European
IPR Helpdesk

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The European IPR Helpdesk

Your Guide to IP and Contracts

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Introducing IP and contracts

Nowadays, the value of a business is increasingly linked to its intellectual property (IP) assets, which are becoming more important in many sectors.

IP can be transferred or licensed, offered to enter into cooperation agreements or contributed as capital in a joint venture. Protecting and managing IP through well-drafted agreements is key for business success. Therefore, the purpose of this guide on IP and contracts is to be a useful tool regarding IP exploitation and management. It aims to help businesses better understand contracts in the IP field and to get an idea on different key points and how these should be drafted.

This guide is divided into two main sections: the first provides an overview on general contract clauses, and the second focuses on IP contracts including some of the most common IP contracts and IP clauses. Both parts contain practical examples to illustrate how contracts can be drafted.

Legal drafting is complex and requires a high level of legal expertise. Therefore, it is strongly advised to seek professional assistance for contracts to be drafted in accordance to the concrete circumstances of each case and the applicable law.

1. General contract clauses

What is a contract?

A contract is an agreement reached between two or more parties. Based on this agreement, the parties agree on the terms governing a particular situation and commit themselves to perform or not to perform certain obligations. A valid contract is legally binding, that is, the parties have a legal right to enforce it (i.e. demand fulfilment of the obligations under the contract by the party concerned).

What are the main general clauses in any contract?

Most of contract law is not harmonised throughout Europe, therefore the requirements for a contract to be valid and legally enforceable may vary from one country to another. That said, there are some sections and clauses that are usually included in most contracts, including IP contracts. A definition, together with some comments and examples regarding these general clauses - where “defined terms“ appear capitalised - is provided below.

Recitals

Recitals usually consist of a number of paragraphs displayed at the beginning of the contract, where the context and background of the relationship between the parties and their purpose under the contract are set out. In non-legal terms, it can be said that recitals function as a preamble.

Usually, a recital section is not legally required in order for a contract to be valid, however, most commercial contracts contain it as in some cases, such as when there are doubts about the interpretation of a certain clause, they can become essential and the key to avoid or solve a dispute between the parties.

- **Whereas the Licensor is the only owner of European patent no. EP 1234567.**
- **Whereas the Licensor is willing to grant an exclusive licence for the Patent, which the Licensee is willing to obtain against payment of the Price under this Licence Agreement.**
- **Whereas the Parties have previously negotiated and agreed on the terms of this Licence Agreement, in particular those regarding the Price of the Patent.**

Parties

The parties to a contract need to be properly defined, otherwise it would be difficult or even impossible to find out who is bound by the contract and against whom can the contract be enforced. To this end, depending on whether the party concerned is a company or an individual, the following information is usually included in the Parties clause:

- If the party is a company: full legal name of the company (trade name), country of incorporation, registered office address and company registration number.

Company A, LLP, is a company incorporated in Czechia, with registered address at Nám. Franze Kafky 1, 110 00 Staré Město, Czechia, registered at the Czech trade register under company registration number A123456789.

- If the party is an individual: full name, nationality, ID or passport number and current address of the individual.

Pieter Klein, of Dutch nationality, with passport number Q123456789, with address at van Breestraat 128III, 1071 ZV Amsterdam, Netherlands.

Contracts are usually bilateral, that is, they involve two parties, which have certain obligations towards one another (e.g. IP assignment agreement, where the assignor undertakes to transfer certain IP to the assignee, who undertakes to pay a given amount in exchange). Contracts can also be multilateral, where several parties are involved, and unilateral, where only one party undertakes an obligation (e.g. insurance contracts are considered in some jurisdictions as unilateral, since the insurance company undertakes to pay the insured person in case a given event takes place).

Definitions

Definitions or defined terms are often-capitalised terms (e.g. "Agreement") whose aim is to facilitate contractual coherence and avoid interpretation issues. Furthermore, definitions make the reading of contracts lighter, avoiding detailed and repetitive descriptions of each relevant term. They can be found in the body of the contract, defined as they appear in the text or all together in a "Definitions" clause. Considering this:

- Provide very precise definitions to avoid misinterpretation.

Effective Date: This agreement shall be deemed effective when signed by all Parties (the "Effective Date").

- Do not define a term unless it appears at least twice in the contract.

- Use terms as defined. For example, if the defined term is "Agreement", avoid using later in the contract "Assignment Agreement" unless it is intended to refer to something else.

- Avoid using the defined term before it has been defined; that is, the first time a defined term is used, a definition should be provided.

Object

The object of a contract describes the purpose of the contract, that is the main obligation to be performed by the parties. In many European jurisdictions, it constitutes one of the conditions for the contract to be valid and there may exist rules defining what can be a valid object. In this sense, an object consisting of an obligation to do something that is not possible or simply illegal may not be enforceable and may render the contract invalid.

The Licensor grants to the Licensee, and the Licensee accepts, a non-exclusive and non-transferable licence on the Software in accordance with the terms and conditions of the Agreement.

Duration

The duration or term of the contract sets its total length, the start and the termination dates. Such term can be:

- fixed, that is calendar based, or

- dependent on the occurrence of a certain event, such as the performance of the obligations under the contract.

This clause often contains, when applicable, the rules for contract renewal, which can be:

- automatic,
- subject to agreement of the parties or,
- subject to the occurrence of a certain event.

It may seem that the duration of a contract is a non-problematic issue; however, disputes over this matter often arise due to ambiguous drafting leaving room for interpretation as to multiple factors, such as start date, term, termination date or renewal.

Calendar-based + renewal upon agreement of the parties:

The duration of this Agreement is five years, commencing on January 1, 2020, and may be renewed for additional five year-periods upon written agreement of the Parties, which shall take place three months prior to the expiration date of this Agreement.

Dependent on the occurrence of a certain event + automatic renewal:

The duration of this Agreement is five years, commencing on the date of the delivery of the Creation supplied by the Licensor. It shall be renewed for additional periods of five years automatically unless one of the Parties notifies the other, at least four months before the expiration date, of their intention not to renew the Agreement.

Obligations of the parties

The Obligation clause of a contract consists of a detailed description of the duties to be performed by the parties, including the moment and place of such performance. Typically, contracts dedicate separate clauses to this matter, each for the obligations of each party. Detail and precision are particularly important in this part of the contract, as the parties need to know exactly what they are expected to do under the contract and what they can demand the relevant counterparty to do. Vagueness on this point may render a contract or part of it unenforceable.

The Licensee undertakes to manufacture the Product in accordance with the Licensor's Instructions.

