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REPORT ON THE ONLINE FORUM ON INTELLECTUAL PROPERTY IN THE INFORMATION SOCIETY June 1 to 15, 2005

The World Intellectual Property Organization (WIPO) conducted an Online Forum on Intellectual Property in the Information Society from June 1 to 15, 2005, as a thematic meeting and part of the Organization's contribution to the World Summit on the Information Society (WSIS).

The Online Forum received some 52,000 visits, and 374 comments from a wide variety of participants in different countries. The discussions were focused on ten themes, relating to intellectual property and how it affects, and is affected by, the Information Society. The ten themes are:

1. The WSIS Declaration of Principles sets out a vision for the Information Society – how can the intellectual property system support this vision?
2. The intellectual property system and freedom of expression and creativity: help or hindrance?
3. The public domain and open access models of information creation: at odds with the intellectual property system or enabled by it?
4. What is the impact of copyright law, both at international and national levels, on education and research?
5. What are the rights and responsibilities of intellectual property rightsholders?
6. Global partnerships to achieve the United Nations Millennium Development Goals: what role for intellectual property?
7. How is intellectual property policy made for the Information Society: and who makes it?
8. How can cultural and intellectual diversity of traditional communities be respected in the Information Society?
9. Emerging business models for distributing intellectual property online: opportunity or threat?
10. What are the challenges for enforcement of intellectual property rights in the digital environment?

This report on the WIPO Online Forum contains the background commentaries on each of the ten themes, together with a brief synopsis of the comments received, and background resources. The Online Forum, including all comments received, is accessible online at the WIPO website at <http://www.wipo.int/ipisforum/en/>.

Theme 1 - The WSIS Declaration of Principles sets out a vision for the Information Society – how can the intellectual property system support this vision?

(a) The intellectual property (IP) system is a diverse and diffuse array of laws, standards, practices and policies – it could even be misleading to describe or conceive of it as one system. While there are clear sets of interests, and clear sides in certain debates, the IP “system” is not as monolithic or as rigid as it sometimes seems in policy discussion. After all, the same copyright “system” is used by major multinational companies, by individual musicians, by creators working in protected commons, by small software houses, by bloggers – to be sure, for very different purposes, commercial and defiantly non-commercial. The values and interests of these different users are incredibly diverse, and even the technical legal standards that apply – even within the international framework – vary considerably.

So when we try to consider whether the IP system does, can or should support the vision for the information society, the working answer could be – it depends, in part, on how it is used, on who is using it and for what purpose, and what legal rules and social and economic incentives determine how it is used.

Perhaps one of the most challenging questions is whether the IP system is viewed as an element of public policymaking, constructed and implemented for public welfare outcomes, or whether it is to be viewed, more narrowly, as a system of exclusive economic rights. The IP system is shaped, in part, by international standards, but also by numerous choices of national legislatures and by individual right holders. Existing international standards have been accompanied by a vigorous, wide-ranging debate that has not focused exclusively on commercial or economic matters. From the beginning, this debate was a discourse on how best to accommodate and balance concerns about legitimate protection with broader public interests. So this discourse has addressed policy questions such as cultural diversity and the strength of home-grown creativity and cultural expression, the role of new communications technologies in education and public information, and the relationship between commercial interests and public policy goals. When the Berne Convention was last revised, in 1971, the Conference Chair paid “a particular tribute to those developing countries which have been members of the Berne Union for a long time and had endeavored at the same time to place intellectual values above purely material considerations. Their efforts had enabled them to acquire an intellectual heritage of the utmost value, which gave them a high reputation throughout the world their example would be followed by other States which preferred a valuable cultural heritage to the sometimes sterilizing importation of foreign works.”¹

These broader policy factors and social concerns were highlighted in debate during continuing work on international copyright law. When, in 1996, the WIPO Copyright Treaty (WCT) was concluded, the negotiators recognized “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information as reflected in the Berne Convention” and also:

- the need to “provide adequate solutions to the questions raised by the new economic, social, cultural and technological developments”;

¹ Records of the Paris Conference, 1971, Closure of the Conference, at para 174.4.

- “the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works”;
and
- “the outstanding significance of copyright protection as an incentive for literary and artistic creation.”²

(b) How to make these words come alive, to make these aspirations a practical reality, is ultimately the task of the domestic legislator, regulator, judge and administrator, operating within the bounds of national law and regulation. And the way the system is perceived and used by individuals can also contribute to these outcomes – it isn’t just a matter of setting the norms and rules, but also a matter of how people choose to operate within the system, and what interests and values they choose to advance. Few would begrudge the creative person, the innovator, a basic right to benefit from their efforts; but equally, society at large and many other communities of interests expect the rules to be applied in ways that meet their broader interests.

(c) This suggests that one way of dealing with this kind of question is to look at the various forms of legal mechanisms that fall under the general label of “intellectual property”. The intellectual property system is not a monolithic unity, but is better conceived as a label describing a complex composite network of international treaties and national laws, together with the business and social practices that have developed around each distinct area of IP (principally the fields of copyright, patents, trademarks and designs). And these established forms of IP law are largely derived from, and shade into, the broader law of civil liability. A leading critic of the IP system, Richard Stallman, when more generally questioning the value of IP, particularly takes issue with the concept “intellectual property” as a single concept, noting that it “operates as a catch-all to lump together disparate laws.” He comments that “these laws originated separately, evolved differently, cover different activities, have different rules, and raise different public policy issues. Since these laws developed independently, they are different in every detail as well as in their basic purposes and methods.”³

(d) Despite their divergent characteristics, there are common elements – for instance, IP laws typically prescribe forms of exclusive rights over intangible subject matter, and seek to define these in a way that maintains a healthy public domain while channeling private interest to promote the creation of public goods – but the way this is done, the principles that apply, and the policy issues and communities of interest that are involved, can vary greatly. For instance, in trademark law, the “public domain” includes those descriptive terms that should remain in the common language for general use; in patent law, the public domain includes technological knowledge that is not novel, inventive or useful (industrially applicable); and so on.. It may be misleading, then, to consider one IP system as an undivided whole, because the policies, purposes and methods of protection, and the legal structures that have evolved to regulate each field are very different.

(e) WIPO administers 23 international IP treaties (and was, itself, established through a treaty – the Convention Establishing the World Intellectual Property Organization, signed in Stockholm on July 14, 1967). WIPO’s purpose is, according to the 1974 Agreement between

² Preamble to the WIPO Copyright Treaty, 1996.

³ Richard M. Stallman , Did You Say “Intellectual Property”? It’s a Seductive Mirage, at http://www.gnu.org/philosophy/not_ipr.xhtml.

the United Nations and WIPO, the *“promotion of creative intellectual activity and the facilitation of the transfer of technology related to intellectual property to the developing countries in order to accelerate economic, social and cultural development (article 1).*

Each IP treaty comes into force, or becomes operational, when a specified number of States ratify or accede to it – following which, depending on a country’s system of implementation, it is translated by each government into its national law. The international IP treaties allow considerable scope and flexibility for countries, when implementing their provisions domestically, to take account of local social, cultural and economic conditions, while requiring acceptance of the minimum standards of protection agreed by negotiation among states. Intellectual property law is territorial in nature – for example, a copyright law enacted by one government sets out the requirements and terms, scope and enforcement of copyright law within that country. Clearly, the territoriality of IP laws raises issues when intellectual property subject matter is accessed and used in a global space, for example through use of the Internet.

These treaties and national laws establish the legal basis for a broad system to manage knowledge in the Information Society. IP rights provide a structure within which to manage relationships between creators and owners of IP on the one hand, and users and consumers of IP on the other. The IP system does not dictate how creators may exercise rights in works they create. Rather, it provides them with choices that range from full-scale economic exploitation (an “all rights reserved” approach), to making works available through sharing with the community at large with no expectation of economic gain (though often still relying on IP rights to preserve the integrity of the work). At the individual level, the IP system is fundamentally about choices available to creators and innovators – whether to profit financially from commercial exploitation of IP, whether to dedicate IP subject matter to the public domain, whether to assert authorship rights as a vehicle for free speech. As a building-block of the Information Society, the IP system does not discriminate based on how creative content is generated or produced, or the message it conveys – the same protection is provided to programming originated by CNN as to programming of Al Jazeera or the BBC; and while they may exercise rights in different ways, open source software developers benefit from the same copyright principles as do providers of proprietary software.

(f) Over time, IP law and IP-based business practices have continually adapted to social, cultural and economic change. In the copyright field, technological innovations from the printing press, to photography, player pianos, radio, television, photocopiers and video recorders, all necessitated evolution of copyright law and principles. In the Information Society, the emergence of digital information and communications technologies, including the Internet, has profoundly affected how we produce, disseminate and consume information globally.

How does IP law respond to these developments? The IP treaties are regularly updated by revisions negotiated among States and implemented at the national level. New treaties can also be created, such as the WIPO “Internet Treaties” – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty - which were concluded in 1996 and came into force in 2002. The impetus for these legal or normative developments is usually a set of needs put forward by WIPO’s Member States, often at the request of IP stakeholders at the national or international levels. In addition to treaty-based law, alternative “soft law” instruments have been developed which provide more flexible, faster and in some circumstances more efficient ways to address needs and challenges in the Information

Society. For example, the Uniform Domain Name Dispute Resolution Procedure (UDRP) (see Theme 10), was developed to address the problem of “cybersquatting,” which involves the pre-emptive registration of trademarks by third parties as domain names. The UDRP was adopted by the Internet Corporation of Assigned Names and Numbers (ICANN), based on recommendations from WIPO following an open and transparent international consultation process, conducted both online and at publicly-reported regional meetings. WIPO’s Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, is another soft law set of recommendations to States for adapting national trademark laws to the digital environment.

(g) IP issues are integral to the World Summit on the Information Society (WSIS) Declaration of Principles and Draft Action Plan, which reflect the central position that “information” plays in the Information Society. The Declaration states:

“Intellectual Property protection is important to encourage innovation and creativity in the Information Society; similarly, the wide dissemination, diffusion and sharing of knowledge is important to encourage innovation and creativity. Facilitating meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society.” (article 42)

The Declaration gives priority to global development in the Information Society, by harnessing the potential of information and communication technologies (ICTs) to promote the development goals of the Millennium Declaration. The Declaration recognizes that “education, knowledge, information and communication are at the core of human progress, endeavour and well-being”(article 8). Further, it states that the “ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society”(article 24). The Declaration emphasizes the importance of removing barriers to equitable access to information; of ensuring a rich public domain⁴ of information; of raising awareness of different software models to ensure affordable access to software; and promoting the creation and dissemination of scientific and technical information (articles 25 to 28). IP rightsholders, including content creators, publishers and producers, among others, are urged to play an active role in promoting the Information Society, especially among least developed countries (article 32).

The WSIS Plan of Action outlines goals with direct relevance to IP, including the following: “to promote the use of information and knowledge for the achievement of internationally agreed development goals” (article 4); “develop policy guidelines for the development and promotion of public domain information as an important international instrument promoting public access to information” (article 10 (a)); “support local content development” (article 23(e)).

While WSIS processes are directed at addressing Information Society issues and concerns, not all of these are new or unique to Information Society discourse. Promoting access to information, sharing of knowledge and creativity, stimulating local content production and innovation to ensure diversity and economic development, and marshaling the IP system for development objectives, are long-standing concerns of the international

⁴ Wikipedia – “public domain” at http://en.wikipedia.org/wiki/Public_domain.

community, reflected in discussions within WIPO and in other international contexts. However it cannot be denied that the dizzying speed with which new ICTs are becoming available gives urgency to the search for solutions.

Questions to Consider

- What are the underlying principles of IP law and policy?
- What social needs and community interests were addressed when the main elements of the IP system were formulated and developed?
- Have society's needs changed, vis-à-vis the IP system, in the digital society? If so, do these changes require adaptation of the IP system?
- How can the IP system best support the Information Society?
- How can we determine if the IP system really contributes to innovation and creativity?
- How can the IP system be actively used to disseminate knowledge, promote creative collaboration, and strengthen cultural diversity?

Discussion synopsis

The 47 comments received on this theme reflected broadly on the purpose and justification underlying IP protection in our current society. Discussions focused on the purpose or goal of IP protection, and some commentators questioned whether the given justification for IP laws had been evaluated or tested. Opinions varied on the purpose of IP laws. Some commentators emphasized the importance of the relation between IP and the public domain.

“Originally the IP system was a contract between society and creators. Society gave the creators certain privileges in exchange for encouraging creation. Part of the contract was that after a reasonable period of time, the creation was given to the public domain.”

Posted by Bill Strebin, June 9, 2005.

“I consider enriching of the Public Domain to be the prime motive of IP Laws.”

Posted by Anand Srivastava, June 9, 2005.

Other commentators focused on the economic motivation and incentives of IP protection, and the economic contribution made by the IP system. Some highlighted the role of IP to enable creators to make a livelihood from the products of their intellect and creativity, and to give them choices as to how to exercise their rights.

“The goal of intellectual property (IP) law is to provide a socially optimal level of incentives for people and businesses to invest in developing and disseminating new technologies and

works. IP laws create these incentives by giving inventors, authors, performers and others the means to earn an economic return on their investments in innovation and creativity.

...

Information and knowledge are the capital – and ingenuity and creativity the means of production – that will drive economic growth in the Information Society. Effective national and global economic policies will therefore require governments to create a climate in which innovation and creativity can flourish. Such a climate depends on sound IP protection.”

Posted by Jesse Feder, Director of International Trade and IP, Business Software Alliance, June 14, 2005.

However, numerous commentators were critical of the displacement of creators by corporate interests and a separation between genuine creativity and the business models that have developed to produce, publish and distribute creative products. Some commentators expressed dissatisfaction that, while creators were not receiving just reward from their creativity, the copyright-based industries appeared to be benefiting from the IP system and protecting their business models at the expense of balance and progress. A distinction need to be drawn, it was stated, between authors, owners and users of IP rights, in order to avoid a capture of interests.

Some discussion focused on the relation between IP, cultural diversity and development. In this respect, some commentators noted a need to raise awareness of issues involving IP and to focus on capacity building.

“Without remuneration on the basis of copyright protection, there will mainly be an interest in investing in the most commercial productions, to the detriment of maintaining a rich and broad cultural life within the community.”

Posted by Michael Waldorf, Secretary General, Danish Actors’ Association, June 13, 2005.

At a fundamental level, some commentators questioned whether the concept of “property” was relevant or appropriate for the Information Society, or whether the digital technologies had fundamentally changed the way in which information should be transacted and consumed. One commentator summarized many of their concerns.

