Background

There are three areas of law that are relevant to IPR in the European Union: national, EU, and international laws.

*National laws* involve the laws of an individual country. In the EU, there are twenty-seven EU Member States. Each EU Member State has [national authorities](#) that address IPR laws in its country. Although, in some cases, it is the EU as a whole that has the authority to regulate IPR, national offices in specific Member States often provide registration services and information to protect IPR. If your company only does business in a limited number of Member States, it may be wise to contact the Member State's national office where your company conducts most of its business to learn about and enforce its rights at the national level.

*EU law* is the "supranational law" of the European Union, which comprises twenty-seven Member States. EU law works in conjunction with Member State laws and is directly applicable in Member States. If there is a conflict between EU law and a Member State's law, EU law often supersedes the Member State's national law, particularly with regard to economic and social policies. The EU is not, however, a federal government, nor is it an intergovernmental organization. The EU is a supranational institution that is based on treaties concluded by Member States.

In addition to EU treaties, the EU also adopts *Regulations* and *Directives*. Regulations are self-executing and do not require the Member States to implement any additional measures. However, they are automatically binding on Member States and leave less flexibility. Directives allow Member States to determine the means of attaining that result as they normally permit some discretion as to the exact rules to be adopted.

*International treaties* that are relevant to IP protection are effectively those that are maintained by the [World Intellectual Property Organization](#) (WIPO), which aims to promote the effective use and protection of IP worldwide. The [WIPO Convention](#) established WIPO in 1967 with a mandate from its [signatories](#) to promote the protection of IP throughout the world through cooperation among countries and in collaboration with other international organizations. WIPO headquarters are in Geneva, Switzerland. Many [international treaties that address IPR](#) have been concluded under WIPO and will be discussed in further detail under the relevant sections.

## Copyright

### ➤ Introduction

Copyright protection is granted to individuals or businesses that want to protect artistic, literary, and/or musical original creations in the form of books, paintings, movies, recordings, and/or software. Copyright protection allows its creator to benefit both economically, by financially rewarding the creator, and morally, by allowing the creator to claim authorship and thereby prevent mutilation or distortion of his/her work. To be granted copyright protection, the creator must establish that the work is both original and expressed in a tangible medium.

### ➤ Legislation

## International Law

All EU Member States are parties to the [Berne Convention for the Protection of Literary and Artistic Works](#) (Berne Convention), so EU copyright protection is automatic and no formal registration is necessary. Therefore, if a company has copyright protection in the US under the Berne Convention, that company will equally have protection in the EU-27. Under the Berne Convention, created works are protected as soon as they exist. As such, WIPO does not maintain a public register of copyrighted material. However, in addition to the Berne Convention, WIPO administers several other treaties that related to copyright protection, including the [Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite](#), [Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms](#), [the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations](#), the [WIPO Copyright Treaty](#), and the [WIPO Performances and Phonograms Treaty](#).

EU Member States are also party to the Berne Union, which allows them to offer more, but not less, protection than is required under the Berne Convention. Many EU Member States have therefore, created domestic registration systems that provide additional benefits to the copyright holder. For example, by using an EU domestic registration system, the creator of a work may license or assign the rights of the creation to a publisher or producer.

## European Union Law

The European Union created many copyright norms in [multiple European Union Directives that address copyright](#), which are implemented by Member States, including the harmonization of the term of protection, the legal protection of software and databases, the adaptation of copyright to the information society, and the enforcement of intellectual property rights. Depending on the type of material for which your company seeks protection, the relevant EU Directive should be referenced.

The [EU Information Society Copyright Directive](#), for example, is a frequently referenced Directive, as it is similar in many ways to the Digital Millennium Copyright Act, which is the US copyright law that implements the WIPO treaties. Both the US Act and EU Directive criminalize production and

dissemination of technology, devices, or services that are used to circumvent measures that control access to copyrighted works and criminalizes the act of circumventing an access control, even when there is no infringement of copyright itself. Both also heighten penalties for copyright infringement on the Internet.

➤ Coverage

Copyright protection does not continue indefinitely. It begins from the moment the work is created and (in most cases placed in a tangible medium) and generally continues for a limited period of time after the death of the work's creator. Under the Berne Convention (to which all EU Member States are parties), copyright protection extends for the life of the creator plus "not less than fifty years after his/her death." In both the US and the EU, copyright protection lasts seventy years after the death of the work's creator.

➤ Registration

Effectively, copyright registration is unnecessary because the Berne Convention grants automatic protection the moment a work is created. This protection extends to all countries that are party to the Convention. As mentioned, however, many EU countries have [national copyright offices](#) often for the purpose of identifying the title of the author's work, or as evidence that the author created the work in the event of an enforcement action. Further, obtaining registration from a Member State may allow the creator to license/assign the rights of the creation to, for example, a publisher or producer. To obtain copyright protection from a Member State, contact its national copyright office for more specific information.

➤ Market Entry Planning

A well-developed, comprehensive IPR strategy may include registering IPR with relevant agencies and controlling and enforcing IPR rights. At a minimum, your company's strategy should include:

Registration - Register your copyright in the relevant EU Member State. Enforcement actions in the EU can and will only take place after formalities are properly recognized. Since formalities take time, it will also be some time before authorities begin enforcement procedures.

Control - Do not allow control of your copyright to slip into the hands of your agents or distributors. Make sure to:

- Incorporate copyright protections into contracts and marketing strategies;
- Enter into written and enforceable contracts that require agents, suppliers, distributors and employees to protect your copyright;
- Refuse to assign or license your copyright unless and until you fully understand the consequences; and
- Make certain that your rights in the copyright remain with you upon termination of the assignment,

license, transaction or investment.

➤ Enforcement

European copyright is enforced both civilly and/or administratively. While there are international agreements, such as the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#) (TRIPS), that have the basic standards for effective IP enforcement procedures, under the [EU's Enforcement of Intellectual Property Rights Directive](#), enforcement is a Member State issue. Under the Directive, Member States must provide measures, procedures and remedies necessary to ensure the enforcement of IPR that are fair and equitable. All EU Member States must provide “effective, dissuasive, and proportionate” remedies and penalties against those engaged in counterfeiting and piracy.

The abovementioned EU Directive has led many states to adopt national provisions on civil remedies more closely in line with “best practices” standards. These standards include procedural protection, which covers evidence and protection of evidence, and provisional measures such as injunctions and seizure. There is also a “right of information” that allows judges to gain access to names and addresses of those involved in distributing the illegal goods, and the details about the amount of goods involved and the prices. Remedies include the infringing work’s destruction, recall of illegal material, and permanent removal of that work from the EU market. The legitimate copyright holder may be entitled to damages and/or injunctive relief. Thus far, the EU has no criminal remedy available.

Under the [EU Regulation concerning customs action against goods suspected of infringing certain IP rights](#), the right-holder may file a written complaint with the relevant customs authorities. Such an application for action must include accurate and detailed descriptions of the work in question, information about the nature of the fraud, and the copyright holder’s contact information. The law applicable when deciding whether an intellectual property right has been infringed is that of the Member State where the work was presumably infringed. Member States may also enable the customs authorities to have the infringing work destroyed.

➤ Helpful Links

Berne Convention for the Protection of Literary and Artistic Works:

[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, *done at* Brussels (May 21, 1974):

[http://www.wipo.int/export/sites/www/treaties/en/ip/brussels/pdf/trtdocs\\_wo025.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/brussels/pdf/trtdocs_wo025.pdf)

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (October 29, 1971):

[http://www.wipo.int/export/sites/www/treaties/en/ip/phonograms/pdf/trtdocs\\_wo023.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/phonograms/pdf/trtdocs_wo023.pdf)

Copyright Directive Overview in Member States:

<http://www.euro-copyrights.org>



Directory of National Copyright Offices:

[www.wipo.int/directory/en/urls.jsp](http://www.wipo.int/directory/en/urls.jsp)

European Union Copyright Directive:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

European Union Intellectual Property Enforcement Directive:

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:HTML)

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations *done at Rome* (October 26, 1961):

[http://www.wipo.int/export/sites/www/treaties/en/ip/rome/pdf/trtdocs\\_wo024.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/rome/pdf/trtdocs_wo024.pdf)

List of European Union Directives that Address Copyright:

[http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm)

Parties to the Berne Convention as of April 13, 2007:

<http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>

Regulation concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights:

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l\\_196/l\\_19620030802en00070014.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_196/l_19620030802en00070014.pdf)

Agreement on Trade-Related Aspects of Intellectual Property Rights:

[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

Understanding Copyright & Related Rights:

[http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.pdf](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf)

WIPO Copyright Treaty *adopted at Geneva* (December 20, 1996):

[http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf)

WIPO Performances and Phonograms Treaty, *adopted in Geneva* (December 20, 1996):

[http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf)

## Patent

### ➤ Introduction

Patent protection is essential because it allows inventors to prevent others from using, making, selling, offering for sale, or importing an invention without obtaining permission from the inventor. As part of the trade-off for receiving these exclusive rights, the inventor must disclose the details of the invention in a patent document that is made publicly available. In this way, the disclosure of new inventions is encouraged, and the fund of human knowledge is enriched.

