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Cluster Three Assessment Report

1. Issue: Intellectual Property Rights

2. Institutions

The term **intellectual property rights (IPR)** describes the set of different regulatory concepts that control the production and usage of intellectual objects. The three main IPR concepts that are dealt with in this paper are **patents**, **copyright** and **trademarks** since they are particularly relevant to ICTs and the Internet, although other forms of intellectual property, such as trade secrets, may be relevant as well.

In identifying the international institutions that have Internet-related governance responsibilities in the area of intellectual property rights, it may be useful to make a distinction between:

- Institutions that have direct or primary responsibilities for governing the IPR mentioned above in the sense that they provide forums for
 - defining intellectual property rights,
 - developing international rules and procedures for establishing and protecting IPR,
 - resolving disputes about IPR;
- Institutions that have indirect or secondary responsibilities for governing the IPR mentioned above, in the sense that they have rules and procedures intended to ensure that IPR are respected and protected by their members and by other parties involved in their operations and decision-making processes.

Within this framework, there are two main institutions that traditionally have exercised direct governance responsibilities in relation to IPR/Internet issues:

- The World Intellectual Property Organization (WIPO), through its “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;
- The World Trade Organization (WTO), through its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

In addition, many would consider that the Domain Name System (DNS) managed by the Internet Corporation for Assigned Names and Numbers (ICANN) creates Internet-related IPR of a new kind when domain names are registered.

There are several institutions that have indirect governance responsibilities, in relation to IPR/Internet issues:

- The most prominent of these is ICANN, which encounters trademark-related issues in the process of registering domain names, and deals with them through its Uniform Dispute Resolution Policy (UDRP) and its policies regarding Whois databases.¹
- Multi-stakeholder or intergovernmental standardization bodies, such as the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C) and the ITU Telecommunication Standardization Sector (ITU-T), which encounter patent issues in developing Internet-related standards, and deal with them through IPR policies, intended to ensure that standards are not ‘owned’ by IPR holders.
- Private sector standardization bodies and industry consortiums that seek to provide “private governance” of IPR on the Internet by embedding IPR protection mechanisms into new technologies, developing technologies intended to increase control by IPR holders over distribution of copyrighted content, or to secure compliance with IPR protection policies through the licensing conditions for such technologies;²
- The International Trademark Association (INTA), through its Internet Committee. With more than 10,000 members, INTA represents trademark owners and practitioners from around the world. The role of INTA’s Internet Committee is to evaluate treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet. It also develops and advocates policies to advance the protection of trademarks on the Internet.

In addition to these global institutions, there are also regional and plurilateral arrangements for governing IPR.

3. Relationship to the Internet

The Internet raises two main questions in relation to IPR:

- To what extent are IPR issues changed in form and substance as a consequence of the Internet?
- To what extent do the issues remain ones of managing IPR in a digital world?

In terms of the distinctions made in the preceding section between the three main types of IPR that are relevant to ICTs and the Internet, the first of these questions appears to be raised mainly,

¹ Although different courts in different countries appear to have taken somewhat different positions on the precise nature of the right created when a domain name is registered, there appears to be a general view that use of a domain name similar to a trademark to offer products or services in the same class as the trademark may constitute infringement.

² See the WGIG chapeau document “Towards a Common Understanding of the Roles and Responsibilities of all Stakeholders in Internet Governance” for a discussion of the growing importance of private governance arrangements, including these kinds of activities.

although not exclusively, by Internet-related copyright issues, while the second appears to be raised by trademark and patent issues, as well as by copyright issues. In other words:

- In the area of trademarks and patents the main challenge facing institutions with direct or indirect IPR governance responsibilities is to develop rules and procedures to manage IPR in the Internet world (e.g. by resolving disputes about the ownership of a trademark, by ensuring the IPR are disclosed and issues settled before a standard is approved);
- 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 simply extending the IPR rules developed for the off-line world into the very different “space” created by the Internet, or whether achievement of these benefits in the “global information society” will require significant modifications to the IPR régime.

These latter issues arise because 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 – and, for example, makes much of the Internet function, facilitates the development of content for e-commerce, and opens new opportunities for cultural and economic development. The ease, however, of duplication and distribution also makes IP highly vulnerable on the Internet.

The key challenge in copyright governance – in relation to the Internet as in relation to previous communications media – is to create a balance between the rights of IP creators (“author’s rights”) and the rights of IP users (“fair use”), by on the one hand creating incentives to innovate 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, non-traditional business models, such as the free development model.

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.

At the level of principle, 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.