“A true information society is one where information flows as readily as possible, subject to reasonable rewards to right-holders. Where the current system is in disrepute is because the mechanism to harvest economic reward is all-powerful, yet may not be appropriate:

(1) many true creators would like their words disseminated free of charge until they have established themselves in the market; yet mechanisms to achieve this are in their infancy (all created material is automatically subject to copyright restrictions, and the would-be user cannot easily know which works may be copied freely)

(2) the laws of few countries allow sufficient freedom to copy (copyright) works, subject to reasonable restrictions, within the controlled environment of educational institutions: this hampers teaching and research, despite the willingness of education to pay for copyright materials

(3) because many copyrights are owned not by authors but by the corporations who publish or disseminate their work, the rights are bought and sold, making it difficult for law-abiding citizens to trace the owner for permission to copy

(4) the term of copyright is too long to be justified as an incentive to creativity – nobody is persuaded into creative action on the grounds that their unborn grandchildren will enjoy their posthumous royalties

(5) very large numbers of works remain in copyright, sterilized against productive use, long after they have lost any commercial value: this is counter-productive in a true information society.”

Posted by Toby Bainton, June 13, 2005

In the field of copyright, in particular, commentators questioned whether the goals of copyright were served by the manner in which copyright laws operate in the current digital environment. The question was asked whether protection of copyright compromised free speech and the flow of information to an unacceptable level. Many commentators took the view that the duration of copyright protection was too long, particularly when technological protection measures were employed to “lock up” copyright works indefinitely.

“Is there any value gained by providing patent/copyright restrictive rights, longer than required to pay for the relative cost/financing of engineering/producing the product, if society on the whole is never given any benefit greater than that which is restricted by those rights?”

Posted by D.K., June 8, 2005.

These commentators suggested limiting the duration of copyright to a much shorter time and, in some cases, requiring registration or other formalities in order to gain protection. Others suggested revisiting concepts of fair use and compulsory licensing, in order to maintain the balance of the copyright system between private rights and the public good.

These criticisms were met, however, by comments that focused on the consequences of not providing adequate protection for IP, including damage caused by infringement of rights, reduced economic development and impoverished cultural diversity.

“The alternative vision of the Internet, supported by a few, places faith in the right to appropriate the creative works of others in order to disseminate them to the world free of charge. This vision will lead to a global reduction in creative output and, where it becomes piracy, an increased source of income for organized crime. Moreover, any vision of the Internet that would permit piracy victimizes local culture as well as the economies of developing countries. The victims of piracy include artists whose creativity gets no reward; governments who lose hundreds of millions of dollars in tax revenues; economies that are deprived of new investments; consumers who get less diversity and less choice; and the producers of creative works who, due to rampant theft, have less money to invest in the development of new talent.

Posted by the International Intellectual Property Alliance, June 15, 2005.

Theme 2 – The intellectual property system and freedom of expression and creativity: Help or hindrance?

(a) The underlying premise of the intellectual property (IP) system is to provide recognition and rewards associated with ownership of inventions and creative works, so as to stimulate further inventive and creative activity for social, cultural and economic growth. As noted copyright scholar Professor William Cornish has said, “Copyright will remain because it provides necessary protection for the investment of intellectual effort and capital in material which is not produced in order to be freely shared”⁵, and because cultural creations are highly valued by society. Copyright achieves this by careful balancing of the scope of private economic rights as against limitations on those rights established in the public interest. The rights granted by copyright (such as the economic right to control reproduction of the work, its adaptation and distribution etc., and moral rights to be attributed as the author and to maintain the integrity of the work) are conferred by virtue of authorship status alone, provided the works created meet the requisite threshold of creativity or originality in national law.

(b) There is ongoing debate over whether copyright protection adequately accommodates the increasingly collaborative nature of some creative processes. Artists, including painters, sculptors and authors are inspired by artists who precede them, and many works reference, borrow or source from earlier works. Conflict arises because what is inspiration to one person may be plagiarism to another. For example, when is the use of indigenous communities’ traditional cultural materials legitimate inspiration, and when is it inappropriate adaptation and copying? Consider the case of Deep Forest - popular “world music” that combined contemporary ambient music with recordings of traditional musical performances published by UNESCO⁶, though - in the case of the song Sweet Lullaby apparently misattributing their cultural source; this in turn inspired musicians such as Jan Garbarek, but recognition of the valuable cultural heritage of the Baegu people seemed to be lost.⁷ Or Andy Warhol, whose famous images of the Campbell Soup can are exhibited in major art galleries worldwide.

How should rights under copyright function in collaborative creative processes, and how will future creativity be affected? Formulating appropriate responses is the task of national governments, who implement copyright policies responsive to national cultural, social and economic needs, and in judicial interpretation of those policies. At the international level, debate focuses on the need for guiding principles to help governments carry out this task responsibly and sustainably.

(c) The words “free” and “freedom” have many different connotations in discussions relating to the Information Society: free access, free of charge, free of legal or technical restriction, freedom to create, freedom to share (freedom not to share). Democratic societies are founded on freedom of expression, including freedom of the press, and copyright plays an

⁵ William Cornish & David Llewelyn, *Intellectual Property: Patents, Copyright and Trade Marks and Allied Rights* (5th ed., Sweet & Maxwell, 2003), at p. 373.

⁶ United Nations Educational Scientific and Cultural Organization (UNESCO), at <http://www.unesco.org>.

⁷ Steven Feld, “A Sweet Lullaby for World Music” *Deep in the Jungle* (2001), at http://www.deepforestmusic.com/dfpress_00-00-00sweetlullabyforworld.htm.

important role in sustaining these democratic freedoms. In exchange for valuable rights, copyright holders contribute to free flow of information in society, stimulating research and education, facilitating criticism and news reporting. Indeed, the laws of many countries impose limitations on copyright to permit uses of a work for purposes of news reporting and criticism and review.

Moreover, freedom of expression means more than the freedom to express one's thoughts. Copyright provides a right to be acknowledged as the author of that expression: this is recognized as the moral right to be identified as the author (the right of paternity), and the right against false attribution of a work.

Access to information is recognized as key in the WSIS Declaration of Principles: "The ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society."⁸ At the same time as IP laws grant individuals rights over their works, they also stimulate production of knowledge by permitting authors to earn a livelihood from their creativity and to choose how to share their ideas with the public. Copyright laws, for example, enable developers of open source software to be identified as the author of their original code, and to provide contractually that any future uses of their work are consistent with open source principles. Among the numerous licensing options available to copyright holders, both the Creative Commons⁹ and the GNU Public License¹⁰ rely upon copyright for their applicability. While copyright grants authors rights over their work, it largely leaves the choice of how to exercise those rights up to the individual (at one end of the spectrum, to reserve all rights or, at the other end, to dedicate all transferable rights in the work to the public domain). Most copyright laws (and particularly in Continental legal systems) provide that some rights, such as the "moral right" to be acknowledged as the creator or performer, are non-transferable. This is designed to maintain the author's personal connection to the work and to protect authors from unreasonable commercial exploitation, and is a reflection of the cultural value given to authorship.

Intertwined with freedom of expression, respect and recognition of the contribution of creators and promotion of the value of cultural diversity – these moral rights mean that a creator can be assured due acknowledgement as the creator of a work, and a right to have a say in how its integrity is preserved. Such respect for the creator can help promote confidence and encourage the dissemination of their creative expression and the expression of their ideas. When it is applied to expressions of folklore (as in the WPPT), it opens up the prospect of the contribution of diverse cultural communities to global cultural exchange, on the basis of mutual respect and recognition.

(d) The IP system, and copyright in particular, helps to preserve cultural diversity in an increasingly globalized environment. Whereas the Internet began its development in the Anglo-American countries, by September 2004, some 64.8% of the online population was non-English-speaking,¹¹ and a similar shift is occurring in the availability of non-English content online. Local copyright protection can help inspire, promote and protect national creativity, and strengthen diverse sources of content against cultural homogenization. The demand for diverse ethnic creative content has never been higher – 'cross-over' films and

⁸ WSIS Declaration of Principles – B(3) at para 24.

⁹ See <http://www.creativecommons.org>.

¹⁰ See <http://www.gnu.org/copyleft/gpl.html>.

¹¹ Source – Global Reach, Global Internet Statistics (2004), at <http://www.greach.com/globstats/>.

music, for example, from Bollywood to World Music, are satisfying this demand both on and offline.

(e) There is also currently debate as to whether the duration of copyright protection is appropriate to meet the goals of the copyright system and the needs of the Information Society, including preservation and promotion of cultural diversity. The Berne Convention provides a minimum term of copyright protection of the life of the author plus 50 years after his or her death¹², however governments may increase this term in national copyright law to suit local conditions. The duration of protection also varies depending upon the nature of the work, the date of its creation and the type of right in question.¹³ The EU Copyright Directive, implementing the WIPO Copyright Treaty (WCT), extended the term of authors' protection in the European Union to 70 years.¹⁴ In the United States, the Sonny Bono Copyright Term Extension Act of 1998¹⁵ extended copyright for authors to 70 years after their death, and to between 75 and 95 years for works of corporate authorship. The US Act is sometimes referred to as the "Mickey Mouse Act" because, without its passage, the Walt Disney Company's animated character would have entered the public domain between 2000 and 2004. There is debate as to whether the extension of copyright duration is in the public interest, or is economically justifiable under copyright principles – however, it could also be argued that the restricted use of dominant cultural products, such as Mickey, promotes the development of diverse, localized and more traditional expressions of creativity. Similarly, it is noted that the unauthorized music most frequently downloaded in developing countries is the product of celebrity, often American, artists, and that this has a detrimental effect on the viability of indigenous musical artists both locally and internationally. In the field of software, copyright and patent protection may act to prevent any one operating system from becoming a de facto standard.

(f) To the extent that copyright law promotes creativity, it also enhances economic growth and welfare. While copyright is not synonymous with economic progress – economic growth has taken place in periods of history and in countries where IP protection was not available – adoption of copyright law has been part of democratic transformations in society, creating opportunities that have best been realized in market economies. There is an open question whether viable alternatives to copyright exist to perform this function – certainly other systems of reward that do not operate on the basis of exclusivity may also promote creativity and novelty, but their long-term sustainability is unknown. It seems difficult to develop a strategic investment plan based on a system with incentives that stop at the point where the product is delivered. It may be technology could provide solutions that meet the same goals as copyright, although perhaps only in the short-term. In Alvin Toffler's Third Wave, licenses will be delivered by machines and creators will be rewarded by consumers on the basis of an ethical attitude – but would an honor system really work in the future? Alternative systems lack

¹² Article 7 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of July 24, 1972 as amended on September 28, 1979), available at <http://www.wipo.int/treaties/en/ip/berne/index.html>.

¹³ For a description of various national copyright terms, see The Online Books Page Frequently Asked Questions, at <http://onlinebooks.library.upenn.edu/okbooks.html>.

¹⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

¹⁵ The Sonny Bono Copyright Term Extension Act, 1998 (Public Law 105-298), at <http://www.copyright.gov/legislation/s505.pdf>.

predictability, credibility and have unclear links to social values – all of which are inherent characteristics of copyright.

Questions to Consider

What are the best means to promote diversity of, access to, and use of knowledge in the Information Society?

- Do IP rights, or exceptions to those rights (or both), provide guarantees of freedom of expression?
- How does the moral right, the right to be acknowledged as creator or performer, strengthen respect for cultural diversity?
- Does the IP system accommodate emerging forms of creativity (e.g., artistic sampling and remix)?
- What is the best means to reward and provide an incentive to creators and artists?
- What does the “free flow of information” mean in the Information Society?
- How can we reconcile private exclusive IP rights, and the role they play in fostering innovation, with the free sharing of information in the Information Society?
- What motivations and stimuli outside the IP system would promote diversity and access to information – and would these be economically viable?
- Is there an alternative to the IP system that could sustain the production costs of valuable information?

Discussion synopsis

The 67 comments received on this theme addressed in the main how to achieve the balance between copyright protection and the public interest in access to information and works of creativity. Many commentators distinguished between the interests of creators, who they felt deserving of protection, and corporations that had acquired the economic IP rights in works of creativity – and expressed a desire to re-focus IP policy on the creators themselves.

“[A]s a legal practitioner involved in the arts, I often see many artists forced to sell out their ideas to corporates (particularly small multimedia designers) for modest sums in order to feed themselves and get the exposure they deserve.”

Posted by Roderick Smith, June 2, 2005.

A number of commentators stated that work was needed to redress the balance between IP rightsholders and the public interest. In particular, numerous statements were made about the need to reduce the duration of copyright protection in order to promote rather than stifle creativity. Some commentators considered that long duration of copyright protection gave no benefit to the creators, particularly as the cost of obtaining

protection and enforcing rights was beyond the reach of many individuals, but instead went towards supporting the traditional business models of the copyright-based industries.

“IP system is neither help nor hindrance: we can only make it more or less helpful.”

Posted by Rafal Próchniak, June 3, 2005.

“The extension of copyright beyond what any reasonable person would call a “limited time” has the potential to seriously hamper creative expression and undermines the balance between creators and the public – particularly when the actual creators don’t own the rights, a corporation does.”

Posted by 193.5.93.35, June 3, 2005.

“There needs to be a better balance for duration of copyright before works can enter the public domain for the enhanced economic growth and welfare to be realized.”

Posted by Taran, June 6, 2005.

On this subject, however, other commentators highlighted the unique benefits of copyright, and the importance of its role in sustaining creators and the flow of creative works and information in the Information Society.

“I would like to draw your attention to the significant difference between authors’ rights and patents – both being subsumed under the notion of IP and © copyright, but not at all to be looked at and treated the same way. While authors’ rights are individual, personal rights, including both moral, intellectual aspects (such as acknowledgement of authorship) and economic aspects (such as equitable remuneration for the use of the created work), patents are more of a commodity, fit to trade upon. We cannot think of any other legal instrument which is at least aiming at providing for an adequate return to authors, literary translators and their countries, while at the same time taking care of authenticity, accessibility and promotion of the great variety of creation in the public interest.”

Posted by European Writers’ Congress, June 14, 2005.

Other commentators focused on patent protection, and remarked on the “chilling effect” of predatory patent litigation, and the need to ensure that patents are granted on just principles, and only to truly deserving inventions.

“The careless award of patents for trivial and obvious ‘inventions’ severely hinders the ability to be innovative. Innovation has always piggybacked on current knowledge and technology. Large leaps are rarely made and small steps and improvement of ideas has always prevailed.”