In general, patent protection will be granted if the invention is (1) “new,” that is, the invention was not previously known to the public, (2) capable of industrial application (i.e., has utility), and (3) represents an “inventive step” over what was previously known (i.e., the invention would not have been obvious to any skilled person in the relevant field in view of what was already known).

An important difference to keep in mind between US and European law regarding patents, is that the United States uses the “first to invent” system for patents while the law applicable in each of the European Union (EU) Member States follows the “first to file” approach. This is to say that the US follows a system wherein one inventor may establish priority of invention over another inventor of the same subject matter based on date of invention, whereas in Europe, the dates of filing of the applications by the competing inventors determines priority.

### ➤ Legislation

It is important to remember that there is no EU-wide patent, and that patent protection is territorial. For Europe, this means that patents must be separately obtained in each EU Member State where protection is desired, and each of those patents is only enforceable as a general matter in the country where the patent was granted. Similarly, if a company has obtained patent protection in the United States, that protection does not extend outside of the United States territory.

Although there is no EU-wide patent available, an inventor may obtain patents in Europe through a variety of mechanisms. The inventor may either file an international application under the Patent Cooperation Treaty (PCT), a (European) regional application with the European Patent Office (EPO), or a national application in the respective EU Member State national patent office(s).

## Patent Cooperation Treaty

All EU Member States are parties to the PCT, which allows an inventor to prepare and file a single international application having the same effect as a national application filed in each PCT Member State designated in the international application. PCT Member States currently number more than 130 countries worldwide. Although the PCT streamlines application filing procedures, it is important to remember that patent protection must still be obtained through national procedures, and according to national law, in each of the designated countries.

Under the PCT, a PCT International Searching Authority performs an international search and

prepares an accompanying written opinion, giving the inventor useful information, at an early stage, as to the likelihood of success in obtaining a patent. If requested, an international preliminary examination may also be performed by one of the PCT authorities. PCT applications may be filed with the applicant's PCT Receiving Office (usually the applicant's national patent office) or directly with the WIPO International Bureau, and generally may be filed either electronically using an online application or in paper form via mail. In addition, in Europe, it is possible to use the European Patent Office (EPO) in the PCT process both as the PCT International Authority and as the designated office for the grant of the European (regional phase) patent.

## **European Patents**

Each EU Member State is also a party to the [European Patent Convention](#) (EPC). The EPC establishes a centralized patent examination and grant process, administered by the EPO.

Under this procedure, an applicant files a single application with the EPO, which determines the patentability of the invention according to the provisions set forth in the EPC, and, as appropriate issues a "European Patent." The application may be filed with the European Patent Office in Munich, or at its branches in Brussels, The Hague, Berlin, or at a national patent office of one of the Contracting States.

### ➤ Coverage

The term "European Patent" is misleading because even if the EPO grants a "European Patent," the rights that are granted are not "European." To the contrary, what is granted by the EPO is only a "bundle" of potential patent rights; the patent only has effect in the EPC Member State(s) designated in the application filed with the EPO, and even then, only after the applicant has taken the necessary steps in each designated country to "validate" the patent. This generally entails making any required translations of the application contents in the official language of the designated state(s) and the payment of any necessary fees. Each such validated patent is only enforceable in the particular Member State. Patents issued by the European Patent Office may be opposed for a limited time prior to the EPO granting the patent, and Member States may provide for separate revocation procedures under national law.

## **European National Patents**

As an alternative to the above-noted filing routes, an applicant may also choose to seek protection separately in selected EU Member States.

Under the Paris Convention for the Protection of Industrial Property, a person or organization that filed a patent in any country that is a member of the Paris Convention can, within one year of that filing, apply for patents in other countries and claim the filing date of the first application as the effective filing date for those applications. This is important because when a company claims priority to an earlier application, the filing date of the earlier application is taken as the filing date for all other applications claiming priority to it. This means that when the prior art (body of existing knowledge in the relevant technical field) search is conducted, only disclosures that were made before the priority filing date will be considered. In practice, it allows a US company to file a patent

in the US and then test the market by publishing and exhibiting its innovation for up to a year before deciding in which jurisdictions to finally apply for patent protection. Another advantage of the priority right is that patent subscription fees can be delayed by a year in each additional jurisdiction if the patent is applied for just before the end of the twelve-month priority right period.

➤ Guidelines

There are five guidelines for examination in the EPO: guidelines for formalities examination, guidelines for search, guidelines for substantive examination, guidelines for opposition and limitation/revocation procedures, and guidelines for general procedural matters. Before filing a patent application with the EPO, companies should review these [guidelines](#) in detail.

➤ Industrial Designs and Patents

It is possible to obtain a patent and industrial design protection for the same innovation, though it must be remembered that the protection, and the requirements for obtaining the protection, are different. New products can have both functional and ornamental aspects. Unlike the situation with patents in Europe, there is a harmonized EU-wide body of law on protection of industrial designs, which is administered by the Office for Harmonization of the Internal Market (OHIM), based in Alicante, Spain. OHIM additionally administers EU trademark protection.

➤ Fees

Depending on how your company decides to obtain its patent protection, the fees will vary. The fees required for pursuing protection in Europe, including translation, attorney, and national/regional office fees, may be substantially higher than the cost of obtaining a US patent. WIPO recommends checking the [directory of national and regional intellectual property offices](#) to get more information about a country's specific patent fees.

➤ Enforcement

Patents in Europe can be enforced both civilly and/or administratively. While there are international agreements, such as [Agreement on Trade-Related Aspects of Intellectual Property Rights](#) (TRIPS), that have the basic standards for effective IP enforcement procedures, under the [EU's Enforcement of Intellectual Property Rights Directive](#), enforcement is a Member State issue. Under the Directive, Member States must provide measures, procedures and remedies necessary to ensure the enforcement of IPR that are fair and equitable. All EU Member States must provide "effective, dissuasive, and proportionate" remedies and penalties against those engaged in counterfeiting and piracy.

The abovementioned Directive has led many States to adopt national provisions on civil remedies more closely in line with "best practices" standards. These standards include procedural protection, which covers evidence and protection of evidence, and provisional measures such as injunctions and seizure. There is also a "right of information" that allows judges to gain access to names and addresses of those involved in distributing the illegal goods, and the details about the amount of goods involved and the prices. Remedies include the destruction of infringing products, recall of illegal material, and permanent removal of the products from the EU market. The legitimate patent holder may be entitled to damages and/or injunctive relief. Thus far, there is no criminal remedy

available.

Under the [EU Regulation concerning customs action against goods suspected of infringing certain IP rights](#), the right-holder may [file a written complaint with the relevant customs authorities](#) seeking to suspend release of imported merchandise. Such an application for action must include accurate and detailed descriptions of the invention in question, information about the nature of the fraud, and the patent holder's contact information. The law applicable when deciding whether an intellectual property right has been infringed is that of the Member State where the infringing products were discovered. Member States may also enable the customs authorities to have the infringing products destroyed.

