Europäisches Patentamt
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EUIPO
EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE

Intellectual Property Teaching Kit

IP Advanced Part II

Trade marks, copyright, trade secrets and know-how

Copyright

IP Advanced Part II
Copyright

Part of the IP Teaching Kit

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Introduction

Intellectual property reaches into everyone's daily lives. A basic awareness and understanding of IP is therefore essential for today's university students, who are the engineers, researchers, lawyers, politicians and managers of tomorrow.

It is vital that students become acquainted with elementary aspects of IP, so that they can benefit from it fully in whatever career they eventually pursue. Students and universities should be aware too of how they can utilise the incomparable wealth of technical and commercial information to be found in IP documentation, and understand the need for universities to convert their research into IP rights, manage their IP portfolios and engage in technology transfer to industrial partners for value creation and the benefit of society as a whole.

Last but not least, students and universities should be aware of the consequences of failing to protect IP assets correctly, including the risk of reverse engineering, blatant copying and even industrial espionage.

This is where the IP Teaching Kit comes in. Produced by the European Patent Academy in association with the Academy of the EU's Office for the European Union Intellectual Property Office (EUIPO), the IPTK is a collection of materials — including PowerPoint slides, speaking notes and background information — which can be used to put together lectures and presentations on all kinds of IP, including patents, utility models, designs, trade marks, copyright, trade secrets and know-how. The materials can be tailored to the background of the students (science or engineering, business or law), their knowledge of the topic, the time available and their learning objectives.

IP Advanced Part II is the third part of the kit to be produced, following on from the introductory IP Basics and IP Advanced Part I. It contains the tools and information you need to deliver more in-depth lectures on the main aspects of trade marks, copyright, trade secrets and know-how.

With the IP Teaching Kit you have at your disposal an extensive set of freely accessible, professional teaching materials which represents one of the most comprehensive IP teaching resources in the world.

About IP Advanced Part II

IP Advanced II is part of the IPTK. It has been designed for teachers of students with little prior knowledge of intellectual property (IP), in order to provide them with advanced teaching material about trade marks, copyright, trade secrets and know-how.

In addition to the main presentations, IP Advanced Part II contains case studies and exercises on trade marks, copyright, trade secrets and know-how that demonstrate their use in the real world.

IP Advanced Part II consists of ready-made PowerPoint slides with speaking notes and additional background information. The speaking notes can be read out as they stand. The background information provides additional details which will help you prepare for the more advanced questions that students might have. It is not intended for this information to be included in the lecture.

For online access to the extensive IPTK collection, plus updates and further learning opportunities, go to www.epo.org/learning-events/materials/kit.html where you will also find a tutorial for teachers and lecturers.

Slide 1
IP Advanced Part II

Title slide


IP Advanced Part II
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Copyright
List of slides

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Copyright

This presentation is all about copyright.


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Slide 76
Introduction

The first section of the presentation introduces the students to copyright and what it protects. What kinds of creations/works are protected? What about ideas?

The second part explains the conditions for obtaining copyright protection. Is registration necessary? What does originality entail? Once copyright protection is awarded, what are the rights that it confers?

The final part deals with the issue of copyright enforcement, including infringement.

It is divided into three parts: definition, protection and enforcement.

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Definition

This section gives an overview of what copyright is and why it exists. It includes examples of copyright-protected works and of other creations which are usually protected by copyright, such as computer programs and databases.

This section focuses also on what cannot be protected by copyright because of the so-called idea/expression dichotomy that exists in copyright law.

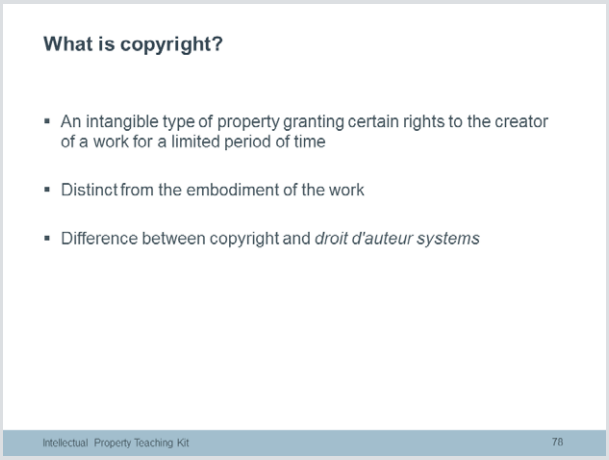
In this part of the presentation we will look at what copyright is and what it protects.

Slide 78
What is copyright?

The United Kingdom, most of its Commonwealth member states (e.g. Australia, South Africa, New Zealand and India), Ireland and the United States belong to the copyright system, whereas the countries of continental Europe, some African countries which inherited the French system, and Central and South American countries apply the *droit d'auteur* system.

Droit d'auteur is traditionally presented as being centred on the relationship between the author and his work, moral rights being the distinguishing feature of the system. The common law approach of the copyright system focuses on the economic value of the work. This position is illustrated by a decision of the Supreme Court of Canada: "Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization" (Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336).

In recent years, however, the dividing line between the two systems has become blurred. This is due to a number of factors, including the influence of EU legislation on English law, the adherence of the US to the Berne Convention and the adoption of international agreements.



Copyright is a property right which protects original works such as novels, plays, music, paintings, sculptures, movies, film scripts and computer programs.

Copyright grants authors a number of exclusive rights (a) economic rights, which allow them to control the exploitation of their work, and (b) moral rights, which include the right to prevent the mutilation or false attribution of their work.

There is a clear distinction to be made between the intangible right in the work and the property right in the physical embodiment of the work. The owner of a painting, for example, is not automatically entitled to make and sell a copy of it.

It is also important to be aware of the differences between the system of copyright in the countries applying common law and the continental European *droit d'auteur* system. The main difference lies in the importance that is attributed to the relationship between the author and his work. In the *droit d'auteur* system, a series of inalienable moral rights are accorded to the author, while the common law approach of the copyright system focuses more on the economic value of the work. In recent years, the dividing line between the two systems has become increasingly blurred.

Slide 79
What are the benefits of copyright?

Copyright tries to balance two objectives: to reward the labour and skills of the creator and to provide access to the works for the benefit of the public. Copyright also stimulates investment in artistic creations. Some films, for example, can cost tens of millions of dollars to make, and would not be made without a reasonable expectation of profit.

There is a certain tension between the protection of intellectual works and the concept of the freedom of expression enshrined in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence ...".

The European Court of Human Rights has recognised that copyright constitutes a limitation of the freedom of expression, but that this is justified by the social interest in promoting and encouraging the creation and dissemination of works (Affaire Ashby Donald et autres c. France - judgment of 10/11/2013, case 36769/08).

Society benefits from copyright. It stimulates investment in artistic creations. It encourages learning, creates economic benefits and promotes cultural development.

But what about freedom of expression? There is a certain tension between copyright and the freedom of expression enshrined in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Slide 80
What are neighbouring rights?

The term “neighbouring rights” refers to rights granted to performers, phonogram producers and broadcasting organisations. They are “neighbouring” in the sense that they are not the result of a creation but are “related” or “ancillary” to the rights of an author/creator.

Within the European Union, rights are awarded to producers of the first fixation (“master copy”) of a film or other audio-visual work by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

Neighbouring rights are protected at international level by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in 1961, by Article 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and by the WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on 20 December 1996.

Rights that are not the result of a creation but are “related” or “ancillary” to the rights of authors and creators are known as neighbouring rights.

They are accorded to performers, producers of phonograms and broadcasting organisations.

Slide 81
Is it possible to use copyright to protect an idea?

Copyright law does not protect ideas or concepts.

This principle is universal. It is enshrined in the US Copyright Act: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery ...".

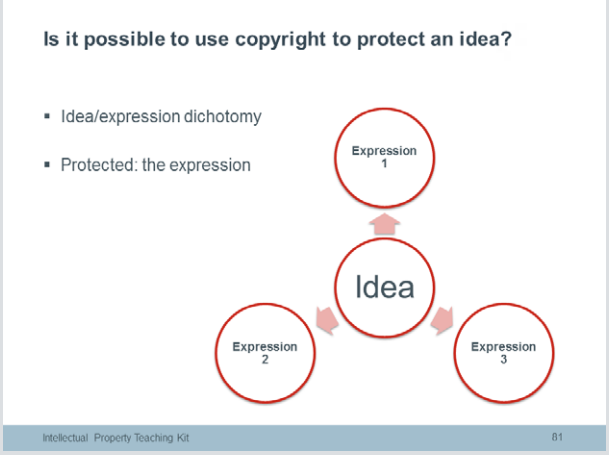
Article 1(1) of Directive 2009/24/EC on the legal protection of computer programs states that "Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."

Article 9(2) of the TRIPS Agreement states that: "Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such".

The same principle applies to facts, procedures, processes and systems, methods of operation, concepts, principles and discoveries.

For example, two persons may write a book about a little wizard fighting against a dark magician, but nobody is allowed to copy the Harry Potter books without the authorisation of the right-holder, because they represent a specific expression of that idea. Similarly, while it is permissible to take a picture of the same event or the same person, it is not possible to copy a specific picture if it is protected by copyright.

However, the dividing line between "idea" and "expression" can still be difficult to determine. For example, the well-known musical *West Side Story* is based on the story of Shakespeare's *Romeo and Juliet*. Two lovers belong to rival families (the Montagues and the Capulets) or gangs (the Sharks and the Jets). Romeo kills Tybalt and Tony kills Bernardo, Maria's brother, in both cases to avenge their best friend, who has been killed by a member of the rival family or gang. The works have similar endings. Idea or expression?



Copyright protects the original expressions of ideas rather than the ideas themselves. This distinction is known as the idea/expression dichotomy and is a universally accepted principle.

As shown by the image on the slide, there can be many possible expressions of the same idea. For example, the story of a little wizard whose parents have been killed by a dark magician is a simple idea that anybody can use. However, the series of novels about Harry Potter represent a specific expression of that idea worthy of copyright protection.

Slide 82
What does copyright protect?

Exhaustive lists of works covered by copyright are usually not to be found in legislation. Copyright protects any production of the human mind, including literary, dramatic, musical, artistic, photographic, phonographic and cinematographic works.

A **literary** work is a work expressed in words (in all existing languages, including Braille), regardless of any consideration of its merit. The title of a literary work may also be protected in itself.

A **dramatic** work is typically intended to be performed on a stage. This category also includes mimes, ballet choreography and television show.

A **musical** work is a combination of sounds, rhythms and harmonies, with or without words. It includes radio station jingles, telephone ringtones and musical samples. In certain jurisdictions, improvisations raise the issue of fixation. For example, under English law, protection will be granted only if the performance has been fixed in a tangible medium.

Artistic works are works that appeal to the eye. The use of the word "artistic" does not imply any aesthetic judgement. This category of works includes engravings, lithographs, drawings, logos (including logos used as trade marks), clothing designs, sculptures, photographs, collages, works of architecture, pottery, embroidery, fabrics, table linen, tapestries, dinnerware, floral compositions, designs of web pages, fine art jewellery and glassware.

Cinematographic works do not need much of an explanation. It is, however, worth mentioning that films are made as a result of several contributions, including the screenplay, soundtrack, costumes, music and sets, all of which are separately protected by copyright. As a result, the holder of the rights to a film will not be allowed to use the individual contributions in a different context.

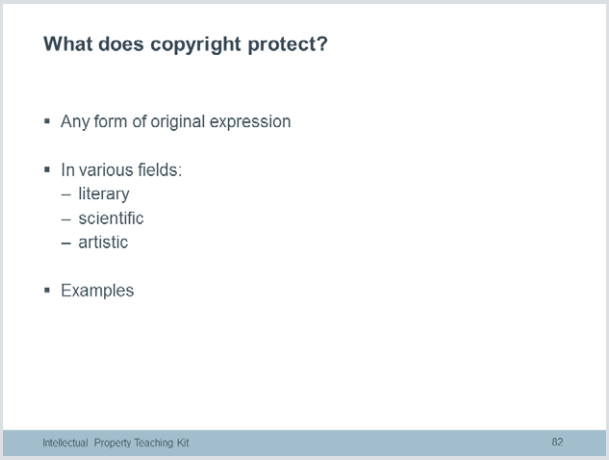
Characters may also be protected independently from the underlying work in which they appear. The courts in various countries have granted protection to "Asterix and Obelix" and "Tintin", for example.

More examples of copyright-protected works are listed in Article 2(1) of the Berne Convention:

"The expression 'literary and artistic works' shall include every production in the **literary, scientific and artistic domain,** whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

Article 2(5) of the Berne Convention stipulates that "collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections".

Similarly, Article 10 of the TRIPS Agreement states: "Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself." The protection of compilations is, however, subject to the requirement of originality. As a result, compilations the creation of which does not involve any intellectual engagement, such as telephone directories, are not protected under copyright.



Copyright protects the original expression of an idea.

This applies not only to “artistic” or “literary” works, but also to works in the scientific field, including trains and bridges, and applied art such as furniture.

The types of material that can be protected are therefore very diverse. They include literary, dramatic, musical, architectural, photographic and artistic works, sound recordings, films, broadcasts, cable programmes, original databases and computer programs.

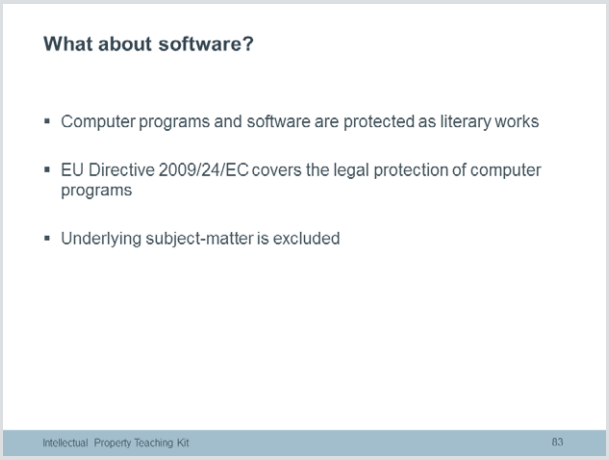
Slide 83
What about software?

Article 10 of the TRIPS Agreement protects computer programs as literary works.

Article 1(1) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs states that: “In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term ‘computer programs’ includes their preparatory design material.”

Article 1(2) of the same directive excludes from the scope of protection ideas and principles which underlie any element of a computer program, including those which underlie its interfaces.

Finally, the courts have held that the visual elements (screens, interfaces) and logical structure of a program, the so-called “look and feel”, also fall within the scope of protection of computer programs.



Software and computer programs are protected as literary works.

The EU has adopted a special directive to ensure the legal protection of computer programs in all its member states. The Computer Programs Directive defines a computer program as a literary work within the meaning of the Berne Convention.

Computer programs are considered to include the preparatory design material, but not works integrated into the program, such as algorithms and interfaces.