Price

The Price clause determines the amount of money or other consideration agreed on by the parties under the contract, to be paid, usually from one of the parties to the other.

It can be a concrete amount (i.e. lump sum) or a percentage based on certain factors, such as future sales, or a combination thereof. Whichever the form chosen, it should be clear to avoid room for interpretation.

In some jurisdictions, the price is a requirement for the existence – that is, the validity and enforceability - of the contract; therefore, lack of price may render a contract invalid and unenforceable. It is common practice to include any agreed rate of interest payable on overdue amounts

The delay in the payment to the Licensor of the sums provided for in this clause in respect of the remuneration will constitute to the Licensee, immediately and without prior notice, an obligation to pay default interest of 8% per month, plus the amount of bank or any other related charges.

(late payment interest) and the consequences for failure to pay. Furthermore, the price clause must comply with applicable regulations. For instance, in consumer contracts at EU level, it is mandatory to indicate the total price inclusive of taxes and additional charges.

The price to be paid by the Licensee for the Licence is EUR 500,000 inclusive of taxes and additional charges.

Payment

The Payment clause describes the way (e.g. bank transfer, check, etc.) and the moment (e.g. lump sum on a certain date, instalments, etc.) in which the price has to be paid. It is common, for instance, to find royalty payments in licence agreements, which are periodic payments to the licensor and are often expressed as a percentage of revenues.

While the payment method is agreed by the parties, national

The Licensee will pay to the Licensor a royalty of 6% of the Net Sales of each Product in the Territory. The royalties will be due and payable within thirty days of the end of January, April, July and October with respect to sales of the Product in the three month periods ending on the last day of January, April, July and October. Such royalties will be paid to the Licensor by bank transfer, in Euros.

legislations usually contain limitations to the freedom of the parties. For instance, in some countries, the party under the obligation to pay will have to pay within a term (in some countries, 30 days) from the date on which such party receives the invoice from the other party.

The Assignee will pay the Assignor the agreed price by bank transfer on the Effective Date.

Subcontracting

Subcontracting is the practice of assigning the tasks under a contract to an external professional or a company. The parties to a contract may decide to subcontract part of their services for different reasons, such as the lack of resources, expertise or time.

Subcontracting can often lead to situations having consequences for the parties and this is why, very often, contracts contain a clause regulating the obligations of the parties involved in this practice.

The Franchisee may perform some of its obligations under this Agreement through one or more Subcontractor(s), provided that (i) the Franchisor agrees in writing to each subcontracting; (ii) the Subcontractor agrees in writing to comply with the obligations undertaken by the Franchisee under this Agreement in relation to the tasks under subcontracting; (iii) the Subcontractor agrees in writing to comply with the confidentiality obligations of the Franchisee under this Agreement.

Data protection

Contractual relationships may involve the parties making use of each other's personal data for the purposes of performing the obligations

under the contract. A potential scenario could be, in a relationship of subcontracting, that of one party – the processor – processing the personal data of the clients of the other party – the controller. The processing and transfer of personal data in the EU is heavily regulated and infringements of the applicable regulations may involve very high fines. As a result, where a contract involves the processing or transfer of personal data, it is very important to comply with the applicable EU and national regulations. Compliance in this field often requires the fulfilment of several obligations which, due to their level of detail, often require the parties to enter into a separate agreement exclusively dealing with data protection issues. Yet, especially where the data protection aspects of a contractual relationship do not entail heavy compliance, they may be regulated in a single clause, as part of the main agreement between the parties.

The Licensee (i) shall process the Personal Data according to the Licensor's instructions and the Licensor's Confidentiality Policy; (ii) shall apply the security measures indicated by the Licensor at any time; (iii) shall not authorise any third party to process the Personal Data unless the Licensor authorises it; (iv) shall assist the Licensor and comply with the Licensor's instructions in relation to any requirements under the applicable regulations.

Waiver

This clause is used to clearly state that the lack of enforcement by either of the parties of any obligation under the agreement does not entail that such party gives up the right to enforce such obligation in the future. For example, if a party accepts the payment under the agreement on a date later than the agreed payment date, it does not

mean that in the future such party cannot enforce the right to receive the payment on the agreed date.

A delay or omission of any of the Parties regarding the enforcement of their rights under this Agreement shall not affect such rights and shall not be interpreted as a waiver to enforce such rights under this Agreement.

Warranties and indemnities

Usually, when one of the parties breaches the contract, it must indemnify the other party for the damages arising from the breach. Besides, parties can agree that one should indemnify the other should an event occur. While warranties constitute an assurance from one party to another, indemnities represent the compensation owed by the warrantor to the other party in the case of the obligations contained in the warranties being breached.

Warranties:
To its best knowledge, the Licensor owns all right, title and interest to the Licensed Trade Mark, free and clear of any liens or encumbrances; and has not entered into any exclusive agreements relating to the Licensed Trade Mark.

Indemnities must not be mistaken for penalties, which also relate to a contract breach, but usually have a punitive character (i.e. they go beyond the covering of the damage caused by a breach and set an actual punishment). One well-known feature of penalties is that, contrary to indemnities, in many European jurisdictions judges can reduce them if considered disproportionate with respect to the contract.

Indemnities:
The Licensor will fully indemnify the Licensee from and against any claims arising from or relating to any breach of the Licensor's warranties under this Agreement.

Severability

The purpose of this clause is to ensure that, in the case that any of the clauses in a contract is declared invalid or unenforceable, the remainder of the contract remains valid and enforceable.

The fact that a clause of this Agreement is declared unenforceable or invalid will not affect the enforceability or the validity of the rest of the Agreement.

Governing law

While contracts establish the rules governing a particular relationship between two or more parties, it shall not be forgotten that there are laws that apply to such a relationship and to the contract itself. But, the law of which country? This is a matter that should be agreed on by the parties, especially in contracts where there are different international elements, in order to avoid possible disputes about the law applicable to any potential conflict between the parties. It might be a good practice to agree on the law of the country where the parties have their business establishments (where these are located in the same country), or where the object of the contract is to be performed, or the law of a third country – due to, for instance, the specialisation of the law of such a country for the case at issue. Where the parties do not expressly agree on the applicable law, the type of contract determines

the rules (e.g. for contracts for the sale of goods, provision of services, franchises or distribution, the law of the country of residence of the seller, service provider or franchisee usually applies). For certain specific types of contracts, such as consumer contracts, the parties do not have freedom to decide on the governing law, as the law establishes a mandatory governing law.

This Contract shall be governed by and interpreted in accordance with the laws of Italy.