➤ Helpful Links

European Patent Application:

<http://www.epo.org/patents/One-Stop-Page.html>

European Patent Application Fees:

<http://www.epo.org/patents/Grant-procedure/Filing-an-application/costs-and-fees.html>

European Patent Convention:

<http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ma1.html>

European Patent Office:

<http://www.epo.org/>

Guidelines for Examination in the European Patent Office:

<http://www.epo.org/patents/law/legal-texts/guidelines.html>

Inventing the Future: An Introduction to Patents for Small and Medium Sized Enterprises:

[http://www.wipo.int/export/sites/www/freepublications/en/sme/917/wipo\\_pub\\_917.pdf](http://www.wipo.int/export/sites/www/freepublications/en/sme/917/wipo_pub_917.pdf)

Member State Patent Protection Information:

<http://www.wipo.int/directory/en/urls.jsp>

Online filing:

[www.epoline.org](http://www.epoline.org)

Patent Cooperation Treaty:

<http://www.wipo.int/pct/en/texts/articles/atoc.htm>

Worldwide Patent Database:

[www.espacenet.com](http://www.espacenet.com)

Patent Information Centres:

[www.european-patent-office.org/patlib/index.htm](http://www.european-patent-office.org/patlib/index.htm)

WIPO's FAQs on Patents

[http://www.wipo.int/patentscope/en/patents\\_faq.html#who\\_grants](http://www.wipo.int/patentscope/en/patents_faq.html#who_grants)

## Trademarks

### ➤ Introduction

The European Union's (EU's) Community Trademark Regulation describes a trademark as "any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings." Even sounds can receive trademark protection, as long as the sound distinguishes the product and can be graphically represented (for example, through a musical staff).

US registered trademarks do not provide protection outside of US territories. If a company wants to protect a trademark asset in the EU, it must register the trademark with an individual Member State or with the EU in the form of a Community Trade Mark (CTM). Registration is especially important in the EU because, unlike in the US, where trademark protection is based on "first use" as well as registration rights; the trademark registration system in the EU is based on a "first-to-file", or more precisely, a "first to successfully register" approach.

### ➤ Legislation

American companies interested in marketing, manufacturing or selling products and services in the EU must consider whether to obtain international, EU, or national trademark protection.

## International Law

WIPO created the [Madrid System for the International Registration of Marks](#) (the Madrid System), which is governed by two treaties: the Madrid Agreement Concerning the International Registration of Marks (Madrid Agreement) and the Protocol Relating to the Madrid Agreement (Madrid Protocol). This system allows applicants to file a single application where protection is sought in any Member State. The Madrid System, which applies to all EU Member States, allows applicants to submit a single application, which may have effect in several countries, as designated by the applicant.

The EU and the US are members of the Madrid Protocol only. Under the Madrid Protocol, companies may have their trademarks protected in any of the countries that have joined the Madrid Protocol by filing a single "international application" directly with their own national or regional trademark office. The resulting "international registration" may then be used to seek protection in Madrid Protocol countries, each of which apply their own rules and laws to determine whether or not the trademark may be protected in their jurisdiction.

## European Union Law

Trademarks may be registered either within individual Member States, or across the entire EU's twenty-seven Member States, in the form of an EU Community Trade Mark (CTM). The CTM is administered by the [Office for Harmonization in the Internal Market](#) (OHIM) in Alicante, Spain.

The CTM system creates a unified trademark registration system in Europe, whereby one registration provides protection in all EU Member States. The “single” nature of the CTM (single application, single language, single fee, single administrative center) also makes it singly fallible. A CTM application will be refused for the entire EU if there are grounds for refusal in any one of the twenty-seven EU countries – this is known as the “all or nothing” concept.

Similarly, if a registered CTM is successfully challenged because of a competing claim in one EU Member State, it immediately becomes invalid for the entire EU. This risk of EU-wide refusal during the examination stage or cancellation after registration need not dissuade businesses from starting first with a CTM registration. An unsuccessful CTM application or registration may be “converted” into individual EU national trademark applications and retain the priority filing date of the CTM application. In practice, this means that if a company applied for a CTM on 1 January 200x then their subsequent EU national applications would be backdated to 1 January 200x.

### **National Law**

If your company is targeting only a limited number of EU countries, it may choose to register its trademark in individual Member States. [Information about national Member State laws](#) is available from OHIM.

#### ➤ Registration

### **International Registration**

The Madrid System which is governed by the Madrid Agreement and the Madrid Protocol, allows a company to protect its trademark in several countries by simply filing one application directly with its own national or regional trademark office. An international trademark that is registered under the Madrid System maintains the same effect of a registration in the Member State(s) that the applicant designates. In other words, if the trademark office of a designated country does not refuse protection within a specified period, the protection of the mark is the same as if it had been registered by that country’s trademark office. The Madrid System also simplifies greatly the subsequent management of the mark, since it is possible to record subsequent changes or to renew the registration through a single procedural step. Requests for protection in additional member countries may be filed at a later time.

The US and the EU are both parties to the Madrid Protocol only. Under the Madrid Protocol companies can use their US registered trademark application or registration as a basis for filing an international application through WIPO’s International Bureau. Since the EU joined the Madrid Protocol, an international application may designate the “European Community” and thereby seek trademark protection in all the EU countries. It is important to remember that the Madrid Protocol does not give a single “internationally effective” trademark. Rather, it provides a streamlined process for companies to secure a bundle of different national/regional marks, which can include the EU’s CTM.

### **European Registration at OHIM**



The Community Trade Mark is administered by the [Office for Harmonization in the Internal Market](#) (OHIM) based in Alicante, Spain. The CTM registration is valid for ten years and may be renewed indefinitely. A basic renewal fee and fees for each class of goods or services in excess of three must be paid; these fees are doubled in the case of collective marks.

To register a CTM, a company may go directly to OHIM to complete a single application, or use an EU Member State's national trademark office that will subsequently forward the application to OHIM. Generally speaking, it is wise to have an agent help US companies with the registration procedures in the EU.

If your company does not have an EU commercial establishment or business presence it can still apply for a CTM. However, note that without a legal/business presence in the EU, your company must have an EU based approved agent or legal practitioner for all dealings with OHIM, except for the initial application procedure.

If EU-wide protection is requested in an international registration under the Madrid Protocol, OHIM has up to 18 months to notify WIPO of any refusal to extend protection. If OHIM fails to make notification within 18 months, then the holder of the international registration is automatically granted protection of its mark in the EU. OHIM processes applications that arrive via WIPO in exactly the same way as those that are filed directly with their office. That is, OHIM conducts the same examination, publication, opposition period, and registration phases. The only difference between filing under the Madrid Protocol and going directly to OHIM is that the Madrid applications for a CTM are strictly limited to the eighteen-month period.

### **OHIM Registration Procedure**

The CTM registration process with OHIM consists of five stages: application, examination, publication, opposition, and registration.

**Application:** Companies may apply for trademark registration with OHIM by hand-delivery, mail, fax, or via an [on-line application](#). If your company applies off-line, you will need to complete the OHIM application form, specify the goods and services for which protection is requested (using the internationally recognized NICE classification system – e.g. Class 25 is “Clothing, Footwear and Headgear” and Class 38 is “Telecoms”), and attach a reproduction of the trademark.

**Examination:** OHIM first checks to see whether the application is complete and then assesses whether or not the proposed trademark qualifies as a mark. If the proposed mark is generic, descriptive, or relates to a well-known trademark owned by another party, OHIM will refuse registration of the mark on “absolute grounds.” To qualify for registration your mark must be distinctive, i.e., it must serve to distinguish the source your goods or services from those of other companies’.

**Publication:** If there are no “absolute grounds” for refusing registration, a company’s application is published in the Community Trade Marks Bulletin. Your company may choose not to proceed if the Community or national search reports on identical or similar CTMs or CTM applications reveal a potential conflict. OHIM will send your company this Community search report during the registration process, together with any national search reports provided by Member States. Please note that national search reports will become optional and subject to a separate fee for all applications

filed on or after March 10, 2008. Applicants should conduct individual trademark searches prior to filing an application to ensure that the mark they have chosen is not already registered for use in connection with the same or related goods or services.

**Opposition:** Once the application is published, other companies or individuals have three months to challenge your proposed trademark on “relative grounds,” i.e., the existence of earlier trademark rights. Such “opposition” can only be based on prior rights such as CTMs, national trademarks, well-known trademarks, or “use based” trademarks. If there is a challenge, you will be notified and OHIM provides you and the challenger with a cooling off period before the formal opposition process begins. If no agreement is reached within two months, OHIM’s “Opposition Division” decides the merits of the challenge. It is worth noting that over 70% of all opposition cases are settled by the interested parties themselves at the cooling off stage without the involvement of OHIM.