Posted by P Masterson, June 5, 2005.

A further common thread among commentators was the importance of the “remix” culture, and the consequences that should follow recognition that creativity is evolutionary

and generally builds upon the foundation of earlier works. Representatives of Creative Commons described the uptake of their licensing system as evidence that creators were eager to find new ways to manage their IP rights, and to permit more free use of their works by sampling and remix than was encouraged by traditional uses of the copyright system.

“The experience of the adoption of Creative Commons Licenses suggests that many artists are willing to permit, and even encourage and acknowledge, derivative uses of their creativity and the derivative nature of their own creativity.”

Posted by Mia Garlick, Creative Commons, June 9, 2005.

Discussion also focused on the importance of maintaining the appropriate balance in the IP system, while differentiating clearly between the nature and driving forces behind the different fields of IP: copyright, patents and trademarks/designs.

“The IP system is far stronger than necessary, simply to balance opportunity costs for producers of valuable creative works. The end result of such unbalanced IP regulation is to skew participation in the market for creative works towards rich producers and rich consumers to the detriment of poor creators and poor consumers, widening the gap of the digital divide.”

Posted by IP Justice, June 14, 2005.

The benefits of IP protection to creativity and innovation was also a common theme, highlighting the in-built checks and balances that ensure the system works to in favor of rather than against the public interest in access to an abundant flow of information. Supporters of the IP system generally recognized that balance between the interests of rightsholders and users, for the public good, is a fundamental principle of a copyright regime. Discussions on the definition of the “public interest” also went beyond merely the public interest in free access to information, to include the public interest in providing incentives for continued production of quality works of creativity and innovation

“The view that IP protection is somehow irreconcilable with the sharing of information fails to appreciate the critical role that IP laws play in promoting the dissemination of information. First, IP regimes invariably include limitations that are specifically designed to balance the interests of inventors and creators with the broad dissemination of information to the public. For instance, while copyright protects an author’s original expression of an idea, the ideas themselves remain fully available to anyone to use, copy, or integrate into a new work of authorship. Furthermore, copyright protection does not extend to facts or other data that do not embody expressive content. Finally, virtually all national copyright regimes include exceptions designed to ensure that the exclusive rights of authors do not override other socially important goals such as research, education, and the like. Similar provisions and balancing of interests are embodied patent and trademark law.

Second, in absence of IP laws, inventors and authors that today rely on IP protection would instead be forced to rely on other legal mechanisms—such as trade secrecy or contract law—to protect the value of their inventions and works. This would likely diminish rather

than increase society's access to information. Indeed, the almost unlimited wealth of free and low cost information available today—particularly via the Internet and other online networks—belies any claim that IP protection is inconsistent with broad access to information.”

Posted by Jesse Feder, Director of International Trade and IP, Business Software Alliance, June 14, 2005.

“While the public certainly has an interest in securing cheap access to copyrighted materials, its primary interest is in ensuring the continued production and distribution of original content so there exists something to access.”

Posted by International Federation of Phonographic Industries (IFPI), June 15, 2005.

Theme 3 – The public domain and open access models of information creation: at odds with the intellectual property system or enabled by it?

(a) Wikipedia defines “public domain” as the “body of knowledge and innovation (especially creative works such as writing, art, music and inventions) in relation to which no person or other legal entity can establish or maintain proprietary interests. This body of information and creativity is considered to be part of the common cultural and intellectual heritage of humanity, which in general anyone may use or exploit.”¹⁶ The public domain includes works and objects of related rights that can be used and exploited by everyone without authorization, and without obligation to pay the copyright owners concerned – generally because the term of protection for the works in question has expired or because there is no provision of copyright law requiring protection of the works in the country where the works are sought to be used.¹⁷

Some complexity arises from the fact that the duration and conditions for copyright protection vary from country to country, and works enter the public domain in different jurisdictions at different times¹⁸, creating challenges for persons wishing to use material accessed from a global medium such as the Internet without potentially infringing copyright. In recent years, and especially in the context of the Information Society, there has been exploration of authors’ ability to exercise their rights by dedicating their work to the public domain.¹⁹ From a legal perspective, it is notable that various national copyright laws may establish limits to the rights that an author may waive or transfer.

Subject to the discussion above, copyright holders can exercise their choice to dedicate their work to the public domain, assign copyright to an open source project, grant a non-exclusive or exclusive license to users for payment or free of charge, or reserve all rights. There are growing concerns that lack of knowledge among creators about the choices available to them leads to a *de facto* position of “all rights reserved”, creating economic scarcity that drives up the cost of copyright goods. The effect, it is argued, is to reduce the public domain of information and knowledge, particularly knowledge that is necessary for continuing creative activity – Professor Lawrence Lessig has described this as the effect of a “permission culture” as opposed to a “free culture”.²⁰

Of course, all rights reserved is a legitimate choice for authors to make, and many do – but equally, others may choose to release their works under more flexible conditions, free of charge or free of restriction. The copyright system itself is not a business model, but a tool that can provide the basis for many business models. The estimated more than 50 million

¹⁶ See Wikipedia “Public Domain” at http://en.wikipedia.org/wiki/Public_domain#External_links.

¹⁷ WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO, prepared by Mihály Ficsor (WIPO Document No.89, 2003), at p.305.

¹⁸ For a description of various national copyright terms, see The Online Books Page Frequently Asked Questions, at <http://onlinebooks.library.upenn.edu/okbooks.html>.

¹⁹ See, for example, the Creative Commons Public Domain Dedication at <http://creativecommons.org/licenses/publicdomain/>.

²⁰ Lawrence Lessig, “Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity”, The Penguin Press, New York, 2004), at p.30.

blogs in existence at April 2005²¹, are largely written for free access and free of charge (although the authors generally assert copyright in their work), and some bloggers are exploring business models that enable payment for their efforts, such as through banner advertising or voluntary contributions. For example, Matt Drudge's blog, the Drudge Report,²² which scores some 150 million pageviews per month, has been reported to earn its creator more than US\$1 million annual income from banner advertising. The blog published by the US political commentator, Andrew Sullivan, invites readers to make a donation through an American Express credit card.²³

(b) The WSIS Plan of Action calls for the development of "policy guidelines for the development and promotion of public domain information as an important international instrument promoting public access to information."²⁴ The Creative Commons initiative, a non-profit corporation in Massachusetts (based in Stanford University, and founded by Lessig) aims to make it easier for creators to make 'free' copyright choices. According to Lessig: "It does this by making it easy for people to build upon other people's work, by making it simple for creators to express the freedom for others to take and build upon their work. Simple tags, tied to human-readable descriptions, tied to bullet-proof licenses, make this possible."²⁵ The CC licenses themselves, however, have yet to be tested in the legal system, and concerns have been expressed at how they may interact with traditional forms of licensing of economic rights, protection of moral rights, and other legal obligations.²⁶

CreativeCommons.org offers licenses that enable authors to attach "some rights reserved" conditions when making their work available to the public, although creators opting for CC licenses cannot be compensated for use of their works (they may, however, decide to allow licensees to use CC-licensed content for commercial purposes). Originally created to license copyright works such as video, educational materials, music and photographs, Creative Commons is now developing licenses for patents and scientific publishing, and is internationalizing its licenses for various jurisdictions. Yahoo! recently announced a beta version of a search tool that enables users to search for some of the more than 10 million "CC" licensed works online, depending on whether the intended use is for commercial purposes or permits modification of the work.²⁷ One added benefit of this system is that it

²¹ Source - Duncan Riley, The Blog Herald, at <http://www.blogherald.com/2005/04/14/number-of-blogs-now-exceeds-50-million-worldwide/>.

²² The Drudge Report, at <http://www.drudgereport.com>. See also Rick E. Bruner, "Blogging is Blooming", iMedia Connection, April 5, 2004, at <http://www.imediaconnection.com/content/3162.asp>.

²³ See <http://www.andrewsullivan.com>.

²⁴ WSIS Plan of Action – C3. (Access to information and knowledge) Para.10(a). See http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161|1160.

²⁵ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press, New York, 2004), at p. 282. See <http://free-culture.org/>. See also <http://www.creativecommons.org>.

²⁶ The Media, Entertainment and Arts Alliance in Australia, for example, stopped production in early 2005 of a "re-mixable" short film called "Sanctuary", because it was planned to release the film under an Australian version of the CC license. It was proposed that audiences would be able to copy and edit the film without restriction except that uses must be non-commercial. The difficulty was concern at the risk that footage of actors' performances could be edited in a way that was prejudicial to the actors' interests and legal rights and obligations. See Seamus Byrne, "Actors' union shouts 'cut' on digital film", Sydney Morning Herald (April 12, 2005). See <http://www.smh.com.au/news/Outsourcing/Actors-union-shouts-cut-on-digital-film/2005/04/11/1113071894581.html>.

²⁷ Yahoo! Creative Commons Search – beta version. See <http://search.yahoo.com/cc>.

may help to raise awareness that, unless otherwise stated, materials posted online may be subject to copyright protection and authorization should be sought for their use. A common complaint among persons wishing to use creative works accessed from the Internet, is that it is unclear what copyrights attach to each work and where to request permission. The attachment of metadata (information about the work and the author) to content in digital form, and rules that prevent such metadata being removed, may partly address this concern. One such initiative is the Digital Object Identifier (DOI),²⁸ which allows for persistent (unchanging) identification of content, including copyright works, in the digital environment.

(c) Creative Commons licenses are but one example of the variety of different licensing options available to IP rightsholders. In the software field, for example, licensing choices range from proprietary to open source development and licensing models. Copyright law ensures that software developed under open source licenses is distributed in accordance with the principles of the movement. Software licensed under the Gnu General Public License (GPL),²⁹ for example, originally developed by Richard Stallman for the Free Software Foundation, can only be modified and distributed provided the source code is made publicly available.

Most open source software is licensed (more than 53 different open source licenses exist)³⁰, and most licenses share two common elements: the right to payment of license fees is waived, and there is a condition that the underlying source code be made available. These licenses rely upon contract to build upon the protections and rights inherent in copyright law, and are enforceable in court on that basis.³¹ The licenses grant rights and permissions subject to conditions that restrict how the software can be changed or distributed – and these conditions are based on IP.³² In addition, the use of source code from OS developers is often permitted on condition of appropriate attribution to the author of the original source code.

The benefits that open source software may offer include access to source code, community-based development, local skills and capacity building, freedom from vendor lock-in, reduced costs, broad rights, and the ability to customize to local conditions. However, while open source software licensing is increasingly well accepted, these licenses have not yet

²⁸ “The Digital Object Identifier (DOI) is a system for identifying content objects in the digital environment. DOIs are names assigned to any entity for use on digital networks. They are used to provide current information, including where they (or information about them) can be found on the Internet. Information about a digital object may change over time, including where to find it, but its DOI will not change.” The International Digital Object Identifier (DOI) Foundation. See <http://www.doi.org/>.

²⁹ Wikipedia, “Gnu General Public License”. See http://en.wikipedia.org/wiki/Free_software.

³⁰ For example, the Open Source Initiative (OSI) maintains a list of OSI-approved open source licenses. See <http://www.opensource.org/licenses/>.

³¹ For example, see Stephen Shankland, “Open-source programmer alleges Linux misuse” CNET News.com (March 16, 2005). See http://news.com.com/Open-source+programmer+alleges+Linux+misuse/2100-7344_3-5621156.html.

³² For example, the Netfilter decision (District Court of Munich, Judgement of May 19, 2004) was an action founded on copyright, that was greeted with enthusiasm by the open source community because it gives recognition to the GPL: “The Court shares the opinion that one cannot regard the General Public Licence as containing a waiver of copyright and similar rights. To the contrary, the developers make use of copyright law to secure and bring to fruition their ideas for the development and distribution of the software.” Unofficial translation, Oxford Internet Institute. See http://www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL2_20040903.pdf.

been fully tested in the courts of various legal jurisdictions.³³ Moreover, they do not contain the warranties, representations and indemnities in favor of the licensee that are standard elements in other licenses. This has given rise to concerns that licensees may be exposed to liability for IP infringement, if infringing code is included in derivative software products.

Software innovation is a powerful tool for economic development. IP plays a critical role in promoting research and development in this field and in protecting and rewarding creative software development, whether based on open source or proprietary models. The choice between open source and proprietary models of software is therefore not a decision antagonistic to IP, but rather a business decision, based on strategic and policy choices, to be made according to the circumstances of each case.

(d) Open source software may be the best-known model of collaborative creativity and innovation, but there are others. Organizations like the Public Library of Science have openly published scientific journals online and, in The Netherlands, scientists from Dutch universities have launched a site (DAREnet) on which all their scientific research is openly accessible in digital form.³⁴ The Biological Innovation for Open Society and Science Commons seeks to develop open source community platforms for scientific and technical research.³⁵ Britain's Wellcome Trust invested some £210 million in the Human Genome Project at the Sanger Institute³⁶, a collaborative project to sequence human genes, in order to ensure that genetic data would be available in the public domain³⁷. Open collaborative programs have also resulted in new technological developments, such as medical technologies for physically handicapped skiers.³⁸ A Californian newspaper, the Northwest Voice, launched a news site based on participatory or citizen journalism in which the content is freely available and almost exclusively contributed by the community (provided each piece meets the conditions of being original, non-libelous, accurate and suitable for family publication).³⁹ Wikipedia, the online free-content encyclopedia has some 1.5 million articles contributed by members of the community, and parts of it are available in 195 languages. Most of these open platforms achieve quality control by way of peer review. A leading online technology magazine, Slashdot,⁴⁰ employs a small staff to post short articles on which readers are invited to comment and elaborate. These examples share a form of production was described by Yochai Benkler as "commons-based peer production" and described "sharing as a modality of economic production".⁴¹

³³ Refer to links to resources on the legality of the General Public License (GPL). See <http://www.newtechusa.com/Viewpoints/GPLLegalityLinks.asp>.

³⁴ Refer to links to resources on the legality of the General Public License (GPL). See <http://www.newtechusa.com/Viewpoints/GPLLegalityLinks.asp>.

³⁵ David Cohn, "Open Source Biology Evolves" Wired News (January 17, 2005). See <http://www.wired.com/news/medtech/0,1286,66289,00.html>.

³⁶ Human Genome Project at the Sanger Institute. See <http://www.sanger.ac.uk/HGP/>.

³⁷ Refer to the Human Genome Project. See http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml.

³⁸ Michael Myser, "Open Source for the Slopes" Wired News (December 11, 2003). See <http://www.wired.com/news/medtech/0,1286,61541,00.html>.