Jurisdiction

The choice of jurisdiction competent to solve a dispute regarding the interpretation of a contract is of fundamental importance, particularly in those contracts containing international elements. This clause determines the courts of the place – city, country – where potential disputes are to be handled. The parties usually enjoy a certain degree of autonomy to decide on this matter. Therefore, before deciding on the competent jurisdiction, it is worth analysing how courts interpret the most crucial issues relevant for the agreement in question and how that interpretation can affect each party. Furthermore, it must be noted that there are EU rules that cannot be circumvented by the parties (e.g. the courts of the Member State in which the deposit or registration of IP rights has been applied for or has taken place have exclusive jurisdiction in proceedings concerned with the registration or validity of those IP rights).

The Parties agree to submit all their disputes arising out of or in connection with this Agreement to the exclusive competence of the courts of Lisbon (Portugal), and they waive any other jurisdiction to which they may be entitled.

Alternatively, as a way to solve disputes out of court, some contracts may include an alternative dispute resolution (ADR) clause, providing for the mechanism(s) chosen by the parties to solve any disputes that may arise between them. These mechanisms have the advantage of avoiding the often high and even unpredictable costs of litigation, as well as of settling the controversy faster and in a confidential way. This clause should contain the specific ADR chosen by the parties – such as, out of court settlement by the parties, arbitration or mediation – as well as the rules applicable to the resolution of the dispute and the forum where the latter should be discussed and eventually solved.

Any dispute, controversy or claim arising under, out of or relating to this Contract and any subsequent amendments of this Contract, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be Munich (Germany). The language to be used in the mediation shall be English.

Force majeure

The force majeure clause details those circumstances going beyond the control of the parties, under which they are allowed not to perform their obligations under the contract. The aim of this clause is to release the parties from their obligations under the contract if external factors beyond their control (e.g. a natural disaster or civil unrest) render the performance of the contract impossible.

The Parties will not be held liable for failure to comply with their obligations under this Agreement as long as such failure is due to a Force Majeure event.

Further Information

Fact Sheets

Alternative Dispute Resolution (ADR) Mechanisms

Guides

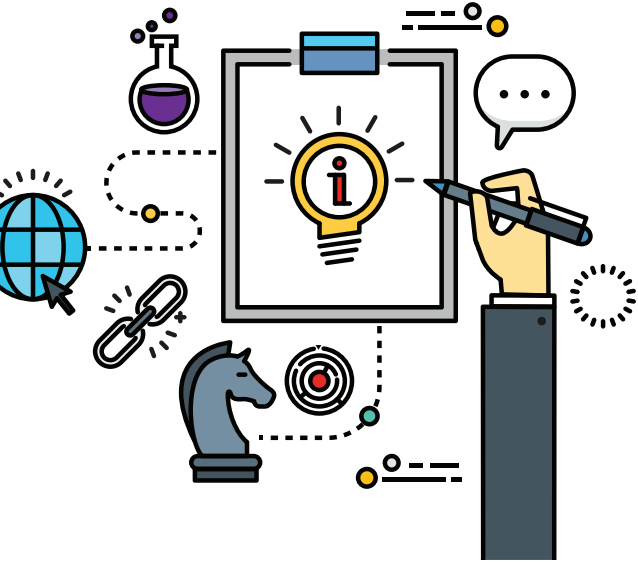
10 Steps to Find a Suitable IP Professional

All these documents can be found in our library.

References

Contractual Obligations in the EU - Determining Which National Law Applies (European Commission)
Contract Law (European Commission)
The Principles of International Commercial Contracts (Unidroit)

2. IP contracts



Before undertaking the challenging task of drafting an IP contract and during the usual preliminary negotiations leading to a business partnership, it is important to consider several questions, which will determine the specific drafting of the clauses and, in general, how the business under the contract is to be conducted.

The Checklist

Strategy of the parties

The parties must inform each other about the aims sought under their collaboration to anticipate any applicable laws and therefore, whether the business sought is feasible from a legal perspective, as well as to foresee any potential IP issues resulting from such collaboration.

Applicable laws and types of IP

It is essential that the parties know the mandatory rules that apply to their contractual relationship, and the types of IP that will be included in the agreement, in order to assist them in understanding the type of contractual relationship allowed and the impact that will have on the project. For instance, in some jurisdictions, trade marks may only be legally transferred or licensed when accompanied by the associated goodwill and, under German, Croatian, Hungarian, Czech, Slovakian and Austrian laws, assignments of copyright are not allowed.

Freedom-to-operate

Prior to carrying out any business project, the parties must establish whether they will actually be able to exploit any results derived from such project - e.g. through a freedom-to-operate (FTO) search - to determine whether a product's commercialisation would infringe third parties' rights. FTOs are often performed in the context of IP due diligence processes (see below).

IP protection

In a business collaboration, it is usually advised that each party protects their own background IP by any applicable means, such as the registration of IPRs or the collection of evidence where registration is not possible or not mandatory, such as with copyrights. This will avoid potential conflicts as to which party owns what and which rights of use each party enjoys regarding their own IP.

IP due diligence

The parties should gather and perform an in-depth analysis of all their IP-related information and documentation, in order to assess the risks potentially involved in a business collaboration or a transaction.

Confidentiality

Contractual negotiations necessarily imply the disclosure of information by the parties. This information is often sensitive and its disclosure to third parties may damage the parties' respective and potential future business. Therefore, and to avoid any issues deriving from such disclosure, it is recommended to start by concluding a non-disclosure agreement (NDA) or include a confidentiality clause in the main agreement.

Material transfer agreement

In the area of research, it is common that the parties exchange tangible materials, such as biological materials, chemical compounds, prototypes or even software. To protect such materials and regulate their use by the recipient in these pre-contractual stages, concluding a material transfer agreement (MTA) is advised.

Competition laws

Business practices can sometimes be in conflict with the prohibitions contained in national and EU competition laws. When it comes to IP contracts, companies often enter into concrete arrangements, which may be considered as anticompetitive in accordance with such laws. Before including this type of arrangement in a contract, the parties should make sure whether such an arrangement is in compliance with competition laws. Lack of compliance with competition laws can entail significant fines and/or court proceedings.

Recording of the agreement

When it comes to IP contracts, such as assignment or licence agreements, some national and European laws may require the recording of the agreement within the registers of their intellectual property offices in order for it to be legally valid and/or enforceable. Therefore, when applicable, it is advisable to include a clause regarding the obligation to register the agreement and to pay any relevant fees.