**Registration:** If there is no challenge to your company’s application, or if the challenge is unsuccessful, your trademark enters the Register of Community Trade Marks and becomes an official CTM.

*CTM direct or CTM via an international application – what difference does it make?*

All the key advantages of the CTM system apply whether or not the application is made directly to OHIM (including via an EU national trademark office) or via the international route under the Madrid Protocol. However, there are some differences worth noting:

**Fees:** The cost of trademark protection will vary based upon a number of factors including the type of trademark that you want to protect and the number of international classes of goods and services selected. For specific information on current fees, see the [WIPO website for fee information](#) and/or [OHIM’s list of fee information](#).

**Representation:** The Community Trademark Regulation requires all non-EU applicants to designate an EU-based professional representative for all proceedings before the office. This representative can either be any legal practitioner established in the EU who is qualified to act before the national trademark office of the country where he or she is established, or can be drawn from a list of professional representatives collated by OHIM. However, you do not need an EU representative to file the initial application. If you apply for a CTM through the Madrid Protocol there is no requirement to use an EU-based representative when filing the international application. However, if OHIM raises an objection at any stage, then EU representation becomes compulsory.

**US trademark ownership:** You need to have a US trademark registration or application in order to apply for a CTM via the international route. Also, if you obtain a CTM through an international application based on a US trademark registration or application, then your CTM will be reliant on the continued validity of the US trademark for five years – after that it stands on its own merits. If your US trademark is refused or cancelled during this period then your CTM and any national trademarks obtained through the international registration will fail. It may be best to have a US trademark registration in hand before applying for an international registration through the Madrid Protocol in case the USPTO refuses to register the mark. If it does, then the international registration automatically fails. If the US registration/application that formed the basis of the international

registration is cancelled or refused, then you can “transform” the international registration into national applications (including a CTM). The transformation request must be made in each individual country within a specified time period, paying new filing fees, and retaining attorneys in each country to assist. On the positive side, the original filing/priority date of the international registration will be maintained.

**Classification of goods and services** - If you apply directly for a CTM you can select the goods and services you wish to cover with your trademark. However, if you apply via the Madrid Protocol, the description of goods and services must be the same or less than those in the US application or registration. As product categories for trademark protection are typically more strictly defined in the US, filing an international application which requests CTM protection may cause you to have to limit the scope of your identification of goods and services more than you would otherwise have chosen to do. In other words, you need to be aware that applying for a CTM via the international route may result in protection that is narrower than you could have obtained had you filed individual national applications or a direct CTM application.

### **National Registration**

If your company targets three or fewer EU Member State markets, national registration is generally less expensive. However, since the costs of trademark protection in individual EU Member States will vary, companies are encouraged to check the current trademark fees of the relevant EU Member States before making a final decision as to the appropriate application method. Furthermore, if your company’s CTM application is refused, or your CTM registration is later revoked following a successful challenge, then obtaining national trademark protection from individual EU Member States is the way forward.

#### ➤ Coverage

*The CTM gives its proprietor protection against the reproduction or imitation of his trademark throughout the European Union. The CTM is also transferable and may be licensed.*

The CTM gives its proprietor the right to prohibit all third parties who do not have his consent from using the same or similar marks for identical or related goods or services as those protected by the CTM. Similarity is judged by reference to the likelihood of confusing the public as to the source of the goods and services. The existence of a reputation in the EU enhances the protection given to a CTM. The prohibition from using identical or similar marks is extended to goods or services that are not similar to those for which the trade mark is registered if such use takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. Contractual licenses granted in respect of the CTM may be exclusive or non-exclusive and cover the entire EU or just specific Member States.

Where the proprietor of the trademark has proceeded or agreed to market goods under this trademark in an EU Member State, he cannot prohibit their free movement in the European Union. This limitation on the rights conferred by the Community trademark is derived from the rule of exhaustion of those rights within the Community, which is also applicable to national and international trademarks of Member States of the European Union. Parallel imports of products covered by the

Community trademark from countries that are not members of the European Union are not subject to this rule and to this limitation, with the exception of those countries party to the Agreement on the European Economic Area.

The CTM may be transferred in respect of all or part of the goods or services for which it has been registered. The transfer does not necessarily involve a transfer of the company. However, such a transfer must not result in the public being misled, in particular with regard to the type, quality or geographic origin of the goods and services.

➤ Market Entry Planning

Companies should apply for trademark protection in the EU as soon as possible and must exercise any priority rights available so that the effect of the registration can be backdated. According to the terms of the WIPO Paris Convention for the Protection of Industrial Property, if you apply for a trademark in the US and then apply for a CTM within six months, the application date of your US mark will be taken as the priority date of your CTM. Because the CTM system is essentially first to file, it is important to make sure you exercise any available rights to an earlier filing date.

The cost of trademark protection will vary based upon a number of factors including the type of trademark that you want to protect and the number of international classes of goods and services selected. For specific information on current fees, see the [WIPO website for fee information](#) and/or [OHIM's list of fee information](#).

*Combining Trademark Protection with other forms of IPR*

A product's "look" can be registered as a design and/or trademark. While the registered design protects the product's novel and individual appearance, the trademark links it uniquely to the producer and helps distinguish it in the target market. In such cases companies should be careful of registering the trademark first since this can impact the novelty criterion for design registration. Sometimes design protection can provide a versatile alternative to 3-D trademarks when a company looks to protect the shape of its products. For example, a 3-D trademark cannot be registered if the shape of the product is essential to its function, whereas a design application can only be turned down on "functionality" grounds if the product can only work if it is designed in that way.

➤ Enforcement

In addition to the practical benefits of a single application in a single language with a single administrative center, the CTM also provides a single enforcement mechanism. If your registered mark is copied or imitated you can take the accused party to a CTM court (national courts designated to hear CTM cases) and get a decision that is valid across the EU-27. This means you will not have to litigate in individual countries, in different languages and under different national laws. The CTM also makes it easier to fulfill the "use or lose" requirement for EU trademarks because you only need to use the mark in one EU Member State to fulfill the use requirement. If you have separate national registrations you need to use the mark in each Member State's market.

Enforcing a European trademark can be done both civilly and/or administratively. While there are international agreements, such as [Agreement on Trade-Related Aspects of Intellectual Property](#)

[Rights](#) (TRIPS), that have the basic standards for effective IP enforcement procedures, under the [EU's Enforcement of Intellectual Property Rights Directive](#), enforcement is a Member State responsibility. Under the Directive, Member States must provide measures, procedures and remedies necessary to ensure the enforcement of IPR that are fair and equitable. All EU Member States must provide “effective, dissuasive, and proportionate” remedies and penalties against those engaged in counterfeiting and piracy.

The abovementioned Directive has led many states to adopt national provisions on civil remedies more closely in line with “best practices” standards. These standards include procedural protection, which covers evidence and protection of evidence, and provisional measures such as injunctions and seizure. There is also a “right of information” that allows judges to gain access to names and addresses of those involved in distributing the illegal goods, and the details about the amount of goods involved and the prices. Remedies include the infringing product’s destruction, recall of illegal material, and permanent removal of that product from the EU market. The legitimate trademark holder may be entitled to damages and/or injunctive relief. Thus far, the EU has no criminal remedy available.

Under the [EU Regulation concerning customs action against goods suspected of infringing certain IP rights](#), the right-holder may file a written complaint with the relevant customs authorities seeking suspension of the release of imported merchandise. Such an application for action must include accurate and detailed descriptions of the product in question, information about the nature of the fraud, and the trademark holder’s contact information. The law applicable when deciding whether an intellectual property right has been infringed is that of the Member State where the presumably infringing product was discovered. Member States may also enable the customs authorities to have the infringing product destroyed.

The law applicable when deciding whether an intellectual property right has been infringed is the law in force in the Member State where the goods were found. In accordance with national provisions, and with the right-holder's agreement, the Member States may now set up a simplified procedure to enable the customs authorities to have the goods destroyed. If the infringement of an intellectual property right is not established within a set deadline, the detention order is lifted and the goods are released once the necessary customs formalities have been discharged. The deadline is shorter in the case of perishable goods.