³⁹ Daniel Terdiman, "Open Arms for Open-Source News" Wired News (July 22, 2004). See <http://www.wired.com/news/culture/0,1284,64285,00.html>.

⁴⁰ See <http://slashdot.org/>.

⁴¹ Yochai Benkler "Sharing Nicely: On shareable goods and the emergence of sharing as a modality of economic production". See <http://benkler.org/SharingNicely.html> See also

(e) The patent system has long had the role of delivering technological knowledge into the public domain - immediately delivering it into the domain of knowledge available for research, learning and experimentation, and later ensuring that is in the public domain of usable knowledge. Private rights (patents) are granted so as to promote the development of innovative goods for our society, while at the same time putting information on those developments at the public's disposal. A patent is an exclusive right granted for the protection of an invention, exclusive in the sense that it enables its owner to exclude others from commercially exploiting the patented invention for a limited period of time. In return, applicants have to fully disclose their invention in the patent application. The basic conditions of patentability have also been designed to safeguard the public interest: "novelty" ensures that matter already in the public domain cannot be patented; "inventive step" ensures that patents are not granted for trivial innovations; and "industrial applicability" (utility) guarantees that only inventions which are useful for society may be protected by patenting.

This role for the patent system was, for many, more a theoretical one than a practical one in the past, given the cost and difficulty of accessing patent information. That situation has completely transformed in recent years. Large quantities of searchable patent information, including patents after grant and, in many countries, also patent applications (generally after 18 months), are now available worldwide free of charge. These online sources include, for example, the databases of the European Patent Office⁴² the United States Patent and Trademark Office⁴³, the Japan Patent Office⁴⁴ or WIPO for published PCT applications⁴⁵. Initiatives such as Biological Innovation for Open Society (www.bios.net) have taken important steps towards promoting fully searchable patent information as part of attaining broader goals, such as democratized innovation, collaborative forms of innovation, charting "freedom to operate" innovation pathways, and leveraging patented technology to ensure open access to derivative innovations.

(f) The patent system effectively makes more than 40 million patent documents in all fields of technology (increasing by more than one million each year) accessible to the public, that might otherwise remain undisclosed. A substantial part of the most recent technical knowledge cannot be found elsewhere. Patent information can be used in different ways:

(i) Searching patent information may help avoid unnecessary expense in researching what is already known, identifying business partners, including licensing partners, and monitoring activities of competitors (in order to become aware of current technical trends) and finding technology which is already in the public domain. It can also be used to avoid infringing others' patents and to oppose the grant of patents where they conflict with one's own patents or business.

(ii) Where patents are being filed in sensitive policy areas, patent information allows the monitoring of developments in those areas, and ensuring that patents are granted in conformity with applicable legal principles. Such information is becoming more and

[Footnote continued from previous page]

http://www.smartmobs.com/archive/2005/03/07/yochai_benkler_.html. See also Azeem Azhar, "Beware the penguin" Prospect Magazine (January 30, 2004).

⁴² European Patent Office. See <http://www.european-patent-office.org/espacenet/info/access.htm>

⁴³ United States Patent and Trademark Office. See <http://www.uspto.gov/main/patents.htm>

⁴⁴ Japan Patent Office. See http://www.ipdl.jpo.go.jp/homepg_e.ipdl.

⁴⁵ See <http://www.wipo.int/pct/fr/gazette/>.

more readily accessible, through online access, thus serving the public interest as well as the interests of patent owners.

(g) In addition to the release of sizeable quantities of technical information, there are different mechanisms to ensure that inventions protected by patents translate into concrete uses and benefits for society. Some of those are summarized below.

(i) Maintenance fees are generally required to keep patents in force. A number of patent systems provide for an increasing fee towards the end of the 20-year patent term, thus reflecting a balance between the patentee's commercial interests and the interest of the public in having the technology released into the public domain. And indeed, existing statistics in a number of countries show that, on average, about half of the patents are abandoned after 10 to 11 years from the filing date, that is, after the half of the maximum possible patent term.

(ii) While patents grant exclusive rights to owners, it is clearly in their interests to place the invention on the market at a price that the market will absorb. Patentees have a range of options as to how to exploit their invention, including licensing or assignment of their patents. Public-private partnerships are also increasingly popular ways to employ patents in useful products. Another strategic choice may be to release patents into the public domain, as was done some months ago by IBM, with a view to enhance the development of new products, in particular, in the software area by giving free access to certain technologies to other developers of the technology in question.⁴⁶

(iii) The patent system itself also provides additional means to ensure that the system fulfills its objective of serving the public interest, i.e., that patents do not unduly block the development of new technologies or prevent access to urgently needed patented products. Such means include the possibility contained in many patent laws to use a patented invention for research purposes or the possibility for countries to grant compulsory licenses to ensure the required supply of needed goods, for example, in the health sector.

Questions to consider

- What is the “public domain”, how is it created and constituted, and what is its relevance to the Information Society?
- Is there a need to preserve, or promote, the public domain? Should the public domain be protected from, or by, the IP system?
- Do open access licenses, such as the Creative Commons License, offer a viable economic model for creators and authors to distribute their works?
- In a society that now enjoys unprecedented access to unprecedented amounts of information, is there a real problem in access to information?

⁴⁶ See Steve Lohr, “IBM to Give Free Access to 500 Patents” New York Times (January 11, 2005). See <http://www.nytimes.com/2005/01/11/technology/11soft.html?ex=1263186000&en=8862caf3587aebab&ei=5090&partner=rssuserland>.

- Are there classes of information for which open access models should be mandatory, and others where they should be excluded?
- Are patent rights (e.g., software patents) consistent with need for interoperability in the Information Society?
- Is the IP system incompatible with, or in support of, open source software principles?
- Are IP issues (both patent and copyright) a factor in a cost/benefit analysis of adopting open source or proprietary software?

Discussion synopsis

The 74 comments received on this theme reflected on the manner in which patents could best be used to fulfil their purpose, by granting limited exclusive rights to inventors in the wider public interest. Numerous commentators criticized corporate interests, and felt that the patent system was used by large companies so as to stifle competition and innovation - while another commentator considered that the discussion was too centered on an individual, rather than social, conception of authorship.

Some commentators noted that the free availability of information on the Internet, and the corresponding difficulty in controlling access and use of protected works, challenged current business models in the IP-related industries. By contrast, other commentators expressed concern at a “lock up” of information in the Information Society. Some highlighted the critical need for interoperability of systems in our global digital environment. Digital technologies had also challenged the very definition of “copy”, while digital rights management technologies were perceived as, at the same time, both fallible and overly effective in restricting access to IP-protected works.

“Now that we have technologies which could allow all ideas and information to spread freely, like fire, (cf Thomas Jefferson), thus bringing education within reach of all, the public interest is in the reduction and limitation of these monopolies and privileges.”

Posted by Shyamala, June 6, 2005.

There was general concern that government sponsored information, and some classes of scientific research, should be more openly available than others. One commentator made the important point that rather than “access” to information, the critical issue was the ability to “use” information. The needs of citizens of developing countries to access information, particularly works in the public domain, was noted as critical to narrowing the digital divide.

“Are there classes of information for which open access models should be mandatory, and others where they should be excluded?

- a) government data, laws and information sources
- b) governmental sponsored knowledge
- c) scientific research.

Exclude:

d) privacy rights: personal data.”

Posted by Andre, June 6, 2005.

Numerous commentators also expressed concern that the granting of patents should be more strictly controlled, with a clearly defined and applied definition of “obviousness” and a limiting of inventions capable of being patented (e.g., software), in order to prevent abuse of the system. Some commentators recommended shortening the duration of patent protection to the minimum necessary to recoup investment, in order to ensure a robust public domain.

“[T]hanks to the copyright term extension of 1998, the most astounding growth in the quantity of information in the world – fueled by the Internet – has not been accompanied by any significant growth in the public domain. Simply put, a healthy public domain is a pre-requisite for support of the creative arts.”

Posted by Dr. Gregory B. Newby, June 13, 2005.

The cost of obtaining patent protection was also described as an impediment to individuals who may seek to take advantage of the IP system. One commentator noted that, whereas IP law was sufficiently strong to protect inventors, improvements were needed to enable IP owners to enforce their rights more effectively. The IP system, it was stated, should give creators and innovators maximum choice – treating alternative business models equally, and leaving the choices of how to exercise their rights to the creators themselves.

“By granting innovators the choice of the distribution model to pursue, IP promotes the sharing of information, culture and technologies, and stimulates competition, for the benefit of users and society at large.”

Posted by Benoît Müller, Business Software Alliance, June 15, 2005.

“[T]he IP system, by defining the scope and length of protection sets the contours of the public domain. But it rests in the hands of the intellectual property owners themselves to determine whether they will seek and maintain protection for their creations or not. If they do not seek protection – or do not maintain it – then their creation falls into the public domain.”

Posted by Jonathon Zuck, ACT, June 15, 2005.

Theme 4 – What is the impact of copyright law, both at international and national levels, on education and research?

(a) The Information Society is characterized by an abundance of readily available information, covering billions of pages hosted on more than 52 million active domains.⁴⁷ A simple Google search for “intellectual property” delivers more than 75 million websites of potential relevance. Wikipedia, the collaborative open source online encyclopedia compiled by the site’s users, contains 536,246 ongoing articles covering 1,540,695 pages, making it the second-most visited reference site online.⁴⁸ Information in digital form is now available on demand more quickly, at lower cost, in more locations and to more consumers and users of educational material than ever before. Intellectual property (IP) rights are used by the authors of such information to control the ways that it is used, and this control raises the concern that IP rights should be exercised responsibly, so as not to overly restrict access to sources of knowledge for educational and research purposes, particularly in developing countries.

Internet dissemination affords access to material such as music, newspapers, computer programs, photos, graphic art and films. Where supported by an adequate system of copyright protection, creators of these materials are able to exploit and market them safely to consumers in countries around the world, sometimes even without foreign intermediaries, transportation facilities or physical manufacturing infrastructure which add to delivery costs. A vast amount of information is also available free of charge, contributing to a culture of expectation among some consumers that all information on the Internet should be freely accessible without restriction. However, it is a truism that not all information on the Internet is or should be free of charge. Production of quality information products requires an investment of resources, and the livelihood of authors may depend upon payment for its use. Copyright law gives authors the choice of how to structure their relationships with consumers – whether to reserve their rights against all uses, charge for some or all uses of content, or make their works available free of charge with or without restrictions upon future use.

In the educational field, the relatively lower entry thresholds and start-up costs involved in copyright-based business models for digital distribution can result in lower costs being passed on to users. In the 1980s, the Encyclopaedia Britannica cost between US\$1500 and \$2200. Today, it is published in paper form (32 volumes containing 65,000 articles, at a price of US\$ 1400), or online (120,000 articles, brief summaries of articles can be viewed for free, and the full text is available for US\$11.95 per month or US\$69.95 per year for individual subscribers).⁴⁹ Emerging business models for distribution of digital content have found ways to generate revenue other than charging consumers, such as through advertising and value-added services. Open access publishing⁵⁰, and the proliferation of free online academic journals, are examples of these trends in the context of education and research.⁵¹

⁴⁷ Source - Whois Source Detailed Domain Counts and Internet Statistics. See <http://www.whois.sc/internet-statistics/>.

⁴⁸ Enid Burns, “Wikipedia’s Popularity and Traffic Soar” ClickZ Network, May 10, 2005. See http://www.clickz.com/stats/sectors/traffic_patterns/article.php/3504061.

⁴⁹ Wikipedia “Encyclopaedia Britannica”. See http://en.wikipedia.org/wiki/Encyclop%E6dia_Britannica.

⁵⁰ The Wellcome Trust defines “open access publication” as follows:

“An open access publication is one that meets the following two conditions:

[Footnote continued on next page]

(b) Copyright-protected content can also be made available under certain exceptions and limitations to rights in national laws and, in limited circumstances under the Appendix to the Berne Convention, under compulsory licensing of certain rights. Since its inception, copyright law has recognized that exceptions to or limitations on the scope of rights granted to authors and beneficiaries of related rights are justified in particular cases. The Berne Convention contains provisions granting flexibility to Member States to limit the rights of authors in certain circumstances, including use of protected content for teaching purposes (article 10(2)). Likewise, the WIPO “Internet Treaties” - the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) - provide countries with flexibility to establish exceptions or limitations to rights in the digital environment. Countries may, in appropriate circumstances and subject to the three-step test contained in Berne, TRIPS and the WCT/WPPT,⁵² grant exceptions for uses deemed to be in the public interest, such as for libraries or non-profit educational and research purposes.

(c) The WIPO Internet Treaties also provide remedies for misuse of technological measures of protection and rights management information, aimed at ensuring (but not requiring) that rightholders can effectively use technology to protect their rights and to license their works online to users. The first obligation requires countries to provide adequate legal protection and effective remedies against the circumvention of technological measures, such as digital rights management (DRM) systems and encryption used by rightholders to protect their rights. The second obligation requires remedies against the deliberate alteration or deletion of electronic information which accompanies any protected material, and which identifies the work, right owners, and the terms and conditions for its use, among other things.

The set of rights and obligations contained in the WIPO Internet Treaties have added complexity to the traditional balancing of the interests of rightholders and users, including in the field of education. Striking the right balance between the legitimate interests of right owners and users of educational materials is not a straightforward process in the digital environment. Use of DRM is a good example: while the Internet Treaties do not *mandate* (require) that DRMs be used, beneficiaries of limitations and exceptions have raised concerns that application of DRMs might thwart certain legitimate uses of works. In their view, DRMs may hinder legitimate access to content in electronic form or hamper the conversion process of works into alternative formats or, in general, weaken the exercise of limitations and

[Footnote continued from previous page]

1. The author(s) and copyright holder(s) grant(s) to all users a free, irrevocable, worldwide, perpetual (for the lifetime of the applicable copyright) right of access to, and a licence to copy, use, distribute, perform and display the work publicly and to make and distribute derivative works in any digital medium for any reasonable purpose, subject to proper attribution of authorship², as well as the right to make small numbers of printed copies for their personal use.

2. A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in a suitable standard electronic format is deposited immediately upon initial publication in at least one online repository that is supported by an academic institution, scholarly society, government agency, or other well-established organisation that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving (for the biomedical sciences, PubMed Central is such a repository).” Wellcome Trust Position Statement in Support of Open Access Publishing. See http://www.wellcome.ac.uk/doc_WTD002766.html.

⁵¹ See, for example, the University of Houston Libraries list of free Scholarly Journals Distributed Via the World Wide Web, at <http://info.lib.uh.edu/wj/webjour.html>.