Special employees

The parties should identify those employees with a particular status. For example, in a research collaboration with university professors, it must be born in mind that some university professors enjoy the so-called "professor's privilege", under which university researchers own any IP they create. This, as well as many other issues in the field of employment law, is a matter of national law, which should be verified at the earliest stage possible in order to avoid any conflicts.

Interim agreements, feasibility agreements and prototype agreements (technology transfer agreements)

These are short-term agreements concluded as a preliminary step in order to anticipate the success or viability of a technology transfer agreement.

Feasibility study (franchise agreements)

It is advisable to conduct a feasibility study as a first measure to decide whether to proceed with franchising.

Further Information

Fact Sheets

IP Due Diligence: Assessing Value and Risks of Intangibles
Non-Disclosure Agreement: A Business Tool
Copyright Essentials
Trade Secrets: An efficient tool for competitiveness
Alternative Dispute Resolution (ADR) Mechanisms
Defending and Enforcing IP
How to Search for Patent Information
How to Search for Trade Marks

Guides

Your Guide to IP Commercialisation
Your Guide to IP in Europe

All these documents can be found in our library.

References

EU Competition Rules (European Commission)
EU Antitrust Legislation (European Commission)
Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States (Report of the European Parliament)

2.1. Assignment agreements

Concept

An IP assignment is generally understood as a permanent transfer of ownership – that is, similiar to sale – of IP from one party (the assignor) to another party (the assignee). Consequently, the assignee becomes the new owner of the transferred IP assets and if the assignor uses them after the transfer has taken place, such use will be considered as an infringement of the IP assigned.

The Assignor assigns to the Assignee, by way of the present assignment, all rights that the Assignor has in and to: the intellectual property in the logos with effect from the date of their creation.

Specific clauses

Object and scope: the identification of the rights assigned and the extent of the assignment. When defining the scope and the object, the accompanying IP should not be forgotten as it may have consequences on the exploitation of the assigned IP (e.g. in a patent assignment, the know-how associated with the patent would be the accompanying IP).

The object of this Agreement is the assignment of the Trade Mark from the Assignor to the Assignee in accordance with the terms and conditions described in this Agreement.

Duration: it is common practice to assign the IP for the legal duration of the IPRs.

The assignment of Rights is made for their remaining legal duration as of the date of the Contract.

Territory: it is essential to mention the territory in which the assignment has an effect.

The assignment of Rights is only applicable in Spain.

Warranties: it is common practice for the IP owner to warrant that the assignor is the only owner of the IP assigned and that such IP is free of any burdens, such as infringements to third party rights.

The Assignor guarantees that the Assignor is the sole and legitimate title holder of all the IPRs in the Software and, therefore, the Assignor has the right to transfer them to third parties.

Further Information

Fact Sheets

Inventorship, Authorship and Ownership
Copyright Essentials
Trade Secrets: An Efficient Tool for Competitiveness
Commercialising Intellectual Property: Assignment Agreements
Defending and Enforcing IP

Guides

Your Guide to IP Commercialisation
Your Guide to IP in Europe

All these documents can be found in our library.

References

Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States (Report of the European Parliament)

2.2. Licence agreements

Concept

An IP licence agreement is a contract by which the owner of the IP (licensor) allows a third party (licensee) to exploit certain IP assets within the limits set out by the provisions of the contract. In exchange of the rights granted under the contract, the licensee usually pays a price, which may be a lump sum, royalties and/or other types of payment.

An IP licence is usually comparable to a rental; it does not imply the permanent transfer of the IP in question, which would be an assignment.
There are different types of IP licences, the choice of which will usually depend on the licensor's business strategy, the target market conditions and the capabilities of the licensee:

Exclusive licence: the licensor can only license the IP to one licensee.

- **Exclusive:** it is the licence with the broadest scope. The licensor retains ownership but grants the licensee the right to use the licensed IP on an exclusive basis (i.e. the owner of the IP is not allowed to use the IP either). An exclusive licensee is often entitled to sue for infringement (either alone or jointly with the licensor, depending on the applicable laws and contract terms).

- **Sole**: the licence is only granted to one licensee and excludes the licensor from granting licences to any other person, while the licensor retains the right to use the licensed IP. In general,

national laws only refer to exclusive or non-exclusive licences, therefore licence agreements should always clearly define what is intended by the parties.

The Licensor grants a sole licence to use the Licensed Patents to the Licensee, subject to the terms and conditions of this Agreement.

Non-exclusive licence: the licensor can grant licences to as many licensees as desired, while retaining the right to use the licensed IP. Usually, and subject to applicable laws and contract terms, non-exclusive licensees are not entitled to sue for infringement, as it is usually the licensor who must bring the action.

The Licensor grants the Licensee a non-exclusive licence to use the IP, subject to the terms and conditions of this Agreement.

Cross-licence: the parties grant each other licences to their respective IP. For each party the licences are (part of) the compensation for the licences which each party grants.

The Parties grant each other a royalty-free licence on their respective rights on their Patents to conduct research for the purposes of realising the object of this Agreement.

Sublicence: licence granted by a licensee (sublicensor) to a third party (sublicensee), which extends part or all of the rights enjoyed by the licensee under the licence agreement to the sublicensee. The right to

grant a sublicence is usually not implicit, and therefore, for it to apply, it must be included in the licence agreement, which usually expresses whether the licensor's prior written approval is required for:

- The granting of any sublicence.
- The choice of sublicensee (e.g. companies pre-approved by the licensor).
- The conditions upon which the terms of the sublicence should accord with those of the licence agreement.

The Licence includes the right of the Licensee to grant sublicenses to third parties, provided that (i) any sublicenses granted by virtue of this clause are subject to the provisions of this Agreement, (ii) the Licensor gives the Licensee its prior written approval regarding the Licensee's choice of sublicensee.

Specific clauses

Type of licence: It must be clarified in the contract whether the licence is exclusive, sole or non-exclusive.

The Licensor grants the Licensee an exclusive right to use the Trade mark in the Territory, subject to the terms and conditions of this Agreement.

The scope of the licence: the exact rights licensed must be clearly defined. For instance, a patent licence is usually limited to the rights to make, use and sell the patented invention, whereas a licence of copyright may include, inter alia, the right of reproduction, the right of

communication to the public, the right to perform the work publicly or the right to make derivative works such as translations or adaptations. The licensee must carefully assess whether the rights licensed are sufficient for an optimal exploitation of the IP licensed. For instance, in trade mark licences it is common to specify the goods and services in connection to which the licensed trade mark(s) may be used.

The Licensee has the right to use the Trade mark only in the context of any activities regarding the exploitation of its spare parts distribution business for the period of time described in clause X.