At the level of practice, others point out that 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 not been entirely successful, among other things because they sometimes prevent any duplication of the content, even in cases when it is permitted by law in order to protect public and personal access.

The infringement of intellectual property rights through electronic media 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 IPR but there, as yet, no broad consensus as to the effectiveness of levies or other remedies.

4. Governance mechanisms

The mechanisms deployed by the institutions with direct or primary Internet/IPR governance responsibilities are at the 'hard', or treaty-making, end of the scale described in the *chapeau* – i.e.

- agreements that establish international law in relation to copyright, patents and trademarks in the case of WIPO, and
- agreements aimed at standardizing rules for establishing and protecting IPR in internationally-traded goods and services, in the case of WTO.

Countries that agree to participate in the WTO régime *ipso facto* not only agree to implement the WTO provisions in national law, but also accept binding procedures for resolving disputes between countries. WIPO treaties should also be transposed into national law, but do not provide a binding mechanism for resolving disputes between countries. This difference was one of the reasons the WTO TRIPS agreement was established – i.e. to strengthen implementation of the WIPO IPR regime with the assistance of the WTO enforcement mechanism.

With respect to IPR disputes between private parties, WIPO provides services that include mediation and binding arbitration, on the basis of procedures recommended by the United Nations Commission on Trade-Related Aspects of International Law (UNCITRAL).³

The mechanisms deployed by institutions with indirect or secondary Internet/IPR governance responsibilities are of a somewhat different character, although they lead to similar results. ICANN's IPR policies, for example:

- require parties seeking to register domain names to disclose information that may be IPR-related as part of the registration process;
- through the Uniform Dispute Resolution Policy (UDRP) – which was originally developed for ICANN by WIPO – require disputes about the ownership of domain names (i.e. trademark disputes) to be resolved through WIPO's Arbitration and Mediation Centre, or through the services of another dispute resolution mechanism accredited to ICANN.

In addition, the data controlled and stored by domain name registrars in Whois databases might well prove useful to an IPR owner, to whom those data would be communicated on the basis of a legitimate right.

The IPR policies of other institutions with indirect Internet/IPR governance responsibilities, such as the IETF, ITU-T, and INTA typically require participants in their standards-making activities to disclose any IPR they hold in technologies related to the standard being developed, and to

³ See the companion cluster 3 assessment note on "E-commerce, Taxation and Trade" for a description of UNCITRAL's role in relation to Internet governance.

agree either to waive these rights or to license them on reasonable terms and conditions and on a non-discriminatory basis, should they be incorporated in approved standards. Other standards-making bodies such as W3C, however, require such technologies to be licensed publicly for free, or they will refuse accreditation as a standard.

5. Evaluation against WSIS criteria

5.1 *Process Criteria* *To what extent to the institution's Internet-related governance mechanisms meet the following criteria, given what could be reasonably expected in light of the governance mechanism used?*

- *Multilateral*
- *Transparent*
- *Democratic*
- *Full involvement of governments, the private sector, civil society and international organizations*

As indicated in the *chapeau* document that introduces these assessment notes, the intergovernmental nature of WIPO and the WTO, the two institutions that have direct governance responsibilities in relation to Internet/IPR issues, colours their understanding of what it means to be “multilateral, transparent, and democratic” in the following ways:

- They are “multilateral” in the traditional sense that only governments are members (WIPO has 184 member states, the WTO 148).
- They are “democratic” in the traditional sense that each country has one vote, that decisions are made by consensus as much as possible, and that balanced geographical representation is an important factor in filling both elected and appointed offices within the organization.
- They are “transparent” in the sense that they publish information about their activities (in this respect, the Internet has greatly improved the transparency of many of these organizations).
- They allow partial involvement of non-governmental actors in the sense that they generally permit accredited non-governmental organizations to attend at least some of their meetings as observers. In the case of WIPO, more than 100 non-governmental organizations from the private sector and civil society are accredited observers⁴. The WTO likewise admits a range of non-governmental organizations from the private sector and civil society as observers at its Ministerial Conferences.

The institutions that have indirect responsibilities in relation to Internet/IPR issues, on the other hand, are more fully reflective of the WSIS criteria. This is particularly the case for ICANN, which represents various stakeholder groups and constituencies in its formal governance structures and decision-making processes. However, questions have been raised and continue to be discussed about whether the interests of different stakeholder groups are always represented

⁴ However, civil society organizations recently complained about discriminations effected by WIPO during the accreditation process for its next meetings. According to these organizations, WIPO would have arbitrarily refused accreditation to many organizations representing the rights of IPR users, while facilitating participation by non-governmental organizations representing the rights of IPR holders.

fairly and in a balanced fashion in all of ICANN’s decision-making processes. This has been a source of some concern in relation to IPR.