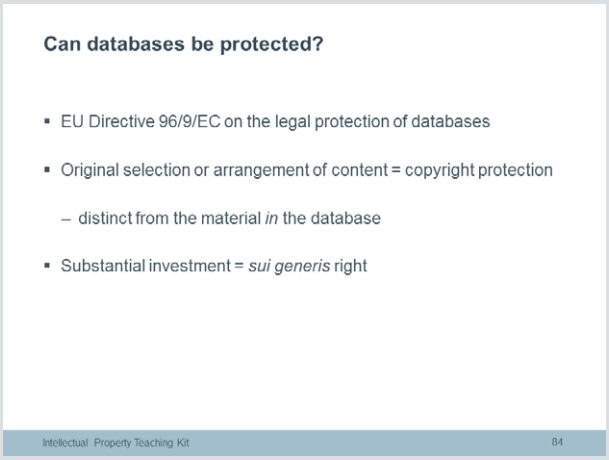
Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are excluded from the scope of protection.

Slide 84
Can databases be protected?

Within the European Union, databases are covered by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. It defines a database as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means".

Under Article 3 of the directive, databases which "by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation" are protected by copyright as collections. According to Article 7, "non-original" databases are protected by a *sui generis* right. This type of right is distinct from copyright protection. The makers of a database can obtain the *sui generis* right only if they have made a substantial qualitative and/or quantitative investment.

Outside the EU, databases can generally be protected only within the limits of unfair competition.



Databases are also covered by an EU directive.

According to this directive, a database is protected by copyright if the selection or arrangement of its content is original. Copyright protection does **not** apply to the software used to organise the database or to the material contained in it.

In addition to copyright protection, databases can also be protected by a *sui generis* right. To obtain this right, the makers of the database must have made a substantial qualitative or quantitative investment in it.

Slide 85
Protection

This section looks at various aspects of copyright protection, including the terms of the protection, its nature and scope.

Slide 86
Does copyright have to be registered?

Unlike in the case of patents and designs, in all the countries, and according to the Berne Convention, registration is not a requirement in order to obtain copyright protection. Copyright protection exists from the moment a work is created in a tangible form of expression –copyright protection is obtained automatically without the need for registration or other formalities.

However, some countries have a system in place to allow for the voluntary registration of works. Such registration can be helpful to solve disputes over ownership or creation, to facilitate financial transactions and to assign and/or transfer rights.

Registration is available in Argentina, Brazil, Canada, Mexico, Spain, Turkey and the United States. In the US, copyright registration is mandatory if you want to file a federal copyright action.

Use of the standard copyright notice (© Name of owner/ year of publication) is not mandatory, but it is highly recommended.

Copyright protection exists from the moment a work is created. Registration is not necessary in order for copyright to exist.

However, an optional registration process is available in some countries. Registration can be useful as it can help prove the date of creation in the event of infringement.

The “©” symbol is used to show that the work benefits from copyright protection. While not mandatory, its use is highly recommended.

Slide 87
The concept of originality

Originality is the key concept in copyright law.

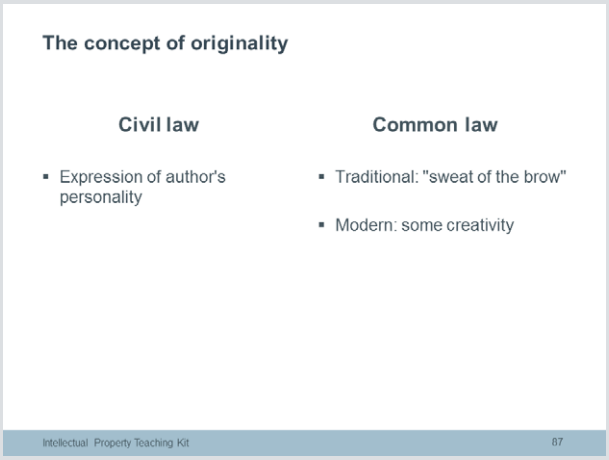
Civil law and common law countries have taken different approaches to defining it.

In most **civil law** countries, following the French model, originality resides in the expression of the author's personality, the intimate link between the author and his work, the personal imprint. The classic example is two painters sitting at the same moment in front of a model: while the subject is the same, the expression will be different. The German approach is similar but more closely concerned with the process leading to the creation of the work *(Schöpfungsprinzip)*. A work will be protected only if it is the result of a certain level of creativity.

The **common law** countries have traditionally taken a more pragmatic approach. The work must not be a simple copy of a pre-existing work and the author must have devoted some skill, judgement and work to its creation. Creativity is not required. On the other hand, the creation of the work must be more than a "purely mechanical exercise".

In the United States, the Supreme Court, in Feist Publications, Inc. v. Rural Telephone Service Co. (499 U.S. 340 (1991)), rejected the "sweat of the brow" doctrine. It did, however, state that a minimum level of creativity will suffice. It concluded that a telephone directory was not entitled to copyright.

Article 1(3) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs states that: "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation." The same prerequisite is also required by Article 3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases: "In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright."



Originality is the key concept in copyright law.

In civil law countries, this means that a work must express the author's personality.

The common law countries, meanwhile, have traditionally focused on the skill and labour that go into making a work. This is known as the “sweat of the brow” doctrine. However, more recently the courts here have stated that works must possess a certain level of creativity.

Some EU directives state that a work will be regarded as original if it is the author’s own intellectual creation.

Slide 88
Is copyright protection valid worldwide?

Copyright is by definition territorial. In other words, protection is granted on a country-by-country basis.

Despite considerable harmonisation of copyright and related rights at EU level, there are still some differences in copyright protection at national level. However, certain standards of copyright and related rights protection apply in all the EU Member States under legislation implementing international instruments such as, for example, the Berne Convention for the Protection of Literary and Artistic Works.

Article 3 of the Berne Convention for the Protection of Literary and Artistic Works states that protection is granted to nationals and residents of signatory countries and to "authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union". In addition, the Convention also applies to "authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union" and "authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union". As of September 2014, 168 countries were party to the Berne Convention.

Article II of the Universal Copyright Convention (UCC) of 1952 states that "Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory."

According to Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), each member state "shall comply with Articles 1 through 21 of the Berne Convention and, therefore, grant protection to all works created by nationals or residents of WTO member states".

The WIPO Copyright Treaty of 1996 updates the Berne Convention to include issues arising as a result of changes in digital technology and communications. The treaty addresses and provides specific protection for computer programs as literary works and databases, and deals with the right of distribution (the right to make a work available to the public), the right of rental for computer programs, cinematographic works and works embodied in a phonogram, and the right of communication to the public by wire or wireless means, including "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them" – in short, internet access. These treaties were transposed into European law by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

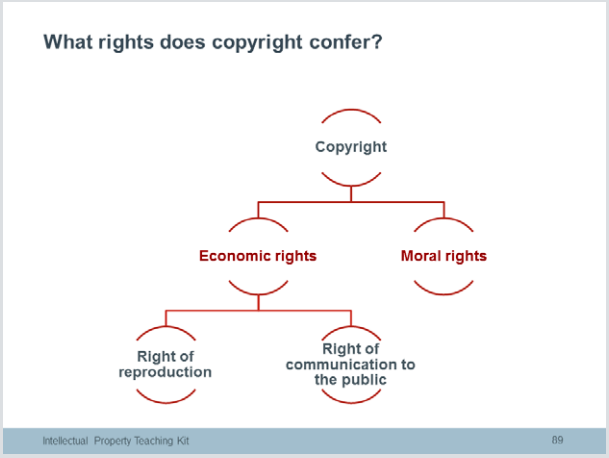
These conventions all contain a national treatment clause, which in essence means that foreigners and nationals must be treated equally. In addition, all these treaties oblige the contracting states to adopt minimum standards for copyright protection.

This slide shows the main international conventions relating to copyright.

All of these treaties include the principle of national treatment. They establish minimum standards for the member states and for the national copyright legislation of these states.

Slide 89
What rights does copyright confer?

The right of reproduction and the right of communication to the public are important economic exploitation rights. See the next slide for more information.



This slide gives an overview of the rights conferred by copyright.

Slide 90
Economic exploitation rights

The Berne Convention grants rights of translation, reproduction, public performance, broadcasting and cable retransmission, and adaptation, including cinematographic adaptation.

The **right of reproduction** relates to the act of making a copy of the work, or a substantial part of it, on the same or a different platform. One example would be the reproduction of a book on an electronic platform.

The **right of adaptation** involves the transformation of a work, for example a translation or an adaptation of a novel into a screenplay.

The **right of communication to the public** covers public performance (public recitation, public representation of a dramatic work, public projection of a movie etc.), broadcasting, cable retransmission and, more recently, the act of making a work available on the internet.

The **public display right** is the right to show or exhibit a copy of a protected work publicly. Under US law, to "display" a work means "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process". For example, if a poster reproducing a photograph were to be shown in a film, the makers of the film would need to obtain the consent of the holder of the copyright in the photograph. A more limited "display right" is provided for in the Canadian Copyright Act, which confers the right to authorise the presentation at a public exhibition, for a purpose other than sale or hire, of an artistic work.

The **right of distribution** includes rental and lending rights. Copyrighted works are frequently rented. This is the case for software (including games), films and musical recordings and also for paintings and other artistic works. About 30 countries have implemented a system to compensate creators of works for loss of revenue resulting not only from the use of rented copies but also, potentially, from the use of illegal copies made from the rented copies.

Within the European Union, lending rights are conferred by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Article 1 grants to the holder the right to authorise or prohibit the rental and lending of originals and copies of copyrighted works.

Resale right is a right granted to the author of an artistic work to receive a portion of the resale price of the work. This right, which is meant to allow artists or their heirs to profit from the resale of their work, was first introduced in France. The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works. The subject of the resale right is the physical work, namely the medium in which the protected work is incorporated.

This right was introduced into European law by Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. The author of an original work of art will receive a royalty based on the sale price obtained for any resale of the work subsequent to the first transfer of the work by the author (Article 1).

The economic exploitation rights that are conferred by copyright include the right of reproduction, the right of adaption, the right of communication to the public - including the right to make the work available on the internet - the right of distribution and the resale right.

Slide 91
Exceptions

Exceptions to copyright allow works to be used for certain purposes without the consent of the author or the right-holder. They are typically in the public interest or are intended to balance the rights of authors against those of users.

Under Article 9(2) of the Berne Convention, the adoption of exceptions by national law is subject to three conditions known as the three-step test:

– The limitation or exception can apply only in certain special cases.
– The limitation must not conflict with the normal exploitation of the work.
– The exception must not unreasonably prejudice the legitimate interest of the author.

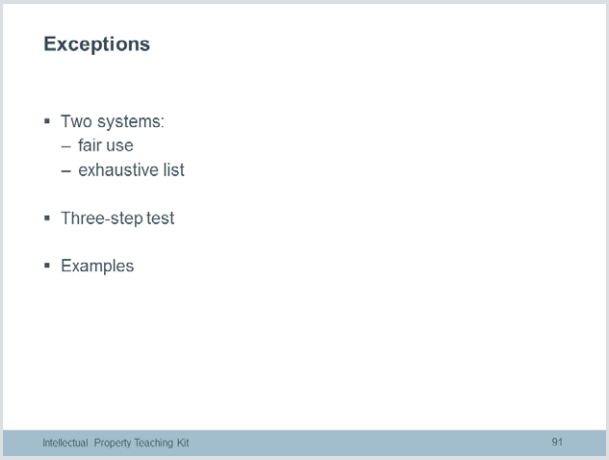
The text of Article 13 of the TRIPS Agreement is identical to this article. The issue is whether the exception results in competition and economic losses to the author or the right-holder.

The criticism and review exception allows the quotation of short extracts of a work. It is justified by the right to freedom of expression.

Many countries have also implemented exceptions to benefit schools and universities, the rationale behind such provisions being the public interest in encouraging education and research. In other countries, such as the Scandinavian countries and Canada, schools and universities and right-holders have concluded special agreements which authorise the reproduction of works for educational purposes under favourable conditions. In Germany, the exception is subject to the payment of an equitable remuneration.

In some countries, an exception allows the use of works for parody, pastiche and caricature.

Finally, the private copying regime allows the copying for personal use of musical recordings, musical works and audio-visual works. For example, a consumer may acquire a musical recording and make a copy on his own computer. Right-holders and authors are compensated by means of a levy imposed on the sale of blank media and recording machines.



There are two systems of exceptions to copyright protection.

In the English-speaking tradition, the concept of “fair use” is applied. Use of the work is authorised for certain purposes, which are not explicitly listed.

In the continental European tradition, use is made of an exhaustive list of exceptions.

Both of these systems are subject to the “three-step test” of the Berne Convention and the TRIPS Agreement.

Examples of frequently adopted exceptions include use of the work for the sole purpose of illustration or scientific research, quotations for purposes such as criticism or review, and use for the purpose of caricature, parody or pastiche.

Slide 92
Moral rights

The first moral right is the "paternity right", i.e. the right to be named as the author of a work or, on the contrary, to remain anonymous.

Independently of the economic rights, authors are granted moral rights (the right of authorship, the right of integrity of work and the right of divulgation). These rights can be asserted by the author even if the economic rights have been transferred to a third party.

The second is the right to the integrity of the work. The right to integrity prevents the distortion of a work by, for example, cutting scenes from a movie, adding a chapter to a book, putting clothing on the nude subject of a painting. These are all situations where the right to integrity might be invoked. In France, for instance, the reduction of the length of a film has been held to infringe the moral right of its author. The same outcome has been reached in relation to the colourisation of black-and-white films. In the same vein, French courts have refused to allow the destruction or mutilation of an artistic work, for example the dismantling of a work so that it can be sold in different pieces. The use of a musical work in advertising has also been held to infringe the moral rights of the creator.

The third right is the right of divulgation, which is typically infringed by the posthumous publication of a work, particularly when during his life the author repeatedly indicated that he did not want it to be released to the public.

The right of retraction is a creation of French law. It allows authors to stop the publication of their work despite any existing licence agreement. This might come into play if an author felt that a previous work no longer reflected his opinions or beliefs.

With the notable exception of France, where moral rights are perpetual, the term of moral rights is generally the same as for economic rights. Moral rights cannot be assigned but can be waived.

Moral rights are intended to protect the intimate relationship between authors and their work. They are a creation of civil law countries. They were introduced more widely, albeit in a limited form, in the 1928 revision of the Berne Convention, but they are specifically excluded by Article 9(1) of the TRIPS Agreement. It is also worth mentioning that the WIPO Copyright Treaty specifies that the contracting states must comply with the moral rights provision contained in Article 6*bis* of the Berne Convention.

The historical reluctance of the common law countries to introduce moral rights changed in the 1980s, when such rights were introduced in the UK Copyright, Designs and Patents Act 1988 and when the United States adhered to the Berne Convention. However, in the United States moral rights were not introduced through its copyright act. In 1990, the US Congress adopted the Visual Artists Rights Act, which is limited in scope to paintings, drawings, prints, sculptures and photographs.

Moral rights are intended to protect the intimate relationship between authors and their work.

