

WIPO



WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

INPUT ON THE WORKING GROUP ON INTERNET GOVERNANCE PAPER ON INTELLECTUAL PROPERTY RIGHTS

As an observer to the Working Group on Internet Governance (Working Group), the Secretariat of the World Intellectual Property Organization (WIPO) offers the following suggestions for consideration in connection with the paper on Intellectual Property (IP) rights. The following comments and suggestions, most of which would appear to be self-explanatory, are restricted to a minimum. They are intended to address inaccuracies, and, on a limited number of issues, to note the existence of another perspective on those topics. They do not imply WIPO's agreement with other sections of the paper, which, in its current form, appears to lack balance and objectivity in approach.

We look forward to further contributing to the work of this Working Group.

Section 2 “Institutions”

Page 1

We suggest to rephrase the first sentence as follows:

“The term intellectual property rights (IPR) describes the legal rights which result from intellectual activity in the industrial, scientific and artistic fields.”

We suggest to redraft the paragraph describing the activity of WIPO as follows:

- “The World Intellectual Property Organization (WIPO), through a variety of activities, including

- the ‘Internet treaties’ – i.e. the 1996 WIPO Copyright Treaty and WIPO Performances and Phonogram Treaty – as well as other WIPO instruments that affect Internet governance issues, such as the Joint Recommendation on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet.
- the Uniform Domain Name Dispute Resolution Policy (UDRP) which was developed by WIPO in the First WIPO Internet Domain Name Process and was adopted by ICANN.
- the delivery of IP services through Internet-based systems that allow the electronic filing and processing of international patent and trademark applications, for example under the Patent Cooperation Treaty (PCT) and the Madrid system for the international registration of marks.
- WIPOnet, a global intellectual property information network, which facilitates the digital exchange of intellectual property information between 330 national intellectual property offices, and provides developing countries with Internet connectivity and basic IT infrastructure.”

Page 2

The correct full name of the UDRP is Uniform Domain Name Dispute Resolution Policy

Section 3 “Relationship to the Internet”

Page 3

We suggest to amend the paragraph on copyright as follows:

- “In the area of copyright, in addition to dealing with significant issues related to the management of IPR in the Internet world, there are also profound questions about whether the greatest overall economic and social benefit will be achieved by extending, without more, the IPR rules developed for the off-line world into the very different ‘space’ created by the Internet. Similarly, it is not yet clear to what extent modifications in the way that IP rights have traditionally been exercised may be appropriate or necessary in order to maximize the benefits of the ‘global information society’.”

We suggest to amend the fourth paragraph as follows:

“The key challenge in copyright governance – in relation to the Internet as in relation to previous communications media – is to strike the right balance between the rights of IP creators (‘author’s rights’) and the privileges of IP users under limitations and exceptions in national laws (e.g. educational uses, uses by handicapped persons, ‘fair use’ or ‘fair dealing’ in jurisdictions where they apply), by on the one hand creating incentives to create and on the other hand not unduly restricting:

- the use and dissemination of information by individuals and groups across the Internet;

- the creation of ‘secondary’ forms of content based on the ‘primary’ or original form (e.g. by copying);
- the voluntary adoption of different business models based on exercising rights in non-traditional ways, such as the free development model.”

The suggestion to replace “rights” by “privileges” is meant to bring the text in line with generally agreed IP terminology. The international copyright system provides a set of exclusive economic rights to authors and their assigns. The substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works, as incorporated in TRIPS, establish the minimum rights that must be provided in all Member States of the WTO. Balanced against these rights, all copyright laws contain a set of limitations and exceptions to economic rights that allow free uses of protected works under certain conditions, without permission or payment. The Berne Convention contains only one mandatory exception, the right of quotation in Article 10. Otherwise, the number and scope of exceptions and limitations are decided by each country based on its own social, cultural and economic policies. “Fair use” is one such limitation on rights in the law of the United States of America. Fair use and other “exceptions” to “rights” are referred to in copyright doctrine as “privileges” of users, to make clear that they are, under the law, derogations from “rights” that would otherwise apply. The default position is that the rights apply, unless a user enjoys a ‘privilege’ based on an exception to rights in national law. WIPO does not view exceptions like fair use as in any way less important than, or secondary to, rights in literary and artistic works under Berne and TRIPS. We simply make a technical point concerning the accurate use of IP terminology in the paper.