Companies wishing to bring a claim for infringement have two options: using a Member State court where an infringement occurred or using the Member State’s court where the alleged infringer is domiciled.

Under the first option—the court of the Member State where the infringement occurred—the court will have jurisdiction to the extent that the act was committed within the territory of the Member State where that court is situated. The second option—choosing to use the court of the Member State where the defendant is domiciled—is advantageous because it allows a party to join all claims in a single proceeding. This is the case because the Member State court has jurisdiction over all infringement acts within the territory of the European Union. Judges sitting at EU trademark courts are specialized in trademark claims and their decisions are enforceable in all EU Member States.

➤ Conclusion

US exporters should always carefully consider seeking intellectual property protection in foreign markets in which they wish to do business. The European Community Trademark provides an effective means of protecting your trademarks across the EU's 27 Member States. It is an opportunity that has not been lost on US companies: almost one-fourth of the CTMs registered between 1997 and 2004 originated from applications by US companies—nearly 58,000 trademarks.

➤ Helpful Links

**International Legislation**

Parties to the Madrid System:

[http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid\\_marks.pdf](http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf)

**EU legislation relating to trademarks**

Community Trade Mark Regulation:

[http://www.europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31994R0040&model=guichett](http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31994R0040&model=guichett)

Council Directive on Approximating Member States Trademark law:

[http://www.europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0104&model=guichett](http://www.europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0104&model=guichett)

**The Community Trademark**

Office of Harmonization in the Internal Market – OHIM:

<http://oami.europa.eu>

Electronic Renewal of Community Trademarks

<http://oami.europa.eu/en/erenew.htm>

FAQs on the Community Trademark:

<http://oami.europa.eu/en/mark/marque/question.htm>

Ten Good Reasons for Using the Community Trademark:

<http://oami.europa.eu/en/mark/role/raisons.htm>

OHIM's Community Trade Mark Bulletin:

[http://oami.europa.eu/bulletin/ctm/ctm\\_bulletin\\_en.htm](http://oami.europa.eu/bulletin/ctm/ctm_bulletin_en.htm)

OHIM's Online Community Trademark Application:

<https://secure.oami.europa.eu/efiling/efservlet?langId=EN&result=init&reloadable=YES#top>

Community Trademark Statistics:

<http://oami.europa.eu/pdf/office/SSC009%20->

[%20Statistics%20of%20Community%20Trade%20Marks%202005.pdf](#)

### **International trademark applications**

USPTO Guide to the Implementation of the Madrid Protocol in the US:  
<http://www.uspto.gov/web/trademarks/madrid/madridguide.htm>

OHIM and the Madrid Protocol:  
<http://oami.eu.int/en/mark/madrid/default.htm>

### **Member State Law**

Applicable Trademark Law in Member States:  
<http://oami.europa.eu/en/mark/aspects/natlaw/default.htm>

### **General**

The Paris Convention for the Protection of Industrial Property:  
<http://www.wipo.int/treaties/en/ip/paris/>

World Intellectual Property Organization's website for SMEs:  
<http://www.wipo.int/sme/en/>

The US Patent and Trademark Office:  
<http://www.uspto.gov/>

DG Internal Market – dedicated website on Trademark legislation:  
[http://www.europa.eu/comm/internal\\_market/en/indprop/tm/index.htm](http://www.europa.eu/comm/internal_market/en/indprop/tm/index.htm)



## Community Designs

### ➤ Introduction

Community designs are the European Union’s (EU’s) equivalent to [industrial design](#) (or simply “design”), which is a type of [industrial property](#) that is protected by intellectual property rights. In the EU, a community design is defined as “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation”. Essentially, community designs protect the ornamental or aesthetic aspects of products, that is, the outward appearance of a product.

US design patents do not provide protection outside US territory. For products marketed or sold in the EU, your company may apply for a Registered Community Design (RCD) by way of a relatively inexpensive and simple application process that provides protection across all twenty-seven EU Member States. US exporters who sell products in the EU, where the value from such products can be attributed in part to the product’s design should register in the EU.

### ➤ Legislation

In general, to receive design protection under international, EU, and national law, companies must establish that their product is novel and possesses an individual character. Design rights protect new and original visual aspects of a product or its package and that a product’s design can be protected at the same time by a registered trademark, design protection, and/or a patent. Each form of IPR serves a different purpose and is *not* mutually exclusive. Specific components of a product may also receive design protection if they are visible during the product’s normal use and their design fulfills the novelty and individuality requirements for a design to be protected.

A registered design qualifies as novel if it is not “made available to the public” prior to the earliest date of filing of the application. Public disclosure of the design before this could affect a design’s novelty (USPTO comments: novelty is the proper term of art) status. The individual character requirement is more searching. A design is considered to be “individual” if the overall impression it produces on the informed user differs from that of existing designs. As Article 6.1 of Regulation 6/2002 puts it, “a design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design that has been made available to the public.”

## International Law

The World Intellectual Property Organization (WIPO) maintains the [Hague System](#) for the International Registration of Industrial Designs, which allows companies to receive industrial design protection from states in the [Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications](#) (SCT) by filing one application.

The European Community submitted an instrument of accession to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs. Accession to the Geneva Act of the Hague Agreement links WIPO’s Hague System and the Office for Harmonization in the



Internal Market (OHIM) community design system (located in Alicante, Spain). This means that as of January 1, 2008, companies can submit one application for design protection through the Community Design and any of the twenty-three countries that are members of the Geneva Act. This will simplify procedures, reduce costs for international protection, and make administration easier.

## **EU Law**

EU Member States adopted Directive 98/71 on the legal protection of designs and Regulation 6/2002 on Community Designs to allow companies to receive a single EU wide design protection instrument. The [Office for Harmonization in the Internal Market](#) (OHIM) processes design applications.

## **National Law**

Companies may choose to register their design with a Member State and receive national design protection, which will exist in parallel with community design protection.

### ➤ Coverage

The Community Design Regulation provides for both an unregistered and a registered design right. The Unregistered Community Design (UCD) automatically protects a design that is new and has individual character for three years from the date it is first made public within the EU.

A Registered Community Design (RCD) provides longer, more robust, and more comprehensive protection. It lasts initially for five years and can be renewed in five-year blocks up to a maximum of twenty-five years. Further, in infringement cases an RCD provides more robust protection because unlike UCD, the design creator does not need to prove the validity of the design. Also, with UCD, to prove infringement, the original designer must prove that the design was copied and not the result of an independent creation by another.

If a design is targeted toward several EU Member States, the simplicity and cost of an RCD is compelling. It involves a single application, language, and administrative center. The initial five-year registration fee for one design is around 350 euros. Further, RCDs allow a designer to include several different designs in the same application and to keep designs confidential for up to thirty months after registration.

## **What Is Not Covered**

OHIM will not cover component parts that are not visible once incorporated into complex products or designs dictated by function of the product. OHIM cites certain parts of a shaver as an example of what will not be covered by the CTM, since the shaver must have a certain shape in order to work and "must-fit" parts of complex products. For example, electrical or other interconnections (with the exception of connections in modular systems such as Lego) will not be protected under the Community Design.

Furthermore, under Directive 98/71, designs that constitute a component part of a complex product will not be protected when used for the purpose of repairing that complex product so as to restore its

original appearance.

### **Combining Design Protection with other forms of IPR**

**Trademarks** - a product's "look" can be registered as a design and/or trademark. While the registered design protects the product's novel and individual appearance, the trademark links it uniquely to the producer and helps distinguish it in the target market. In such cases companies should be careful of registering the trademark first since this can impact the novelty criterion for design registration. Sometimes design protection can provide a versatile alternative to 3-D trademarks when a company looks to protect the shape of its products. For example, a 3-D trademark cannot be registered if the shape of the product is essential to its function, whereas a design application can only be turned down on "functionality" grounds if the product can only work if it is designed in that way.

**Patents** – patent and design protection are not mutually exclusive either. New products can have both an innovative function and a novel design but, as the timing of disclosure/publication is crucial to both the registering of a design and the filing of a patent, the IP protection process needs to be managed carefully. Unfortunately, there is no patent protection equivalent of the Registered Community Design (see section on patents).

