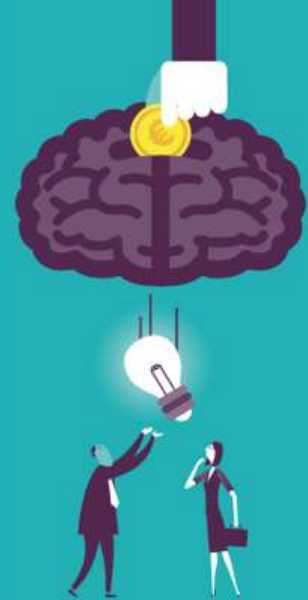




Rigorous empirical
research on
intellectual property

What you need to know about copyright and music

Dr Hayleigh Boshier, Brunel University





FRAND licensing levels under EU law

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Summary

February 2020



Case Law post CJEU ruling *Huawei v ZTE*

4P Council Case law home CJEU Huawei v ZTE German court decisions Italian court decisions English court decisions English/Irish court decisions Romanian court decisions French court decisions Dutch court decisions National Courts Guidance

Authors & contributors

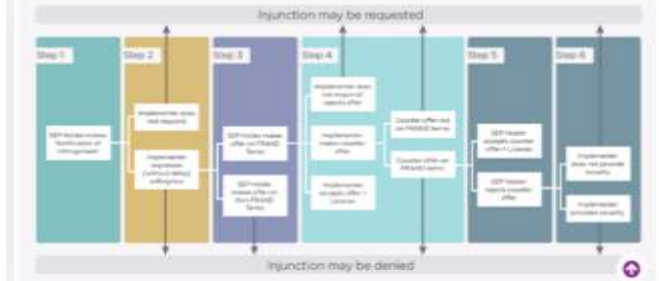
National Courts Guidance

Negotiating Licenses for Essential Patents in Europe

Increased clarity provided on the principles established by the Court of Justice of the European Union in *Huawei v ZTE*.

The Court of Justice of the European Union clarified, in *Huawei v ZTE* (Case No. C-170/13), European law relating to the availability of injunctive relief for infringements of FRAND-based standard essential patents. In doing so, the Court provided a legal framework focused on the good faith

Huawei v ZTE process



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Rigorous empirical research on intellectual property

Types of IP
Benefits of IP
IP for Business Growth
4 Reasons to Patent
4 Reasons 4 Copyright
4 Reasons 4 Trademarks
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4 REASONS TO PATENT

- 1 - MARKET ACCESS
- 2 - NEGOTIATING
- 3 - FUNDING
- 4 - STRATEGIC VALUE

Explore how patents add value with our [interactive guide](#).

4 REASONS 4 COPYRIGHT

- 1 - COMPETITIVE EDGE
- 2 - REPUTATION
- 3 - COLLABORATION
- 4 - FUNDING

Explore the benefits of copyright with our [interactive guide](#).

4 REASONS 4 TRADEMARKS

- 1 - DIFFERENTIATION
- 2 - PROTECTION
- 3 - REPUTATION
- 4 - REVENUE

Explore the benefits of trademark with our [interactive guide](#).

4 REASONS 4 DESIGN RIGHTS

- 1 - EXCLUSIVITY
- 2 - COMMERCIALISATION
- 3 - REPUTATION
- 4 - VALUE

Explore the benefits of design rights with our [interactive guide](#).

Which types of intellectual property do you need?

Filter table columns

	PATENTS	COPYRIGHTS	DESIGN	TRADEMARKS	TRADE SECRETS
What do they protect?	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.
Examples of what is protected	Patents protect inventions that are new, non-obvious, and capable of industrial application. They are granted for a limited period of time.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights protect original literary, artistic, scientific, and technical works. They are automatically created as soon as the work is fixed in a tangible form.
How are my rights protected?	Patents are protected by the patent office. They are granted for a limited period of time.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.
How long is the protection period?	Patents are protected for a limited period of time.	Copyrights are protected for a limited period of time.	Copyrights are protected for a limited period of time.	Copyrights are protected for a limited period of time.	Copyrights are protected for a limited period of time.
Do I have to register it?	Patents are protected by the patent office. They are granted for a limited period of time.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.	Copyrights are protected by the copyright office. They are automatically created as soon as the work is fixed in a tangible form.

How do I use intellectual property to grow my business?





Dr. Hayleigh Boshier

Internationally published legal academic, speaker and legal consultant specialising in intellectual property



Music Copyright Dr Hayleigh Boshier

Tweet @BoshierHayleigh

Why copyright matters to music?