⁵² Exceptions must be confined to special cases that do not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightsholder.

exceptions to copyright, for example fair use. These concerns have been addressed in the WIPO studies and meetings that are listed below.

(d) The Appendix⁵³ to the Paris Act of the Berne Convention contains a special regime with respect to the translation, reproduction and broadcasting of works protected under the Convention that may be invoked by developing countries, notably for educational and research purposes. The Appendix allows developing countries, under certain conditions and circumstances, to limit the rights of translation, reproduction and broadcasting by submitting them to a system of special provisions on non-voluntary licenses. This possibility is subject to an obligation of notification, which means that the developing country that wishes to benefit from the provisions of the Appendix must notify it to the Director General of WIPO. Such notification automatically lapses on expiry of 10-year periods but can be renewed according to paragraph 2 of Article I of the Appendix.

Despite the advantage to developing countries in utilizing the system provided by the Berne Appendix, the number of countries under the current 10-year regime still remains modest. WIPO is actively engaged in raising awareness about the adherence to such special provisions as well as in its implementation in national legislation.

Questions to consider

- Are copyright-based business models for making educational and research materials available in digital form meeting the needs of the Information Society?
- re existing exceptions and limitations to copyright law being used in a way that sustains education and research?
- What role could the Appendix to the Paris Act of the Berne Convention play in ensuring access to educational texts?
- What differences exist among national laws implementing the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) with respect to technological protection measures and copyright protection and uses for education and research?
- On balance, is there predominantly a “lock-up”, or rather an increased availability, of information in the digital environment?

Discussion synopsis

The 23 comments received on this theme focused on the importance of responsible exercise of copyright, including utilization of digital rights management technologies, to ensure that sufficient access was enabled to promote education and research. Commentators noted that copyright provided the very foundation of systems of education and research, which develop through books and journals that owe their existence in part to

⁵³ Appendix to the Berne Convention – Special Provisions Regarding Developing Countries, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

the protection granted by the IP system. Free access to information, it was stated by one commentator, could not be interpreted as free of cost, in fairness to the work of authors and publishers and their entitlement to equitable remuneration for their work.

However, some commentators directed criticism at corporate interests – in this case, the publishing industry – and considered that the goals of profit and the public interest were difficult to reconcile. In some fields, such as scientific or government-funded research, there was support for open-access journals as one business model that was supportive of education and research. Similarly, the treatment of “orphan works” (works without identifiable or credible rightsholders) merited careful consideration, in favor of an enriched public domain.

“One thing that is not currently well recognised is the difference in status of rightsholders. We academics do not have the salaries to legally protect our copyrights. On the flip side, when we have a paper accepted for publication, it is usual for us to have to sign over all the rights to the publisher of the journal. If we work for a State institution, this means that our work, which was paid for by the public, is being given away to private corporations.”

Posted by Dr. Istvan Bekeley, June 6, 2005.

Some educational professionals commented on the side-effects of copyright law enforcement, which it was stated could inhibit the sharing of information by persons such as teachers who wished to distribute their works freely, but were frightened of the consequences. Concerns were expressed by some commentators that digital technologies in conjunction with anti-circumvention laws could be employed so as to upset the careful balance struck in copyright law by, for example, restricting access to works whose use is permitted by law as fair use.

“The default assumption is that maximum protection is to be applied if the author does not expressly say otherwise, while the reality is that almost all authors do not require any legal protection, only very few require some of it, and practically no one except traders in copyright (and not authors) require the full protection (and all they can get on top of it, such as disallowing fair use or failing to meet other legal obligations by using technology).”

Posted by Ofer Hadas, June 8, 2005.

“The ‘fair use’ concept in IP law – in its most flexible and generous sense – is crucial to the healthy existence of education and research (E&R). IP is embedded in cultural artefacts which are themselves the objects of study as well as the vehicles of cultural transmission in E&R.”

Posted by Jeff Clark, June 13, 2005.

While copyright law was the main focus of discussions, the role of patent law in research and development was also subject of some comment.

“[C]apture of academic research under patent protection creates substantial friction in the propagation of knowledge, as permission must be arranged explicitly in order to pursue research that depends on a derivation of patented results.”

Posted by IP Justice, June 14, 2005.

Other commentators considered that the balance between creators/producers and users could be sustained by more efficient administration of copyright licenses – such as through collective licensing systems. The discussion examined the tension that arises because, although digital rights management technologies are used to control access to IP works, such works are increasingly available, although unauthorized, in open formats and over P2P networks. The high cost of educational materials, particularly to those in developing countries, was also an issue of some concern.

While numerous commentators expressed the need to enhance access to copyright works for educational and research purposes, the point was also made that, without effective copyright protection, there would be little incentive to produce the literary works and the wealth of scholarly material would likely not exist.

“Copyright laws create opportunities for educators and researchers world-wide. Virtually all textbooks and scientific journals were created and continue to flourish both nationally and internationally because of an effective copyright system. Without the potential for recouping their investments few, if any, authors and publishers would produce educational books.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

Theme 5 – What are the rights and responsibilities of intellectual property rightsholders?

(a) Public policy, intellectual property (IP) standards and IP law have a complex interrelationship. IP laws and standards give effect to policy choices, and policy interests affect how laws are interpreted and applied. Within this complex picture, a wide array of rights, interests and obligations are at stake. How are these rights and responsibilities defined, and how do specific rights and responsibilities tie in with public policy interests?

IP law, standards and policy are developed both at the international level, including at WIPO (although not exclusively)⁵⁴, and at regional and national levels, in legislatures, by the judiciary and among industry representatives and civil society. Diverse stakeholders engage in such policy processes. They include: national governments (WIPO currently has 182 Member States, represented at WIPO meetings by government delegations), non-governmental organizations representing a variety of interest groups such as industry and civil society (some 193 non-governmental organizations currently enjoy permanent observer status at WIPO and many more are admitted to WIPO meetings on an ad-hoc basis⁵⁵), and individuals such as academics and legal professionals. At the global level, the question is how these diverse stakeholders can best work together to promote the overall interests of society when developing and implementing the IP system. Clearly, each of the stakeholders above have a role and share responsibility for IP policy development in the general public interest, with governments taking the lead in setting the legal framework and policy directions. Yet individual holders of IP rights also bear the responsibility for exercising their rights appropriately, one might even say sustainably. Legal constraints and safeguards apply against abuse of IP rights, and anticompetitive behavior; but apart from legal measures, there is a debate about what ethical considerations should apply. And are consumers and users of IP works also responsible for enjoying their interests in a way that sustains creativity and innovation (for example, by respecting IP rights)?

(b) In the field of copyright, at their current level of development, technical protection measures (TPMs) and digital rights management (DRM) systems are largely unable to discriminate between digital content that is protected by copyright, on the one hand, and content that is in the public domain on the other; nor can DRM systems generally process requests from users claiming they are eligible to free access to content under a limitation or exception to copyright in a given national law. Anti-circumvention laws, supplemented by

⁵⁴ Among other international organizations that consider issues relating to IP are: Secretariat of the Convention on Biological Diversity (CBD), Food and Agricultural Organization (FAO), International Labour Organisation (ILO), International Telecommunication Union (ITU), International Trade Centre (ITC), Office of the High Commissioner for Human Rights (OHCHR), Organisation for Economic Cooperation and Development (OECD), Permanent Forum on Indigenous Issues, United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Commission on International Trade Law (UNCITRAL), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Bank, World Health Organization (WHO), and World Trade Organization (WTO).

⁵⁵ For information about admission criteria for permanent observer status at WIPO, see <http://www.wipo.int/about-wipo/en/members/admission/index.html>. In addition, ad hoc observer status may be requested for a particular meeting by direct application to the director of the substantive division concerned.

End User License Agreements (EULAs), may in many cases preclude users from accessing digital content to which they may be entitled. Legislative attempts to ensure that TPMs/DRMs applied by rightsholders do not impede access to content that should be available without permission are in their infancy (Digital Millennium Copyright Act (DMCA), Section 1201(a)(1),⁵⁶ and European Commission Copyright Directive, Article 6.4⁵⁷).

(c) Maintaining a balance between protection of IP rights and the promotion of competition is a major goal in the Information Society. Historically, IP rights have functioned almost exclusively in the economic sphere. Apart from limitations on the duration of rights ensuring that IP subject matter at some point leaves the control of rightsholders and enters the public domain, preventing the use (abuse) of IP rights to restrict competition among creators, innovators and other potential holders of IP is not often advanced to justify the various exceptions and limitations to rights that allow use of protected subject matter without payment or permission. Indeed, the TRIPS Agreement provided that limitations and exceptions to both copyright (and patent) rights must be limited to cases that do not conflict unreasonably with economic exploitation opportunities.

While remedies for anti-competitive behavior are provided under antitrust or competition legislation in many countries, stakeholders have begun to suggest that the IP system itself should be more effective in promoting competition among creators and innovators, for example through broader IP exceptions (for example, the expansion of fair use under copyright) or, in certain cases greater resort to compulsory licensing.

(d) In the field of domain name dispute resolution, the Uniform Domain Name Dispute Resolution Policy (UDRP) and Rules were adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999, to address the problem of ‘cybersquatting’, which involves the pre-emptive registration of trademarks by third parties as domain names. The UDRP provides a procedure by which trademark holders can bring complaints against alleged cybersquatters, and, if certain conditions are met, seek to recover the domain names. The UDRP contains a number of checks and balances: it is limited to clear cases of abuse, accepts any valid right or legitimate interest a respondent may have in its domain name as a defense, and does not impose any fees on the respondent (unless he moves to have the case decided by a three-member panel). In addition, the UDRP allows Panels to address cases of ‘reverse domain name hijacking’, defined as “using the Policy in bad faith to attempt to deprive a registered domain name holder of a domain name” (UDRP Rules, paragraphs 1

⁵⁶ Digital Millennium Copyright Act of 1998, available at <http://www.copyright.gov/legislation/hr2281.pdf>. Refer also to the US Copyright Office Summary of the DMCA, see <http://www.copyright.gov/legislation/dmca.pdf>.

⁵⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, available at <http://europa.eu.int/eur-lex/lex/LexUriServMillennium Copyright Act of 1998>. See <http://www.copyright.gov/legislation/hr2281.pdf>. Refer also to the US Copyright Office Summary of the DMCA, at <http://www.copyright.gov/legislation/dmca.pdf>.

⁵⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, available at <http://LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

and 15(e))⁵⁸. Most importantly, the UDRP does not preclude either party's recourse to a national court of justice and facilitates such recourse for a losing respondent by requiring the complainant to submit to a "mutual jurisdiction" either at the place of the respondent or the registrar for that purpose. A decision ordering transfer or cancellation of the disputed domain name will only be implemented if the respondent has not initiated court litigation within 10 days following the notification of the decision (UDRP, paragraph 4(k); UDRP Rules, paragraph 1, 3(b)(xiii)).

(e) Finally, in the field of patents, the current debate about patents on innovations based on genetic resources has raised searching questions about the legal and equitable basis of the right to receive and exercise a patent. The argument has been made that when an inventor benefits from access to genetic resources or traditional knowledge (TK) in creating an invention, she should be held to an obligation to share these benefits with the custodians of the genetic resources or TK.⁵⁹ This has led to specific proposals to broaden the base of information that a patent applicant must disclose, with some calling for disclosure of genetic resources and TK used in an invention, as well as information on the legal conditions surrounding access to the resources and knowledge (such as whether access was in accord with equitable benefit-sharing regulations)⁶⁰. This leads in turn to a debate about the interplay between broader equitable principles and the right to apply for and obtain a patent.

Questions to consider

- What is the "public interest" in the Information Society?
- Does expansion of the scope of IP protection (e.g., duration of protection) pose a risk to the public interest?
- How can the public interest be protected from abuse of IP rights?
- Is there a duty to create, as well as a duty to share information?
- Do rightsholders owe any duty beyond compliance with the in-built checks and balances of the IP system (e.g., disclosure of patent information, limited terms for copyright, trademark and patent protection)?

⁵⁸ "To succeed on a claim of RDNH [reverse domain name hijacking], the Respondent must show that the Complainant knew of the Respondent's unassailable right or legitimate interest in the disputed domain name or the clear lack of bad faith registration and use, but nevertheless brought the Complaint in bad faith. *Sydney Opera House Trust v. Trilynx Pty Limited*, WIPO Case No. D2000-1224. The Panel must consider both "malicious intent and recklessness or knowing disregard that the Respondent possessed legitimate interests". *Gold Line International Inc v. Gold Line*, WIPO Case No. D2000-1151." See *BAA plc v. Bob Larkin*, WIPO Case No. D2004-0555. For an index of UDRP decisions taken by panelists of the WIPO Arbitration and Mediation Center dealing with reverse domain name hijackings, consult the WIPO UDRP Panel Decisions and Legal Index, at <http://arbiter.wipo.int/cgi-bin/domains/search/legalindex?lang=eng&cmd=search&legal=12880.12910>.

⁵⁹ WIPO Process Regarding an Invitation by the Convention on Biological Diversity on Access to Genetic Resources and Disclosure Requirements in IP Rights Applications, available at <http://www.wipo.int/tk/en/genetic/proposals/index.html>.

⁶⁰ See the WIPO Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge, available at http://www.wipo.int/tk/en/publications/technical_study.pdf.

- Do owners of certain types of IP rights – such as patents in pharmaceutical products or genetic resources – owe special duties to the public?
- How can or should rightsholders ensure access to such content on a multi-territorial basis?
- Can limitations and exceptions to IP rights serve as tools to promote competition? If so to what extent?
- If IP rights provide incentives to creativity and innovation, should competition law play a greater role in ensuring that rightsholders do not deny access to content on which further creativity and innovation might be based?

Discussion synopsis

The 24 comments received on this theme focused on the importance of the public interest and social benefit as justifications for the patent system. Commentators stated that the public interest could be jeopardized by over-long duration of patent protection, or limited public disclosure of patent information, that would together deplete the public domain. Some commentators directed criticism at large corporate interests, who it was felt profited from the patent system, without there being evidence that the patent system itself benefited society as a whole.

“The public interest in the information society is, simply, the ability to create and use patents, copyrights and trademarks without prohibitive (and artificially/legally inflated) costs and with the ability to advance such information available to the benefit of themselves (financially or otherwise) and the information society as a whole.”

Posted by Taran Rampersad, June 8, 2005.

Some commentators expressed concern at the granting of patents that were seemingly obvious or ubiquitous. For others, the cost of obtaining patent protection was considered to be too high for the individual inventor to benefit from the system.

