

Response to the EUIPO Consultation on Strategic Plan 2025 stakeholder consultation

https://euiipo.europa.eu/ohimportal/en/news?p_p_id=csnews_WAR_csnewsportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=2&journalId=4962888&journalRelatedId>manual/

Background

This is a collaborative submission from a group of academics based in the UK with expertise in intellectual property law and information technology law.

The preparation of this response has been funded by British and Irish Law, Education and Technology Association (“BILETA”) <http://www.bileta.ac.uk/default.aspx>

This response has been prepared by Prepared by Felipe Romero Moreno (University of Hertfordshire) and James Griffin (University of Exeter) .

This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association) <http://www.bileta.ac.uk/default.aspx> and is therefore submitted on behalf of BILETA.

In addition, this response is submitted by the following individuals:

Dr Catherine Easton, University of Lancaster

Dr. Maureen O. Mapp, Birmingham Law School, University of Birmingham

Dr Mark Leiser, Leiden University

Q1:

How can we reinforce the value of IP rights and make them more meaningful and competitive, given the rise in importance of e-commerce?

The value of Intellectual Property (IP) rights is usually not appropriately acknowledged and their potential for offering future profit-making opportunities is broadly underrated. Nevertheless, if IP rights are adequately protected and there is a demand for IP-related goods and services, these rights can become a valuable asset to rightholders.¹ Thus, there are some recommendations that the EUIPO should adopt to strengthen IP rights. Firstly, IP infringement frequently arises because rightholders cannot satisfy their consumers with legal alternatives. Therefore, the best way to tackle IP infringement is with more convenient, accessible and better legitimate supply. This is more effective than the use of enforcement powers. Secondly, illegal sites specializing in IP infringement are commercial businesses, which means that another effective way to battle these sites is to stop their monetary funds, for example, by removing infringing sites from payment processor and advertising services. Thirdly, a different way to reinforce the value of IP rights is to implement enforcement measures, for instance, investment in streamlining processes for the removal of infringing material. Fourthly, IP infringement allegations brought in bad faith can be used for censorship and anti-competitive purposes. Rules that currently deal with e.g. copyright misuse (in the UK, restraint of trade) that reign in anti-competitive uses are weak, and there are limited judicial (or policy) discussions concerning the relationship of IPR and the freedom of expression. Thus, another way to strengthen IP rights is to ensure that these fabricated allegations are flagged up and rejected. There should be a strengthening of policy towards assessing the boundaries between IPR, freedom of expression and competition law, rather than brushing the issues under carpet. Finally, the last way to make IP rights more competitive and meaningful is to increase transparency. For instance, using Transparency Reports, which disclose the number of requests that internet intermediaries receive from rightholders to takedown content from their services.²

How can we further increase the understanding of IP by citizens and policymakers?

In order for the EUIPO to more effectively raise public awareness and understanding of IP, the key is innovation in branding, advertising and marketing. For instance, Google offers some platforms for advertisers to increase brand awareness, attract new clients, and create additional revenue sources. By working with regulators and other industry partners, it helps guide the development of industry standards for safe digital display advertising. As noted before, infringing sites are most of the time for-profit entities, and provided that these sites can make money from infringements, arguably, enforcement powers will be unsuccessful. Thus, an effective way to battle such sites is to adopt the 'follow the money' approach, thereby cutting off their monetary funds by removing them from

¹ See WIPO, 'How can Intellectual Property enhance the market value of your SME?'.
² See Google, 'How Google fights piracy' (November 2018) pg 8.

advertising services.³ Accordingly, it is suggested that to raise awareness on the value of intellectual property and prevent its infringement, in addition to 'follow the money', the Office should also adopt micro-targeted educational advertising. For instance, using big data analytics, to model target specific groups of IP infringers by ensuring the right IP-related educational advertising messages are directed to the right individuals, such as commercial scale IP offenders. However, importantly, in view of the current Facebook-Cambridge Analytica scandal, the Office should also ensure that this micro-targeted educational advertising is implemented in a way which is compatible with human rights. Specifically, the use of big data analytics to target IP infringers should respect their right to privacy, protection of their personal data and freedom of expression, under Article 7, 8 and 11 of the EU Charter.