The main moral rights are the paternity right, which is the right to claim authorship of a specific work; the right of integrity, which is the right to stand up against any act that could distort the work or harm its reputation; and the right of divulgation, which is the author's right to decide when he discloses his work to the public.

Moral rights cannot be assigned or transferred.

Slide 93
Who is the author? Who owns the rights?

In the system of *droit d'auteur,* the author is the physical person who created the work. The same is generally also true in the copyright system, but there are certain cases where a legal person, i.e. a company, is considered to be the author of the work. For example, under US law the employer is deemed to be not only the owner of the copyright in works created by his employees in the course of their employment but also the author.

A work may be the result of the involvement of more than one person. As a general principle, only a contribution to the originality of the work will be recognised as conferring the status of co-author. For example, a journalist who merely repeats verbatim an interview or a speech does not qualify as a co-author. However, if on the basis of an interview he writes a story which includes an important part of the interview, the resulting work will be considered as a work of joint authorship. Finally, if the journalist writes a book on the basis of the interview, without incorporating a substantial part of the words of the interviewee, he will be considered the sole author of the work. A person who merely provides ideas or whose participation is limited to revising a work will not be considered a co-author.

The creation of a cinematographic work constitutes a good illustration of a work of joint authorship. In civil law countries, the scriptwriter, the director, the author of the musical works integrated in the movie and the cameraman are considered to be co-authors. By contrast, the common law system does not address the issue of the author of a cinematographic work but rather focuses on the ownership of the copyright, which is attributed to the producer either directly or, as in the United States, through the doctrine of "work made for hire", under which the rights are deemed to be held by the employer of the person who commissioned the work.

Works created in the course of an employment raise certain issues. Under common law, the rights to a work made by an employer are deemed, unless there is an agreement to the contrary, to belong to the employer (see, for example, section 11(2) of the UK Corporate Copyright Act). Under US laws, the same principle has been extended to a work specifically commissioned by a party. The parties must, however, sign an agreement to that effect. This position contrasts with the one adopted by civil law countries, whereby the employee retains the rights to a work that he has created in the course of this employment.

In the *droit d'auteur* system, the physical person who created the work is considered to be the creator. In general, the same is true for the copyright system, but in countries with this system the rights can also be directly vested in a legal person, for example a company.

A work may have several creators who then share authorship of the work. As a general principle, only a contribution to the originality of the work will be recognised as conferring the status of co-author.

In the absence of an agreement to the contrary, the rights to works created in the course of employment belong to the employer.

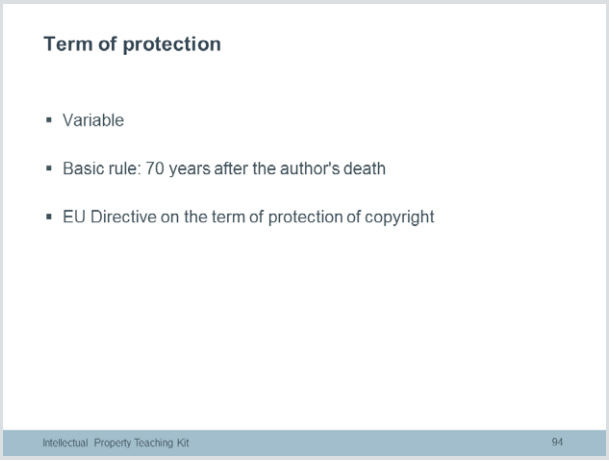
Slide 94
Term of protection

Article 7 of the Berne Convention and Article 12 of the TRIPS Agreement require copyright protection to last until at least 50 years after the death of the author.

Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights lays down a period of "70 years after [the author's] death, irrespective of the date when the work is lawfully made available to the public. In the case of a work of joint authorship the term shall be calculated from the death of the last surviving author" (Article 1). For cinematographic or audio-visual works, the term of protection expires 70 years after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audio-visual work. The terms are calculated from the first day of January of the year following the event which gives rise to the term (Article 2).

In the United States, the Copyright Term Extension Act (adopted in 1998) extended copyright terms in the US by 20 years to 70 years after the death of the author, and for works of corporate authorship (a work which has been commissioned by a legal person) to 120 years after creation or 95 years after publication, whichever is earlier.

After the expiration of the term, the work falls within the public domain and can be used freely, without the consent of the author or the right-holder.



The term of protection afforded by copyright varies from country to country. It also depends on the type of work.

As a basic rule, copyright is valid for a period of 70 years after the author's death.

In the EU, the term of protection is governed by Directive 2006/116/EC on the term of protection of copyright and certain related rights.

Slide 95
Enforcement

The final part of the module deals with the important issue of copyright enforcement.

Copyright infringement is defined and the remedies at the disposal of the right-holder explained.

This section deals with the enforcement of copyright, and includes infringement, remedies, border measures and the internet.

Slide 96
Infringement

Infringement occurs when a person exercises a right conferred on the author or the right-holder without having obtained their consent.

For example, using either the whole or a substantial part of the pre-existing work without the permission of the author or the right-holder violates the right of reproduction. By "substantial part" is meant a qualitatively significant part of the original work, even where this is a small part of the work.

The "imitation" of a work will also be considered to be an infringement, even if it is limited to a few cosmetic changes while preserving the expression of the work.

Ignorance of the fact that a certain act constitutes an infringement and the absence of intention to infringe do not constitute a defence in an action for copyright infringement.

Third parties can invoke other defences:

– It is not the same expression, but merely the same idea.
– It was non-creative material.
– The work has already entered the public domain.

Exhaustion of rights

Within the context of ensuring the free movement of goods throughout the internal market the EU has standardised the approach across the member states. The first sale in a member state exhausts copyright. In other words, the right-holder cannot prevent any subsequent sale within the European Union.

Copyright infringement occurs when a third party exercises one of the rights of the author or owner without their consent.

Infringement occurs when a substantial part of the copyright-protected work is used.

Examples of defences that can be invoked by third parties include:

- It is not the same expression but merely the same idea.
- It was non-creative material.
- The work has already entered the public domain.

Ignorance of the fact that a certain act constitutes an infringement and the absence of intention to infringe do not constitute a defence in an action for copyright infringement.

According to the exhaustion of rights doctrine that exists within the EU, copyright is exhausted upon the first sale of the goods within the EU.

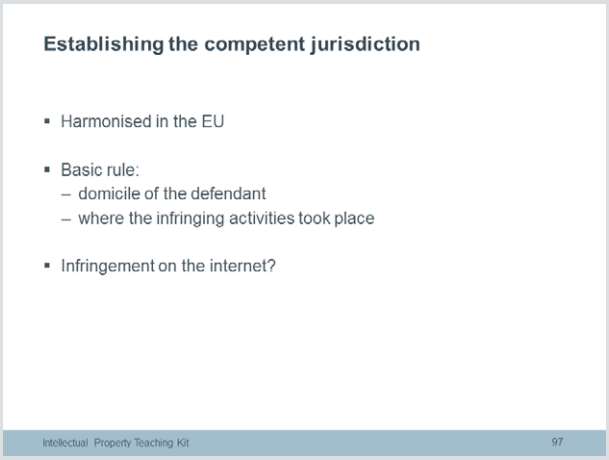
Slide 97
Establishing the competent jurisdiction

Infringement very often occurs in more than one country. Counterfeited goods may be manufactured in one country, transit through a second one and finally be sold in a third. Furthermore, the internet poses new challenges. A website may be located in one country but be accessible worldwide. The issue of competent jurisdiction is, therefore, one of the key aspects of copyright litigation.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states that, in principle, defendants will be sued in the country of their domicile. However, pursuant to Article 5, in copyright infringement cases they may be sued "in the courts for the place where the harmful event occurred or may occur" and where the infringing activities took place (such as the manufacture or distribution of infringing copies or the downloading onto a server of a copy of a musical work or a movie). It is important to note that "the mere fact that a website is accessible from the territory covered by the trade mark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory" (see judgment of 12/07/2011, C-324/09, 'L'Oréal and others', paragraph 66, equally applicable to copyright). In other words, the mere fact that counterfeited goods are sold through a website accessible within the European Union does not automatically confer jurisdiction on a court of one of the member states. The website must specifically target consumers residing within the boundaries of the Union. This would be the case if the prices were indicated in euros or if the site used one of the languages of the European Union or clearly indicated that the goods were available for shipment to one of the member states.

Furthermore, in cases involving joint defendants, Article 6 states that they may be sued in the courts for the place where any one of them is domiciled, "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

In the United States, the courts have followed a different approach. The test there is whether or not there is minimum contact between the defendant and the forum. A similar position was adopted in Canada, where it is an infringement of copyright for a person, by means of the internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the internet or another digital network as a result of the use of that service (Article 27(2.3) Canadian Copyright Act).



Copyright infringement often occurs in more than one country. This is a problem when it comes to establishing the competent jurisdiction able to handle the case.

In the EU, this difficult matter is harmonised by Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The basic rule is that the defendant may be sued in the country of his domicile or in the country where the infringing activities took place.

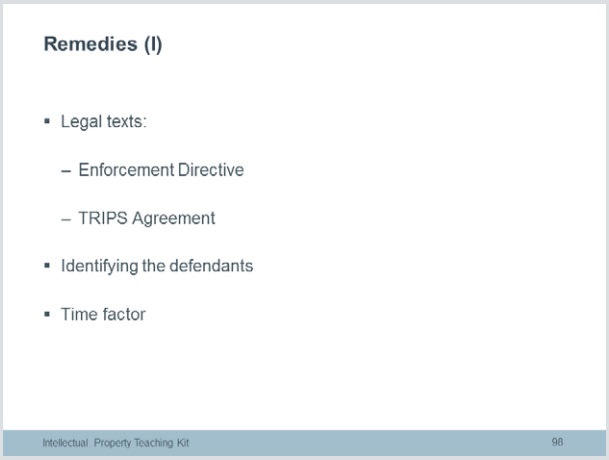
But what about infringement on the internet? The mere fact that counterfeited goods are sold through a website accessible within the European Union does not automatically confer jurisdiction on a court of one of the member states.

Slide 98
Remedies (I)

In the European Union, remedies are provided by Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. The directive relates to all IP rights, including copyright. It states that member states must provide for the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. Those measures must be fair, and must not be complicated or costly or entail unreasonable time limits or unwarranted delays. In addition, claimants must be allowed access to documents which are under the control of the infringer, including financial and banking documents. The courts may issue an interlocutory injunction to prevent the destruction of evidence or an imminent infringement, and may also order the seizure of the defendant's assets.

The first step in the procedure is to identify the defendants. This means not only those responsible for the unauthorised use of the copyrighted work but also all persons involved in the chain of events leading to the infringement, including manufacturers, importers, resellers, retailers and possibly, in the case of a legal person, directors and shareholders.

In most infringement cases, time is of the essence. Many infringers are street vendors, operate in flea markets or are "fly-by-night" entities which tend to disappear without further notice once they are served with court proceedings. Provisional injunctions preventing any further distribution of the infringing copies of the work are therefore an essential tool in copyright litigation.



In the EU, the enforcement of IP rights is governed by the Enforcement Directive, under which the member states are obliged to adopt the necessary measures, procedures and remedies to ensure the enforcement of IP rights.

At international level, the TRIPS Agreement provides minimum standards for the member states to uphold.

Before we look at the remedies that are open to right-holders, we also need to consider two other key aspects of the infringement procedure.

The first of these is the need to identify the defendants in the case. They are not just the person or persons responsible for the unauthorised use, but also all persons involved in the chain of events leading to the infringement, including manufacturers, importers, resellers, retailers and, possibly, in the case of a legal person, directors and shareholders.

The second is the question of time, which in most infringement cases is of the essence. Provisional injunctions preventing any further distribution of the infringing copies of the work are therefore absolutely vital.

Slide 99
Remedies (II)

Article 50 of the TRIPS Agreement mandates the member states to implement provisional measures, including *ex parte* interlocutory injunctions, pending the final outcome of the case.

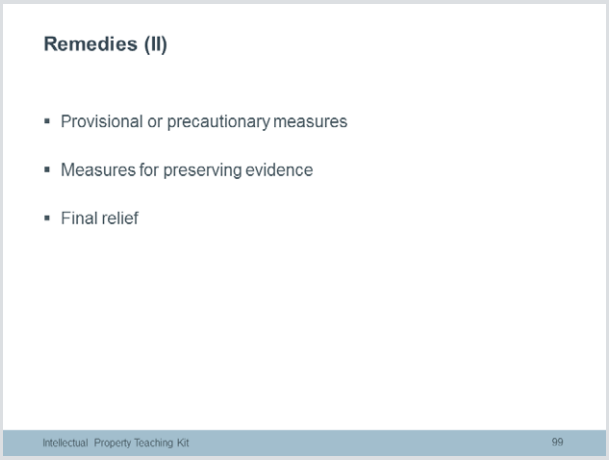
In most common law jurisdictions, the courts are allowed to grant provisional or interlocutory injunctions, which are temporary orders addressed to the defendant prohibiting any further infringing activities until trial on the merit of the case. Applicants must demonstrate that there is a serious issue to be tried, that they will suffer irreparable harm if denied relief and that the balance of inconvenience pending trial favours their position. Similar proceedings exist in civil law countries, such as the French *référé* or the German *einstweilige Verfügung*.

Furthermore, infringing goods can be seized and put under the surveillance of a judicial guardian. Article 50 of the TRIPS Agreement states that "the judicial authorities shall have the authority to order prompt and effective provisional measures ... to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance." Article 9(1)(b) of Directive 2004/48/EC grants the courts the power to "order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce".

A further step is to ensure that defendants do not dispose of their assets to make themselves "judgment-proof". Article 9(1)(b) of Directive 2004/48/EC reads as follows: "In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information." Under English law, these orders are known as Mareva injunctions. The requesting party must demonstrate that without a freezing order the defendants will dispose of their assets and that, as a result, the plaintiff will not be able to have an eventual judgment satisfied.

Pursuant to Article 50(1)(b) of the TRIPS Agreement and Article 7 of Directive 2004/48/EC, the judicial authorities are also allowed to issue provisional injunctions "to preserve relevant evidence in regard to the alleged infringement". These orders, known under English law as "Anton Piller orders", may, for example, be used to request the seizure of computer hard disks to prove the unauthorised downloading of musical works.

In terms of final relief, if the action succeeds, the court will typically order a permanent restraining order, award damages, confiscate the net profits made by the defendants through their illegal activities, and order the destruction of the infringing goods and payment of the costs incurred in connection with proceedings. In some countries, such as Canada, the courts are also allowed to grant exemplary and punitive damages, which are intended to have a deterrent effect on intentional socially reprehensible conduct. In copyright cases, punitive damages are often awarded when the actual damages are so insignificant that the defendants may not perceive the judgment as a real condemnation of their behaviour (see also Articles 45 and 46 of the TRIPS Agreement and Articles 13 to 15 of Directive 2004/48/EC).



There are a number of different remedies and procedures available for enforcing copyright.

Provisional or precautionary measures include stopping further infringement, seizing infringing goods and seizing the movable and immovable propriety of the alleged infringer.

