

Idea

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Psychology studies have for some time shown that, as humans, we tend to recognise the ownership of ideas and that the unauthorised use of others' ideas is frowned upon (Olson and Shaw, 2011). Morally, a person is often said to have a natural right to the product of their brain (Vaver, 1990). This explains why Intellectual Property (IP) is so frequently defined as the legal protection of ideas (e.g. British Library, 2023). It is one of core tenets of IP law that ideas as such are not protected, IP protection exists only for manners of expressing or instantiating ideas (Mandel, 2014; *Bilski v. Kappos*, 130 S. Ct. 3218, 3225 (2010)). The concept of idea will be illustrated with reference to the idea-expression dichotomy in copyright law, to the exclusion of abstract ideas in patent law, and to the protection of ideas as trade secrets. It will be argued that ideas are becoming increasingly the domain of IP, which is open to criticism from a policy perspective. This entry will consider the law as it stands in Europe, including the UK; US law will be considered where it addresses the (non)protectability of ideas in a clearer or more direct way (mostly in patent law).

The idea-expression dichotomy

In principle, the non-protectability of ideas is straightforward in copyright law, which protects the expression of ideas, rather than ideas themselves (*University of London Press v University Tutorial Ltd* [1916] 2 Ch 60 per Peterson J at [609]-[610]; *Feist Publications, Inc. v Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)). The international basis of this idea-expression dichotomy is provided by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, art 9(2)), the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT, art 2) and, indirectly, the Berne Convention (art 2(1)(2)). Copyright instantiates a policy bargain whereby exclusive rights are provided to incentivise creativity. The necessity to strike a balance between the competing public and private interest at play leads to copyright being limited and temporary. If ideas as such became the object of property, free access to ideas – and therefore freedom of expression – would be at risk (*Bikram's Yoga College of India v Evolation Yoga*, 803 F.3d 1032, 1037 (9th Cir. 2015)).

The dichotomy emerges at various points, most notably to determine copyright subsistence and infringement. The intersection of idea-expression dichotomy and copyright subsistence is twofold. First, it justifies the requirement of fixation i.e. that copyright subsists only if the idea is recorded (UK Copyright Designs and Patents Act (CDPA), s 3(2)). Therefore, for example, make-up has been deemed an idea – rather than an expression – because 'paint without a surface is not a painting. Make-up [...] however idiosyncratic it may be as an idea, cannot possibly be a painting' (*Merchandising Corp of America Inc v Harpbond* [1983] F.S.R. 32 [46]). This requirement – and the underpinning dichotomy – goes at the heart of the justifications of copyright as a whole. Indeed, as Farwell LJ put it, copyright 'creates a monopoly, and in such a case there must be certainty in the subject matter of such a monopoly to avoid injustice to the rest of the world' (*Tate v Fullbrook* [1908] 1 KB 821 [832]-[833]). While today we do not regard copyright as a monopoly – crucially, independent creations of identical subject matter are protected – the point remains that as ideas are the building blocks of knowledge, it would be unfair to allow their enclosure. Second, the dichotomy is intertwined with the concept of originality. This can be seen with clarity when the copyrightability of the shape of a product is

at issue. In *SI and Brompton Bicycle Ltd v Chedech / Get2Get* (C-833/18, EU:C:2020:461), the EU Court of Justice (CJEU) held that a product whose shape is, at least in part, necessary to obtain a technical result may be protected by copyright in so far as it is original. Originality is not made out where the realisation of a subject matter has been exclusively dictated by technical considerations, rules or other constraints which have left no room for creative freedom. This follows from the idea-expression dichotomy: '[w]here the expression of those components is dictated by their technical function, the different methods of implementing an idea are so limited that the idea and the expression become indissociable' (see C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* EU:C:2010:816 [48]-[49]). The fact that often it is impossible to distinguish between ideas and their expressions is a useful reminder that, rather than a dichotomy, we are in fact dealing with a fluid policy-informed interpretive directive.

Even though the dichotomy is increasingly blurred, it continues to serve an important role in providing judges with a tool to limit the otherwise unstoppable propertisation of immaterial goods. It can be said, for example, that thanks to the dichotomy the CJEU could hold that the functionalities, programming languages, and the format of data files in a computer program are 'ideas' and as such do not qualify for copyright protection (EU Software Directive, art 1(2); C-406/10 *SAS Institute Inc. v World Programming Ltd* EU:C:2012:259 [40]; Noto La Diega, 2013).