#### ➤ Registration

Before filing for design protection, companies should search international design registrations listed in the [Hague Express](#) database. Provided that the design has not yet been registered, companies can apply for a Community Design with the EU agency responsible for EU wide trademark and design registration, OHIM, or through a national industrial property office, which will forward the application to OHIM.

Non-EU based companies can apply for an RCD but need an EU representative for all subsequent dealings, including future correspondence, with OHIM. In practice many EU-based firms also choose to use the services of experienced design practitioners for their initial design registration and subsequent dealings with OHIM. OHIM has a list of professional representatives on its website. Companies can also use any legal practitioner that is qualified to represent a client to a national trademark office.

While it checks the application to see that it is complete and not "contrary to public policy or morality", OHIM does not carry out a detailed examination of the design's novelty or individual character. You will need to carry out your own research to check the validity of your design. OHIM's on-line design search tool can help in this respect. A design can be invalidated following registration if the challenger can prove that it is not new, or does not possess individual character. Importantly, lack of novelty can be demonstrated if the design was first publicly disclosed more than twelve months before registration.

### **An application may be made by mail, by fax, electronically or in person at OHIM**

OHIM receives applications by mail and fax, and now also offers on-line [e-filing](#). The registration request needs to show the design, and has to specify to which products it will be applied. To speed up the registration process, OHIM recommends that applicants use its detailed product classification list

(EUROLOCARNO), which is based on the international Locarno system, translated into the EU's 23 official languages and searchable on-line. The application may cover an unlimited number of different designs as long as they all belong to the same class of product. For example, class 06 is "furnishings" and class 02 is "clothing."

In the case of fax filing, the quality of the representation of the design is likely to be quite poor (especially if photographs are used) since this technology is not adequate for the transmission of image information. Filing by fax is therefore not favored in general. If, however, applicants still wish to use the fax to file, they should make sure that a paper copy of the representation is sent to OHIM within one month from the date of the receipt of the fax. The examiner will await a confirmation copy for a period of up to one month, before further processing the application.

The application for registration must be filed together with payment of the required fees (350 euros for a single application).

RCD registration lasts for up to twenty-five years and may be renewed every five years up to that maximum. The basic registration fee for a first design is approximately 230 euros, although the fees are lower for any further design registered at the same time. Renewals cost 90 euros for a first renewal up to 180 euros for a maximum fourth renewal. To be eligible for protection, designs must be new and have an individual character. This means that the design must appear different from products that existed previously to the public.

### **Is there a limit to the number of designs, which may be applied for in an application?**

For traditional filing, there is no upper limit to the number of designs that may be submitted. However, the products to which the design is applied belong to the same Locarno class, which means that they must pertain to the same type of goods. The exception to this is that if filing an online application, OHIM will only accept 99 designs. This condition does not apply when an application concerns ornamentation.

### **How many views of my design can I submit?**

The design should be represented by at least one view but up to seven views per design may be supplied. In a multiple application, the maximum number of views will be seven per design, multiplied by the number of designs.

### **The Registered Community Design – Key Considerations**

**Grace Period** - novelty is an essential criterion for an RCD. A design that has been made public is no longer novel. The Design Regulation provides an exception to this in the form of a twelve-month grace period between a design's first public disclosure and the earliest filing date of the application. This "grace period" allows your company to test its design marketability before pursuing a formal registration. In the interim the design is protected as an Unregistered Community Design against exact copies. If the twelve-month deadline is missed, then an RCD can later be challenged on the grounds of lack of novelty. It follows that enjoying three years protection under the UCD system, and then looking to register, is not an option. Given the importance of disclosure to a design's validity,

one should carefully document that first public appearance, particularly at trade shows and exhibitions.

**Priority Right** – companies may request that an earlier filing date for their registration by using what is known as the “priority right”. If the design a company presents for RCD status has already been the subject of an earlier filing (in certain countries), or has been disclosed at an officially recognized exhibition, a company may exercise its priority rights to claim the original filing/disclosure date as the filing date for an RCD. Because the novelty status of a design is so important to ensure its legal protection, this priority right should be exercised wherever possible, but is only available for six months after the original filing/disclosure. Carefully timed and well documented disclosure is key for companies to benefit from the grace period and priority right options because once a design is disclosed the clock starts ticking. You have six months to claim the priority right, twelve months to register your RCD.

**Disclosure** – EU design protection law essentially defines disclosure as making the design available to the public before the applicable date of the protection one is seeking. In addition, EU law provides that public availability means that the disclosure cannot have been subject to a confidentiality agreement or have been made in such a way that the interested sector operating in the EU could not have become aware of it.

**The deferral option** – a company may opt to keep their RCD confidential for up to thirty months after filing its application. This can be helpful if a company needs time to fine-tune a product launch and want to keep the design under wraps. If a company chooses this “deferred publication” option it provides all the necessary details just as it would in a normal application. However, OHIM only publishes basic details in the Register and the substance remains confidential. Note that companies may cancel this deferral at any time.

➤ Enforcement

Enforcing an RCD is generally easier than separately enforcing national design rights in each individual Member State. Infringement proceedings go before Community Design Courts, which are Member State courts that are designated to hear RCD cases. The decisions of these courts apply throughout the EU, making it unnecessary to separately litigate an infringement claim in Member State individual courts. In short, the RCD is an instrument designed to complement the single market. If your market, actual or potential, is EU-wide then a pan-European design protection instrument makes sense.

OHIM deals with implementation at Community level. Member States have exclusive powers for infringements of Community designs (registered and unregistered) and, to that end, must designate one or more Community design courts of first and second instance.

These courts are responsible for:

- infringement actions and - if they are permitted by national law - actions in respect of threatened infringement;

- actions for a declaration of invalidity of an unregistered Community design;
- counter-claims for a declaration of invalidity of a Community design raised in connection with infringement actions.

➤ Fees

There are registration, publication, and renewal fees for EU design protection, which are available on the [OHIM website](#). To discover the specific fees for registering a design with WIPO, you can use WIPO's [fee calculator](#).

➤ Conclusion

The design of a product can add to its value and increase its marketability. If your product's appearance risks being copied or imitated then its market potential could be threatened unless you protect your industrial property. The RCD provides you with an exclusive right against unauthorized copying or imitation of your design. OHIM design registration statistics point to the attractiveness of the RCD. Over 8,500 have been registered by US companies, which represent nearly 9% of the total. Registering designs in the EU is relatively inexpensive and simple. For this reason, even those US companies that may not have considered design registration at home may look at it as a viable option in the EU.

➤ Helpful Links

Costs of registering a Community Design:

STOP! USG campaign to promote better enforcement of intellectual property rights:  
[www.stopfakes.com](http://www.stopfakes.com)

United States Patent and Trademark Office:  
<http://www.uspto.gov/>

World Intellectual Property Organization's SME website:  
[www.wipo.org/sme/en/index.html](http://www.wipo.org/sme/en/index.html)

TRIPS agreement:  
[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)

## Geographical Indications

### ➤ Introduction

The World Intellectual Property Organization (WIPO) defines a [geographical indication](#) (GI) as “a sign used on goods that have a specific geographical origin and possess qualities, a reputation, or characteristics that are essentially attributable to that origin.” An [appellation of origin](#) (AO) is a common form of a GI that consists of either a geographical name or a traditional designation used on products that suggests specific qualities or characteristics, which are attributed to the geographical environment in which they are produced. Frequently, GIs are associated with and include the name of a product's place of origin.

Geographical indications may be used for a wide variety of products whether organic or manufactured. Agricultural products are often associated with their region of production because such products are generally a result of local climate, sunshine, and soil that are specific to a particular region. For example, Napa Valley is reputable for its wine, Tuscany for its olive oil, and Roquefort for cheese. These generally have GI protection. National laws dictate whether GIs qualify for protection. GIs may serve as a successful marketing tool because they help customers associate the product with a level of quality. Companies that sell products where a specific characteristic of that product relates to a geographical origin should consider obtaining GI protection.