How can the role of IP rights be further enhanced to promote sustainable economic and social development?

When it comes to promoting sustainable economic and social development, AI can increase innovation and labour productivity, driving growth through human-machine collaboration and intelligent automation. As of February 2019, there are a large number of smart factories in the world where robots and humans are currently working together to enhance outcomes. Moreover, within the insurance industry, robots are carrying out monotonous tasks, permitting individuals to concentrate upon more difficult, knowledge-based processing and help line services. Similarly, new business opportunities are likewise generated through spillovers of innovation activities. For example, Google Maps is helping in boosting Uber and Ola growth, revolutionising mobility in society and generating jobs for many individuals.⁴ However, AI is not only for the tech, manufacturing, insurance, and transport industries. The energy, chemical, industrial and agricultural industries are also currently developing, procuring and deploying AI systems. For example, there are AI powered ocean micro-robots, which identify issues with deepwater drilling. AI is also deployed to match compositions for coatings and paint colors. Notably, the development, procurement and deployment of AI is already having a transformative impact across most industries. Thus, what the EUIPO should recognize is that the protection and enforcement of intellectual property rights might come more fully to fruition in the future, but not only the tech industry will need to start preparing for that moment.⁵ Sooner rather than later, AI systems will be as commonplace as electricity and will lead to the creation of new industries particularly to address issues, which even now, nobody knows.⁶

³ Ibid pg 56.

⁴ See Menon, 'How AI can drive socio-economic transformation'.

⁵ See Lexology, 'Litigating intellectual property issues: The impact of AI and machine learning'.

⁶ See Menon, 'How AI can drive socio-economic transformation'.

What more should we be doing to increase the efficiency of IP enforcement across Europe and to cooperate with IP Offices and other national authorities in coordinating our efforts to that end?

Using Article 13 of the forthcoming EU Copyright Directive as a case study, future changes in IP enforcement across EU are likely to depend on AI systems being developed by US companies. Presumably, to implement Article 13 it is likely that EU online content sharing service providers will be required to buy 'upload filters' from American corporations (eg Audible Magic and/or YouTube). However, it should be noted that in tackling IP infringement the deployment of these filters might easily lead to a well-documented set of legal problems. For instance, the evidence suggests that 'upload filters' can negatively impact on: (i) the right to freedom of expression ie Article 11 EU Charter - false positives, impact on lawful material; (ii) the right to protection of personal data and privacy ie Articles 8 and 7 EU Charter – use of Shallow Packet Inspection and/or Deep Packet Inspection; (iii) the freedom to conduct a business ie Article 16 EU Charter – complexity and cost of filters; (vi) and the right to a fair trial ie Article 47 EU Charter – inadequate complaint and redress mechanisms.⁷ For this reason, to increase the efficiency of IP enforcement across Europe, it is suggested that the EUIPO should encourage the cooperation of all concerned state authorities and regulators. Thus, for instance, supposing that Article 13 was eventually implemented in the UK, to avoid potential legal issues with these filters - see above - this would require cross-sector collaboration between four authorities. Specifically, the IPO (intellectual property authority), Ofcom (communications regulator), the ICO (data protection authority) and the CMA (competition authority). Notably, in the UK there seem to be some first steps being taken in this direction. For example, Ofcom is developing a collaborative research and work programme with the ICO and the CMA on matters sitting within their particular remits. Additionally, Ofcom is also working with overseas and domestic regulators to synchronise their specific work programmes regarding duties related to the internet.⁸

What are the areas where synergies should be sought by enhanced coordination with National Offices, the EPO, WIPO and other competent International organisations for the benefit of IP offices and users?