The idea-expression dichotomy is also pivotal to ascertaining copyright infringement. The dichotomy – and its link to the concept of originality – are often used to determine where the defendant has copied (or performed other restricted act) the substantial part of the claimant's work. In the leading authority *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11, the House of Lords concluded that the defendant's fabric design reproduced a substantial part of the claimant's because it incorporated a substantial part of the original expression of the latter's ideas. The useful premise is that this principle must be handled with care because 'every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author' ([24]). In reality, only certain ideas are excluded from copyright protection and, correspondingly, only in some instances their unauthorised use will instantiate infringement. The dichotomy supports two distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work (e.g. an invention included in an artistic work, see *Kleeneze Ltd v. D.R.G. (U.K.) Ltd* [1984] FSR 399). The second and more important proposition is that there is no copyright protection (and no infringement) if the ideas are not original, or so commonplace as not to form a substantial part of the work (e.g. the notion of combining stripes and flowers in *Kenrick & Co. v Lawrence & Co.* (1890) 25 Q.B.D. 99). Against this backdrop Lord Hoffman expressed the link between the dichotomy, originality, and substantiality in unrivalled terms: 'the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality [...] tends to lie in the detail with which the basic idea is presented' (*Designers Guild* [26]). A similar line of reasoning was followed in *Baigent v Random House Group Ltd* [2007] EWCA Civ 247, where the Court of Appeal that despite the many similarities between *The Da Vinci Code* and *The Holy Blood and the Holy Grail* (the reproduction of items of information, facts, ideas, theories, arguments, and themes), what was copied 'was on the ideas side of the dividing line between ideas and expression, because it was at too high a level of

abstraction’ ([60]) and that the latter book lacked a central theme able to qualify as a substantial part of the work.

Abstract, banal, simple, generic ideas fall outwith the scope of copyright, which makes it hard for the substantiality requirement to be made out in the infringement assessment. Not entirely dissimilar rules apply under patent law.

Abstract ideas in patent law

In patent law, only novel and inventive ideas with an industrial application can be patented. In Europe, the exclusion of ideas can be inferred from all four patentability requirements. First, similar to the non-copyrightability of commonplace ideas, ideas that are already part of the existing stock of knowledge fail to meet the novelty requirement (European Patent Convention (EPC), art 54). Second, ideas that depart from the state of the art in a way that would be obvious to the person skilled in the art would not evidence the required inventive step (EPC, art 56). Third, ideas that are not susceptible of being used in an industry would not be eligible for patent protection. Fourth, there is a negative requirement whereby certain subject matter is not regarded as an invention (EPC, art 52). Of the excluded subject matter, many items can be regarded as mere ‘ideas’, namely discoveries, mathematical methods, business methods, and computer programs (e.g. T 1749/14 *Mobile Personal Point-of-Sale Terminal/Maxim* EP:BA:2020:T174914.20200403). These ideas are excluded only if claimed ‘as such’ (EPC, art 52(3)) which for example means that the exclusion applies to a purely abstract mathematical method, if the claim does not require any technical means (European Patent Office, 2023 [3.3]) Finally, whilst not qualified as a patentability requirement, applications must also to disclose the invention in a manner which is enough for it to be performed by a person skilled in the art (‘sufficiency’ or ‘enabling disclosure’). Applications containing unclear and incomplete ideas are destined to be rejected (EPC, art 83). The indirect exclusion of ideas from patentability is even more pressing compared to copyright law because patents do constitute monopolies as they block competing innovation, even in the event of independent creations (Maggiolino and Montagnani, 2011).