Measures to preserve evidence can also be taken.

In terms of final relief, the court may order the destruction of the infringing material and award damages, including the confiscation of profits, and court costs and legal fees.

Slide 100
Border measures

In 2011, the European Commission reported the seizure of over 115 million counterfeited products (medicines 24%, cigarettes 18%, clothing 4% and mobile phone accessories 3%), representing a value of EUR 1.3 billion, an increase of 15% compared with 2010.

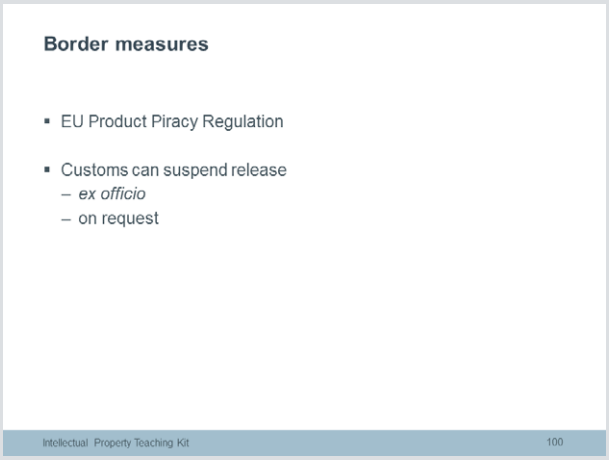
Council Regulation 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights ("Product Piracy Regulation") targets piracy. The objectives of the regulation are explained in Recitals 2 and 3 of the preamble, which read as follows:

2) The marketing of ... goods infringing intellectual property rights does considerable damage to ... right-holders, as well as deceiving and in some cases endangering the health and safety of consumers. Such goods should, in so far as is possible, be kept off the market and measures adopted ... without impeding the freedom of legitimate trade. ...
3) In cases where counterfeit goods, pirated goods and, more generally, goods infringing an intellectual property right originate in or come from third countries, their introduction into the Union customs territory, including their transhipment, release for free circulation in the European Union, placing under a suspensive procedure and placing in a free zone or warehouse, should be prohibited and a procedure set up to enable the customs authorities to enforce this prohibition as effectively as possible.

Counterfeited goods may be retained at the request of the right-holder or *ex officio* by the customs authorities if they have sufficient grounds for suspecting that the goods infringe an intellectual property right. This will allow the right-holder to submit an application for action in accordance with Article 5 of the regulation. The right-holder must institute infringement proceedings in the country where the goods are detained within ten days of receipt of notification of the suspension of release of the goods. In the event that the right-holder fails to act within this time limit, the goods will be released by the customs authorities (Article 13). Goods found to infringe an intellectual property right at the end of the procedure shall not be allowed to enter into the European Union customs territory, released for free circulation, removed from the Community customs territory, exported, re-exported, placed under a suspensive procedure or placed in a free zone or free warehouse (Article 16). In accordance with national provisions, the goods will then be remitted to the right-holder or destroyed by the customs authorities (Article 17).

In 2011, "in 90% of the cases of detentions by customs, the goods were either destroyed after the holder of the goods and the right-holder agreed on destruction, or the right-holder initiated a court case to establish the IPR infringement. In only 7.5% of cases, goods were released because they were either original goods (3%) or the right-holder did not react to the notification by customs (4,5%)" (see "Report on EU customs enforcement of intellectual property rights: Results at the EU border – 2011", Publications Office of the European Union, 2012).

A proposal for a new regulation is currently under discussion. The proposed text would broaden the scope of the regulation by including trade names, topographies of semiconductor products and utility models, and would allow customs authorities to destroy counterfeited goods without any judicial involvement in cases where the owner of the goods does not file any opposition to their retention.



The EU's Product Piracy Regulation - Regulation 1383/2003 – is aimed at stopping pirated goods at the borders of the EU.

It allows customs authorities to keep allegedly counterfeited goods off the market.

Slide 101
Copyright and the internet

The use of a work on the internet always involves the reproduction of the work on a server.

However, in order to facilitate their transmission, website contents are also temporarily reproduced on intermediate servers ("caching"). Pursuant to Article 13 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive 200/31/EC), caching does not constitute an infringement of the copyright of the underlying work. The same rule has been implemented by Section 512(b) of the US Copyright Act.

Internet service providers are also exempted, provided that they are unaware of any unlawful activities by their clients and that, upon obtaining such knowledge or awareness, they act expeditiously to remove or disable access to the information. Article 512 of the US Copyright Act is to the same effect. However, upon notification by the copyright-holder, the internet service provider must remove the infringing content until such time as it receives a counter-notification denying any wrongdoing by the content provider.

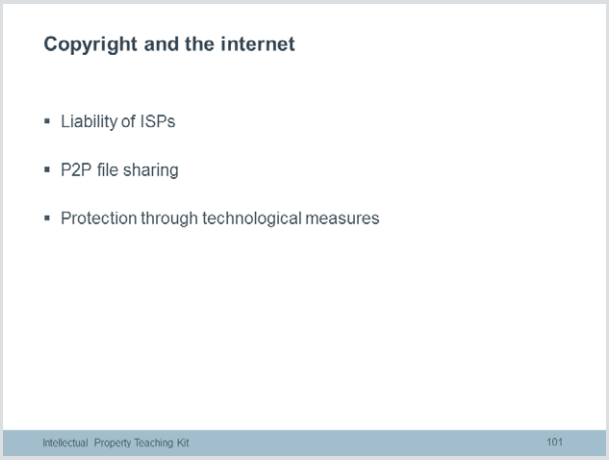
Telecommunications services providers are also exempt from any liability if they have acted as a "mere conduit" for the transmission of the content (Article 12 of Directive 2000/31/EC and Article 512(a) of the US Copyright Act).

Peer-to-peer file sharing
Providers of "peer to peer" (P2P) file-sharing software are liable for copyright infringement on the basis that they distribute "a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement" (Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd., et al., 545 U.S. 91). The same conclusion was reached in Arista Records LLC v. Lime Group LLC (715 F. Supp. 2d 481 (2010)) regarding the P2P software LimeWire.

Protection through technological measures
In response to the massive scale of the reproduction of protected works on the internet, copyright-holders have developed and implemented technological measures aimed at preventing unauthorised use, including technical devices preventing copying. In response to such devices, users have devised tools which allow the circumvention of these protective measures.

Article 11 of the WIPO Copyright Treaty (1996) requires the contracting parties to implement in their national legislations remedies against the circumvention of these technical measures.

In the European Union, this obligation was introduced by Article 6(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society: "Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."



Contrary to widespread belief, material posted on the internet - including in blogs, chat rooms and e-mails - cannot be used without permission.

Internet service providers are exempted, provided that they are unaware of any unlawful activities by its clients and that, upon obtaining such knowledge or awareness, they act expeditiously to remove or disable access to the information.

Providers of “peer to peer” file-sharing software are liable for copyright infringement on the basis that they distribute “a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.”

In response to the massive scale of the reproduction of protected works on the internet, copyright-holders have developed and implemented technological measures aimed at preventing unauthorised use. These include technical devices that prevent copying. However, users have found ways to circumvent these barriers, an act which is in itself prohibited in many countries.

Slide 102
Quiz

You can end the presentation by asking the students a few questions, to help them remember the key aspects of copyright law.

1. What is meant by the idea/expression dichotomy?
Copyright does not protect the idea, only the original expression of that idea. The same idea can have many different original expressions. In the same way, facts, procedures, concepts, principles, discoveries, etc. are also excluded from copyright protection.

2. When is a work original?
Here must be distinguished between the civil law and common law traditions. According to the former, a work must be the expression of the author's personality. The latter takes a different approach, traditionally applying the "sweat of the brow" doctrine. However, more recently the courts have stated that a work must possess a certain level of creativity.

3. What are the main rights conferred by copyright?
Copyright confers economic rights. These include the right of reproduction, the right of adaptation, the right of communication to the public, the right of distribution and the resale right. It also confers moral rights. These include the paternity right, the integrity right, the divulgation right and, in some countries, the right of retraction.

Ask the students to explain what these rights entail.

4. When does copyright infringement occur?
Infringement occurs when a person exercises a right conferred to the author or the right-holder without having obtained their consent. The right to reproduce is considered to have been infringed if a substantial part of the pre-existing work is used without the authorisation of the author or the right-holder.

Third parties can invoke various defences:
– It is not the same expression but merely the same idea.
– It was non-creative material.
– The work has already entered the public domain.

1. What is meant by the idea/expression dichotomy?
   (Copyright does not protect the idea, only the original expression of that idea.)
2. When is a work original?
   (When there is a certain level of creavity.)
3. What are the main rights conferred by copyright?
   (Copyright confers economic rights and moral rights.)
4. When does copyright infringement occur?
   (Infringement occurs when a person exercises a right conferred to the author or the right-holder without having obtained their consent.)

5 Copyright case study

Copyright case study
List of slides

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Copyright case study: SAS Institute v. World Programming


COPYRIGHT CASE STUDY
SAS INSTITUTE V. WORLD PROGRAMMING
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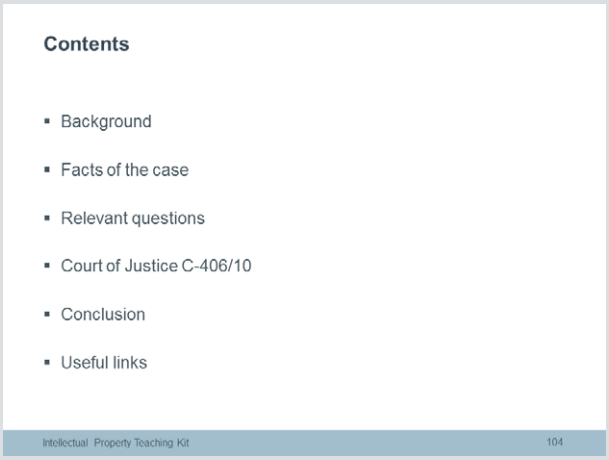


This module comprises a case study involving various aspects of copyright law.

We will start the module with some background information on computer programs and how they are protected by copyright law.

We will then look at the facts of the case and the two parties involved, examine the legal questions that arose and investigate judgment C-406/10 of the European Court of Justice in search for answers to these questions.

We will finish with a summary of the conclusions of the Court of Justice.

Slide 105
Background

The slides that follow summarise the copyright protection afforded to computer programs by European and international law. We will see what computer programs are and what they do. We will also address the question of why software should be protected.

Slide 106
What is a computer program?

The presentation makes no distinction between the terms "computer program" and "software".

A computer program could be defined as a sequence of instructions to a computer to perform a specified task. Basically, computer programs tell computers what to do.

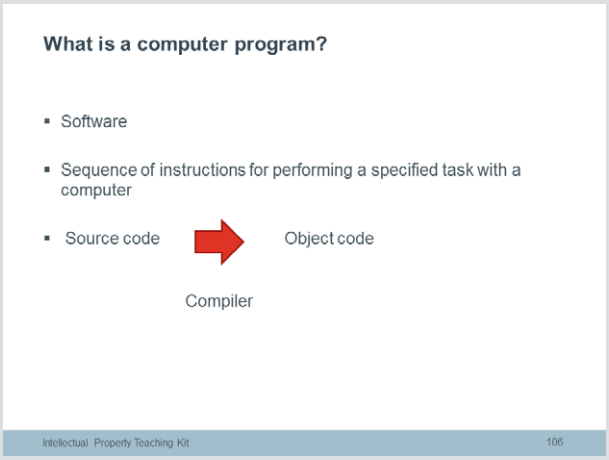
There is a difference between source code and object code. This difference is recognised, for example, in Article 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Computer programs are compiled in **source code.** The source code is written in a programming language which acts as translator between the user and the computer. It enables the user to write instructions in a language that he himself understands. The code is the programmer's expression of a certain idea or logical process which the computer will follow to achieve a certain result. However, this source code alone is not enough to enable the computer to execute what the programmer wants to achieve. Another element is needed, and this is the object code.

The **object code** is the part of the computer program that operates the computer. This code could be described as a machine language or machine-usable code. It is impossible for humans to read, or at the least very difficult for them to understand. An object code has a binary form and consists only of 0s and 1s, which represent the statuses "on" and "off" in the circuits of the computer. This machine code allows the computer to actually do something, to perform a task or fulfil a certain function. Within the object code, therefore, lies the functional part of the computer program.

The transformation from source code into object code is done by programs known as compilers. Through the compilation process, readable source code is transformed into object code. The reverse operation is called decompilation.

Note the dual nature of computer programs: both functionality and expression are involved. This creates problems under copyright law.



Computer programs – or software – are essentially a sequence of instructions for a computer to perform a specified task.

They consist of source code, which is the human-readable computer programming language of a computer program, and object code, which is the part of the program that operates the computer.

The transformation from source code into object code is done by programs known as compilers. Through the compilation process, the readable source code is transformed into object code. The reverse operation is called decompilation.

Slide 107
Why should software be protected?

In addition to the ease with which competitors can copy software, developers in the EU were previously faced with the additional problem of dealing with the differences in the legal protection afforded to computer programs by the individual member states. The 1991 Software Directive was adopted to solve this problem.

The development of computer programs requires the investment of considerable resources.

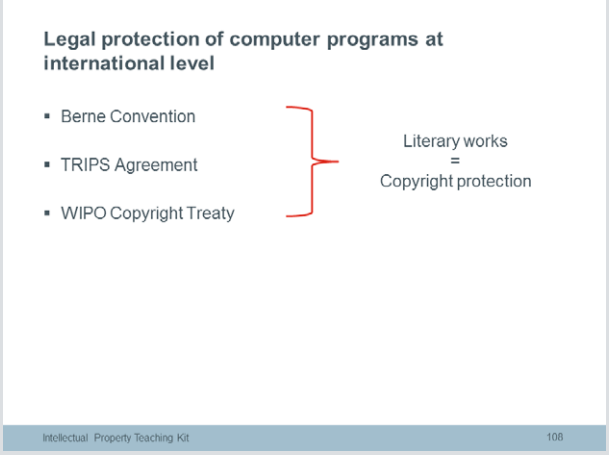
However, they can be copied very easily and at a fraction of the cost needed to develop them.

If software were not protected, there would be less incentive to develop it, a consequence which would be highly undesirable in view of its important role in today's society.

Slide 108
Legal protection of computer programs at international level

Article 10(1) of the TRIPs Agreement
"*Computer programs, whether in source or object code, shall be protected as* ***literary works*** *under the Berne Convention.*"

Article 4 of the WIPO Copyright Treaty
"*Computer programs are protected as* ***literary works*** *within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.*"



The cornerstone of the legal framework at international level is the Berne Convention of 1886. Article 2(1) of the Convention states that the expression “literary and artistic works” includes “every production in the literary domain, whatever may be the mode or form of its expression”. It goes on to give a non-exhaustive list of examples which can be considered literary and artistic works. The Convention was created at a time when computers were still the stuff of science fiction, but the description of what is protectable is broad enough to include computer programs.

