Comments on

UN Working Group on Internet Governance (WGIG)

Issue Paper on Intellectual Property Rights

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Authors/Organisations

The following represents the input by

Free Software Foundation Europe
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and we feel that given the amount of papers by the UN WGIG and the theoretical need to comment on almost all of them, the time given was unrealistically insufficient.

The following is therefore work in progress, trying to give some meaningful input in the time available.

> **Draft WGIG Issue Paper on Intellectual Property Rights Executive Summary**
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> *This paper is the executive summary of a 'draft working paper' reflecting the preliminary findings of the drafting team. It has been subject to review by all WGIG members, but it does not necessarily present a consensus position nor does it contain agreed language accepted by every member. The purpose of the draft is to provide a basis for the ongoing work of the group. It is therefore not to be seen as a chapter of the final WGIG report, but rather as raw material that will be used when drafting the report. Draft working papers have been published on the WGIG website for public comment, so they will evolve, taking into account input from governments and stakeholders.*

As a general note, it should be commented that this paper remains too vague. It seems to be dealing exclusively with Copyright issues, making conclusions for this area based on rather single-sided view biased towards large Copyright holders, largely ignoring authors, artists and society as a whole.

By using the unspecific terminology of "Intellectual Property Rights" or "Intellectual Objects," these conclusions are then applied to areas like Trade-

marks or Patents, making the implicit assumption these were similar. This assumption is wrong.

The paper is basically correct in the apparently implicitly made assumption that Copyright is the most affected area of the aforementioned – but it should clearly differentiate and make clear which area it is talking about.

As the paper seems written with Copyright in mind, the mutual influence with areas such as Trademarks and Patents is generally very different from what this paper describes.

In particular patents on software,[1] which spread strongly negative innovative and economic signals across all of economy and society, are an area in which this paper fails to make any meaningful investigation or contribution.

Also, the paper fails to address the question how internet governance should be defined and to interact with the issues at hand, which are far larger than internet governance itself.

Issue

- *The term intellectual property describes the set of different regulatory concepts that control the production and usage of intellectual objects. The three main concepts are patents, copyright and trademarks, but other special regimes exist for specific types of objects – for example, geographical identifiers, or industrial designs.*

It should be noted that the notion of "intellectual property" is permanently changing and different groups would define it in very different ways; there are strong regional differences, as well.

Since the term is so ambiguous, using the term "Intellectual Property" or "Intellectual Property Rights" tends to bring about misleading and ambiguous results. Instead of trying to work with such a blanket term, we suggest to go into medias res and discuss the specific areas, which individually have more solid definitions.

- *In the context of WGIG a question that must be addressed is to what extent IPR issues are changed in form and substance as a consequence of the Internet and to what extent do the issues remain ones of managing IPR in a digital world.*

This is in truth two questions. One is indeed how the internet affects the methodology of granting limited monopolies, such as Copyright, Patents and Trademarks.

[1] `http://fsfeurope.org/projects/swpat/`

The second question is how the regulation and methodology of such monopolies adversely affects the internet and how these risks can be mitigated. Software patents and so-called "Reasonable And Non-Discriminatory" (RAND) licensing policies are examples for these risks.

> - *The Internet allows the relatively low cost duplication and relatively easier worldwide distribution of intellectual objects; an attribute of the Internet that is in part allowing the rapid and effective diffusion of IP across many countries and users Í and, for example, makes much of the Internet function, facilitates the development of content for ecommerce, and opens new opportunities for cultural and economic development. The ease, however, of duplication and distribution also makes IP highly vulnerable on the Internet.*

In the internet context, IP is generally meant to understand "Internet Protocol," but it seems that in this paragraph, what the author means is "Copyrighted works." We propose to say this explicitly.

Also, even though it may seem logical, the simplistic notion of the internet having an adverse effect on Copyrighted works is not true. A recent study[2] by Felix Oberholzer of Harvard Business School and Koleman Strumpf of UNC Chapel Hill has tried to measure the effect of downloads on record sales.

Their conclusion, much to the amazement of the authors, was that indeed "Downloads have an effect on sales which is statistically indistinguishable from zero, despite rather precise estimates."

> - *The key challenge is creating a balance between creating the incentives to innovate and not restricting the use and dissemination of information by individuals and groups across the Internet.*

Creating a balance between monopolization of knowledge and access to knowledge is indeed a major issue, but one that we consider outside the scope of a working group on Internet Governance.