The concept of a “duty” of rightsholders to exercise their IP rights with due regard to society, was also the subject of some discussion. Some commentators felt that the exceptions and limitations built into IP law, for example, as provided in the TRIPS Agreement, maintained a careful balance between private rights and the public interest.

“Rightsholders have a responsibility to ensure that legal - but unauthorized - uses of their IP are effectively protected, such as fair use. Rightsholders also have the responsibility to ensure that the works pass into the public domain unencumbered by technological or other restrictions. Rightsholders who are unwilling to give individuals the ability to exercise their lawful rights under the “copyright bargain” should not be allowed to benefit from the IP system.”

Posted by IP Justice, June 14, 2005.

“However, it is not the responsibility of creators to provide users of their works with free access nor to make it as easy as possible for them to pirate their creative expression without permission or payment. It is everyone’s hope that new business models developed to take advantage of broadband technologies will make it even easier and cheaper for users to have access to valuable protected works.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

“Similarly, exceptions and limitations in intellectual property laws themselves – many of which serve important functions to prevent abuses (such as compulsory licensing of patents) – should not be so widely or liberally used such that the exception overwhelms the general rule of exclusive intellectual property rights.”

Posted by Jonathan Zuck, ACT, June 15, 2005.

Theme 6 – Global partnerships to achieve the United Nations Millennium Goals: what role for intellectual property?

(a) The global Information Society, approaching one billion persons using the Internet, is still far from global in character. By 2005, more than 641 million people were online (13.9% of the world population), and 36% of these users were located in developing countries⁶¹. The fastest growth in Internet usage now takes place in Asia and, by September 2004, some 64.8% of the online population was non-English-speaking⁶². However, there remains a “digital divide” between technologically developed and developing countries. Only 1.5% of the African population is online, compared with 67.4% in North America⁶³.

(b) The G8’s Digital Opportunity Taskforce usefully described the concept as follows:

“This ‘digital divide’ is, in effect, a reflection of existing broader socio-economic inequalities and can be characterized by insufficient infrastructure, high cost of access, inappropriate or weak policy regimes, inefficiencies in the provision of telecommunication networks and services, lack of locally created content, and uneven ability to derive economic and social benefits from information-intensive activities.”⁶⁴

The WSIS process is addressing critical issues relating to access and affordability of information and communication technologies (ICTs), and the legal and policy infrastructure necessary to build capacity in all countries to engage fully in the information society. As the information society matures, so do our ideas on what the digital divide represents, and how best to address it. The Economist magazine recently described a backlash against the early dot-com generated belief that access to ICTs could, of itself, address the digital divide, stating that “the debate over the digital divide is founded on a myth – that plugging poor countries into the internet will help them to become rich rapidly”. The relevance of ICTs to fundamental development goals is questioned, and it suggests that the mobile phone will, among all technologies, have the greatest impact on development.⁶⁵

From an IP perspective, the divide can be found in the “content gap” marked by a lack of online material, including works protected by and managed through IP rights, originating from creators and innovators in developing countries. The consumption of unauthorized works in such countries also tends to be of digital content of foreign origin, again diminishing the prospect for local content and ingenuity to flourish online. Thomas Homer-Dixon

⁶¹ Sources - Internet World Stats: Usage and Population Statistics, see <http://www.internetworldstats.com/stats.htm>. UNCTAD Ecommerce and Development Report, 2004, see <http://www.unctad.org>.

⁶² Source - Global Reach, Global Internet Statistics (2004), see <http://www.greach.com/globstats/>.

⁶³ Source - Internet World Stats: Usage and Population Statistics, see <http://www.internetworldstats.com/stats.htm>.

⁶⁴ Report of the Digital Opportunity Task Force (DOT Force), “Digital Opportunities for All: Meeting the Challenge” (May 11, 2005) at p. 6.

⁶⁵ It states that an extra ten phones per hundred people in a typical developing country increases GDP growth by 0.6 %. The Economist, Technology Quarterly, “The Real Digital Divide” and “Behind the Digital Divide”, March 12-18, 2005, at pp. 11 and 19-20.

described the “Ingenuity Gap”⁶⁶ and the implications of disparity between a society’s need for ingenuity to solve its problems and satisfy its demands, and the supply of ideas capable of responding to those problems. This reflects the fact that, in the digital economy, wealth is increasingly measured in terms of intellectual rather than physical capital.

(c) The United Nations Millennium Development Goals⁶⁷ originated in the Millennium Declaration of 2000, by which 191 Member States pledged to meet the eight Goals by 2015. The goals were to: (1) eradicate extreme poverty and hunger, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/AIDS, malaria and other diseases, (7) ensure environmental sustainability and (8) develop a global partnership for development.

Clearly, these goals represent fundamental and pressing needs of humanity for survival – how can we consider the use of IP as a tool to meet those goals?

WIPO’s approach towards economic development is rooted in the United Nations Millennium Declaration and its Millennium Development Goals, aimed at reducing global poverty and creating an environment conducive to development. The most recent WIPO draft Program and Budget states that WIPO’s core development objective is: “To support developing and least developed countries in their initiatives to maximize the use and effectiveness of IP as a tool for economic, social and cultural development.”⁶⁸

(d) It is arguable to what extent we can quantify, with any exactitude, the contribution of IP to human development. Likewise it is difficult to quantify the contribution of copyright to social progress, education, and human enlightenment. These effects are intangible, and long-term. What we can do is to assess the contribution that is made by economic activities that operate on the basis of copyright protection in terms of value added, job creation and foreign trade. This approach is described in the *WIPO Guide on Measuring the Economic Contribution of the Copyright-Based Industries*⁶⁹ and tested in practice in a number of countries. It provides a good idea of the scale of the contribution of the creative industries, even if some may argue that the measurement is not exact. It also provides a valuable tool for assessing the importance of this sector and how one country may compare to its major competitors.

The contribution of copyright industries illustrates the contribution made by IP overall to national economies. In Singapore⁷⁰, in 2001, copyright-based industries accounted for 5.6% of the gross domestic product (GDP) and 5.7% of total employment. In Canada⁷¹, in 2002, such industries account for 5.38% of the GDP. In the United States⁷², in 2002, core copyright

⁶⁶ Thomas Homer-Dixon, “*The Ingenuity Gap: How Can We Solve the Problems of the Future?*” (Vintage, London, 2001).

⁶⁷ See <http://www.un.org/millenniumgoals/>.

⁶⁸ See http://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_8/wo_pbc_8_3.pdf.

⁶⁹ WIPO Guide on Measuring the Economic Contribution of the Copyright-Based Industries, see http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf.

⁷⁰ Source – Intellectual Property Office of Singapore, 2004, see <http://www.ipos.gov.sg/main/index.html>.

⁷¹ Source – The Economic Contribution of Copyright Industries to the Canadian Economy, prepared for Canadian Heritage by Wall Communications, Inc. (March 31, 2004), see http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/economic_contribution/economic_contr_e.pdf.

⁷² Source – International Intellectual Property Alliance (IIPA) economic study (2004), see http://www.iipa.com/pressreleases/2004_Oct7_Siwewk.pdf.

industries accounted for 6% while total copyright industries accounted for 12% of the GDP, and these industries employed between 4 and 8% of US workers respectively.

Another way of looking at the contribution of the creative/copyright-based/cultural industries is to assess the copyright assets on which they are based – for example, to attempt to value the reproduction and distribution rights in film catalogs, or publishing and mechanical rights in musical compositions. What are these rights worth in different markets? Valuation is typically undertaken in the context of audits before mergers. This market-oriented approach can shed more light on the way copyright operates in practice, and on what rights may be worth at a given moment. In the meantime, alternative techniques for measuring the contribution of the IP industries are being developed by academic institutions and companies.

There is obviously an important development dimension to the protection of IP rights, that will require each country to adopt an IP system that is customized to its development needs. However, it is undeniable that all countries possess a rich cultural and intellectual heritage that, appropriately managed, may provide a rich potential asset for economic, as well as cultural development.

Clearly, when developing countries choose to implement IP laws and systems for protecting and promoting IP, they strike a balance among important tradeoffs that vary depending upon the nature of the economy in question. Fink and Maskus have identified some of the costs of IP protection for developing countries, including: the implications if rights are predominantly foreign-owned including higher costs of goods such as pharmaceuticals and computer software, the loss of employment in copying industries and the costs of administering and enforcing IPRs. Clearly, differences between developing and industrialized countries (including innovative potential, education of work force, structure and funding of research and development, management of technological assets and institutional support such as collection agencies) mean that a “one-size fits all” approach to implementing IP protection is not recommended⁷³. The IP system has in-built flexibilities to ensure that countries can implement IP laws and practices that are nationally appropriate and optimal for development. IP functions as a tool that can be used to structure relationships between private rightsholders and the public, and it is the task of policy makers at national and international levels to ensure that this tool is used positively, to maximize the public good.

Questions to consider:

- How is IP relevant to sustainable development?
- How does IP contribute to development – economic, cultural or social? How can we measure or assess such contribution?
- Can IP play a role in narrowing the digital divide?

⁷³ Carsten Fink & Keith E. Maskus “*Intellectual Property and Development: Lessons from Recent Economic Research*” (The International Bank for Reconstruction and Development/ The World Bank, Washington, 2005), in summary at pp.3-13.

- If poverty, hunger, health, housing and literacy are arguably critical priorities for developing countries, what is the relevance of IP in the context of these development needs?
- As a specialized agency of the United Nations, WIPO is responsible for “promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development” – how can WIPO best fulfil its role in assisting countries to use the IP system to their advantage

Discussion synopsis

The 14 comments received on this theme reflected on the economic benefits, or costs, of the IP system for national development.

One commentator noted that IP, and specifically the patent system, could operate as a trade barrier in certain circumstances – while other commentators noted that effective IP laws and enforcement could curb infringement and promote trade and innovation in developing countries.

“To allow developing countries to be able to compete, it is necessary that international IP agreements limit what can be patentable and enforced. Unless IP is handled as other trade barriers, the monopolies created by patents will further differentiate the industrialized countries from the developing countries, and thus the first of the millennium goals is at risk.”

Posted by Klas Skogmar, Swedish Intellectual Property Enterprises, June 2, 2005.

“Let me disagree with my friend Klas from Sweden. We all remember that the Uruguay Round of the WTO introduced TRIPS. Importantly, IP was used to curb piracy and promote trade.”

Posted by Wilson Rading Outa, Centre for Intellectual Property – Nairobi, June 3, 2005.

Other commentators highlighted the contribution of the IP system (creativity and technological innovation) to economic development, by creating jobs, tax revenue, and encouraging foreign investment. It was noted that an IP system needed to be effective, if it was to deliver those benefits, because widespread infringement and imports of foreign counterfeit or infringing works into a country had a negative impact on the ability of local artists, composers, publishers and producers to compete. The result was said to be a reduction in the incentive to create, with consequently lower growth in cultural identity and reduced investment in industrially produced IP. Surveys were referenced in the discussion to provide evidence of the economic contribution of the copyright industries to development.

“Strong intellectual property rights protection furthers the United Nations Millennium Development Goals by providing developing nations with a solid foundation upon which to build their economic futures and move their economies up the value chain.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

Discussions also focused on the digital divide, and one commentator noted that the different sources of IP production (in the developed world) and consumption (in the developing world) was a cause for concern. While the IP system was recognized for contributing to a body of knowledge and creativity, accessibility to that body of information was seen as key.

“[T]he correlation between socio-economic status of people and internet access is really at issue, which is one interpretation of the phrase, ‘digital divide’. However, durations of copyrights and patents do not make for fair competition at present. The public domain has to be increased significantly to allow for developing countries which are not producing copyright and patented information such that they have a chance to ‘catch up’. ...

Patents, Copyrights and Trademarks contribute to development by building a body of knowledge that is intellectually usable for development – not locked away from the public domain for lifetimes.”

Posted by Taran, June 8, 2005.

“Strong copyright protection has been shown in numerous studies to be the key engine in the growth of many countries’ economies the world over. It also can stimulate greater diversity in cultural expression, and can foster technological and economic growth that can literally narrow the divide between economies now operating at vastly different levels of development.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

Finally, the discussions also addressed the role of creators, at the individual and collective levels, in furthering the benefits of IP for development.

“[I]t is the task of rightsholders to:

- work in favor of international agreements (in WIPO, UNESCO and WTO) in order to protect and improve cultural production and national heritage in developing countries,
- establish networks and partnerships among authors and performers worldwide and, as is taking place in FIA (International Federation of Actors), seeking funding for seminars and developing projects on subjects such as: intellectual property rights, union development, cultural exchange,
- support any initiative that can enhance access to modern technology,

- work for freedom of speech and artistic freedom.”

Posted by Mikael Waldorff, Danish Actors' Association, June 14, 2005.

Theme 7 – How is intellectual property policy made for the information society: and who makes it?

(a) Intellectual property (IP) law and policy is fundamentally a matter for individual countries to set, although the international layer of law and policy helps set the framework that individual countries work within. It's at the domestic level that IP rights are granted, exercised and enforced, and that any measures against the misuse of rights are applied. Users of IP-protected material need to get authorization from the rightsholder under national laws, or make use of limitations or exceptions under national laws. So the practical impact of the IP system is ultimately determined by what domestic laws and legal systems provide for. For domestic policymakers, understanding the extent of the international framework and the flexibilities it offers is important for optimizing policy outcomes. Regional frameworks also play an important role. At the international level, a range of legal and policy elements and processes help shape the policy space that domestic policymakers work within. A number of United Nations (UN) bodies and specialized agencies work on issues relevant to IP policymaking.⁷⁴

(b) Within the UN system, WIPO, is the specialized agency with specific responsibility for developing IP policy at the international level. The WIPO Secretariat (also called the International Bureau), is made up of some 940 staff from 95 different countries, and serves the needs of the 182 Member States⁷⁵ who sit on various permanent and *ad hoc* committees that meet regularly to negotiate and decide IP policy. The WSIS Declaration of Principles recognizes that *“building an inclusive Information Society requires new forms of solidarity, partnership and cooperation among governments and other stakeholders, i.e., the private sector, civil society and international organizations.”*⁷⁶ And that *“[f]acilitating meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society.”*⁷⁷

The Convention that established WIPO⁷⁸ provides that only States can be Members, however, WIPO has traditionally been open to non-State observers and is increasingly building collaborative relationships with representatives of the private sector and civil society.