Unlike Europe, the US regards ideas as not eligible for patent protection in a more explicit fashion. While the excluded subject matter is not set forth in legislation, numerous judicial interventions have clarified that abstract ideas, laws of nature, and natural phenomena cannot be patented unless they include an ‘inventive concept’ (*Bilski v Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v Prometheus Labs., Inc.*, 566 U.S. 66 (2012); *Ass’n for Molecular Pathology v Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Alice Corp. v CLS Bank International*, 573 U.S. 208 (2014)). Currently, patent eligibility is determined by applying the *Alice/Mayo* test (Stolbova and Baldan, 2021). First, the court has to consider whether the claims are directed at abstract ideas, laws of nature, or natural phenomena. The second step – to be performed only if the claims are directed at such patent-ineligible concepts – requires a determination of whether the claims contain ‘an inventive concept sufficient to transform the claimed abstract idea into a patent-eligible application’ (*Alice Corp. v CLS Bank International*, 573 U.S. 208, 217 (2014), quoting *Mayo Collaborative Servs. v Prometheus Labs., Inc.*, 566 U.S. 66, 78–79 (2012)). To ascertain whether the invention is ‘significantly more’ than one of the patent-ineligible concepts has proved particularly controversial when it comes to the abstract idea exception (Zhang, 2019). Courts and examiners often struggle to determine when a claim is ‘directed to’ an abstract idea and what constitutes ‘significantly more’ than an abstract idea

(e.g. *The Chamberlain Group, Inc. v Techtronic Industries Co.*, 935 F.3d 1341 (2019)). On the one hand, this uncertainty has been criticised because it would lead to suboptimal growth of patents and hamper R&D investments (Wimberly, 2017). On the other hand, this uncertainty can be positively appraised from an open science perspective, and it has in effect done little to slow software innovation (Noto La Diega, 2017).

Secret ideas

Under certain circumstances, ideas can be protected as a trade secret. We will leave aside the question of whether trade secrets constitute an IP right (as opposed to their misuse instantiating a tort or delict; see Graves, 2007) and we refer to the →trade secrets entry in this *Encyclopedia* for a deeper analysis of the relevant regime. For the purposes of this entry, suffice it to say that in Europe, in line with the Paris Convention (art 10*bis*) and the TRIPS (art 7), trade secrets are defined as information having commercial value because it is not generally known among, or readily accessible to, persons within the circles that normally deal with that kind of information, if the holder has taken reasonable steps to keep it secret (EU Trade Secrets Directive, art 2(1)). This regime adds to the common law action for breach of confidence, which can be successful if the claimant meets three requirements: (i) the information is capable of being protected, (ii) the defendant owed an obligation to keep the information confidential, (iii) the used the information without authorisation (*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, [1968] FSR 415). Not all secret ideas will qualify as confidential information. For example, encrypted files will not always be regarded as eligible for protection because '[a]nyone with the necessary skill to de-crypt had access to the information. The fact that only a few have those skills is [...] neither here nor there. Anyone can acquire the skills and, anyway, a buyer is free to go to a man who has them' (*Mars v Teknowledge* [2000] FSR 138, 149; but in different terms *Volkswagen v Garcia* [2013] EWHC 1832 (Ch)). Similarly, depending on the facts of the case, courts may not protect trivial (*Attorney-General v Guardian* [1990] AC 109, 281–2), grossly immoral (*Stevens v Avery* [1988] 2 All ER 477), vague (*De Maudsley v Palumbo* [1996] FSR 447, 456) ideas, as well as ideas that are in the public domain (*CMI v. Phytopharm* [1999] FSR 235, 255).

Unlike patents and copyright, few restrictions are imposed on information that is protected (Bently, Sherman, Gangjee and Johnson, 2022: 1260). While in general even simple ideas may be protected, one needs to account for a jurisprudential strand that add further requirements i.e. that the information be novel or original (e.g. *Wade v British Sky Broadcasting Ltd* [2016] EWCA Civ 1214); this is however far from being the dominant view on the matter.

Current trends: protecting data, owning ideas?

With the idea-expression becoming increasingly blurred, the expansion of the patentable subject matter, and the rise of trade secrets, one could go as far to say that the old tenet that IP does not protect ideas no longer holds true. While it may be too soon to conclude in such a way, other signals appear to point in the same direction; most notably, the expansion of rights in data. While not qualifying as property rights, these rights 'make a significant contribution to the protection of valuable interests, either in combination with traditional IP rights or in their own right' (Pila and Torremans, 2019: 483). The database right (→sui generis right), data exclusivity in TRIPS Plus agreements (→TRIPs Agreement) and the narrow text and data mining exception in the new EU Copyright Directive (→DSM Directive; →text and data mining) all would suggest that the law provides tools to appropriate ideas in their simplest and 'raw' form i.e. data. Counterweights do exist and different trends around open data governance

should not be underestimated; the process of enclosure of ideas is both far from complete and far from uncontested.

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