- × Copyright was created *for* creators
- × Copyright is how music makes money
- × But, it's not just about the money
- × Understanding copyright can help creativity and business
- × Understanding copyright can help avoid mistakes

Quick copyright basics

- × Copyright is a type of intellectual property right
- × It protects original literary, artistic, dramatic, musical works
- × Original = skills, labour, effort / own intellectual creation / creative choices
- × Also protects sound recordings & film
- × It arises automatically (but need to register in some places for full benefit)
- × Only protects the **expression of ideas** – not just an idea
- × Fixed in permanent form (under UK Law)
- × Provides the exclusive right to copy, licence, lend, perform, communicate your work to the public
- × Is a territorial right – differs between countries

Copyright limitations

- × Time and scope
- × Does not protect ideas

EU Copyright exceptions

- × Quotation, criticism & review
 - × Parody
 - × News reporting, educational institutions, private study, libraries and archiving
-
- × US Fair Use
 - × Exhaustion of rights / first sale doctrine (for physical goods)

Copyright in a song:

1. Musical composition or melody = musical work, initially be owned by the creator, usually licenced or assigned to record label
2. Lyrics = literary work, initially be owned by the lyricist.
3. Master = sound recording, usually owned by the Producer (meaning the person or company that made the arrangements, often the record label, not always the music producer).
4. Album artwork = artistic work, initially be owned by the creator of that work.
5. Performers rights in the performance of the song.
6. Music video = a film, owners would be the producer and the principal director.
7. Moral rights can apply to lyrics, composition or melody, performance and artwork, when they are used in the sound recording or film.

Duration of copyright:

1. Musical composition or melody = 70 years after creators death
2. Lyrics = 70 years after creators death
3. Master = 70 years after publication, or 50 years after it was made if not published.
4. Album artwork = 70 years after creators death
5. Performers rights = 50 years after the performance, or if it is fixed as a sound recording, 70 years after the release, or if it is recorded but not as a sound recording it lasts for 50 years from the publication of the recording
6. Music video = 70 years after the death of the last surviving creator alive.
7. Moral rights = in UK life of the copyright, in some countries foreveerrrr! (e.g. France & Spain)

Copyright Infringement

- × Primary, secondary, criminal infringement
- × Taking the whole, or a substantial part of, a copyright work – without the benefit of a copyright exception
- × Substantial part = the original parts
- × Substantial = quality not quantity
- × UK courts: ‘The nature and extent of the copying; the quality and importance of what has been taken; the degree of originality of what has been taken or whether it is commonplace; and whether a substantial part of the skill and labour contributed by the author in creating the original has been appropriated.’

Sampling



Taking a fragment of a song and using it to create a new track & requires a licence

EU: Sampling does not fall under the copyright exception for quotation. The case involved a 2 second rhythm sequence sampled from Kraftwerk's *Metall auf Metall* in the song *Nur Mir* by Pelham and Haas (21 years of litigation for a 2 second sample!)

US: N.W.A. after their song *100 Miles and Runnin'* sampled a two-second guitar chord from Funkadelic's track *Get Off Your Ass and Jam*.
Judge: 'Get a license or do not sample.'

Copying or taking inspiration?

- × Copyright protects only the expression of ideas, not the ideas themselves. You can copy ideas. Not the expression of the idea.
- × Taking inspiration from someone else's work is allowed
- × but you need to create something original by using your own originality.
- × Using another's work is copyright infringement when 'the work as a whole or any substantial part of it' has been copied.

Blurred Lines

"Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye's Got to Give It Up. I was like, Damn, we should make something like that, something with that groove."

Robin Thicke and Pharrell Williams' 2013 'Blurred Lines' infringed the copyright in Marvin Gaye's 1977 track 'Got To Give It Up'. Gaye's family awarded biggest copyright damages in music history: US\$7.3 million.

2018: verdict upheld, damages reduced to 5.3m



Dark Horse v Joyful Noise

- × The crux of the alleged copy was a descending minor mode 8 figure ostinato.
- × Infringement found in the first instance
- × Gray was awarded 22.5% of the profits = \$2.78 million in damages



Stairway to Heaven v Taurus

- × 2020 US Circuit Court of Appeal upheld the verdict that Led Zeppelin's Stairway to Heaven did not infringe the copyright of the song Taurus
- × Descending chromatic scales, arpeggios or short sequence of three notes = common musical elements.
- × No infringement



Impact of Zeppelin on Katy Perry case

- × Case appeal against the *Dark Horse* decision came just 9 days after the *Stairway to Heaven*
- × Question of substantial similarity re-considered.
- × Test for similarity failed on the basis that the individual elements of the ostinato were not protectable by copyright
- × The previous decision for infringement was overturned



Copyright in the Music Industry Playlist on [Spotify](#) & [Apple Music](#)

Book:

**Copyright in the Music Industry: A Practical Guide to
Exploiting & Enforcing Rights (Edward Elgar, 2020)**

Blog:

**The impact of Zeppelin on Katy Perry's copyright
infringement case – overturned, [The IPKat](#)**

Articles:

**The Impact of Skidmore v Led Zeppelin on US Music
Copyright; Closing the Floodgates After Blurred Lines?
(2020) [Entertainment Law Review](#)**

**Skidmore v Zeppelin: Copyright infringement in music under
US law, [Journal of Intellectual Property Law & Practice](#)**

Thank you

Q & A

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Managing Your Intellectual Property

Tuesday 29th September 2020, from 16.00-17.00 CET (including Q&A)

This **4iP Council** webinar will address the following:

- How to develop a business strategy for your IP.
- Establishing IP processes and policies.
- Exploiting your IP and considerations for your management.
- Monitoring and assessing your IP activity effectively.



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