Improvements: especially in patent licensing, it is often the case that both parties have the right to make improvements through further research or by developing know-how related to the licensed technology. Therefore, it is highly recommended for the parties to clearly address the ownership and use of future improvements. It is common practice to grant mirror rights, that is, each party retains ownership but grants rights on its own improvements to the other. EU competition regulations forbid any provisions under which the licensee is obliged to grant back to the licensor on an exclusive basis, the improvements made by the licensee to the licensed technology, thus preventing the licensee to use its own improvements itself. However, obligations to grant back licences to such improvements to the licensor on a non-exclusive basis, may be legal subject to potential review under applicable competition law.

Any modifications in the Technology are allowed provided that the Licensor expresses his prior and written consent. Should the Licensor authorise the Licensee to introduce such improvements, the Licensee shall retain any rights attached thereto and shall grant a non-exclusive licence to the Licensor, upon the Licensor's request, to use such improvements in the terms agreed in writing by the parties.

Duration: the expiration date, the market and economic life of the IP licensed must be taken into account. The maximum duration of licence agreements regarding IP subject to term expiry – that is, IPRs, such as patents or copyright – usually lasts until the licensed IPR expires. As regards trade marks or know-how licences, which often have an unlimited duration, the term usually specifies the concrete licensing period. Regarding sublicences, it should be stated if, upon termination of the licence for any reason, the sublicence also comes to an end.

The duration of this Agreement is one year, commencing on January 1, 2020 and may be renewed for additional one year periods only until the Patent expires, upon written agreement of the Parties, which shall take place three months prior to the Agreement's expiration date.

Territory: geographical boundaries of the licensed rights – that is, the places where the licensee is authorised to use the licensed rights.

The Licensee shall have the right to Use the Patent only within the territory of Germany.

Price: different payment methods exist – such as royalties a lump sum, instalments, etc. Royalties may be calculated based on a percentage of the sale price, profits made or a fixed amount per each product unit sold, etc. If deductions are to be made (e.g. tax, delivery expenses) it is essential to clearly indicate them and to comply with the applicable law. The licensor can also set a "minimum royalty clause" as a form of protection in case there are no revenues generated.

The Licensee shall pay the Licensor the amount of 0.50 EUR per Item sold, by bank transfer in accordance with the payments calendar contained in Annex 1.

Pricing of Standard Essential Patents (SEPs): SEPs are the patents that are necessary to comply with a technical standard, and due to their "essential" character, they should be offered on fair, reasonable, and non-discriminatory (FRAND) terms. Considering this, it may be that the technology protected by means of a SEP is priced differently than the rest of the technology transferred.

As consideration for the grant of the License under this Agreement, the Licensee agrees to pay to the Licensor 4% of the gross sales price for sales by the Licensee of all Products produced as a result of the Non-Essential Technology transferred under this Agreement; and 2% of the gross sales price for sales by the Licensee of all Products produced as a result of the Essential Technology transferred under this Agreement.

Further Information

Fact Sheets

Technology Licensing-in

Commercialising Intellectual Property: Licence Agreements

Guides

Your Guide to IP Commercialisation

All these documents can be found in our library.

Useful Documents

Exchanging Value – Negotiating Technology Licensing Agreements: A Training Manual (WIPO)

Communication from the Commission to the Institutions on Setting out the EU approach to Standard Essential Patents (European Commission)

Guidance Licensing Intellectual Property (UK Intellectual Property Office)

IP Licence Agreement Skeleton (UK Intellectual Property Office)

2.3. Non-disclosure agreements

Concept

A non-disclosure agreement (NDA), also called a confidentiality agreement, is a legally binding contract in which one party (the disclosing party) agrees to disclose confidential information to another party (the receiving party), and the latter agrees not to disclose this information under the conditions set by the NDA.

Entering into an NDA can be advisable in many different situations. For example, it is best practice to conclude an NDA before engaging in negotiations for licence agreements or R&D projects, as well as whenever it is necessary to discuss innovative ideas, products or technologies with potential business partners.

While laws may differ in some aspects, generally for a piece of information to be legally protected, it has to comply with the following requirements: not being in the public domain, not being already known by the receiving party and not becoming publicly available by means other than a breach of the confidentiality obligations.

There are different types of NDAs depending on the number of parties disclosing information:

- **One-way:** also known as unilateral. One party discloses information and the other party receives it.
- **Two-way:** also known as bilateral or mutual. Each party discloses confidential information to the other.
- **Multilateral:** Several parties disclose and receive information.

Specific clauses

Definition of confidential information: it is the description of what information is to be kept confidential under the agreement. Besides, this clause usually contains a description of the concrete information to be excluded from the confidential information definition.

For the purposes of this Agreement, Confidential Information means any data or information possessed by a Party and not generally known to the public or that has not yet been revealed including: trade secrets, plans for products or services, customer or supplier lists, business plans and any other information that should reasonably be recognised as Confidential Information by the Parties. Confidential Information shall exclude information that is already in the public domain, was already known by the Receiving Party or becomes publicly available by means other than a breach of the confidentiality obligations.

The permitted purpose: the use that the receiving party can make of the information. It is possible to widen the permitted purpose at a later stage but not to narrow the restriction on the use of the confidential information.

The Receiving Party desires to receive and/or use the Information for the specific purpose of deciding whether to acquire a licence or other rights to the Confidential Information. The Receiving Party shall obtain no right of any kind to, including any right to use, the Confidential Information except for the Purpose of this Agreement.

Limitation of disclosure: the receiving party may need to share the information with other people (e.g. employees or professional advisors). It must be clearly stated that these disclosures are to be made in confidence.

The Receiving Party will not disclose and will keep confidential the information received, except to its employees, representatives or agents who need to have access to the Confidential Information for carrying out their duties in connection with the permitted purposes specified in clause X. The Receiving Party will inform them about the confidential quality of the information provided and will ensure that their agreement is obtained to keep it confidential on the same terms as set forth in this Agreement. Hence, the Receiving Party will be responsible for ensuring that the obligations of confidentiality and non-use contained herein will be strictly observed and will assume full liability for acts or omissions made by its personnel, representatives or agents.

Term: even if the duration of the agreement is determined by the parties (often three to five years), it is possible to envisage that the confidential information will be kept secret indefinitely.

This Agreement shall remain in effect for a term of five years. Notwithstanding the foregoing, the Receiving Party's duty to hold in confidence the Confidential Information that was disclosed during the term shall remain in effect indefinitely.

In order to contractually protect confidential information, it is not mandatory to enter into an NDA. It is also possible to include a confidentiality clause in any other agreement with business partners or with employees.