⁷⁴ Among other international organizations that consider issues relating to IP are: Secretariat of the Convention on Biological Diversity (CBD), Food and Agricultural Organization (FAO), International Labour Organisation (ILO), International Telecommunication Union (ITU), International Trade Centre (ITC), Office of the High Commissioner for Human Rights (OHCHR), Organisation for Economic Cooperation and Development (OECD), Permanent Forum on Indigenous Issues, United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Commission on International Trade Law (UNCITRAL), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Bank, World Health Organization (WHO), and World Trade Organization (WTO).

⁷⁵ Refer to the List of Member States of WIPO, at <http://www.wipo.int/about-wipo/en/members/index.html>.

⁷⁶ WSIS Declaration of Principles, paragraph 17

⁷⁷ WSIS Declaration of Principles, paragraph 42.

⁷⁸ The Convention Establishing the World Intellectual Property Organization (WIPO), was signed at Stockholm on July 14, 1967, entered into force in 1970 and was amended in 1979, available at <http://www.wipo.int/treaties/en/convention/index.html>.

Permanent observer status at WIPO is currently held by 172 non-governmental organizations, 65 international intergovernmental organizations, and 10 national non-governmental organizations.⁷⁹

The WIPO Convention provides that the Organization's mission is: "to promote the protection of IP throughout the world through cooperation among states"⁸⁰ in order to encourage creativity and innovation. WIPO's main fields of activity are:

(i) *normsetting*. This takes place through traditional treaty making processes (WIPO administers 23 international treaties), but also new forms of international multistakeholder consultation, such as the two WIPO Internet Domain Name Processes, which were held online and through physical meetings that were reported online;

(ii) *providing international IP services to the private sector*. WIPO facilitates the worldwide protection of IP through its registration services for patents, trademarks and designs, and through the dispute resolution services offered by the WIPO Arbitration and Mediation Center; and

(iii) *enhancing access to the IP system*. WIPO assists its developing country members as well as small and medium sized enterprises to use IP as a tool for economic development.

(c) The Information Society poses particular challenges for IP policy-making. In the digital environment, IP concerns touch more people's lives, and involve more stakeholders from diverse backgrounds with differing needs and perspectives than ever before. The rapidity of technological developments, which have a real impact on substantive IP issues, risks leaving less technologically advanced stakeholders behind, thereby excluding them from meaningful participation in policy-making. To ensure the participation of all Member States in policy-making processes, WIPO funds the participation of developing country representatives at all major meetings, and organizes awareness-raising activities throughout the world to enable full and informed participation in developing IP policies.⁸¹

The speed with which information and communications technologies are developing challenges the traditional policy-making approach of organizations such as WIPO. International IP treaties have traditionally taken between 10 and 15 years to negotiate, and then various delays before they come into force. Even the fast-tracked WIPO Internet Treaties (WCT and WPPT) took six years to negotiate, and six years to come into force with the required 30 ratifications or accessions by States. WIPO is exploring alternative ways of addressing the need for new IP policy and solutions, through flexible "soft law" approaches such as joint recommendations,⁸² best practices,⁸³ model laws and administrative dispute

⁷⁹ Refer to the list of WIPO Observers, at <http://www.wipo.int/about-wipo/en/members/admission/pdf/observers.pdf>, and criteria for admission as a permanent observer at WIPO, at <http://www.wipo.int/about-wipo/en/members/admission/index.html>. In addition, *ad hoc* observer status may be requested for a particular meeting by direct application to the director of the substantive division concerned.

⁸⁰ Article 3.

⁸¹ See list of WIPO meetings, conferences and seminars, at <http://www.wipo.int/meetings/en/>.

⁸² Refer to WIPO Joint Recommendations for the progressive development of IP law, at <http://www.wipo.int/academy/en/>.

resolution procedures,⁸⁴ that are better adapted to finding solutions for IP-related needs in the Information Society. WIPO is also working on streamlining the decision-making processes by Member States and the working methods and procedures of the Organization to make them more transparent, cost-effective, customer-focused, and results-oriented.

WIPO's challenge is to remain effective in encouraging creativity and innovation, to respond to the legitimate and changing needs and expectations of users, and to retain flexibility to accommodate both rapid technological developments and diverse national policy objectives in IP policy development. However, these concerns and challenges are not entirely new to the Information Society. The source of modern Anglo-American patent law is found in the English Statute of Monopolies of 1623, which provided true inventors with up to 14 years of exclusive rights over their inventions provided that "they be not contrary to law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient."⁸⁵ The process of balancing private rights and the public good is integral to the ongoing development of IP policy at both national and international levels, and is the focus of WIPO's work today.

(d) The WSIS discussions focus on the critical importance of "capacity building" to ensure that all stakeholders can participate meaningfully in the development of policy for the Information Society. While capacity building remains undefined, the WSIS Declaration of Principles emphasizes the need for a people-centered, inclusive society, empowering young people and women in the decision-making process, and the engagement of all stakeholders in building capacity. The Declaration states, at paragraph 29, that "*each person should have the opportunity to acquire the necessary skills and knowledge in order to understand, participate actively in, and benefit fully from, the Information Society and the knowledge economy.*"

The WSIS Declaration also describes the need to build national capability in research and development (R&D) of ICTs.⁸⁶ Patent and copyright protection mechanisms provide a useful tool for promoting R&D within developed and developing countries, and help to establish the "enabling environment" recognized in the WSIS Declaration as essential to the Information Society.⁸⁷

India, for example, is a country that is successfully fostering its economic development, and involvement in ICT policy-making, by focusing on high technology, investing in human resources through training and technical skills development, and implementing national

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⁸³ See, for example, the WIPO Country Code Top Level Domain (ccTLD) Best Practices for the Resolution and Prevention of Intellectual Property Disputes, developed by the WIPO Arbitration and Mediation Center, available at <http://arbiter.wipo.int/domains/cctld/bestpractices/index.html>.

⁸⁴ The first WIPO Internet Domain Name Process resulted in recommendations to the Internet Corporation for Assigned Names and Numbers (ICANN) that formed the basis of ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) and Rules, which went into effect December 1, 1999. The UDRP is an administrative dispute resolution procedure for resolving conflicts between trademarks and domain names. The WIPO Arbitration and Mediation Center is one provider accredited by ICANN to administer dispute resolution services under the UDRP, and the Center's 383 international expert panelists have decided more than 7,250 UDRP cases by May 2005. See <http://arbiter.wipo.int/domains/index.html>.

⁸⁵ English Statute of Monopolies of 1623, available at http://ipmall.info/hosted_resources/lipa/patents/English_Statute1623.pdf.

⁸⁶ WSIS Declaration of Principles, at paragraph 33.

⁸⁷ WSIS Declaration of Principles, at paragraph 38.

policies and laws that establish IP protection for its domestic and international endeavors. The Digital Opportunity Initiative Report states that “India’s well-established framework for protecting intellectual property rights has been an important inducement to business investment.”⁸⁸ The Indian software and services export industry reported revenues of US\$7.2 billion in 2002-3, a growth of 18.4% over the previous year, and growth has been projected at 25% over the next several years.⁸⁹ It is also reported that, in 2003-2004, total software and service revenue offshored from the US to India was \$12.2 billion, an increase of 28% over the \$9.54 billion recorded the previous year. Similar economic development linked to R&D, skills training and capacity building in ICTs is occurring in other developing countries as diverse as Malaysia, Bangladesh, Costa Rica and Estonia, which share a focus on leveraging human resources and knowledge capital as assets for economic and social development.⁹⁰ The protections and incentives offered by the IP system play an important strategic role in providing the enabling environment, and the confidence and security needed to further this process.

(e) Capacity building involves the empowerment of holders of knowledge and intellectual capital to make informed choices as to how to use or manage that capital, consistent with their values. The WSIS Declaration of Principles acknowledges the critical need for education, including distance learning, as an essential foundation for capacity building.⁹¹ To help raise awareness about IP, WIPO holds a full calendar of conferences, seminars and meetings at its Headquarters in Geneva and in many locations around the world, and details of these meetings are publicly available on the WIPO website.⁹²

The WIPO Worldwide Academy, founded in 1998, provides teaching, training and research in IP.⁹³ Its programs cater to diverse target audiences, including inventors and creators, business managers and IP professionals, policy makers and government officials of IP institutions, diplomats and representatives, students and teachers of IP and civil society. Its five core programs are: professional training, distance learning, policy development, teaching and research. The distance learning program, for example, has had 30,000 participants in 170 countries since its inception in 1999.⁹⁴ The Academy also aims to promote international

⁸⁸ Accenture, Markle and the United Nations Development Programme (UNDP) “*Creating a Development Dynamic: Final Report of the Digital Opportunity Initiative*” (July 2001), at Appendix 3, Case 4-India, available at <http://www.opt-init.org/framework/pages/contents.html>.

⁸⁹ Source – National Association of Software and Service Companies (Nasscom), at http://www.nasscom.org/artdisplay.asp?Art_id=1924; and see Subir Roy, “Boom Ahead for Indian Software” Rediff.com (September 8, 2004), at <http://inhome.rediff.com/money/2004/sep/08spec.htm>.

⁹⁰ See WIPO “Intellectual Property on the Internet: A Survey of Issues” at para.393 to 397, and generally in Chapter V, available at

http://www.wipo.int/copyright/e-commerce/en/ip_survey/ip_survey.html.

⁹¹ WSIS Declaration of Principles, at paragraph 29-31.

⁹² Refer to list of WIPO Conferences, Meetings and Seminars, at <http://www.wipo.int/meetings/en/>.

⁹³ Refer to the website of the WIPO Worldwide Academy, at <http://www.wipo.int/academy/en/>.

⁹⁴ The WIPO Worldwide Academy’s distance learning courses are Internet-based, but content is also available on CD-ROM for those unable to study online. An introductory, an intermediate and two advanced courses on specialized IP subjects are offered through an online platform that also favors learning exchanges between students. Three more advanced courses are being released in 2005. In the case of the advanced courses, students can actively interact with tutors throughout their online studies. Tutors are selected amongst outstanding academics in universities worldwide. While the introductory and the intermediate courses are offered entirely free-of-charge, participation in the advanced courses is subject to the payment of a fee, which is significantly reduced for participants from developing countries. Government officials from all countries are exempted from paying any registration fee. Increasingly, online courses on IP are being integrated in the official curricula of academic institutions, both at graduate

cooperation towards capacity building by enhancing IP skills and awareness through global networking with stakeholders and partners.

WIPO's approach is to educate people about the choices offered by the IP system as a tool, rather than to impose any one model of knowledge management. As to IP rightsholders, WIPO's role is to inform them about their choices and the economic and policy issues raised by those choices, including the balance that the IP system must maintain between private rights and the public good. This balancing process is constant, and new issues continue to emerge that require consideration and in some cases, redress.

(f) The field of traditional knowledge (TK), and the protection of the cultural heritage of indigenous communities, is one such important issue under consideration at WIPO (see Theme 8). The IP system, as a tool, is capable of being used in ways that may or may not be beneficial to indigenous peoples' interests. This was illustrated by a case involving Mountford, an anthropologist who, in 1940, undertook an expedition to the Northern Territory in Australia. He recorded information revealed to him by the local Aboriginal people, including tribal sites and religious and culturally significant objects, some of which he included in a book "Nomads of the Australian Desert", which was published in 1976. The plaintiff in the case of *Foster v. Mountford*⁹⁵, on behalf of the Aboriginal communities involved, won an action to restrain publication of Mountford's book on the basis of the common law doctrine of confidential information, although they were unable to bring an action for copyright infringement because the book had not been written by them and they had not acquired copyright in it. The Court held that the publication of the book could disclose information of deep religious and cultural significance to the Aborigines that had been supplied to Mountford in confidence, and its publication would amount to a breach of confidence.

(g) Another area where careful balancing has been required has been in the patent field, where respect for TK appeared to be in conflict with the IP system. Concern has been expressed that illegitimate patents may be granted over TK subject matter, where this TK has been acquired from traditional communities. A patent that is not based on a genuine invention is invalid. But the informal nature of TK systems, and their localized geographical quality, can make it particularly difficult for patent examiners to learn about relevant TK when assessing the validity of a patent application. This has resulted in a series of initiatives, ranging from the practical to the legal, to increase the likelihood that relevant TK will be taken into account during the patent examination process. The underlying concern has been that the patent system, rather than recognizing and rewarding genuine new inventions, may serve to misappropriate traditional communities' existing knowledge - which would be an outcome at odds with the core principles of the system. Significant changes are already underway in the international patent system to deal with this concern (including enhancing the

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and post-graduate levels. The introductory and intermediate courses are offered in multiple languages (Arabic, Chinese, English, French, Portuguese, Russian and Spanish), and the advanced course on Copyright and Related Rights is available in English, French and Spanish. Other advanced courses will be translated upon request.

⁹⁵ *Foster v Mountford* (1976) 29 FLR 233. See a discussion in the WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore (WIPO Publication No. 785), at p.55, available at http://www.wipo.int/tk/en/publications/785e_tce_background.pdf. For further background, refer to Kamal Puri, "Protection of Traditional Culture and Folklore," at <http://www.folklife.si.edu/resources/Unesco/puri.htm>.

range of TK that patent examiners consider in the course of checking the validity of patent applications), and further changes have been implemented in national laws and are proposed at the international level (such as a specific requirement to disclose any TK or genetic resources used in a claimed invention).

(h) The international IP framework includes a number of standards and agreements beyond the treaty system administered by WIPO. For instance, perhaps the most wide-ranging multilateral agreement on IP, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement)⁹⁶ is a key international legal instrument that sets standards for IP systems. While this includes substance from a number of WIPO treaties, it is a distinct legal instrument administered by the WTO. The TRIPS Council of the WTO is engaged on a number of highly topical policy and legal debates on IP issues.

(i) Many pressing issues involve consideration from a wide range of policy perspectives, both within and beyond the specific realm of IP policymaking. This requires close policy coordination among international organizations. It also means that policymakers have taken up and reviewed existing international norms from the point of view of broader public policy interests. The WTO Doha Declaration on TRIPS and Public Health⁹⁷ was an important statement on a critical policy issue of today - the role of IP in relation to public health and access to medicines. The World Health Organization has established a Commission on Intellectual Property Rights, Innovation and Public Health,⁹⁸ which is considering a range of issues relating to IP, and the development of and access to treatments for neglected diseases. This is currently exploring a wide range of issues within and beyond the traditional scope of IP law and policy.

Questions to Consider

- What does “capacity building” mean in the Information Society?
- How should policy-making function in the Information Society? What is the role of governments, international organizations and individuals in this process?
- Is there meaningful community participation at international level in policy making and capacity building for the Information Society?
- Does the IP system support, or hinder, capacity building in local education and skills training?