This has been followed by other international treaties and agreements. For example, Article 10(1) of the TRIPS Agreement and Article 4 of the WIPO Copyright Treaty consider computer programs to be literary works within the meaning of Article 2 of the Berne Convention. The TRIPS Agreement adds that both source and object code can be protected.

Slide 109
Legal protection of computer programs at EU level

In line with these international conventions, the EU Council adopted the Directive on the legal protection of computer programs on 14 May 1991. A codified version – Directive 2009/24/EC of the European Parliament and the Council – was adopted in 2009. It is known as the Software Directive.

The Software Directive protects computer programs by copyright as literary works within the meaning of the Berne Convention (Article 1(1) of the Directive). The term "computer program" is not defined. The preamble to the Directive states that it includes programs in any form, including those which are incorporated into hardware. Protection also extends to preparatory design work leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

In accordance with the international conventions, protection is awarded only to the expression in any form of a computer program (Article 1(2) Software Directive). This means that the ideas and principles which underlie the different elements of the computer program are not protected by copyright. The preamble to the Directive states that "to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected" (Recital 11).

This is the so-called "**idea/expression dichotomy**", a basic principle in copyright law. This distinction is also laid down in various international treaties. Article 9(2) TRIPS Agreement and Article 2 WIPO Copyright Treaty state that copyright protection extends to expressions and not ideas, procedures, methods of operation or mathematical concepts as such. This basic dichotomy affects the scope of protection that can be offered to computer programs.

The Software Directive applies **originality** as the criterion for protection. A computer program will be deemed original in the sense that it is the author's own intellectual creation. No other (stricter) criteria, such as tests of the qualitative or aesthetic merits of the program, can be applied. The elements of creativity, skill and inventiveness manifest themselves in the way in which the program is put together. The programmer defines the tasks to be performed by a computer program and carries out an analysis of the possible ways to achieve those results.

The author of the program selects the steps to be taken, and the way in which those steps are expressed gives the program its particular characteristics of speed, efficiency and even style

At European level, the EU Council adopted the Directive on the legal protection of computer programs in 1991. The more recent, codified version of this directive is Directive 2009/24/EC, which is known as the Software Directive.

The Software Directive considers computer programs to be literary works, worthy of protection under copyright.

It protects "the **expression** in any form of a computer program". This explicitly includes preparatory design material leading to the development of the program. However, the ideas and principles underlying the program are not protected. This is the basic idea/expression dichotomy that characterises copyright law.

The criterion for protection according to the Directive is originality. This means that the program must be the author's own intellectual creation.

Slide 110
Copyright protection at EU level

Copyright law is not fully harmonised in the European Union. However, some directives have harmonised certain aspects of it.

One of these is Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive). Under Article 2(a), the member states are obliged to provide authors with the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their work.

This case study also touches on the topic of copyright protection for works other than computer programs.

In the EU, certain aspects of copyright and related rights are harmonised. Under the Information Society Directive, the member states must give authors the exclusive right to authorise or prohibit the reproduction of their works.

Slide 111
About the case

The following slides provide an overview of the main facts of the case.

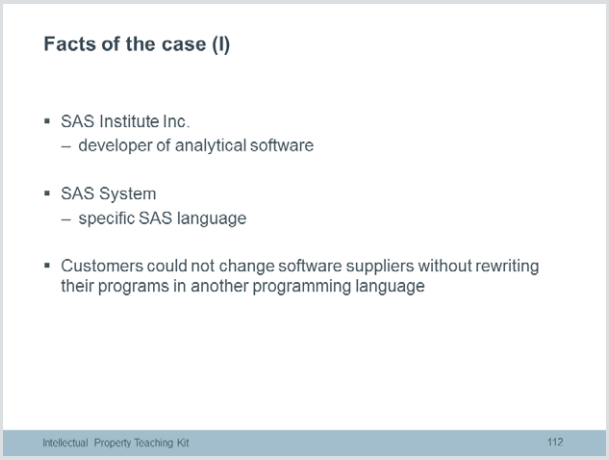
Slide 112
Facts of the case (I)

SAS Institute Inc. is a developer of analytical software. It developed an integrated set of computer programs which enabled users to carry out a wide range of data-processing and analysis tasks, particularly statistical analysis. This was known as the SAS System. Besides the Full Edition, SAS Institute also made a Learning Edition, which enabled users to learn how to use the system.

The core component of the SAS System was called Base SAS. It enabled users to write and run their own application programs in order to adapt the SAS System to work with their data. These application programs, or scripts, were written in a programming language peculiar to the SAS System. Known as the SAS language, it consisted of many different statements, expressions, options, formats and functions.

To help their customers get to know the SAS System, SAS Institute produced SAS manuals. These were technical works which exhaustively documented the functionality of each part of each SAS component, the necessary inputs and, where appropriate, the expected outputs. They were designed to give users a large amount of information about the external behaviour of the SAS System.

Over the years, SAS Institute's customers wrote thousands of application programs in the SAS language. These ranged from short, simple scripts to large, complex programs which took many years to create. In order to run their existing SAS language application programs, as well as to create new ones, SAS Institute's customers had to license use of the necessary components of the SAS System. Although there were many other suppliers of analytical software which competed with SAS Institute, any customers wanting to switch suppliers would have had to rewrite their existing application programs in a different programming language. Understandably, considering the investment involved, many customers were hesitant to make the change.



Our case study involves SAS Institute Inc., a developer of analytical software.

SAS Institute developed the SAS System, which consisted of:

– Base SAS, the core component which enabled users to write their own scripts or application programs, and
– A specific SAS language, in other words a programming language peculiar to the SAS System and used to write scripts.

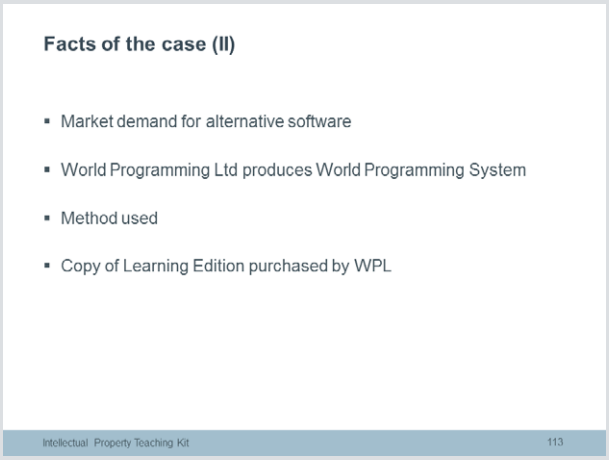
Over the years, users of the SAS System wrote numerous scripts in the SAS language. Although there were many other suppliers of analytical software which competed with SAS Institute, any users wanting to switch suppliers would have had to have rewritten their existing application programs in a different programming language. Understandably, considering the investment involved, many of them were hesitant to make the change.

Slide 113
Facts of the case (II)

The other party in the proceedings, **World Programming Ltd (WPL)**, recognised that there was a market demand for alternative software capable of executing application programs (scripts) written in the SAS language. It created the World Programming System (WPS), designed to emulate the SAS components as closely as possible in that, with a few minor exceptions, it attempted to ensure that the same inputs would produce the same outputs. This would enable users of the SAS System to run scripts which they had developed for use with the SAS System on the WPS. In other words, WPL sought to emulate much of the functionality of the SAS System as closely as possible.

In writing the World Programming System, the programmers of WPL studied, among other materials, the Learning Edition of the SAS System and the SAS manuals. None of the WPS developers had access to the SAS System source code, nor did any of them ever attempt to decompile any SAS System object code. There was, thus, no copying of the text of the source code. All the developers did was observe, study and test the behaviour of the SAS System and its functions.

Note
WPL lawfully purchased copies of the SAS System Learning Edition, which was supplied under a click-through licence. Click-through licences require the purchaser to accept the terms of the licence before being permitted to access the software. The terms restricted the use of the licence to non-production purposes.



A company called World Programming Ltd recognised that there was a demand for alternative software which was capable of executing scripts written in the SAS language.

It created the World Programming System, which allowed users to execute scripts in the SAS language, making it easier for them to switch software suppliers.

The method used by WPL consisted of observing, studying and testing the behaviour of the SAS System. It was accepted by the parties to the case that WPL had had no access to the source code and had not attempted a decompilation from object code into source code.

To develop its own system, WPL bought a copy of the SAS Learning Edition under a click-through licence for non-production purposes only.

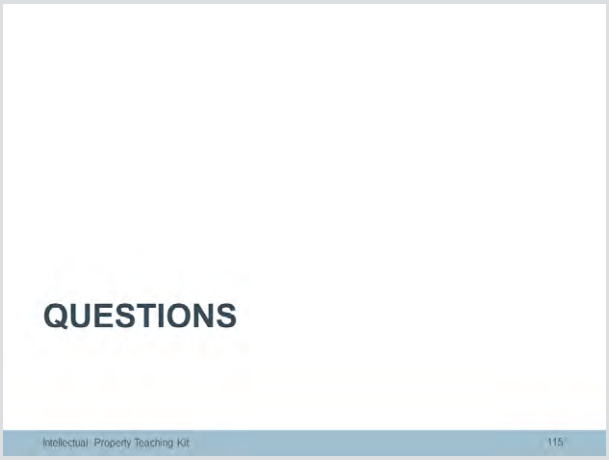
Slide 114
The dispute

SAS Institute brought proceedings against WPL for copyright infringement.

The dispute came before the Chancery Division of the High Court of England and Wales. The court referred the case to the European Court of Justice for a preliminary ruling.

This slide shows the claims which SAS Institute brought against WPL. It claimed infringement of copyright in the SAS manuals, arguing that WPL had copied them when creating the World Programming System and the WPS manual.
It also claimed that copyright in the different components of the SAS System itself had been infringed by WPL's use of the SAS manuals, and that WPL had breached the terms of the licence of the SAS Learning Edition.

Slide 115
Questions



We now come to various interesting questions that were raised in the case.

Slide 116
Legal questions

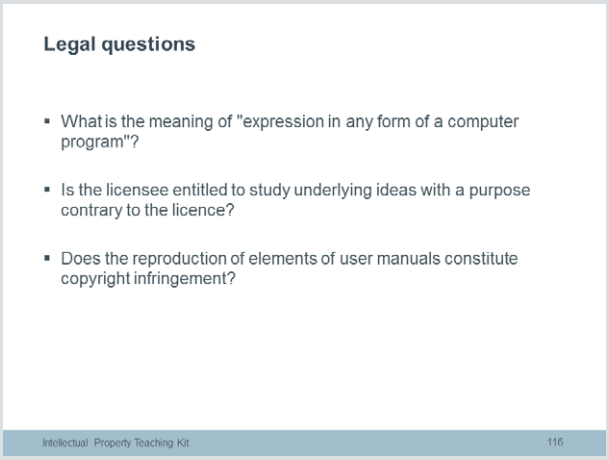
This slide gives an overview of the legal questions that arose in the case.

The **first question** concerns the meaning of "expression in any form of a computer program" in Article 1(2) Software Directive. Must this be interpreted as meaning that the functionality of a computer program, the programming language and the format of data files used in a computer program in order to exploit some of its functions constitute a form of expression of that program and may, as such, be protected by copyright?

The **second question** concerns the terms of licensing agreements. Is a person who has obtained a copy of a computer program under a licence entitled to observe, study or test the functioning of that program in order to determine the ideas and principles which underlie any element of the program, with a purpose that goes beyond the framework established in that licence?

The **third question** is whether or not the reproduction in a computer program or a manual for it of certain elements described in the user manual for another computer program protected by copyright constitutes an infringement of the copyright in that manual.

These questions relate to a number of issues, such as the extent to which copyright can protect the functionality of a computer program and the test to be applied to determine what amounts to reproduction of a substantial part of a copyright-protected work.



This case raised many different issues and questions.

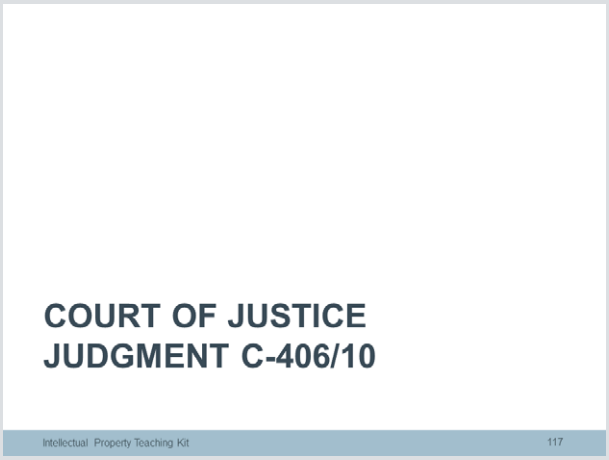
First of all, what is the meaning of “expression in any form of a computer program”? Does this include functionality? Programming language? Data file format?

The second is whether or not licensees are entitled to study the underlying ideas of a computer program with a purpose that is contrary to the licensing agreement.

The third question is whether or not the reproduction of elements of a user manual in a computer program or in a manual for it constitutes copyright infringement.

Slide 117
Court of Justice judgment C-406/10

The judgment was issued by the Grand Chamber.



We will now take a look at the judgment handed down by the European Court of Justice.

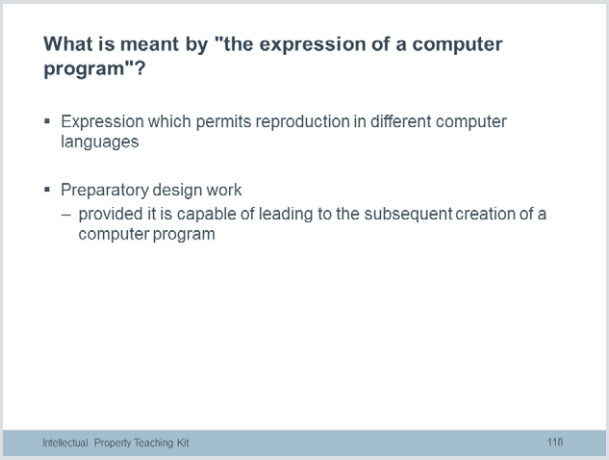
Slide 118
What is meant by “the expression of a computer program”?

In answering this question, the Court of Justice first referred to the idea/expression dichotomy that exists in copyright law. Ideas and principles which underlie the computer program or which are present in the logic, algorithms and programming language of the program are not protected.

The Court then referred to an earlier judgment in which it defined the object of protection of the Software Directive more clearly. The “expression of a computer program” is the expression in any form of a computer program, such as the source code and the object code, which permits reproduction in different computer languages. It also held that any form of expression of a computer program must be protected from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its function. For more details, see judgment of 22/12/2010, C-393/09, ‘Bezpečnostní softwarová asociace’.

The expression of a computer program also includes the preparatory design work leading to its development, on condition that the nature of the preparatory work is such that it can lead to the subsequent creation of a computer program. This follows from Article 1(1) and Recital 7 of the preamble to Directive 2009/24/EC.