[2] `http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf`

- *For some, the current international framework for intellectual rights management is targeted towards an extensive and ongoing protection of monopoly rights granted to producers, and stricter pressure and enforcement on non-complying entities, be they countries or individuals. The main objective of regulation thus appears to grant producers long term and full control over the use and redistribution of intellectual objects. Some argue that there is an imbalance in the regime and there is a need to increase the focus on measures to make access to knowledge and culture easier, especially for developing countries, individual citizens, and non-commercial uses.*

The current system of limited monopolization in forms of Copyright, Patents, Trademarks and others does indeed pose questions in many areas from medicine to basic education. These affect all areas, North and South, of the world and all activities, commercial and non-commercial.

Again, the question is whether it should be dealt with in a working group on Internet Governance. By providing input on how these interact specifically with Internet Governance and how to avoid creating problems for Internet Governance by overzealous monopolisation, the WGIG could however make useful recommendations a for reform of this system.

- *The nature of the Internet makes it extremely hard to enforce existing IPR legislation without the cooperation of the users. Technical attempts to attach copy-protection measures or the use of Digital Rights Management (DRM) techniques to intellectual objects have until now been mostly unsuccessful or contested by consumers, since they prevent all kinds of duplication of the content, including those granted to users by law to protect public and personal access. The enforcement of this legislation through police actions would possibly require the introduction of such a high degree of personal surveillance that some fundamental basic rights such as privacy and freedom could be endangered. There is no agreement yet on the proper balance between these human rights and the need to protect the interests of intellectual industries.*

We find it deeply objectionable that a Working Group on Internet Governance (WGIG) apparently considers the United Nations Universal Declaration on Human Rights (UDHR) negotiable. Human Rights are inalienable and cannot be subjected to being "balanced" with the interest of monopoly holders.

We believe this statement is also in clear violation of the UN WSIS Declaration of Principles,[3] which reaffirms the Universal Declaration on Human Rights and on the basis of which the UN WGIG was convened.

[3] `http://www.itu.int/wsis/docs/geneva/official/dop.html`

Leading experts on cryptography and security have very clearly shown that introduction of DRM can only work in what would normally be described as "police state." Mandating such political change cannot be the role of the UN Working Group on Internet Governance (WGIG).

Also, as referenced above, studies show the internet to have no noticeable impact on Copyright holders in the case of the record industry.

What are needed are new, consistent answers to the questions for which monopolisation used to be the only answer before digitalisation. Since it is most likely outside the capabilities of the WGIG to find these answers, we recommend the WGIG encourages search for them outside its scope.

> - *The infringement of intellectual property rights is an issue which predates the Internet. Addressing this issue of wide-scale infringement of rights has, in some countries, led to the introduction of levies on 'blank' media and recording devices as a 'catch-all tax'. The proceeds from these levies are redistributed through the collecting societies to rights holders. With the widespread diffusion and use of the Internet there is widespread recognition of the growing significance of the infringement of IPRs? but there, as yet, no broad consensus as to the effectiveness of levies or other remedies.*

As the approach of limited monopolisation of works and methods is essentially a concept that evolved around 1500ad and was spread and adapted from there, violation of such monopolies does indeed predate the internet.

It is therefore correctly not considered an internet specific question and needs to be dealt with on a forum beyond the Working Group on Internet Governance (WGIG).

Also, there are many fora – both private and public initatives – trying to find alternatives to the current system of monopolisation. These indeed include legalizing all distribution for any purpose by establishing 'catch-all taxes' on internet access.

These are good indications that the WGIG best only concern itself with the specific issues of limited monopolies that affect the internet and its governance, such as prevention of software patents.

SWOT Analysis

- *The main strengths of the present regulatory system are the incentive for the creation and development of new industries based on intellectual production.*

We very much object to this statement.

Not only is the mentioned connection of incentive and creativity obviously wrong when considering centuries of human creativity before Copyrights, Patents or Trademarks existed. The current system is indeed well-known for failing to provide sufficient payment to authors and artists to sustain themselves.

This is even true for big artists like Courtney Love,[4] which sell millions of CDs. As she makes the case, the only place for which such a connection between "incentives" and "production" might exist, is indeed the so-called "music industry," where the music is "produced", but in truth this is rather misleading, as the music is still written and performed by musicians.