The Parties will keep secret the terms of this Agreement. The Parties will agree beforehand to any disclosure concerning this Agreement. In particular, each Party agrees to:

- **keep secret the confidential information and documents received, not disclose or communicate their object or content to third parties, not even partially, and to impede unauthorised third parties from accessing them;**
- **use such information solely and exclusively for the object set out in this Agreement; and**
- **put immediately at the disposal of the other Party, in the event of termination of the Agreement and at its request, all confidential information and documents in connection with this Agreement that are in its possession, without keeping any copies, summaries or extracts.**

Further Information

Fact Sheets

Trade Secrets: An Efficient Tool for Competitiveness
How to Manage Confidential Business Information
Non-Disclosure Agreement: A Business Tool

Templates

Mutual Non-Disclosure Agreement
Non-Disclosure Agreement (UK Intellectual Property Office)

Except for the Template "Non-Disclosure Agreement" all these documents can be found in our library.

2.4. Technology transfer agreements

Concept

A technology transfer (TT) agreement often regulates the relationship between two or several (e.g. patent pools) parties for the purpose of the production of contract products involving the exploitation of a given technology (e.g. patents, know-how, software programs). It often takes the shape either of a licence agreement or of an assignment agreement, where the licensee or the assignee produces such contract products. Therefore, while TT agreements present some specificities, the contract structure and relevant clauses generally coincide with those in licence and assignment agreements.

TT agreements can be concluded between competitors (so-called horizontal agreements) and non-competitors (so-called vertical

agreements, which involve companies active in different levels of the production or supply chain, such as for example a mining company and a steel manufacturer).

Specific clauses

Improvements: especially in patent licensing, it is often the case that both parties have the right to make improvements through further research or by developing know-how related to the licensed technology. Therefore, it is highly recommended for the parties to clearly address the ownership and use of future improvements. It is common practice to grant mirror rights, that is, each party retains ownership but grants rights on its own improvements to the other.
EU competition regulations forbid any provisions under which the licensee is obliged to grant back to the licensor on an exclusive basis, the improvements made by the licensee to the licensed technology, thus preventing the licensee to use its own improvements itself. However, obligations to grant back licences to such improvements to the licensor on a non-exclusive basis, may be legal, subject to potential review under applicable competition law.

Any modifications in the Technology are allowed provided that the Licensor expresses his prior and written consent. Should the Licensor authorise the Licensee to introduce such improvements, the Licensee shall retain any rights attached thereto and shall grant a non-exclusive licence to the Licensor, upon the Licensor's request, to use such improvements in the terms agreed in writing by the parties.

Further Information

References

Commission Recommendation on the Management of Intellectual Property in Knowledge Transfer Activities and Code of Practice for Universities and Other Public Research Organisations (European Commission)

Commission Regulation (EU) No 316/2014 of 21 March 2014 (European Commission)

Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements (European Commission)

Licensing Agreements for the Transfer of Technology (European Commission)

2.5. R&D agreements

Concept

There are two main types of research and development (R&D) agreements: (i) where a company outsources R&D activities to a research institution or university under a research contract (contract research) or (ii) where companies enter into research collaborations with other companies, including competitors, to carry out R&D activities (collaborative research).

Specific clauses

Payment: it is common for the payment to be divided into instalments to be paid as the different phases of the project take place.

The Company shall pay the University an amount of EUR 85,000. This amount shall be paid by bank transfer as follows: 50% upon the signing of this Agreement, 25% upon the initiation of Phase II and the remaining 25% upon the initiation of Phase III. Payments are to be made at the first request of the University, after invoicing.

IP management: an IP management strategy covering the following issues should be established – (i) IP ownership and access rights; (ii) IPRs registration protocol; (iii) Exploitation strategy; (iv) IP management in case of termination of the agreement.

Note that background IP remains the property of the party that generated it. It is possible to create a pool of IP rights for the party's use for the duration and purpose of the research activities. In contract research the project results are usually owned by the company whereas in collaborative research the results usually stay with the party that generated them. Regarding inventions, co-ownership of results may be combined with a field-of-use clause, specifying and restricting how the parties may apply and use the research results.

Access rights refer to rights granted by the parties to each other, as opposed to licences to third parties. They should determine which parties can use which pieces of results/background, for research purposes and/or for exploitation purposes, and on what conditions.

The Parties represent that they have listed the IP contributed by each of them ("Background") to the Project in Schedule I, indicating the respective IP owners and any persons that have a right to use such IP.
The Parties hereby give their consent to mutually access each other's Background IP for the purposes of complying with their obligations under this Agreement according to the procedures established in Schedule II.
The Results shall be exclusively owned by the Company where an invention made or know-how acquired relates exclusively or specifically to the Technology. Otherwise, the property of the results thereof shall become the full and exclusive property of the Company, if and when an assignment agreement is signed between the University and the Company, with a royalty of 3%, as indicated in clause 3. The Parties agree that the Company shall exploit the Results.

Exclusivity: in contract research, the parties may want to impose exclusivity clauses among themselves, for example by undertaking not to enter into any kind of cooperation, including providing advice or consulting, in the project's area with third parties. This reinforces confidentiality and decreases the chances that the parties' competitors embark on similar projects, which may constitute a threat to the business success of the project's results.

During the term of the Agreement, the University undertakes not to engage, without the Company's prior consent, in any consulting or similar activity with third parties in the area which is the object of research under the Agreement.

Publication: some national laws, depending on the type of funding and project, require the publication and dissemination of research results. Therefore, the parties need to be well aware of any rules in this respect before and during the contract drafting.

The Parties undertake to publish the Project's Results in a scientific journal, whenever they jointly agree and no later than the Agreement's Expiry Date.

Further Information

Fact Sheets

Exploitation Channels for Public Research Results
Publishing v. Patenting
The Plan for the Exploitation and Dissemination of Results in Horizon 2020
IP Management in Horizon 2020 MSC Actions
Inventorship, Authorship and Ownership
Commercialising Intellectual Property: Spin-offs

Guides

Your Guide to IP Commercialisation
Your Guide to IP in Europe

All these documents can be found in our library.