One area we can identify is that there could be co-ordination of the development of digital standards for the registration of IP rights, not just in terms of the right itself but with identifiers that could enable for easier automated licensing. Flags could also be inserted into documents to enable right holders to be able to more easily identify infringements as well as legitimate re-uses of their

⁷ See Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4; for an in-depth analysis of 'upload filters' see Romero-Moreno F, 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright' (2018) *Intl Rev of L Computers & Technology*.

⁸ See Ofcom, 'Addressing harmful online content' (London, 18 September 2018) pg 10.

works. This would then enable those offices to work more closely together in the online environment.

How can we make the IP system simpler and more accessible?

The provision of the IP toolkit that you have is a great starting point. However, the next step would be to campaign for clearer IP laws in member states. Perhaps we are an extreme example, but in the UK, we only need to look at our domestic statutes to realise that most of the critical aspects of our IP law is not present within the statute – or, if it is, then it is extremely vague. A campaign suggesting a greater degree of codification would be welcome. Whilst there have been a number of attempts to provide simplified information about the scope of IP, we feel that a more developed interactive means by which to advise individuals about IP would be useful. As suggested elsewhere, making the application process for IP more ‘digitally aware’, namely with more integrated reference and data flags, would be a first step in this direction.

Q2:

How can the Office use technological developments to improve user experience, efficiency and the quality of our services to them?

Direct online access to existing patent [EPO] and trade mark applications both in Europe and globally is already possible, but perhaps this could be made more easily and readily available via your web access point. We would also argue that there could be means by which to make information about copyright works more available, for instance, linking to existing repositories. In addition, the EUIPO could support the development of online licensing systems (e.g. that developed by Griffin et al in China with regard to 3D printing). This is a natural development of the Copyright Hub system in the UK, which can be developed in line with Article 13 of the proposed copyright directive. However, such a system could be used to encourage licensing of content without the problems of content flagging and censorship, a core concern of youtube’s arguments against filtering under that article. Your online systems could provide a means to interface with, and regulate, such a system, e.g. providing the means for human regulatory action.

Are there any new tasks or services that the Office could undertake to increase its added value to the EU and its citizens?

More increase of the digital means by which to provide means for applications would be of use. As noted elsewhere, the development of digital standards in applications would assist with the development of standards. For example, clear digital standards for computer software invention

applications could provide the means for third party integration, providing a means by which for others to be able to search for patents / trademarks / copyrights. It might be possible for a provide to enable a smart phone app which would scan content for potential IP – your databases could be opened to provide the information which otherwise would be more difficult to access.

What services do you think EUIPO can provide to make IP protection more accessible and attractive for SMEs?

From our empirical research, the best means by which to make IP more accessible is to provide free legal advice. Many feel that it would cost too much to initiate legal proceedings of any kind (even informal contact). That legal advice would go beyond descriptions of the law – more developed automated systems indicative of outcome could be used. These systems could use search algorithms to provide such an indication, by combining together the use of content flags attached to IP applications and publications, with AI knowledge of existing law.

Q3:

What support does the EUIPO staff need to face the future with confidence as the working world changes in response to new technology?

Using the example of the tech giant Google as a case study, in terms of staff support, the first important factor that the EUIPO should take into account to face the future with confidence and do high-quality work, is training for both, teams and employees. For example, the Google-to-Googler network (G2G) involves over 6,000 employees who volunteer their time to helping their colleagues to learn and improve. According to Google employee Edmonson, ‘G2G members do one-on-one mentoring, coach teams on psychological safety, and teach courses in professional skills ranging from leadership to Python coding... everyone can be both a learner and a teacher.’⁹ Secondly, another key factor to consider by the EUIPO, which helps Google employees to understand their roles, objectives and execute plans is a culture supporting structure and clarity. Google’s employee Shaw notes that to measure the team’s success and each employee’s role in attaining the team’s common objective, teams are grouped according to employee chemistry and strengths. ‘Google stresses the need for team members with the social and emotional skills needed to work well together... to produce something greater than they would if working alone.’¹⁰ Thirdly, to support staff, the last major factor that the Office should take into account is transparency. In an interview with former vice president at Google, Laszlo Bock stated, ‘Transparency is part of everything we do... we give engineers access to almost our entire code base on day one. Google employees get to see

⁹ See Edmonson, ‘The Fearless Organization: Creating Psychological Safety in the Workplace for Learning, Innovation, and Growth’ (2018).