> *These strengths ensure a reliable environment for investment in such enterprises, and creating wealth and job places in those countries where intellectual industries represent a significant part of the GDP. The weaknesses of the existing framework reside in the limitations imposed to access and sharing of knowledge. Another weakness of the present regulatory system is its difficult enforceability and although new technical solutions are being announced it is not clear that these will ensure a satisfactory balance between the rights of the suppliers and the users.*

Since the underlying assumption was deeply flawed, it is hard for this paragraph to come to a meaningful conclusion. But it also ignores fundamental and wide-spread knowledge about the internet – like the fact that on the internet, everyone is both imparting and giving knowledge and information.

In the terminology of the paragraph: Everyone is both supplier and user.

The question should therefore not be how to enforce and balance a system that is purely based on centralisation and control, but rather what system might be needed in its stead.[5]

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[4] `http://dir.salon.com/tech/feature/2000/06/14/love/index.html`

[5] See also `http://fsfeurope.org/documents/wiwo.en.html`

Actors

- *The private sector is well represented in the policy making process both internationally and nationally. Key industry bodies include the International Federation of Phonographic Industries (IFPI) and the Recording Industry Association of America (RIAA) for music, the Motion Picture Association (MPA) and the Motion Picture Association of America (MPAA) for movies, the Business Software Alliance (BSA) for software.*

- *Civil society has traditionally been less involved in the making of policy in this field. However, in the last few years a number of civil society organizations have become more vocal; these include the Electronic Frontier Foundation (EFF), the Foundation for a Free Information Infrastructure (FFII), IP Justice, European Digital Rights (EDRI). Also, specific organizations were born to promote alternative models for content licensing, such as the Free Software Foundation (FSF) and Free Software Foundation Europe (FSFE) for free software and Creative Commons for free writings, music and videos.*

This paragraph grossly mis- and underrepresents parts of Civil Society and the contribution that they had.

Although they have developed and still maintain the GNU General Public License (GPL) and GNU Lesser General Public License (LGPL) – the two most often used licenses for Free Software – the Free Software Foundations are not primarily about promoting "alternative models for content licensing."

As the first organisation in this field, the Free Software Foundation created these licenses to protect and propagate Free Software, software which gives users the freedoms of usage, studying, modification and distribution.

While proprietary vendors were busy failing with their attempts at building proprietary internets, the FSF began working on a completely Free Software operating system, the GNU System, known best in its GNU/Linux variant, sometimes also only referred to as "Linux." That system, either as a whole or in its components, runs much of the internet today.

The internet has in fact only become possible because of Free Software and the various groups that write it – like the different flavors of BSD, or Apache, the web server that serves more than 60% of all web pages.

The Free Software Foundations have been working for many years in all areas of Free Software and issues of digital freedom and regulation, and in different fora. Among them are for instance UNESCO, UNCTAD, UN WSIS, European Commission, World Bank, WIPO, UK Commission on Intellectual Property Rights.

The Free Software Foundation Europe in particular has done much work on the area of software patents together with and sometimes through its associate organisation, the Foundation for Free Information Infrastructure (FFII), which the author aforementioned.

The described part of Civil Society has had a major and seminal role in bringing the internet about and has in fact driven several of its major innovations. It also has and will continue to determine much of the political course of the internet.

That is one of the reasons why it seemed surprising that these groups were excluded from the UN WGIG although they participated to the process in normal, orderly and timely fashion.

- *There are several international and inter-governmental organization involved in the policy debate. The two primary agencies are the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO). Smaller intergovernmental organizations, established by treaties, deal with specific types of intellectual inventions, such as the International Union for the Protection of New Varieties of Plants (UPOV), that deals with intellectual rights over the creation of new plant varieties. Other international organizations, such as the World Health Organization (WHO) and United Nations Educational, Scientific and Cultural Organization (UNESCO) have specific interests in part of the IPR debate.*

- *Another international organization, the Internet Corporation for Assigned Names and Numbers (ICANN), deals with intellectual property rights over the Internet, especially in defining rules for domain name dispute resolution (originally devised at WIPO, then approved and administered by ICANN) and for the access to Whois databases providing access to the names and addresses of domain name registrants as may be required, inter alia, by third parties for rights enforcement.*

- *Whenever a new technology for the embodiment and distribution of intellectual objects arises, new private consortiums of industry leaders are formed; these consortiums define the technical standards for the new technology, and the policies for protection of intellectual rights that are often implied by these standards. These new private forums include the DVD Forum, DVD Copy Control Association (DVD-CCA) and the Secure Digital Music Initiative (SDMI) for media, and the Trusted Computing Group (TCG) for hardware and software. These forums usually do not involve governments or civil society.*