The Court went on to give examples of what can and cannot be protected by the Directive. It concluded that the source code and the object code are expressions, because they can lead to the reproduction of the program. A graphical user interface, on the other hand, does not enable such reproduction but merely constitutes one element of the program by means of which users make use of its features.



The court held that the expression of a computer program is any expression in any form of that computer program which permits reproduction in different computer languages. For example, the source code and object code can be considered expressions of a computer program, but the graphical user interface cannot.

The expression of a computer program also includes the preparatory design work, but only on condition that it is capable of leading to the subsequent creation of a computer program.

Slide 119
What is not protected by copyright

Based on the idea/expression dichotomy in copyright law and the definition of an expression of a computer program, the European Court of Justice concluded that the following are not protected by copyright under the Software Directive:

– The functionality of the computer program.
– Its programming language.
– The format of data files used to exploit certain functions.

In other words, the expression that leads to the reproduction of the computer program is protected under copyright, but its functionality, i.e. the purpose it serves, is not. The functionality of a computer program can be defined as the set of possibilities offered by a computer system, the action specific to that program, or, in other words, the service which the user expects from it (Point 52, opinion of Advocate General Bot in C-406/10, 29 November 2011).

The Advocate General gave the concrete example of a computer program for airline ticket reservations. This type of software will contain plenty of functionalities needed to make a booking. The computer program will have to find the flight requested, check availability, book the seat, register the user's personal details, take online payment and edit the user's ticket. All these functionalities have a specific purpose; in this way, they are similar to ideas. Furthermore, there are many means of achieving the concrete expression of those functionalities. Other authors can create similar and even identical programs, provided that they refrain from copying. It is, therefore, legitimate for computer programs to exist which offer the same functionalities.

Moreover, accepting that the functionality of a computer program could be protected would amount to making it possible to monopolise ideas, which is not the aim of copyright. If only the individual expression of the work is protected, other authors can create similar or even identical programs, provided that they refrain from copying.

The programming language used to read and write data in a specific format is a means by which users exploit certain functions of the computer program. The same applies to the format of data files used in a computer program to interpret and execute application programs.

Note
The Advocate General stated that a programming language is made up of words and characters known to everyone and lacking originality. The language is a functional element which allows instructions to be given to the computer. He said that "programming language must be regarded as comparable to the language used by the author of a novel. It is therefore the means which permits expression to be given, not the expression itself." It is the source code of the computer program that is written in the programming language, i.e. the expression in that programming language, that will be eligible for protection under the Directive (Points 71 and 74, opinion of Advocate General Bot in C-406/10, 29 November 2011).

If a third party were to procure part of the source code or object code relating to the programming language or the format of data files and subsequently create a similar computer program, this conduct would be considered a partial reproduction and, therefore, an infringement of the copyright. However, as mentioned before, WPL did not have access to the source code, nor did it carry out a decompilation of the object code.

As a consequence of the idea/expression dichotomy in copyright law, the court concluded that neither the functionality nor the programming language nor the format of data files can be protected by copyright.

The court held that allowing the functionality of the computer program to be protected under copyright would amount to the monopolisation of ideas. This would run counter to the aim of copyright protection.

It stated that programming languages and data file formats are means to exploit the functions of computer programs.

Slide 120
Studying the functioning of a computer program

The second question deals with the scope of the exceptions to the exclusive right enjoyed by the author of the computer program. In essence, the referring judge wanted to know if the wording "any of the acts of loading, displaying, running, transmitting or storing the program [which the person having the right] is entitled to do" in Article 5(3) Software Directive covered only the acts which the holder of the licence to use the computer program is authorised to perform under that licence.

In addition, he wanted to know whether or not the purpose for which these acts are performed has an impact on the licensee's ability to rely on that exception. In other words, does the purpose of the study or observation of the functioning of the computer program have an effect on whether or not the licensee may invoke the exception?

In full, Article 5(3) states that observing, studying or testing of the functioning of the computer program, in order to determine the underlying ideas and principles, is allowed, provided that certain conditions are met. First of all, the observer must have the right to use a copy of the computer program, e.g. he must be a licensee. Second, this study must be the result of performing any of the acts of loading, displaying, running, transmitting or storing the program *which that person is entitled to do.*

The purpose of this provision is to ensure that the ideas and principles which underlie the computer program are not protected by the owner of the copyright by means of a licensing agreement. For that reason, the Directive adds that any contractual provisions contrary to the exceptions provided for in Article 5(2) and (3) are null and void (Article 8(2)).

In this case, the problem lies in the meaning of the words "any of the acts of loading, displaying, running, transmitting or storing the program which he [i.e. the person who has the right] is entitled to do". According to the Court, it follows from that provision that the determination of those ideas and principles may be carried out within the framework of the acts permitted by the licence. The question is, thus, what are the acts that the licensee is entitled to do?

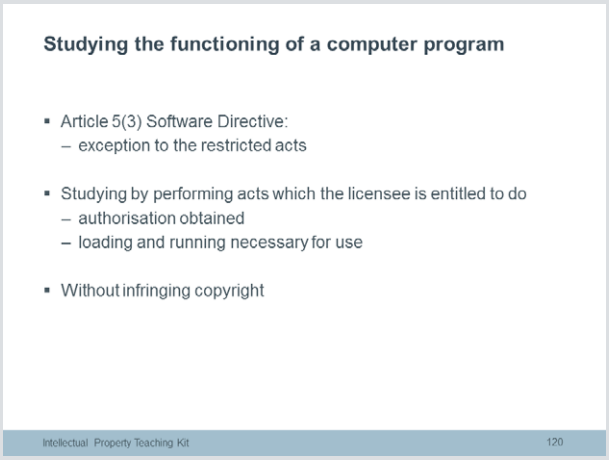
According to the Court, by reference to the Advocate General, the acts in question are those which are referred to in Article 4(1)(a) and (b) and Article 5(1) of the Software Directive, i.e.:

– Acts that fall within the exclusive right of the right-holder to do or authorise:
  • permanent or temporary reproduction (this includes the acts of loading, displaying, running, transmission or storage of the program necessary for reproduction);
  • translation, adaption, arrangement and any other alteration and the reproduction of the results thereof.
– Acts necessary for the use of the computer program in accordance with its intended purpose, including for error correction. In this regard, the preamble to the directive states that the acts of loading and running necessary for that use may not be prohibited by contract.

In short, the acts which a licensee is entitled to do are the acts for which he obtained authorisation from the right-holder and the acts of loading and running necessary to use the computer program.

As to the purpose for which the computer program can observed, etc., Recital 14 of the preamble to the Software Directive states that the acts mentioned in Article 5(3) cannot infringe the copyright in that program. In other words, these acts do not enable the person having the right to use a copy of a computer program to access information which is protected by copyright, such as the source and the object code. In this case, WPL did not have access to the source code but merely studied the program in order to reproduce its functionality. The copyright in the program was, therefore, not infringed.

Whether or not WPL performed acts which fell outside the scope of the licence in question must be examined by the referring judge.



Next, we come to the question of whether or not a licensee is permitted to observe, study or test the functioning of a computer program by performing acts which run counter to the purpose and framework established by the licence.

Article 5(3) of the Software Directive allows for exceptions to the exclusive rights which are awarded to the author of a computer program. It says that a person having the right to use a copy of the computer program may observe, study or test the functioning thereof by performing any of the acts of loading, displaying, running, transmitting or storing the program which that person is entitled to do.

The Court stated that the acts which a licensee is entitled to do are the acts for which he has obtained authorisation from the right-holder and the acts of loading and running, which are necessary to use the computer program.

However, the licensee can perform these acts only as long as he does not infringe the copyright of the software.

Slide 121
Reproduction of elements of a user manual

SAS Institute claimed that the copyright in its user manuals had been infringed because WPL not only created its own manual but also created the computer program itself, based, in part, on the manual. It claimed that certain elements of the SAS manuals were reproduced in the World Programming System and the WPS manual.

WPL contended that it had copied only the ideas, procedures, methods of operations and mathematical formulae described in the SAS manuals, not the expression of the manual itself.

The SAS user manuals are not a computer program and, therefore, are not protected by software copyright. However, the manuals are nonetheless a protected literary work for the purposes of the Information Society Directive. It was not contested that the creation of the SAS manuals involved substantial skill, judgement and labour on the part of SAS Institute's employees. What was disputed was whether or not WPL had infringed the copyright in those manuals by reproducing certain elements described there.

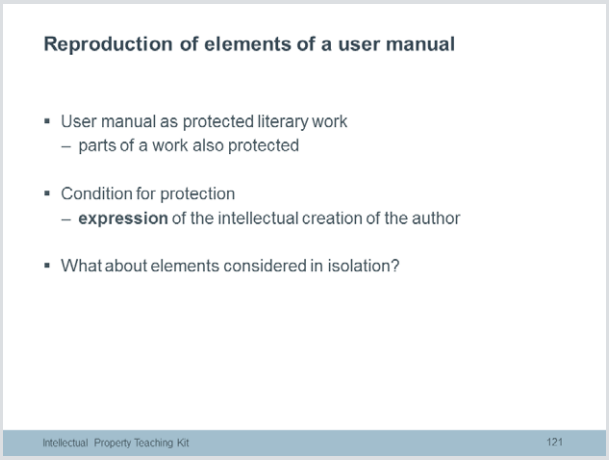
Pursuant to Article 2(a) Information Society Directive, the author has the exclusive right to authorise or prohibit the reproduction of his work "by any means and in any form", "direct or indirect", "temporary or permanent" and "in whole or in part". From that wording, it is clear that a reproduction of (part of) a work in a different form, such as a computer program, is also considered a reproduction within the meaning of the Directive.

The question is, did WPL infringe copyright in the SAS manuals?

The Court referred to a previous judgment (European Court of Justice judgment of 16/07/2009, C-5/08, 'Infopaq International') in which it ruled that the various parts of a work enjoy protection under Directive 2001/29/EC, provided that they contain some of the elements which are the expression of the intellectual creation of the author of the work.

In this case, certain elements of the SAS, manuals are not protected by copyright. These elements include keywords, syntax, commands or combinations of commands, options, defaults and iterations that consist of words, figures or mathematical concepts which, considered in isolation, are not, as such, an intellectual creation of the author of the computer program. It is only through the choice, sequence and combination of those words, figures and mathematical concepts that the author can express his creativity in an original manner.

The question is, thus, whether or not the reproduction of those elements by WPL is the reproduction of the expression of the intellectual creation of SAS Institute.



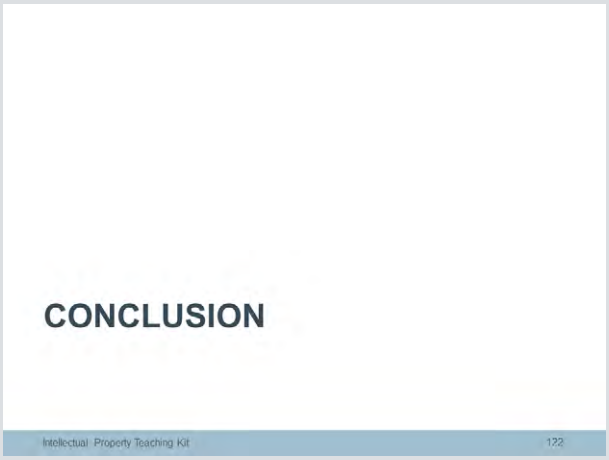
The SAS manuals constituted a protected literary work.

The Software Directive was not applicable to them, as they were not a computer program. But the Information Society Directive, including Article 2(a), which attributes to the author an exclusive right to prohibit or authorise the reproduction of his work “in whole or in part”, was applicable. Reproduction in another manual or in a different from, such as a computer program, falls within the scope of the provision.

It follows from this that parts of a work can also enjoy protection, but only on condition that the part in question is an expression of the intellectual creation of the author.

Certain elements, when considered in isolation, are not intellectual creations. Examples include keywords, syntax, commands or combinations of commands, and options. Only through choice, sequence and combination of those elements can there be expression.

Slide 122
Conclusion


CONCLUSION
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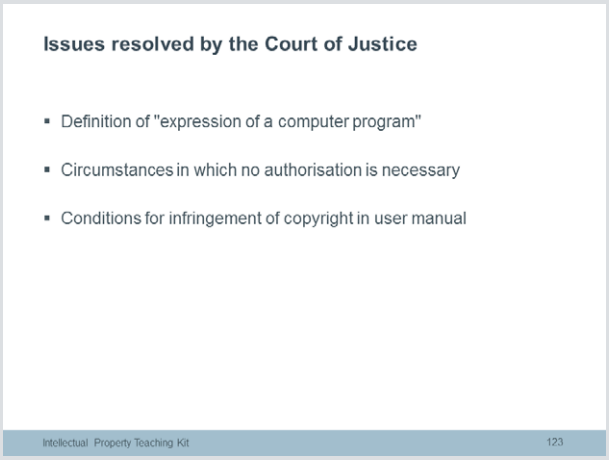
122

Slide 123
Issues resolved by the Court of Justice

These are the issues that were resolved by the judgment of the European Court of Justice.

It is now up to the referring national court to apply these principles to the facts of the present case.



These are the issues that were resolved by the European Court of Justice.

Firstly, the Court gave a definition of what is meant by “the expression of a computer program”. According to this definition, the functionality, programming language and format of the data files of a computer program are not protected by software copyright.

It also outlined the circumstances in which the authorisation of the author of the copyright-protected work is not necessary. This is the case when a person who has the right to use a copy is observing, studying or testing the functioning of a program by carrying out, without infringing copyright, acts of loading and running necessary for use and/or acts allowed by the licence.

Finally, the Court explained that, through choice, sequence and combination, certain elements not protected by copyright can when considered in isolation nonetheless amount to copyright-protected works when they are the expression of an intellectual creation of the author.

Slide 124
Useful resources

The following documents were used in preparing the case study.

Legal texts
Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version)

Directive 91/250/EEC of the Council of 14 May 1991 on the legal protection of computer programs

Referring court case
England and Wales High Court (Chancery Division), *SAS Institute Inc. and World Programming Limited,* 23 July 2010 (Justice Arnold)

Opinion of the Advocate General
Opinion of Advocate General Bot in C-406/10, 29 November 2011

Cases referred to in the judgment
European Court of Justice judgment of 16/07/2009, in C-5/08, 'Infopaq International A/S v. Danske Dagblades Forening'
European Court of Justice judgment of 22/12/2010, in C-393/09, 'Bezpečnostní softwarová asociace'

Here is a list of legal texts and other cases from the Court of Justice which will provide useful background information.

6 Copyright exercises

Copyright exercises
List of slides

Slide 125
Copyright exercises

This module starts with a recap of what we have learnt about copyright. We will then work through a number of exercises on various aspects of the topic.