¹⁰ See Fast Company, ‘This is how Google motivates its employees’.

the presentation that was given to the board of directors... if you have good people... they're going to make better decisions by being exposed to what is going on in the organization.'¹¹

What specific issues do we need to take into account given the likely changes to the way in which stakeholders will organise their interactions with the Office?

Given developments in AI, there are three issues the EUIPO staff may need to pay particular attention to. Firstly, automation takes away human oversight from elements of a decision-making procedure, conducting certain tasks with computer technology. Moreover, automation allows massive amounts of data being processed at a scale and speed not attainable by humans. Nevertheless, it also depends upon datasets that, in their design or adoption, can introduce bias and create discrimination risks for authorities such as, the EUIPO. Similarly, too much confidence and reliance upon automation might hinder the accessibility and transparency of a procedure, precluding the EUIPO from giving an account of outcomes. Secondly, in terms of data analysis, any dataset could be part of AI. The deployment by AI of these datasets raises doubts about individuals' rights over them, their origins and accuracy; the ability of AI to decrypt anonymized data; and biases, which might be incorporated into the datasets or introduced by EUIPO staff through training or data's labelling. AI assessment of data might find correlations but not necessarily causation. Thus, this could lead the EUIPO to flawed and biased outcomes, which are hard to examine. Thirdly, with regard to adaptability, depending upon the level of EUIPO staff oversight, AI might find patterns and reach conclusions unexpected by its creators. This lack of foreseeability is one of the key features of AI as a technological tool for transformation. However, it also highlights the difficulties the EUIPO will face in the future. Specifically, as EUIPO staff are increasingly prevented from setting out the goals and outputs of AI, promoting accountability, transparency and access to remedies and reparation for human rights abuses becomes more difficult.¹²

How can the Office further increase staff engagement and develop and retain knowledge?

Again, relying on Google as an illustrative example, the tech giant is consistently rated as a top employer due to the culture it creates when it comes to making employees happy. In terms of staff satisfaction, employee happiness is directly related to productivity, something that the EUIPO should take into consideration. The message appears clear, if you treat your staff well (eg from free healthy food to free gym, yoga and meditation), this then generates a social contract through which those staff perform harder, tend to be more dynamic, and try to do more for the organization.¹³ Secondly, in terms of employee development, Google likewise permits staff to spend up to 20% of their

¹¹ See J Scorza, HR at Google.

¹² See UNHRC, 'Report of the Special Rapporteur Mr David Kaye on the promotion and protection of the right to freedom of opinion and expression' (29 August 2018) UN Doc A/73/348 pg 5-6.

¹³ See Krapivin, 'How Google's strategy for happy employees boots its bottom line'.

allocated working time on advancing their own creative ideas. According to Professor Lucy Ford, ‘many of the Google products that are integrated into our daily lives are the result of this 20% time... employees are not required to spend 20% of their time on their own projects, but if they choose to, it is encouraged.’¹⁴ Thus, the Office should also support staff development along similar lines. Finally, a last important consideration when increasing staff engagement to be considered by the EUIPO is an alignment of values. Google regularly publishes the core values, which direct their engagement not only with each other, but also their clients. The company also reviews these values, adapting when required. The writer Susan Kuckzmarski concludes ‘values and norms are the DNA of a culture... they tell employees what beliefs are to be shared and what behaviours are expected... you have to question people... why it is important.’¹⁵

How can new technologies help to make the EUIPO even more sustainable, transparent and accountable?