Useful Documents

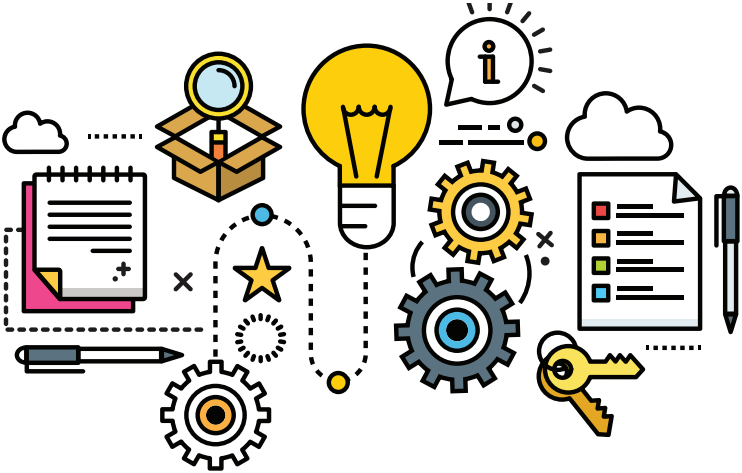
Exchanging Value – Negotiating Technology Licensing Agreements: A Training Manual (WIPO)

References

Commission Recommendation on the Management of Intellectual Property in Knowledge Transfer Activities and Code of Practice for Universities and Other Public Research Organisations (European Commission)

European Research Area Guidelines on Intellectual Property (IP) Management in International Research Collaboration Agreements between European and Non-European Partners (European Research Area Committee)

3. Contracts that contain IP clauses



3.1. Joint venture agreements

Concept

A joint venture agreement regulates the contractual relationship among two or more independent organisations (venturers) which undertake to carry out a specific project together (for instance in the context of a tender) or to achieve a certain goal by sharing risks.

As in other collaboration projects, it is common that the venturers bring into the project their previously owned IP assets (background) and that they generate new IP (results - foreground) as a result of the project implementation. It is essential that the agreement contains provisions on access rights for venturers to both background IP and results. Depending on the decision of the parties and the objectives of the project, the background IP can be assigned or licensed (or sublicensed) to other venturers for project implementation.

Specific IP clauses

IP management: an IP management strategy covering the following issues should be established – (i) IP ownership and access rights[1]; (ii) IPRs registration protocol; (iii) Exploitation strategy; (iv) IP management in case of termination of the agreement.

[1] *Check section 2.5 on R&D contracts for further information.*

The Parties represent that they have listed the IP contributed by each of them ("Background IP") to the Joint Venture in Schedule I, indicating the respective IP owners and any persons that have a right to use such IP.

The Parties hereby give their consent to mutually access each other's Background IP for the purposes of complying with their obligations under this Agreement according to the procedures established in Schedule II. Any IP Results generated as a result of the implementation of the Joint Venture shall be owned by the Party who generates them.

The Parties shall agree on the protection methods for any generated IP relevant to the exploitation of the Joint Venture's results, and each Party should bear any related costs to obtain protection of their own IP.

The Parties agree that the Joint Venture's results shall be exploited jointly unless any of the events detailed in clause 4 arises, in which case, the Parties shall agree on a different exploitation route in accordance with the procedures detailed in Schedule III.

Further Information

Fact Sheets

Commercialising Intellectual Property: Joint ventures

Guides

Your Guide to IP Commercialisation
Your Guide to IP in Europe

All these documents can be found in our library.

3.2. Franchise agreements

Concept

Franchising is a special type of licensing, enabling the replication of the owner's (franchisor) business concept in another location by providing continuous support and training to the recipient (franchisee). Since business concepts include the use of IP allowing the business to be run, franchising has an intrinsic connection with IP based on licensing of IPRs and know-how.

Franchising always involves six basic features: independence of the parties involved, economic interest, a business format, a brand, control of the franchisee by the franchisor and the provision of assistance to the franchisee by the franchisor.

Specific IP clauses

Key terms in franchising agreements are similar to those in IP licensing agreements. However, particular attention should be paid to conformity with the European Code of Ethics for Franchising and the conditions for providing goods/services to the franchisee during the operation of the franchise. Information on some relevant IP-related clauses together with some examples is provided below:

IPRs of the franchisor: the name and all the distinctive signs which distinguish the premises or the franchised products belong to the franchisor and the franchisee should not register any IPRs connected to the franchise arrangement.

The Franchisee shall not apply for registration of any trade mark, or distinctive signs of the Franchisor, as well as any other similar symbols which may be confused with any elements of the Franchisor's activities.

Know-how: the know-how is owned by the franchisor and the franchisee should not disclose it to anyone without the prior consent of the franchisor in writing. This obligation is usually agreed upon for an indefinite period and it is usually foreseen that the franchisee shall notify the franchisor of any improvements and discoveries, as to the know-how, that occur as a result of the operation of the system.

The Franchisee shall not, during the term of this Agreement and thereafter for an indefinite period of time, disclose the Franchisor's Know-how to any third party without the prior written consent of the Franchisor, and shall only use this Know-how according to the provisions of this Agreement.

Franchise disclosure document: during the negotiations, it is a good practice to prepare a franchise disclosure document which encompasses, inter alia, detailed information about the franchisor, franchising system, related IP, references and financial figures (e.g. details on the IP to be licensed, namely evidence regarding the rights over the trade marks and description of the know-how or financial information to allow the evaluation of the total investment required by the franchisee). It must be noted that some countries in the EU have specific franchise disclosure rules, which must be complied with when sharing information with franchisees.

Further Information

Fact Sheets

Commercialising Intellectual Property: Franchising

Guides

Your Guide to IP Commercialisation
Your Guide to IP in Europe

All these documents can be found in our library.

References

The European Code of Ethics for Franchising (European Commission)

Legal Perspective of the Regulatory Framework and Challenges for Franchising in the EU (Report of the European Parliament)

3.3. Software development agreements

Concept

A software development contract is a services agreement entered into between a company (contractor/client/user) and a software developer, under which the software developer undertakes to create a software program for the company based on its requirements or specifications.

Specific IP clauses

IP: this clause shall mention which party owns the IP to the software program. Usually, it is agreed that the contractor owns these rights. Since the developer is the creator of the software, and therefore is the original owner, the contractor will become the owner by means of an assignment of the IP in the software. Being the owner,

the contractor shall have the right to use the software as it pleases, make modifications, etc., subject to any legal limitations.

On the Contractor's acceptance of the Software and payment of all compensation due to the Developer under this Agreement, the Developer shall assign to the Contractor all Intellectual Property in the Software.

Confidentiality: this clause should contain the developer's agreement not to disclose any details to any third party regarding the contractor, its operations or its clients. Usually, the developer should also agree not to create copies of the software or to distribute the same to third parties.

The Developer shall not disclose to third parties any information regarding the business of the Contractor and the Software program, unless the Contractor authorises the Developer in writing.