5.2 *Role and responsibility criteria* *(To what extent do the institution’s Internet-related governance mechanisms enable the different stakeholder groups to fulfill their roles and responsibilities as defined by WSIS? To what extent to the different stakeholder groups have the capacity to fulfill their roles and responsibilities?)*

- Governments
- Private Sector
- Civil society
- Intergovernmental organizations
- Other international organizations

As indicated in section 5.1, the intergovernmental nature of WIPO and the WTO puts boundaries around the extent to which the private sector, civil society, and international organizations are “fully involved” in their governance processes, although in recent years both organizations have attempted to reach out to non-governmental actors, in order to build understanding and improve communication by providing better information on their activities (e.g. through workshops and seminars), as well as to obtain information on the views of non-government stakeholders on issues facing these organizations.

In spite of these efforts, much work remains to be done to effectively include developing country governments and other stakeholders, and civil society organizations in the decision-making processes of these organizations.

5.3 *Outcome Criteria* *(How effectively to the institution’s Internet-related governance mechanisms contribute to achievement of the following goals?)*

- Equitable distribution of resources
- Access for all
- Stable and secure functioning
- Multilingualism

Internet-related IPR governance impacts all of the WSIS “outcomes criteria”, but has particularly important effects in the areas of “equitable distribution of resources” and “access for all”.

It is clear that the balance struck between the rights of creators and the rights of users through copyright law has a major impact on the distribution of “intellectual objects” – including information and knowledge – and on the practical possibility for users, particularly in developing countries, to access these resources. What is less clear, and subject to much discussion and debate, is the precise nature of the balance that will be most beneficial to all stakeholders. This is the ongoing challenge of IPR governance.

WSIS has taken the view that, in the global information society, economic and social development fundamentally depends on access to knowledge, and that the Internet and other ICTs provide significant opportunities for increasing access to information and knowledge resources, particularly in developing countries.

However, there is another side to this coin. In the global information society, information and knowledge resources are more valuable than ever before, and the rewards that can be gained by “capturing” this value through IPR are potentially much greater than in the past.

In this situation, some believe there is a danger that the simple extension into the global information society of IPR rules that were created for a different economic and social context – i.e. one characterized by traditional industry and media structures – will 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 complying with IPR, and the indirect costs of not respecting them.

Others – IPR holders in particular – do not see a problem in seeking to build the information society of the future by adapting the IPR governance practices of the industrial age, and believe in the continuing efficacy of an incremental approach. Getting the balance between creators and users and between past and future right for the global information society is clearly one of the most important and difficult challenges facing WSIS.

At a much different level, the manner in which Internet-related patent and trademark issues are governed has important implications for the “stable and secure” functioning of the Internet, in respect both to the Domain Name System (DNS) and Internet-related standardization processes. For the moment, though, these issues appear to be effectively managed, and not to raise any major issues for WSIS.

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

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.

This appears to be the case for three main reasons:

- The issue of determining the most appropriate, effective and beneficial approach to governing IPR in the global information society (not just Internet-related copyright issues, but IPR in relation to all knowledge resources ranging from traditional knowledge to genetic engineering) appears to lie ‘above and beyond’ the mandates of the two organizations with direct responsibilities for governing IPR – i.e. WIPO and the WTO;
- In spite of the cooperation agreement between the two organizations, there may not be sufficient coordination between WIPO and the WTO, let alone with other organizations

with a stake in IPR issues in relation to the Internet, ICTs and the global information society;

- There is a growing battle, which involves the use of lawsuits and law enforcement mechanisms, between on the one hand IPR holders and others with a stake in the protection of IPR and the content industries built on IPR, and on the other hand the inventors and users of new technologies for making copies of copyrighted content (e.g. peer-to-peer sharing of music and video files) – a fight which makes it hard to promote reciprocal understanding and to reach a satisfactory solution.

7. Overall assessment: What are the points that most need improvement in order to meet the WSIS criteria?

- Policy vision mechanisms to identify and assess the impact and implications of the Internet for governance regimes and institutions, while encompassing the needs of all stakeholders
- Coordination mechanisms to address the horizontal, ‘barrier-breaking’ impacts of the Internet within and between governance regimes and institutions
- Innovative governance mechanisms to more fully and effectively engage non-government actors – including representatives of industry, consumers, and users – in intergovernmental decision-making processes in a fair and balanced manner, as well as to engage non-private-sector actors in private sector standards-making processes
- Capacity building mechanisms to assist governments and other stakeholders in developing countries