### ➤ Legislation

GIs are protected in accordance with international, EU, and national laws. For example, trademark laws in the form of collective marks or certification marks, unfair competition legislation, consumer protection laws, or specific laws that recognize individual GIs.

## International Laws

WIPO administers multiple [international treaties](#) that address GI and AO protection, notably the [Paris Convention](#) for the Protection of Industrial Property and the [Lisbon Agreement](#) for the Protection of Appellations of Origin and their International Registration.

The [Lisbon System](#), which was established under the [Lisbon Agreement](#) was established to facilitate

the international protection of AOs. The system offers a means of obtaining protection for an AO in the contracting parties to the Lisbon Agreement through a single registration. Registrations can be searched through the [Lisbon Express](#) database.

In addition, Articles 22 to 24 of the [Agreement on Trade-Related Aspects of Intellectual Property Rights](#) (TRIPS) address international protection of geographical indications within the WTO framework.

WIPO works with Member States and interested organizations in the [Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications](#) (SCT) to develop the international legal framework for GIs.

## European Union Laws

In 1992, the EU established a method for companies to gain unitary GI protection throughout the EU-27 Member States. The EU offers specific GI protection for wines, spirits, and mineral waters. If the EU has not developed legislation for a specific GI, GIs may be registered as a certification or collective mark under either or both a Member State's national law and/or as a Community Trademark.

As mentioned, the US and the EU have disputed over the EU's legal regime and in 1999 the US and Australia brought dispute settlement proceedings against the EU before the World Trade Organization (WTO). After the WTO panel held in favor of the US and Australia, in 2006, the EU updated its [GI Regulation](#) to grant equal protection to GIs properly filed in Europe.

The EU protects GIs that qualify as designations of origin or geographical indications and that have not become generic. To qualify as a Protected Designation of Origin (PDO) or Protected Geographical Indication (PGI), a product must comply with specifications for describing the "principal physical, chemical, microbiological or organoleptic characteristics" of the product, and also list the geographic area from which it originates that gives rise to such a product's unique proprietary traits.

A "designation of origin" refers to a region's name and will be protected if the designation fulfills three conditions: (1) the product must originate in that geographical area, (2) the quality or characteristics of the product must be essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and (3) production, processing and preparation of the product must take place in the defined geographical area.

Essentially, the only requirement for a word to become a PDO is a connection between land and the qualities of the product. A traditional non-geographical name designating a region or a specific place may also be registered as a PDO if it fulfills the conditions above.

A "geographical indication" also refers to a region's name and is also subject to three conditions: (1) the product must originate in that geographical area, (2) a specific quality, reputation or other characteristic that is attributable to that geographical origin, and (3) the production and/or processing and/or preparation of the product takes place in the defined geographical area.

A main difference between PGIs and PDOs is that PDO products are generally more connected to the product's qualities and the land, whereas PGIs must only be attributable to the product's geographical origin. Also, to be granted PGI protection, an applicant need only establish that one of the elements of production, processing, or preparation takes place in the geographical area. Traditional non-geographical names designating regions or specific places may also be registered as a PGI.

It is not possible to register PGIs as symbols. To date, there is no obligation for GIs to indicate that the name of a product marketed under a registered PDO or PGI is a registered designation. If a product is placed on the European market after April 30, 2009, the company must properly mark the product's label as receiving EU GI protection.

➤ Coverage

EU GI protection prohibits any misuse, imitation, or evocation of registered GIs, even where an unprotected product indicates its true origin, or where qualifiers such as "method," "style," and "type" accompany the name of an unprotected product. The GI Regulation also prohibits any false or misleading indication as to the provenance, origin, nature or essential qualities of a product any other practice that could mislead consumers.

➤ Registration

If your company has an EU office, that office may file a GI application for registration with the Member State's national authority. However, if your company does not have EU representation, it may either file an application with the EU Commission or the Member State authorities. The relevant national authority conducts an initial examination of the GI application, and forwards the application to the EU Commission for a review. If your company's product originates from outside of the EU, only the European Commission will review its application.

If the Commission approves the GI registration application, the relevant authorities will publish your company's PDO or PGI and the specifications for such a GI, in the Official Journal of the European Union. For six months after the date of publication, parties may object to a proposed PDO or PGI. Any natural or legal person, inside or outside of the EU who has a legitimate interest in the outcome of the GI registration application may file an objection. Natural or legal persons in an EU Member State outside of the Member State where the application originated must file objections with the competent authorities in their home Member State within a limited and reasonable period established nationally but not to exceed six months. If there are no objections to the GI application, the GI will be registered as either a PDO or PGI.

➤ Helpful Links & Sources

Annette Kur and Sam Cock's Article: Nothing but a GI Thing: Geographical Indications under EU Law, May, 8, 2007, available at <https://law.fordham.edu/publications/articles/200flspub8031.pdf>

Council Regulation on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs:

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_093/l\\_09320060331en00120025.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_093/l_09320060331en00120025.pdf)



National Authority for Geographical Indications:

[http://ec.europa.eu/agriculture/foodqual/protec/national/index\\_en.htm](http://ec.europa.eu/agriculture/foodqual/protec/national/index_en.htm)

TRIPS Agreement:

[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

WIPO Gate for GIs:

[http://www.wipo.int/about-ip/en/geographical\\_ind.html](http://www.wipo.int/about-ip/en/geographical_ind.html)

## **Trade Secrets**

### ➤ Introduction

Trade secrets refer to various types of confidential business information. That is, technical, commercial, or financial information that is not readily ascertainable by the public. Under TRIPS Article 39, information is eligible for trade secret protection if it is identified, substantial, and secret. Trade secrets help give businesses a competitive edge.

### ➤ Legislation, Registration, & Enforcement Information

Trade secret protection is afforded without registration and can last indefinitely, if the business can ensure that confidentiality is maintained. Difficulty arises when the trade secret involves an invention or patentable product, however, because companies must consider the costs and benefits between obtaining protection by considering the scope of legal protection that a patent would provide versus trying to maintain the entirely confidential information in-house. When companies make this decision, they should consider the gravity of confidential information involved, the product's projected use, the scope of the competitive advantage the company maintains by having the information, and the company's ability to keep the information confidential

The difficulty in evaluating what, if any, protection to obtain, is identifying the gravity of allowing the information to go public. Once a trade secret is revealed, that company's competitive advantage may be lost. Trade secret holders should, at minimum, create confidentiality provisions in contracts with those who will have access to the information and consider what legal remedies may be sought if the information becomes public or is illegally disseminated. Confidentiality and Non-Disclosure Agreements (NDAs) might also be worth considering when others (clients, colleagues, or employees) may have access to confidential business information.

## **International Law**

TRIPS Article 39 allows sanctions against procurement, use or disclosure of a trade secret, through application of the laws on unfair competition or practices. Further, if your company created confidentiality provisions by way of an NDA, a violation of a confidentiality clause may provide grounds for a breach of contract claim.

## **European Union Law**

There are no EU-wide laws that protect trade secrets, but there are multiple European Directives and Regulations that protect data submitted for registration purposes. It is important to discover what data your company is trying to protect and which relevant European legislation applies to determine exactly how to protect your company's trade secrets.

## Trade Shows

Given that a vast majority of products and technologies are introduced into the EU market via trade fairs, US companies interested in entering the EU market should consider taking full advantage of the business opportunities presented at these events.

EU trade fairs provide excellent opportunities for monitoring international infringement of your IPR. The larger trade fair organizers offer some sort of legal advice during trade fairs, either thru in-house lawyers or affiliated law firms. They are, however, not in a position to act on behalf of (or against) exhibitors unless there is a court decision that clearly stipulates that such an action is legally justifiable (could be an injunction or court order).