Still on page 3, we suggest to add a sentence to the last paragraph and to slightly amend the rest of the paragraph to read as follows:

“For others, the challenge consists in ensuring that the international IP system remains effective in encouraging creativity and innovation - while at the same time being responsive to the legitimate needs and expectations of users - and that it is flexible enough to accommodate rapid technological developments as well as diverse national policy objectives. At the level of practice, they point out that the nature of the Internet may make it hard to enforce their IP rights without the cooperation of users. Technical attempts to attach copy-protection measures or the use of Digital Rights Management (DRM) tools in relation to intellectual objects have not been entirely successful, among other things because they sometimes prevent all duplication of the content, even in cases when it is permitted in order to protect public and personal access to digital content that is either in the public domain or which falls within an exception or limitation to rights under the applicable national law.”

Page 4

The first paragraph on page 4 implies inaccurately that existing private-copying levy systems provide compensation for unauthorized copying. If the Working Group finds it necessary to address the issue of levies, we suggest to replace that paragraph with the following:

“In some countries, levies are collected on blank media (such as CDs) and recording hardware as a *quid pro quo* for private copying by individuals, which is expressly permitted under the relevant national legislation. The proceeds from these levies are distributed to rights holders by collecting societies. While current levy systems are not intended to compensate for unauthorized uses such as piracy, the proliferation of

copyright infringement on the Internet has led to proposals for extending levy systems to cover, e.g., peer-to-peer file sharing. However there is not, as yet, broad consensus as to the effectiveness of levies or other remedies.”

Section 4. “Governance mechanisms”

Page 4

We suggest to insert the following paragraph after the paragraph starting with “Countries that agree to participate in the WTO régime *ipso facto*...”

“WIPO has also used open consultation processes to develop IP rules. The first WIPO Internet Domain Name Process for example addressed conflicts between domain names and trademarks through an open international process of consultations, which were conducted online as well as at meetings in various continents, and in which every interested party was invited to participate. A Final Report was published in April 1999 and included a recommendation to establish an international procedure allowing trademark owners to resolve disputes arising from the bad faith registration and use of domain names that reflect their trademarks without taking recourse to national courts of justice. This recommendation formed the basis for the UDRP which was subsequently adopted by ICANN and entered into force on December 1, 1999.”

We also suggest to correct the following paragraph as follows:

“With respect to IPR disputes between private parties, WIPO, through its Arbitration and Mediation Center, provides services that include mediation and binding arbitration, on the basis of the WIPO Mediation Rules, the WIPO Arbitration Rules and the WIPO Expedited Arbitration Rules.”

The second bullet at the bottom of page 4 should be corrected to read as follows:

- “through the UDRP – which was originally developed for ICANN by WIPO – require disputes about the bad faith registration and use of domain names in violation of trademark rights (i.e. trademark disputes) to be resolved through WIPOs Arbitration and Mediation Center, or through the services of another dispute resolution provider accredited by ICANN.”

Section 5. “Evaluation against WSIS criteria”

Page 5

The factual information about WIPO should be corrected:

WIPO has 182 (rather than 184) Member States. A list of WIPO Member States is available on WIPO’s web site at http://www.wipo.int/about-wipo/en/members/member_states.html.

About 200 (rather than 100) non-governmental organizations have been accredited as permanent observers. A list of permanent observers (<http://www.wipo.int/about-wipo/en/members/admission/pdf/observers.pdf>) and the criteria for admission as permanent

observer (<http://www.wipo.int/about-wipo/en/members/admission>) are posted on WIPO's web site.

