Dossier Intellectual Property

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Luxembourg wants to position itself ahead of the curve when it comes to innovation and research. The local authorities have created a safe environment for intellectual property (IP) in order to encourage research and development (R&D) activities. LFF asked Office Freylinger, a European leader in intellectual property, why it is important for companies to protect their IP and what role Luxembourg can play in this domain.

Wearing a fake watch bought on the beach of a Mediterranean tourist destination or an imitation luxury bag purchased from a street vendor on a busy high street was often regarded as being of little importance. This might still be the view of the consumer who cannot afford the original brand name item, but certainly not the one of the person whose business is being harmed by counterfeiting. Pierre Kihn is CEO of Office Freylinger SA, European Patent and Trademark Attorney. He says that “the trade of fake goods has been more widely accepted, much more than illegal dealing with drugs, for instance”. The trade of counterfeited and pirated products has always been part of the parallel economy, but times have changed, and the consequences of counterfeiting are now more serious. “Ten years ago, the geographic distances protected your business in some way, because you sold your products and goods on a local and regional basis. Often, you didn’t mind that fake items of your European brand were sold in Asia, because you were not active in that region of the world. This is not the case anymore, especially not for large companies, because business trade has become global”.

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As a consequence, the experts from Office Freylinger insist on the fact that a company’s trademark and its other IP rights have to be protected, as these are a valuable asset. Pierre Kihn feels strongly that people who have created something new and innovative should be granted the right to stop infringement and obtain seizure or destruction of fake goods, and prior filing is the only way to obtain such a right.
PROTECT YOURSELF AND YOUR IDEAS

Olivier Laidebeur is a European Trademark Attorney and Head of the Trademark Department at Office Freylinger. To him, suffering from counterfeiting is not only about losing money, but has also to do with security and health risks. He mentions fake brake discs for cars or pharmaceuticals of poor quality as examples that should provoke reflection. And there is more to it, “Companies often underestimate the financial harm of counterfeiting. It is only when they have lost important market shares that they realise, usually too late, that damage has been done. That’s why effective protection of the intellectual property rights of a business is an asset in the market.”

Pierre Kihn underlines that around 300,000 patents are registered every year. “Company attitudes have changed. Today, everything is being patented. In the past it was different, firms would only have registered a patent when they felt they had created something inventive and original.” Why this change of mentality? “Scientists are more mobile today. When they leave a company to go work for a competitor and they haven’t registered their patents, their creations and ideas can be used by anybody else.”

There are differences between the US and the European laws on intellectual property. According to Pierre Kihn, one of the differences between the two economic powers is that “In the United States, a lot of patents are registered and the costs are lower than in Europe. However, legal proceedings are far more expensive in the US than in Europe.”

Through international conventions, the applicant may extend the patent protection to other States within a 12 month period following the initial filing. This possibility is open to any new filing, in Luxembourg, in Europe or in the US.

In Europe, the European patent provides protection in about 40 countries through a centralised filing and examination process controlled by the European Patent Office based in Munich, Germany.

GAMES WITHOUT FRONTIERS

Pierre Kihn noted that once a company has reached a certain size, it is advisable to create a company to host its intellectual property in order to structure it properly. The next question a company manager has to ask himself is where to put this structure. Until a few years ago, Luxembourg was not a premium location for such a business activity. But things have changed, as Pierre Kihn explains. “Ever since a law was passed in 2007 and came into force in 2008 that provides an 80% exemption on certain types of IP-related income, Luxembourg has been on a shortlist of attractive countries.” For instance, the local tax system foresees an 80% exemption regime for net income derived from IP. This exemption results in a tax rate of less than 6%. Olivier Laidebeur, however, considers that this regime is in line with the EU guidelines as it is integrated in the Lisbon strategy and that “there are many countries in the European Union with a similar regime. In France, there is the research and development tax credit and in the Netherlands and in Belgium there is a tax regime similar to the Luxembourg one.”

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This exemption proves to be successful as numerous companies are transferring IP assets to Luxembourg, where an experienced local community (IP attorneys, fiduciary and trust services, tax advisors, etc.) is on hand to help implement these structures.

However, the differentiator that creates an additional advantage for Luxembourg is the exit strategy. Capital gains realised on the disposal of IP also benefit from an 80% exemption. Pierre Kihn explains what the purpose of this idea is. “Take, for instance, a company from the gaming industry. It registers a certain number of patents. At the beginning, the potential of the company might be immense but the value is not. It is only when a video game is used by millions of consumers that the value of the IP rights skyrocket. Paying only 6% tax on this added value will pay off for the company.” So the present tax regime combines two objectives. According to a brochure on IP by Luxembourg for Business, the local trade promotion organisation, “it allows for a full deduction of all research and development expenses. Moreover, successful projects are not penalised through excessive taxation once they come to fruition”.

So Luxembourg is perfectly in line with the objective of the Lisbon Strategy, which aims to make the EU the most competitive and dynamic knowledge-based economy in the world. Innovation as a motor for economic change is one of its main goals. CW