If your company decides to participate in a trade fair, it is wise to complete the following:

- ❖ Register your IPR before you exhibit at a trade fair.
- ❖ Register with an [EU Member State's Customs Authority](#) if you believe that another exhibitor will be infringing your rights.
- ❖ Bring documentation with you to the trade fair; you must be able to demonstrate your ownership. Copies of your patent or trademark rights will suffice.
- ❖ Be aware that at many EU Member State trade fairs, organizers do not themselves determine which party is guilty of unauthorized copying – that is left to a legal process. They are, in fact, prohibited by law from actually closing down a trade fair booth during the show. The organizers are, however, generally willing to remind an exhibitor of his/her responsibilities under the anti-piracy clause not to knowingly copy the IPR of other exhibitors – and that helps dissuade some.
- ❖ Contact the [US Commercial Service](#) in the Member State where you will participate in a trade fair for detailed information on IPR protection activities of the individual trade fair organizers.
- ❖ Take steps to protect your trade secrets (anything that has commercial value because it is secret, such as pricing methods, key ingredients, customer lists.) To make a claim against a violator, you need to show not only that the secret has value but that its value derives from the fact that it is secret. You also need to show that you have taken reasonable steps to ensure its secrecy. This may mean restricting access to only those parties with a clear need-to-know AND requiring those persons with access to sign non-compete and non-disclosure agreements.

If you suspect that another exhibitor is copying you, consider taking the following steps:

- ❖ If you believe in advance of a trade fair that a competitor may infringe your company's EU registered rights, contact Customs at the relevant Member State, register with them, and inform them about your suspicion. German customs authorities have the right to seize infringing products, sometimes even at the fairgrounds. Contact the [US Commercial Service](#) for further information.
- ❖ At the trade fair, check out exhibitors you suspect of copying. If you see an exhibitor you suspect of copying your IPR, try to obtain a sample and/or brochure plus their contact information. Contact the fair organizer's legal department, if available, to discuss your options and seek their assistance. Some fair organizers have staff on hand, which are able to provide counseling and other help. Also inform the US Commercial Service. We cannot provide legal counsel but can help you consider options and contact a lawyer if advisable.
- ❖ Check a Member State's Declaration of Forbearance. A lawyer can work with you to draft a Declaration of Forbearance and serve it on the alleged copier. Upon accepting it, the alleged copier agrees to voluntarily withdraw product(s) in question, remove (or black out) any references in catalogs, etc., as well as pay the lawyer's fee for drawing up the Declaration of Forbearance (starting at about 200 euros, for example, in Germany).
- ❖ If the exhibitor refuses to sign, a Preliminary Injunction may be necessary. The procedure entails a lawyer taking proof, provided by the US exhibitor (copies of registrations, letters, faxes, or e-mails showing that the alleged copier had previously procured samples from the US exhibitor, etc.) to a judge. The preliminary injunction prohibits the alleged IPR-copier from exhibiting or selling the products in question, until the issue becomes a court case in which rights are clarified.
- ❖ Some trade show areas are legally declared a "customs border area," where seizures can be made before an infringing exhibitor is served with orders.

## **What You Can Do to Protect Your Intellectual Property**

Making regular audits of the existence or registration of your company's rights is key to protecting your intellectual property. If possible, maintaining a small in-house lawyer/legal team may also help your business protect its intellectual property. It may also be wise to consider withholding trade secrets or other sensitive business information from vulnerable markets where infringement is common. Using due diligence is always a must when your intellectual property is involved. If you have diverse products, testing a potentially unreliable market with an older product may also be a wise choice. Also, register with an [EU Member State's Customs Authority](#) in advance of trade show participation.

It is important to note that only when intellectual property is properly protected may a company initiate legal action for infringement. According to a study commissioned by the EU, 80% of small businesses fail to register patentable rights. The study also demonstrated that many SMEs are

unaware that having patent or trademark protection in one country does not protect that product from potential infringement in other areas of the world.

## What the US Government Can and Cannot Do

Many companies, particularly SMEs, which discover that their products are being infringed in the EU, contact the US Embassy in the Member State where the infringement occurred or the Department of Commerce in Washington for assistance. Because intellectual property rights are private rights, the US government can provide only limited direct assistance. In many cases, the US government can provide companies with information to aid in navigating the EU's legal system, including lists of local investigative firms and attorneys, and share experiences and expertise in the EU. However, the government cannot provide American companies with legal advice or advocate on a company's behalf when a matter is before a court or administrative agency.

When a company encounters blatant infringement of its IPR, the rights holder should hire local counsel and pursue a preliminary investigation, or through a contracted professional firm, keeping in mind that US companies should ensure compliance with EU law. Once the initial investigation is complete, the company should determine whether it is worth pursuing further action, especially considering possible costs. Rights holders have the option to initiate actions or seek redress through either the judicial or administrative systems.

Once a company decides to pursue a remedy, the US government will monitor the case, if requested to do so by the company. The Department of Commerce maintains a database of IPR disputes, which US companies bring to government's attention. The US government cannot intervene in these cases. However, the government can inquire about their status or contact EU government officials about concerns related to the effective administration of legal remedies available to IP holders as a general matter. As with other types of commercial disputes, US government efforts to assist with IPR disputes are aimed at achieving a fair and timely resolution in accordance with international commitments and EU laws, and in advancing adequate legal and judicial protection for all parties.

## Other Reference Materials and Links

Business Europe's Guide to Intellectual Property Rights for SMEs in Europe:

<http://212.3.246.117/docs/1/JPPDAIMAOGLJAPGPHICEANLPPDB39DBNGY9LI71KM/UNICE/docs/DLS/2007-00641-EN.pdf>

Charter of Fundamental Rights:

[http://ec.europa.eu/justice\\_home/unit/charte/en/charter-freedoms.html](http://ec.europa.eu/justice_home/unit/charte/en/charter-freedoms.html)

Collection of Laws for Electronic Access (CLEA):

<http://www.wipo.int/clea/en/index.jsp>

Doing Business in the European Union: A Guide for US Companies:

[http://www.buyusa.gov/europeanunion/two\\_zero\\_zero\\_seven\\_ccg.pdf](http://www.buyusa.gov/europeanunion/two_zero_zero_seven_ccg.pdf)

Directory of WIPO Member State Intellectual Property Offices:

<http://wipo.int/directory/en/urls.jsp>

International Chamber of Commerce's Roadmap for Business and Policy Makers:  
[http://www.original-ist-genial.de/fileadmin/icc\\_dokumente/IP\\_Roadmap-2007.pdf](http://www.original-ist-genial.de/fileadmin/icc_dokumente/IP_Roadmap-2007.pdf)

Intellectual Property Helpdesk (free service created by the European Commission's Directorate-General for Enterprise):  
<http://www.ipr-helpdesk.org/index.htm>

Intellectual Property Provisions in European Union Trade Agreements, Implications for Developing Countries, Maximiliano Santa Cruz S., (June 2007):  
<http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue%20.pdf>

International Treaties and Conventions on Intellectual Property:  
<http://wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf>

List of European Union Intellectual Property Laws:  
<http://www.law.stanford.edu/program/centers/ttlf/law/eu/ip/>

Member States Industrial Property Offices:  
<http://oami.europa.eu/en/links.htm>

Stop Fakes:  
<http://www.stopfakes.gov/>

Study: Effects of counterfeiting on EU SMEs and a review of various public and private IPR enforcement initiatives and resource:  
[http://www.ec.europa.eu/enterprise/enterprise\\_policy/industry/doc/Counterfeiting\\_Main%20Report\\_Final.pdf](http://www.ec.europa.eu/enterprise/enterprise_policy/industry/doc/Counterfeiting_Main%20Report_Final.pdf)

The European Commission's Strategy for the Enforcement of Intellectual Property Rights in Third Countries:  
[http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122636.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf)

United States Mission to the European Union's Department of Commerce:  
<http://www.buyusa.gov/europeanunion>

United States Trade Representative Special 301 Report:  
[http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2007/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2007/Section_Index.html)

World Intellectual Property Organization (WIPO):  
<http://wipo.int/portal/index.html.en>

World Intellectual Property Organization Member States:  
<http://wipo.int/members/en/>

**For more information:**

The US Commercial Service at the US Mission to the European Union is located at Boulevard du Régent 27, Brussels B-1000, Belgium, and can be contacted via e-mail at:

[brussels.ec.office.box@mail.doc.gov](mailto:brussels.ec.office.box@mail.doc.gov); or visit our website at [www.buyusa.gov/eu](http://www.buyusa.gov/eu).

You can locate your nearest US Export Assistance Center, as well as Commercial Service offices throughout Europe by visiting [ww.buyusa.gov](http://ww.buyusa.gov) and [www.buyusa.gov/europe](http://www.buyusa.gov/europe).

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