Since the development of effective AI relies upon the procurement of massive datasets and long-term investment in technical infrastructure, the private sector is likely to control development, making and capacity, resulting in the EUIPO dependency on corporations for access to AI. Thus, as private sector development of AI continues, there is clear danger that States will entrust increasingly convoluted and burdensome monitoring and censorship measures to tech giants. For this reason, the EUIPO should scrutinize and incorporate ethics into the procurement, design, use and adoption of AI systems. However, it is worth noting that whilst ethics offer a fundamental framework to tackle emerging challenges raised by big data and AI, it was never supposed to be a substitute for human rights protection.¹⁶ Accordingly, in order for the Office to be more transparent, accountable and sustainable, it should also ensure that human rights issues and accountability are strongly incorporated into all elements of their tools based on big data and AI, while at the same time, understanding the need to develop and refine codes of ethics.¹⁷ To be effective, however, transparency does not have to be complex. Instead of struggling with the difficult task of making elaborate technical procedures understandable to the public, the Office should endeavour to promote transparency, accountability and sustainability without requiring technical expertise in AI systems. For this purpose, the Office should focus its efforts on educating staff about an AI’s presence, rationale, nature and effect, instead of contracting upon the source code, inputs, outputs and training data.¹⁸

¹⁴ See Fast Company, ‘This is how Google motivates its employees’.

¹⁵ Ibid.

¹⁶ See UNHRC, ‘Report of the Special Rapporteur Mr David Kaye on the promotion and protection of the right to freedom of opinion and expression’ (29 August 2018) UN Doc A/73/348 pg 16-17.

¹⁷ See Article 19 and Privacy International, ‘Privacy and freedom of expression in an age of artificial intelligence’ (London, 2018).

¹⁸ See Rieke, Bogen and Robinson, ‘Public scrutiny of automated decisions: early lessons and emerging methods’ (Omidyar and Upturn, 2018).

Have you any other suggestions regarding this Strategic Driver?

As noted before, the future is likely to rely on increased automation, green and best value procurement, as well as delivering more foreseeable, ‘intelligent’ and efficient tools. Thus, when developing, procuring or using AI systems the EU IPO should ensure that it acts in a way that is compatible with human rights principles. The adoption of full transparency during the whole AI life-cycle requires AI suppliers to take measures to allow systems to be inspected and challenged from creation to adoption. Thus, it is suggested that the Office should carry out human rights impact assessments before development, procurement or deployment of AI systems, as these assessments can identify and respond to risks associated with AI usage.¹⁹ For example, as of 2018, the think tank ‘AI Now’ has suggested a public agency algorithmic impact assessment, which requires companies to carry out AI internal reviews and enable external review to examine and confirm assumptions and conclusions.²⁰ Importantly, enabling external review of AI systems offers a fundamental safeguard when it comes to thoroughness and independence in transparency, accountability and sustainability. Thus, in addition to pre-procurement human rights impact assessments, the Office should also ensure that the use of AI systems be subject to external audits being carried out on a regular basis by independent experts. Accordingly, if the Office were to deploy a particular AI system, refusal on the part of the supplier to be transparent concerning the presence, rationale, nature and effect of the system would mean that the Office could be in breach of its own accountability duties.²¹

End of submission

¹⁹ See UNHRC, ‘Report of the Special Rapporteur Mr David Kaye on the promotion and protection of the right to freedom of opinion and expression’ (29 August 2018) UN Doc A/73/348 pg 19.

²⁰ See Dillon Reisman and others, ‘Algorithmic impact assessments: a practical framework for public agency accountability’ (AI Now, 2018).

²¹ See UNHRC, ‘Report of the Special Rapporteur Mr David Kaye on the promotion and protection of the right to freedom of opinion and expression’ (29 August 2018) UN Doc A/73/348 pg 19-20.