Slide 126
Recap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Slide 127
Subject-matter protected by copyright

Works covered by **copyright** include written works, musical works, dramatic and choreographic works, cinematographic works and multimedia products, computer programs and databases. Article 2(1) of the Berne Convention provides a broad definition:

"*The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.*"

Copyright does not protect mere ideas or facts, procedures, processes, systems, methods of operation, concepts, principles or discoveries. It protects the way ideas are expressed.

In order to be protected by copyright, a work must be original. National laws usually do not define originality or creativity. The meaning of these terms has been left to interpretation by the courts.

– According to the civil law countries, originality resides in the expression of the author's personality. Therefore, originality involves creativity.
– Common law countries require that a work should not be a simple copy of a pre-existing work and that the author must have exercised some skill, judgment and labour in the course of the creation of the work.

The Berne Convention allows member countries to decide whether or not creative works must be "fixed" to enjoy copyright: "It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."

Many countries do not require a work to be produced in a particular form in order for it to be eligible for copyright protection. However, the common law countries, such as the United States and Canada, generally require that the work must be fixed in a tangible medium to obtain copyright protection.

Work is protected from the moment of creation. The protection of copyright is not subject to any formalities, such as registration. However, in a number of countries, copyright registration is available. The © sign, followed by the name of the right-holder and the year in which the work was created, can be used to indicate that the work is protected by copyright.

The term "**neighbouring rights**" refers to rights granted to performers, phonogram producers and broadcasting organisations.

Neighbouring rights are not the result of creation; they are "related" to the rights of the author.

In the main module, we discovered that copyright protects literary and artistic works, and that there is a distinction between ideas and expressions, with copyright protecting the latter only. We also found out that, in order to be protected, an artistic work must be original.

We heard that copyright is not subject to formalities such as registration, and that the interests of performers, producers and broadcasters are protected by so-called neighbouring rights.

Slide 128
Rights, exceptions and enforcement

This slide contains a summary of the rights afforded by copyright and how they are enforced.

Copyright grants authors a number of exclusive **economic rights** which allow them to control the exploitation of their work:

– Right of reproduction,
– Right of translation,
– Right of adaptation,
– Right of communication to the public,
– Right of distribution,
– Resale right.

There is a clear distinction between the intangible right in the work and the property right in the medium.

Moral rights protect the personal link between authors and their work. They include:

– The right of paternity (the right to be recognised as the author of the work).
– The right of integrity (the right to object to any changes to the work that would be prejudicial to the author's honour and reputation).
– The right of divulgation of the work.

Exceptions and limitations exist. They balance the rights of authors and right-holders against those of users. They allow works to be used in specific situations, for example for criticism and review, education and research, and parody or personal use.

Copyright-protected works cannot be used without the permission of the author or right-holder. If a copyright-protected work is used without the permission of the author or right-holder, this constitutes infringement. Owners can take steps to enforce their rights.

The rights conferred on the author can be divided into economic rights and moral rights.

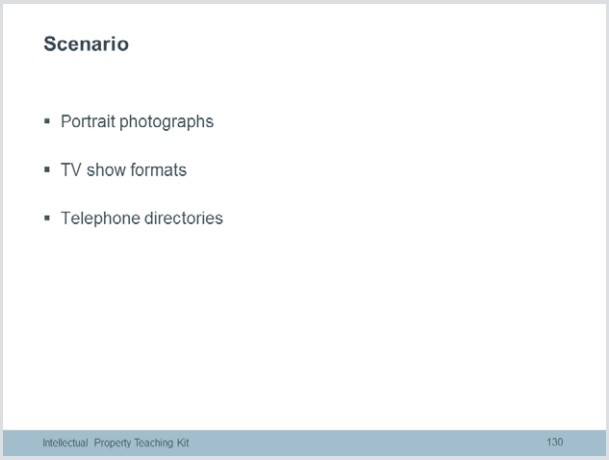
Exceptions allow users to use copyright-protected works for purposes such as criticism and review or education and research.

Using copyright-protected works without the permission of the author or right-holder constitutes infringement. There are various remedies available to deal with infringement.

Slide 129
Exercise 1: Subject-matter

The first exercise concerns the subject-matter protected by copyright.

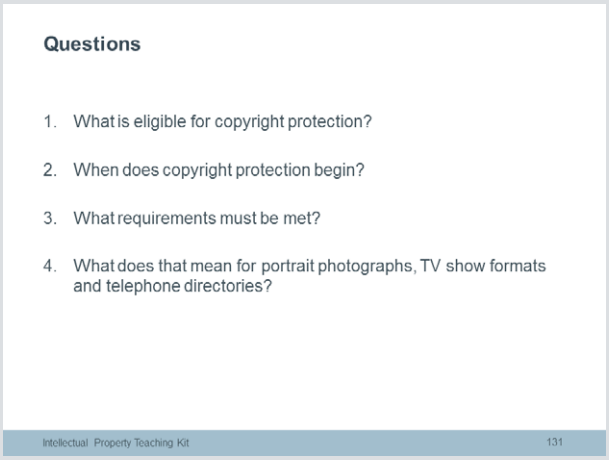
Slide 130
Scenario



Which of the items shown on this slide are eligible for copyright protection?

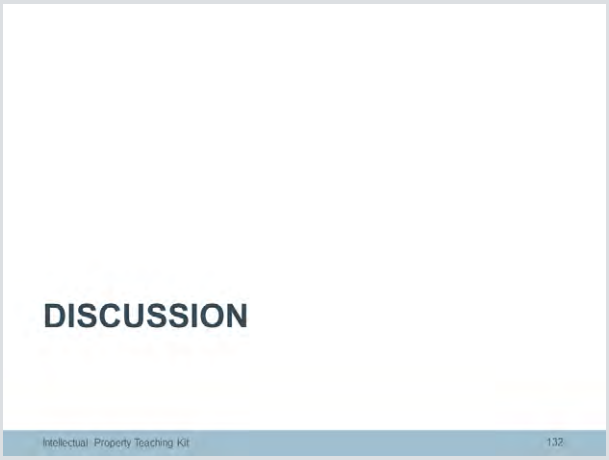
Slide 131
Questions

Ask the students the questions on the slide.



In order to answer the questions on the previous slide, we need to establish the answers to the questions shown here.

Slide 132
Discussion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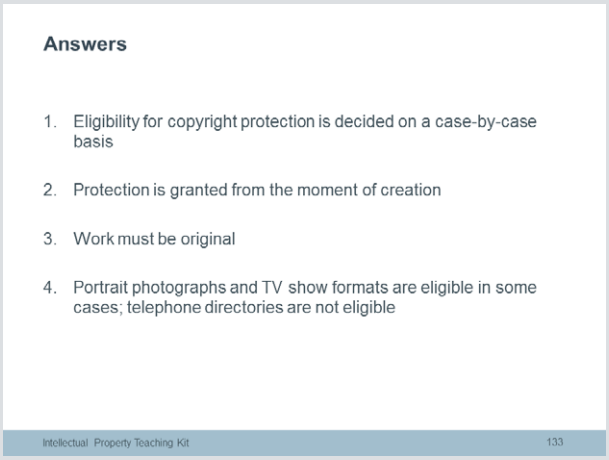
Slide 133
Answers

Copyright protects literary and artistic works. The protection is granted **from the moment of creation.** However, in order to be protected, the subject-matter has to meet certain requirements. Generally, it has to be decided in every individual case whether the work is eligible for copyright protection or not.

Photographic works are included in the list of literary and artistic works in Article 2(1) of the Berne Convention. Portrait photographs might in some cases be considered as lacking originality; however, as was stated by the European Court of Justice, "a portrait photograph can [...] be protected by copyright if [...] such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph" (judgment of 01/12/2013, C-145/10, 'Painer').

Judicial opinions on the protection of TV show formats differ. In some cases, the courts deny protection on the basis that it is merely an idea for a TV show and therefore not protectable under copyright law.

Compilations of data or other material, whether in machine-readable or other form, which by reason of selection or arrangement of their contents constitute intellectual creations, are protected as such. Such protection does not extend to the data or material itself and is without prejudice to copyright in the data or material itself. However, the protection of the compilation is subject to the requirement of originality; compilations which do not involve any intellectual input, such as telephone directories, are not protected.



Eligibility for copyright protection should be decided in each individual case, taking into account the relevant facts and circumstances.

The work must be original. In the case of portrait photographs, the determining factor is whether they are the intellectual creation of the author reflecting his personality and expressing his free and creative choices.

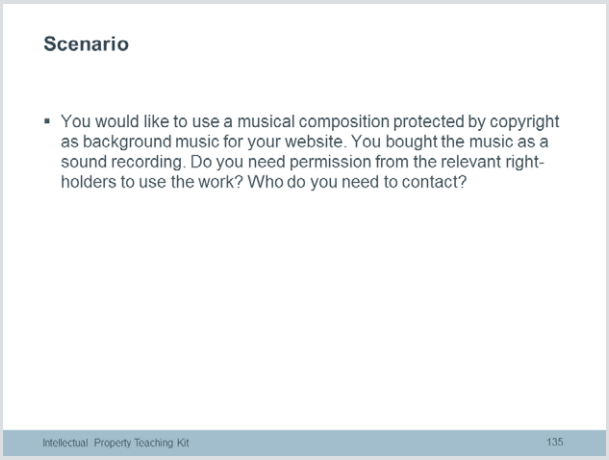
Telephone directories are not protected, because they lack both originality and intellectual involvement.

Ideas or mere facts are not protected. Some TV show formats have been regarded by the courts as mere ideas for TV shows and therefore not protectable.

Slide 134
Exercise 2: Rights involved

The second exercise is about the economic and moral rights of copyright.

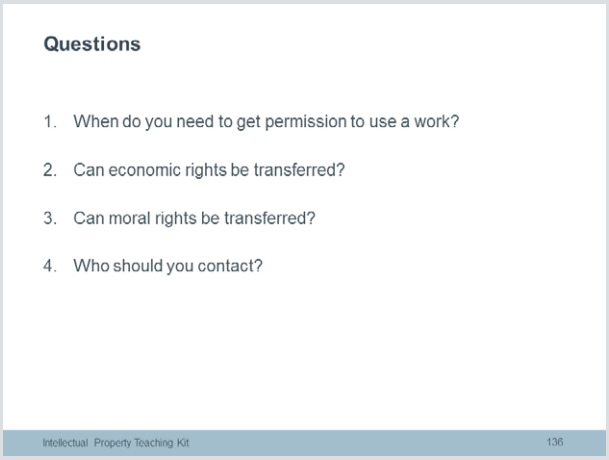
Slide 135
Scenario



For this exercise you should imagine that you want to use a musical composition protected by copyright as background music for your website. You have bought the music as a sound recording. Do you need permission from the relevant right-holders to use the work? Who do you need to contact?

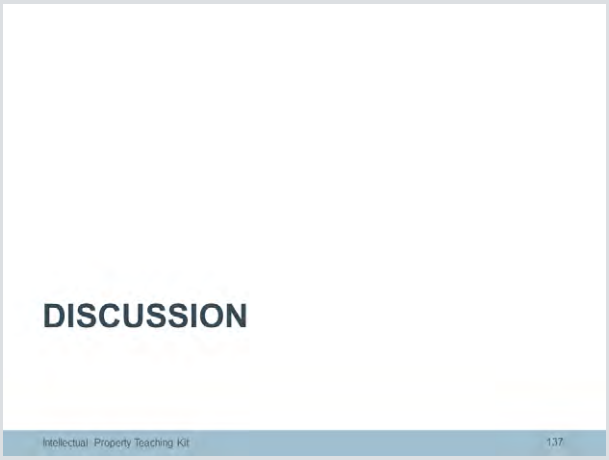
Slide 136
Questions

Read out the questions on the slide.



To find the solution, we need to answer the questions shown on this slide.

Slide 137
Discussion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Slide 138
Answers

Copyright comprises two main sets of rights: economic rights and moral rights. Rights belong to the creator who can exercise them. He can use the work himself or can give permission to use the work. Generally, work protected by copyright cannot be used without the permission of its author or right-holder, unless an exception or a limitation applies.

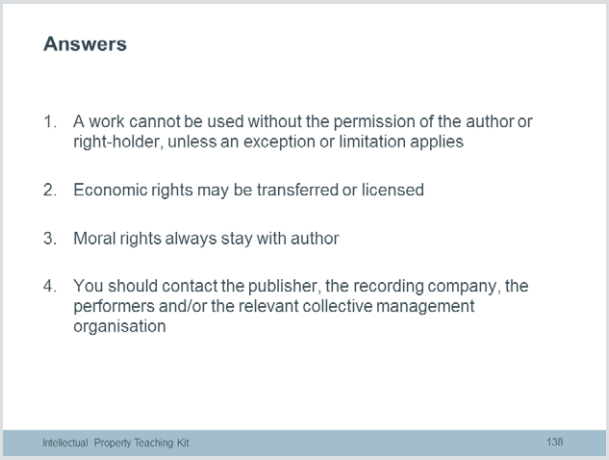
Copyright provides the author with exclusive economic rights over the work. If you have a sound recording of a musical composition, you cannot upload it on the internet, since that would require making an electronic copy of the work and would therefore involve the right of reproduction and the right to make a work available to the public. You must therefore contact the author or right-holder and ask for permission to use the work.

Economic rights can be transferred by either assignment or licence. Assignment is a way of transferring economic rights to a person, who then becomes the new owner of the copyright. Those who acquire economic rights are called right-holders. Licensing means that the author remains the owner of his economic rights but allows the licensee to carry out certain acts in relation to his work for a limited time. Licensing may also take the form of the collective administration of rights.

Moral rights maintain a personal link between the author and his work. They include the right of paternity (the right to be recognised as author of the work), the right of integrity (the right to object to any changes to the work that would be prejudicial to the author's honour and reputation) and the right of divulgation of the work. Moral rights are independent of economic rights and always remain with the author, even when the economic rights are sold. When using protected works, you should always credit the original author and avoid making changes to the work that could be prejudicial to their honour or reputation.

In the case of music, there may be several different right-owners from each of whom licenses are required. Copyright protection applies to musical composition, and related rights protection applies to the sound recording (the recording of a performance). You have to obtain permission to use both the musical composition and the sound recording. You may therefore need to contact the music publisher, the recording company and the performers.

When you need permission to use works or performances, the easiest way is to contact a collective management organisation. Collective management is the exercise of copyright and related rights by organisations acting in the interest and on behalf of the owners of the rights (e. g. copyright and neighbouring rights).



A work protected by copyright cannot be used without permission, unless an exception or limitation applies.

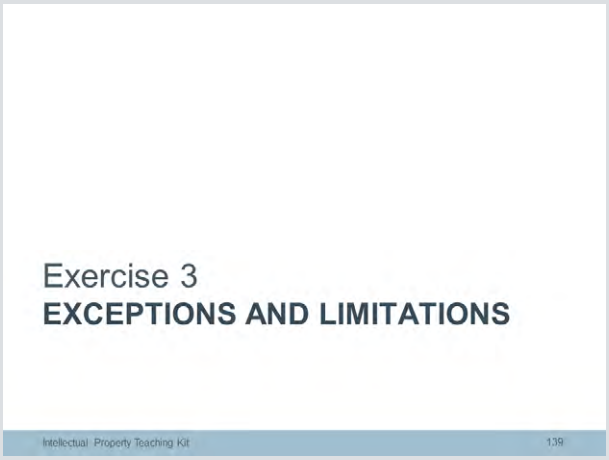
Copyright provides the author with exclusive economic rights over the work. Economic rights can be transferred by either assignment or licence.