Section 5.2 “Role and responsibility criteria”

Page 6

The following paragraph should be inserted after the first paragraph:

“WIPO carries out a wide range of capacity-building activities for, and with, developing and certain other countries which are designed to provide:

- advice and expertise in the drafting and revision of national legislation - particularly important for those WIPO member States with obligations under the TRIPS Agreement;
- comprehensive education and training programs at national and regional levels for officials dealing with intellectual property, including those concerned with management of rights and enforcement; and for traditional and new groups of users, on the value of intellectual property and how to create their own economic assets through better use of the intellectual property system;
- extensive computerization assistance to help developing countries acquire the information technology resources (both in human and material terms) to streamline administrative procedures for managing and administering their own intellectual property resources, and to participate in WIPOnet;
- financial assistance to facilitate participation in WIPO activities and meetings, especially those concerned with the progressive development of new international norms and practices.”

The last paragraph in this section should be amended as follows:

“In spite of these efforts, work remains to be done to effectively include non-governmental stakeholders, and civil society organizations in the decision-making processes of these organizations.”

Section 5.3 “Outcome Criteria”

Page 7

The second, third, fourth and fifth paragraphs on page 7 should be redrafted to read as follows:

“However, there is another side to this coin. In the global information society, information and knowledge resources are more valuable than ever before and, insofar as these resources can be protected as IP rights, then those IP rights are commensurately more valuable than in the past.

“In this situation, some believe there is a danger that the simple extension, without examination, into the digital environment of IPR rules that were created for a different

economic and social context – i.e. one characterized by analog industry and media structures – would not only be problematic, but possibly counterproductive.

“On this view, while appearing to maintain a carefully-achieved balance between the rights of creators and the rights of users to the greatest overall benefit of all, the application of existing rules in the new context of the global information society may inadvertently disadvantage both sides of this equation – i.e. damage the interests of creators, because of the cost and difficulty of enforcing traditional-style IPR, and at the same time damage the interests of users, particularly in developing countries, because access remains largely unaffordable in terms both of the direct costs of paying for authorized use of IPR, and the indirect costs of liability for infringement.

“Others – IPR holders in particular – consider that the best way to build the information society of the future is by examining and adapting the current IPR system, and believe in the continuing efficacy of an incremental approach to policy change. It is considered that, by constantly adapting the IP laws to the changing technological and policy environment, creators will benefit by newly emerging tools to assist in the management of their IPR, and users throughout the world will benefit from unprecedented access to ever-increasing quantities of works of information and knowledge in digital form. Maintaining the appropriate balance between creators and users and between past and future for the global information society is clearly one of the most important and difficult challenges facing the international community, and the WSIS.”

Section 6. “Coordination: How effectively is governance of this issue coordinated with governance of other Internet-related issues?”

Page 7

We suggest to add a sentence at the beginning of the first paragraph and to slightly amend the rest of the paragraph to read as follows:

“The Internet has brought new policy challenges to many areas of what might be called ‘governance’: the need to act faster, to develop flexible responses, and to act in a coordinated fashion on an international basis. Some feel that the major Internet-related IPR issue discussed in this assessment note – the most appropriate approach to governing copyright in the global information society, so that ‘the greatest good is achieved for the greatest number’ through affordable access for all to information and knowledge resources – does not appear to be well-coordinated.”

Page 8

We suggest to add the following sentence at the end of this section:

“For others, most of these Internet-related policy challenges can be, and are being, addressed in accordance with the same principles – and in the same fora – as governance issues that arose before the birth of the Internet. The main challenge is to make these existing fora more efficient and responsive to needs created by the Internet. While Internet-related issues may call for novel approaches, these approaches must stay in touch with general principles and policies of intellectual property. International policy-making in intellectual property must ensure that the intellectual property system remains effective in encouraging creativity and innovation; that it meets the legitimate

needs and expectations of users, and that it is flexible enough to accommodate rapid technological developments and diverse national policy objectives.”

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