Further Information

Fact Sheets

IPR Management in Software Development

This document can be found in our library.

References

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs (Official Journal of the European Union)

Report on the Trends and Current Practices in the Area of Patentability of Computer Implemented Inventions within the EU and the US (European Commission)

3.4. Consortium agreements

Concept

Consortium agreements (CAs) are contracts, made between "consortium partners", to set out rights and obligations during a temporary partnership for the purposes of carrying out a specific project. It must be noted that in EU-funded programmes CAs cannot contradict or negate the provisions established by the Grant Agreement or the Rules for Participation.

They minimise the probability of later disputes as they provide rules and responsibilities for the parties during the project, together with the access rights to be granted to the partners concerning the project results. Within this agreement, parties also outline the rights and responsibilities of each member of the consortium concerning IP.

Specific IP clauses

IP management: an IP management strategy covering the following issues should be established – (i) IP ownership and access rights[2]; (ii) IPRs registration protocol; (iii) Exploitation strategy, which should be consistent with the proposal's exploitation measures; (iv) IP management in case of termination of the CA and in case parties enter/leave the CA.

[2] *Check section 2.5 on R&D contracts for further information.*

The Partners shall define in Schedule II the Background which may be subject to Access Rights of other Partners. The Partner which owns the Background may, at any time, expand the existing list by adding further Background to Schedule II. Any limitation to Schedule II after signature of this Agreement requires the acceptance of all Partners.

Any Results generated as a result of the implementation of the Project shall be owned by the Partner who generates them. In case of jointly owned Results, the co-owners will decide on a single owner who will grant Access Rights to the other co-owners. The Partners shall agree on the protection methods for any generated IP relevant for the exploitation of the project's results and each Partner should bear any related costs to obtain protection of their own IP. If a Partner decides not to protect Results, that Partner shall consult the other Partners, which may wish to acquire ownership of those Results.

The Partners agree that the project's results shall be exploited jointly unless any of the events detailed in clause 4 arises, in which case, the Partners shall agree on a different exploitation route in accordance with the procedures detailed in Schedule III.

If a Partner leaves the Consortium, it shall in no way affect the obligation of that Partner to grant Access Rights to the remaining Partners. A Partner leaving the Consortium shall have Access Rights to the Results developed until the date of the termination of its participation.

Further Information

Fact Sheets

IP Management in European Structural and Investment Funds
IP Management in Horizon 2020: Project Implementation and Conclusion
How to Manage IP in Horizon 2020: Grant Preparation Stage
IP Joint Ownership
How to deal with IP related clauses within Consortium Agreements

Guides

Your Guide to IP Commercialisation

All these documents can be found in our library.

Useful Documents

DESCA 2020 Model Consortium Agreement for Horizon 2020 projects
EUCAR Model Consortium Agreement for Horizon 2020 projects
MCARD-2020 Model Consortium Agreement for Horizon 2020 projects
LERU Model Consortium Agreement for Marie Skłodowska-Curie projects
BAK Model Consortium Agreement for Marie Skłodowska-Curie projects
Eurostars Consortium Agreement Skeleton
Lambert Tool Kit – Model Consortium Agreements
Checklist for Consortium Agreement in CIP – ICT PSP projects

References

Horizon 2020 Work Programme 2014-2015 - Marie Skłodowska-Curie Actions (European Commission)

Guidance – How to Draw Up Your Consortium Agreement (European Commission)

3.5. Employment agreements

Concept

An employment agreement is a written legal document that lays out binding terms and conditions of an employment relationship between an employee and an employer. Some aspects of labour law have been harmonised at EU level, through the setting of some minimum standards, but there is no harmonisation at EU level regarding ownership of intellectual property rights. National laws still vary to a great extent from country to country, and different rules apply to each IPR.

Specific IP clauses

The main questions that arise when IP is created by an employee relate to the ownership status of the IP and to whether compensation is payable to the employee. The answer will depend on the applicable laws and on the type of IP created by the employee. Below is some guidance on these IP issues in relation to the IPRs where they most frequently arise, together with some examples of IP clauses that may be included in employment contracts:

IP: to avoid later disputes the ownership of the IP created by an employee and the right to receive an additional remuneration shall be laid down in the employment contract, in accordance with the applicable laws.

Ownership

- The rules on employee's computer programs are harmonised at

European level, according to which the employer is vested with the economic rights in the software created within the scope of the employee's duties or under the instructions of the employer.

- Employee's inventions are often regulated by national laws. They usually provide the same solution regarding the following two scenarios:
  - the invention created in the course of the employee's duties is usually owned by the employer and,
  - the invention created outside the employment contract (so-called "free invention") is usually owned by the employee.

  However, national solutions vary when the invention is the result of neither of the two scenarios mentioned but something in between, such as an invention made during the employee's working hours but outside the scope of the employment contract obligations. Regarding European inventions, the European Patent Convention foresees that the applicable law for ownership of employees' inventions is the law of the country where the employee is mainly employed or, in the alternative, the law of the country where the employer has the place of business to which the employee is attached.
- Employees' copyrighted works are regulated by national laws, which establish different rules for the economic and moral rights of authors. In general, in Member States belonging to the civil law system, moral rights are usually considered to arise directly in the author and to be inalienable (no assignment to the employer), whereas in Member States belonging to the common law system, employees may have no moral rights as the copyright is often vested with the employer.

The Employee acknowledges that all IP that the Employee generates, modifies or improves in the course of the Employment Contract is and shall remain the Employer's sole property during and after the Employment Period within the legal limits.

Compensation

Several Member States such as, inter alia, Austria, Bulgaria, Denmark, France, Germany, Greece, Hungary, Italy, the Netherlands, Norway, Portugal, Spain, Sweden or the United Kingdom have mandatory provisions regarding the right of employees to perceive a reasonable remuneration for the rights in inventions transferred to the employer. For other IP creations, national solutions vary.

All the Intellectual Property created by the Employee under the direction of the Employer shall remain or be assigned to the Employer from its creation, within the legal limits. The assignment referred to herein is for the entire term of protection of the respective rights without compensation other than that established under this contract and within the scope of the law.

Further Information

Fact Sheets

Inventorship, Authorship and Ownership

Copyright Essentials

Guides

Your Guide to IP in Europe

All these documents can be found in our library.

References

EU Labour law (European Commission)

Considering all the above-mentioned information, please remember that when drafting a contract it is advisable to consult a professional, since such agreements should be adapted to the concrete circumstances of the case and the applicable laws.

Get in Touch

Please feel free to get in touch with us at any time for further information or if you have questions regarding our services.

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