Moral rights are independent of economic rights and always remain with the author.

In the situation described, you would have to obtain permission to use both the musical composition of the song and the sound recording. You would therefore have to contact the music publisher, the recording company and also the performers. For permission to use works or performances, the easiest way is to contact a collective management organisation.

Slide 139
Exercise 3: Exceptions and limitations

The third exercise deals with exceptions and limitations to copyright.


Exercise 3
EXCEPTIONS AND LIMITATIONS
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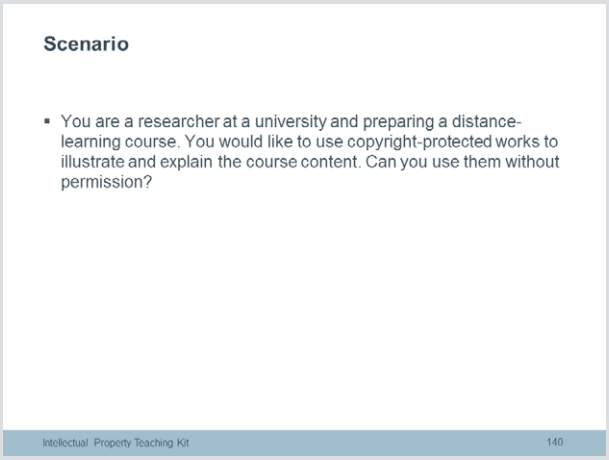
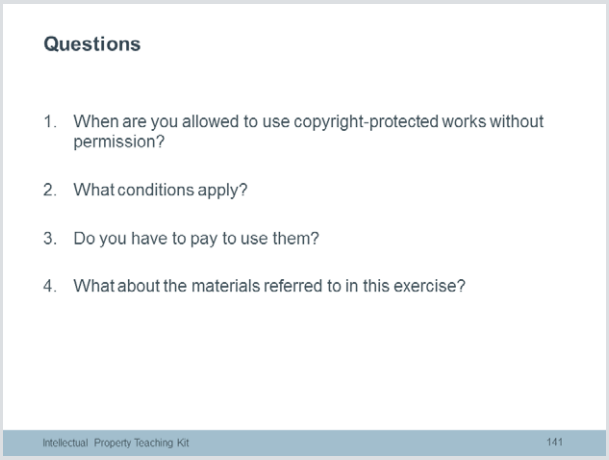
Slide 140
Scenario



For the purposes of this exercise, you are a researcher at a university. You have been asked to prepare a distance-learning course. You would like to use copyright-protected works to illustrate and explain the course content. Are you allowed to use these works without permission?

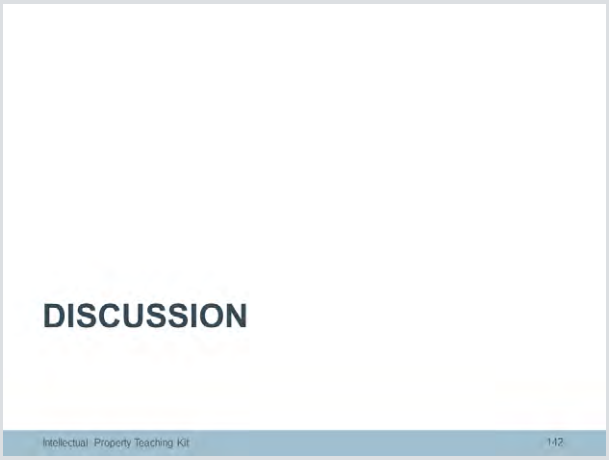
Slide 141
Questions

Read out the questions on the slide.



To get the solution to this exercise, we need to answer the questions shown on the slide.

Slide 142
Discussion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Slide 143
Answers

Copyright laws allow certain cases in which protected works may be used without the authorisation of the author or right-holder and with or without payment of compensation.

Under Article 9(2) of the Berne Convention, the adoption of limitations and exceptions is subject to the so-called "three-step test":

– The limitation or exception can apply only in certain special cases.
– The limitation or exception must not conflict with the normal exploitation of the work.
– The limitation or exception must not unreasonably prejudice the legitimate interest of the author.

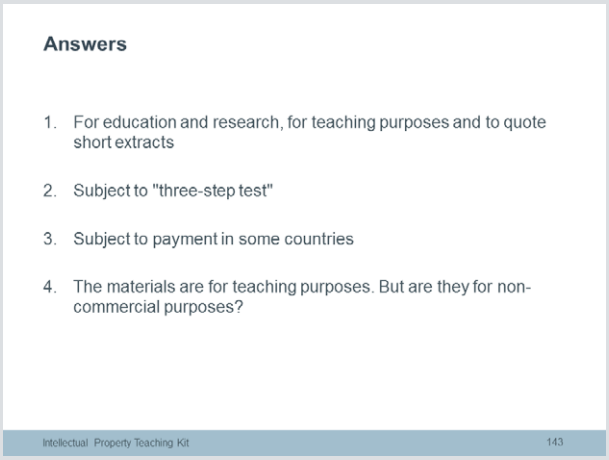
There is a strong public interest involved in education, so most countries provide an exception for educational and research purposes. The extent and conditions of this exception vary from country to country, so you should consult the relevant national copyright laws.

Article 10(2) of the Berne Convention provides for an exception for teaching purposes. In this article, utilisation of literary and artistic works is allowed to the extent justified by the purpose by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided it is compatible with fair practice.

Directive 2001/29/EC was adopted in order to harmonise the main legal issues concerning copyright in the information society in the EU. Among the exceptions listed in the Directive, Article 5.3(a) allows member states to exempt any "use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved." The exception covers the rights of reproduction and communication to the public, which includes making works available to the public. There is no limit on the extent and nature of the works that can be used. The exception allows for the use of entire works or fragments thereof.

In the present situation, the material is intended for educational and research purposes. In such cases, copyright-protected materials can be used for illustration, on condition that they pass the "three-step test". However, the exception can only be applied if the materials are being used for a non-commercial purpose. Does online distribution in a distance-learning course involve any commercial activity? As national laws vary, and often fail to refer to distance learning, you should check the situation in your own country regarding the right of reproduction and the right of communication to the public.

The quotation exception covers the reproduction or use of a portion of a work for criticism and review, allowing you to quote short extracts from a work.



Limitations and exceptions are allowed where the public interest is served or to balance the rights of authors and right-holders against those of users. They are allowed for education, research and teaching purposes.

Their application is subject to the so-called "three-step test". According to this test, the limitation or exception can apply only in certain special cases.

It must not conflict with the normal exploitation of the work and it must not unreasonably prejudice the legitimate interest of the author.

In some countries use of work is free; in others, it is subject to payment of an equitable remuneration.

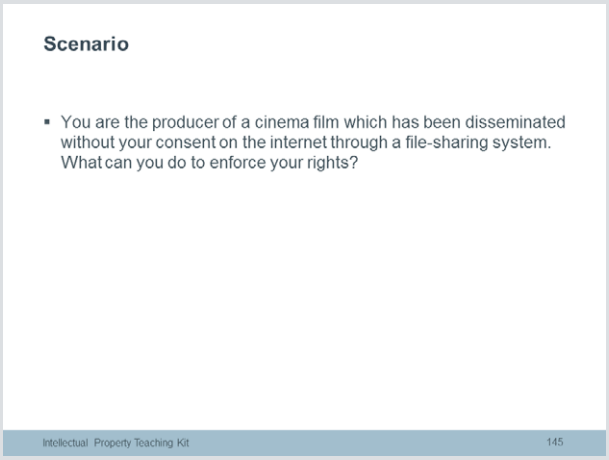
The materials in our exercise are to be used for teaching purposes. But does the online distribution of works in a distance-learning course involve any commercial activity? You should check the national copyright laws regarding the right of reproduction and the right of communication to the public.

When use of protected works is allowed, the original author must be credited.

Slide 144
Exercise 4: Enforcement

The fourth exercise deals with the enforcement of copyright, and what can be done when copyright is infringed.

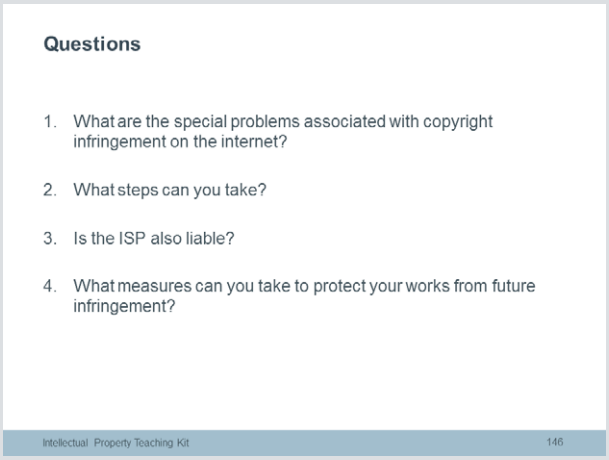
Slide 145
Scenario



In this exercise, you should imagine that you are the producer of a cinema film which has been disseminated on the internet through a file-sharing system, without your permission. What can you do to enforce your rights?

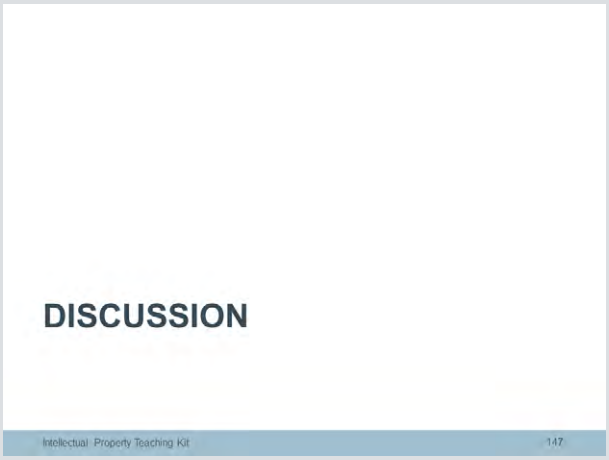
Slide 146
Questions

Read out the questions on the slide.



To find the solution to this problem, we need to answer the questions shown on the slide.

Slide 147
Discussion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Answers

Infringement occurs when a person exercises a right conferred on the author or the right-holder without having obtained their consent. Economic rights are infringed if someone without authorisation makes a copy and distributes the work. Moral rights are infringed if your contribution as the author of the work is not recognised or your work is subject to derogatory treatment or is modified in a way that is prejudicial to your honour or reputation.

The internet poses new challenges, as websites are located in one country but accessible worldwide.

The first step in enforcing your rights is to identify the persons responsible for the unauthorised use of the copyrighted work and send them a “cease and desist” letter. You can send the letter to the alleged infringer asking him to remove the infringing material from the website, indicate you as the author of the material and pay you for the use of the work.

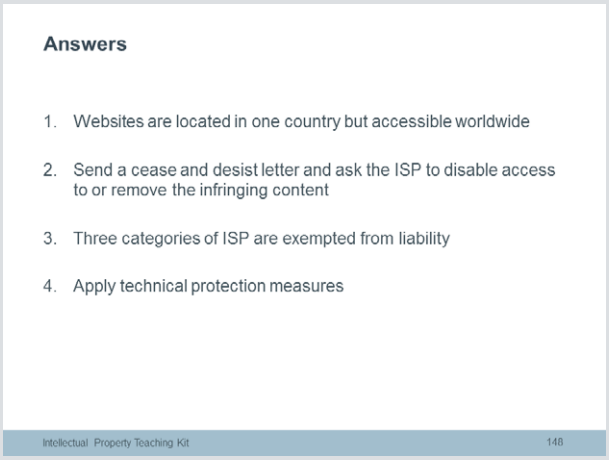
You should also inform the ISP hosting the website about the infringement and ask it to disable access to or remove the infringing content.

If the problem is not fixed, you may decide to sue the infringer. Defendants must be sued in the country of their domicile; however, in copyright infringement cases they may be also sued in the courts of the place where the harmful event occurred and where the infringing activity (e.g. downloading a copy of a movie on a server) took place.

According to the E-commerce Directive 2000/31/EC, three categories of ISP are exempt from liability: (i) those that transmit information (“mere conduit”), (ii) those that engage in “caching” information and (iii) those engaged in “hosting” information. The exemption for "hosting" information is subject to the condition that the service provider is unaware of the unlawful activities of its client and that upon obtaining such knowledge it acts expeditiously to remove or disable access to, such content.

Pending the final outcome of the case, you can apply for provisional measures, such as injunctions, which have the dual purpose of preventing any further infringing activity and preserving evidence.

In order to protect your work from future infringement, you can apply technical protection measures, including technical devices preventing copying, aimed at preventing the unauthorised use of works. According to international law, it is illegal to remove, alter or circumvent technical protection measures.



The internet poses new challenges, as websites are located in one country but accessible worldwide.

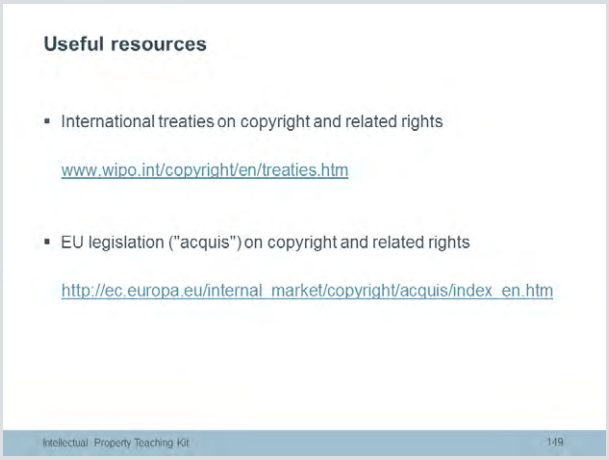
The first step is to identify the persons responsible for the unauthorised use and send them a “cease and desist” letter. You should also inform the internet service provider or ISP hosting the website about the infringement and ask it to disable access to or remove the infringing content.

There are three categories of ISP that are exempt from liability: those that transmit information, those that engage in “caching” information and those engaged in “hosting” information. The exemption applies only if the service provider is unaware of the unlawful activities of its client and if upon obtaining such knowledge it acts expeditiously to remove, or disable access to, such content.

Pending the final outcome of the case, you can apply for a provisional measure, such as an injunction, which is a temporary order addressed to the defendant prohibiting any further infringing activity. To protect your work from future infringement, you can apply what are known as technical protection measures aimed at preventing the unauthorised use of works, including technical devices preventing copying.

Slide 149
Useful resources

This slide contains links to international and EU legislation on copyright and related rights.



Here are two websites with more information about EU and international legislation on copyright and related rights.

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