⁹⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

⁹⁷ Declaration on the TRIPS Agreement and Public Health, adopted on November 14, 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

⁹⁸ The World Health Organization (WHO) Commission on Intellectual Property Rights, Innovation and Public Health was established by the World Health Assembly in 2003:

“...to collect data and proposals from the different actors involved and produce an analysis of intellectual property rights, innovation, and public health, including the question of appropriate funding and incentive mechanisms for the creation of new medicines and other products against diseases that disproportionately affect developing countries...”

See <http://www.who.int/intellectualproperty/en/>.

- Does international harmonization of the IP system support the Information Society, or hinder its development?

Discussion synopsis

The 21 comments received on this theme expressed a general desire within the community for significant involvement in discussions and policy development for the Information Society. Some commentators expressed a need to have more confidence that policy makers are listening and responding to their concerns. Some individual commentators described their frustration at the sense of being excluded from decision making, by governments and powerful corporate interests at the national level, and Western interests at the international level. There was a call, in particular, for greater representation of consumers, independent creators and the general public, in IP policy development.

While some commentators expressed the desire for more real communication between policymakers and community interest groups, others felt that there already exists meaningful community participation in IP policy making for the Information Society.

“As in so many matters, policy is set by government delegations whose opinions are influenced mostly by the needs of businesses. Only the IP businesses have both the resources and the motivation to seek specific laws and regulations. For information policy, the resulting unbalanced view is specially unfortunate for national and international strategy, since true development and true maximization of intellectual capital would be better achieved by attending more carefully to the needs of education and the ordinary citizen, and indeed to the primary creators (whose interests are not always the same as their distributors). We cannot do without businesses in the world of intellectual property: they have a vital role. But governments should remember that information in a civilised society is like the air we breathe, and its circulation should not be unduly restricted. A more holistic view of intellectual property (that is, a view embracing businesses and elements of society without a direct commercial interest in it) would actually be more beneficial for businesses, and creators, as a whole. A true information society would be in accord with the whole of society’s needs.”

Posted by Tony Bainton, June 13, 2005.

Some commentators asked questions that revealed the need for more awareness raising by international organizations such as WIPO, to develop greater understanding of the ways in which policy is developed at the international level. For example, some statements revealed the need for clarification of the role of the WIPO Secretariat, vis à vis the Member States of the Organization, their Delegates and the role each entity plays in taking decisions on new laws, policies and programs.

While, in the context of WIPO’s work, the issue is of community involvement at the international level, the discussions also focused on the need for greater involvement at the national level, with some examples of relatively successful community participation.

“At the national level, governments must bear in mind the necessity of establishing dialogue between rights holders, institutions (educational as well as others, like public libraries) and end users in order to create a fair balance between the interests involved. In Denmark, such dialogue has been a successful tool as to giving the public easy and widespread access to protected material. At the international level, the importance of WIPO and UNESCO are most significant, even though severe obstacles of clashing interests are hampering the work of the organizations.”

Posted by Mikael Waldorff, Secretary General, Danish Actors’ Association, June 14, 2005.

“We should assume that when diplomats negotiate on behalf of their governments, they should have consulted with individuals and think tanks for the necessary inputs & not simply a government affair. In the same sense, WIPO has granted observer status to various NGO’s meaning that the civil society is not left out of such proceedings.”

Posted by Wilson Rading Outa, June 15, 2005.

The discussions also described various views on the meaning of “capacity building”.

“Capacity building means (1) the ability to build/create and (2) the protection of the public domain from which derived works can be done, tailored to the needs of specific issues.”

Posted by Taran Rampersand, June 8, 2005.

“Capacity building means the involvement of stakeholders when it comes to policy formulation.”

Posted by Wilson Rading Outa, June 15, 2005.

The view was also expressed that capacity building is enhanced by the cultural and economic empowerment offered by effective IP systems.

“The international intellectual property treaties help facilitate the WSIS goal of ensuring that no country is “excluded from the benefits the Information Society offers.” The spread of intellectual property rights protection helps developing countries to grow economically and culturally. This growth enables their citizens to participate fully in the policy-making processes that steer the Information Society. In this way, the development that accompanies effective intellectual property protection furthers the “capacity building” that the WSIS discussions focused on.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

One commentator took the view that IP policy-making is currently dominated by the traditional business models of the IP industry, to the detriment of emerging models of production and use of IP. Another commentator, speaking in the context of the software industry, described the holistic economic strategies that governments should ideally adopt, and the need to remain open to both existing and emerging business models.

Theme 8 - How can cultural and intellectual diversity of traditional communities be respected in the information society ?

(a) Indigenous, local and other cultural communities justly cherish traditional knowledge (TK) and their traditional cultural expressions (TCEs) as part of their very cultural identities. Maintaining the distinct knowledge systems that give rise to TK, and sustaining the cultural life that finds expression in TCEs, can also be vital for their future well-being and sustainable development and for their intellectual and cultural vitality. For many communities, their TK and TCEs form part of an holistic world-view, and are inseparable from their very ways of life and their cultural values, spiritual beliefs and customary legal systems. This means that it is vital to sustain not merely the knowledge but the social and physical environment of which it forms an integral part. TK also has a strong practical component, since it is often developed in part as an intellectual response to the necessities of life: this means that it can be of direct and indirect benefit to society more broadly. There are many examples of important technologies being derived directly from TK. Similarly, the cultures and cultural expressions of Indigenous, traditional and other cultural communities have immeasurably enriched the cultural life of others worldwide, and have also been drawn on in many productions that have been commercially successful.

When others seek to benefit from TK and TCEs, especially for commercial advantage, this can lead to concerns that the knowledge or cultural expressions have been misappropriated and that the role and contribution of the customary holders of TK and TCEs have not been recognized and respected. One of the challenges posed by the modern age is to find ways of strengthening and nurturing the roots of TK and TCEs, even in times of social dislocation and change, so that their fruits can be enjoyed by future generations, and so that traditional communities can continue to thrive and develop in ways consistent with their own values and interests. At the same time, traditional holders stress that their TK and TCEs should not be used by others inappropriately, inequitably and without their consent and arrangements for fair sharing of the benefits; more generally, it leads to calls for greater respect and recognition for the values, contributions and concerns of Indigenous and other local and cultural communities.

So, profound hope for the future is mingled with deep apprehension. Indigenous peoples, local communities, and other cultural communities, often look upon their distinctive knowledge systems, their cultural heritage, and the ways of life and world view they represent, with deep pride and as an essential part of their continuing identity. They understandably look to others to show appropriate respect and acknowledgement for their distinctive intellectual traditions, for their cultural expressions, and for the values and beliefs that they embody. TK and TCEs are often maintained, shared and passed on between generations within the one community according to customary law and practices; these legal and cultural norms are in turn integral to the way of life and distinctive cultural identity of the community. They call for others to respect these customary norms. And these communities are not static or antique: they are living societies that continue to innovate and create. Traditional knowledge systems respond to changing needs and demands, and traditional creativity and cultural expression continue to evolve and to respond to diverse cultural and social influences.

(b) Beyond these traditional communities, there is growing interest in their traditional knowledge and their cultural expressions – and this interest can take on a commercial or industrial character, such as when TK forms the basis of commercial products, or TCEs are used in design, in music or in directly commercial ways such as trademarks. From one perspective, at least some of this ‘interest’ may be considered beneficial and even valuable, it is an integral part of the way people learn from one another: research and development builds on the knowledge of others, and cultural expression responds to influences of others, the more diverse the better. But this can be exactly where apprehension and concern can arise: what might be seen by a user as a useful research input, an exotic cultural influence, or a fashionable ethnic reference, may be seen by the original community as an unattributed, illicit or inequitable appropriation of their knowledge, their cultural expressions, even their very identity.

This kind of “use,” “borrowing” or “influence” of TK and TCEs may be seen in legal terms as various forms of misappropriation, and may be an infringement of specific legal rights, including intellectual property (IP) rights (see, for example, the cases discussed by Indigenous lawyer Terri Janke in “Minding Culture – Case Studies on Intellectual Property and Traditional Expressions,” listed in the background resources below). But the concerns run deeper than simple legal infringement, and can be expressed in terms of cultural survival. The Tulalip Tribes have stressed that misuse of TK can “cause severe physical or spiritual harm to the individual caretakers of the knowledge or their entire tribe from their failure to ensure that the Creator’s gifts were properly used, even if misuse was used by others outside of the tribe, or by tribal members who were outside of the control of customary authority. For this reason ... misappropriation and misuse was not simply a violation of “moral rights” leading to a collective offense, but a matter of cultural survival for many indigenous peoples.”⁹⁹

This concern is especially acute when it concerns material of sacred or spiritual significance, where even the publication of the material, or its inappropriate use, can create severe offence. Sacred-secret materials of Indigenous peoples have been protected by the law concerning breach of confidence. Already discussed above is the case of *Foster v Mountford*, concerning the book “Nomads of the Australian Desert” which contained information that was imparted in confidence to the anthropologist Dr Mountford. The question of cultural survival came before the court, when members of the Pitjantjatjara Council successfully argued that the “revelation of the secrets contained in the book to their women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community”. This case led to an injunction, on the basis of breach of confidence, to restrain publication of the book.

It’s because of this kind of case that the increasing, indeed world-wide, interest in the intellectual and cultural heritage, the traditional knowhow, and cultural expressions of Indigenous and other traditional communities can be a two-edged sword – never before has such a diverse array of traditional knowledge and cultural expressions been so widely dispersed and readily accessible, but this accentuates apprehension and concern that this will simply facilitate unauthorized, offensive, or unattributed use. There are many instances of TK holders choosing not to impart their knowledge to outsiders, because of a lack of confidence that this knowledge will be used appropriately and respectfully, that commercial and

⁹⁹ Statement of the representative of the Tulalip Tribes of Washington, document WIPO/GRTKF/IC/5/15.

industrial benefits will be reaped from the TK without equitable sharing of benefits. While our present discussion is not directly addressing the issue of genetic resources, TK and genetic resources are often closely related to one another, as part of a community's collective heritage and customary practices. Therefore similar concerns arise about genetic resources being used and appropriated, and benefits reaped from them, contrary to law and equitable practices; this can lead to unwillingness to grant access to such resources, for lack of confidence that they will be used fairly. For example, as noted above, a range of proposals have been tabled to deal with this concern in the international patent system.

So the challenge for the policymaker is how to promote socially beneficial, legitimate sharing and exchange of TK and TCEs, while also recognizing the rights, interests and concerns of the communities for which they form part of their very identity, and suppressing cases of misappropriation and illegitimate use. How to tackle this challenge at the international level is an area of active work and debate within WIPO, as in a number of other international forums and processes, with which WIPO works closely.

Traditional knowledge: what are the issues?

(c) The wider significance of TK means that it arises in international discussions on a host of issues – food and agriculture; biological diversity, desertification and the environment; human rights, especially the rights of indigenous peoples; cultural diversity; and trade and economic development. TK has also moved towards the center of policy debate about IP. This leads to some challenging questions. Is the IP system compatible with the values and interests of traditional communities – or does it privilege individual rights over the collective interests of the community? Can IP bolster the cultural identity of indigenous and local communities, and give them greater say in the management and use of their TK? Has the IP system been used to misappropriate TK, failing to protect the interests of indigenous and local communities? What can be done – legally, practically – to ensure that the IP system functions better to serve the interests of traditional communities? What forms of respect and recognition of TK would deal with concerns about TK and give communities the tools they need to safeguard their interests?

With these questions in mind, WIPO started to work on TK in 1998. The first step was to listen directly to TK holders, learning of the needs and expectations of some 3,000 representatives of TK-holding communities in sixty locations around the world. Their insights and perspectives still guide WIPO's work. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC") was established in 2001 as an international policy forum. WIPO's work therefore ranges from the international dimension of TK and cooperation with other international agencies, to capacity building and the pooling of practical experience in this complex area.

What is traditional knowledge? Can the astonishing diversity of indigenous and local intellectual traditions and cultural heritage be bundled together into one single definition, without losing the diversity that is its lifeblood? Is it feasible or even desirable to find one form of international protection for TK? For that matter, what is it to "protect" TK: what is to be protected, and what is it to be protected from, for what purpose, and for whose benefit? These questions, important in themselves, lead to some deeper questions. What is valuable and distinctive about TK: what makes it "traditional"? How can those qualities gain greater recognition and legal protection beyond the traditional circle, indeed worldwide, but in a way that remains appropriate, useful and beneficial for the communities that maintain TK systems?

No single definition would fully do justice to the diverse forms of knowledge that are held by traditional communities; and no form of legal protection system can replace the complex social and legal systems that sustain TK within the original communities. One form of protection, but one form only, suppresses unauthorized or inappropriate use of TK by third parties beyond the traditional circle. This is the IP form of protection – recognition of the need to prevent third parties from misappropriating or misusing TK in certain ways. This has been achieved in many different ways in national laws – not necessarily by creating exclusive property rights in TK, although this approach has been taken in some cases. A common thread has been the need to refocus existing legal laws or to create new ones to clarify and strengthen the legal constraints against various forms of misuse or misappropriation of TK. There are strong calls to address this at the international level, including through the development of binding international law as an urgent priority; others have suggested that while international work and cooperation is essential, a fresh treaty may be premature.

Traditional cultural expressions: what are the issues?

(d) A closely related process and debate concerns the misuse and misappropriation of traditional cultural expressions (TCEs) (or “expressions of folklore”). Indigenous and other traditional and cultural communities argue that traditional creativity and cultural expressions require greater protection in relation to IP. They cite a wide array of examples: indigenous art copied onto carpets, T-shirts and greeting cards; traditional music fused with techno-house dance rhythms to produce best-selling “world music” albums; hand-woven carpets and handicrafts copied and sold as “authentic”; the process for making a traditional musical instrument patented; indigenous words and names trademarked and used commercially.

WIPO first began examining the relationship between IP and the protection, promotion and preservation of TCEs/folklore several decades ago. It has an active program of policy development, legislative assistance and capacity building in this area, in close coordination with work on TK. The relationship between TCEs and IP raises complex and challenging issues. Expressions of traditional cultures/folklore identify and reflect the values, traditions and beliefs of indigenous and other communities. Traditional cultural expressions, often the product of inter-generational and fluid social and communal creative processes, reflect and identify a community’s history, cultural and social identity, and values. While lying at the heart of a community’s identity, cultural heritage is also “living” – it is constantly recreated as traditional artists and practitioners bring fresh perspectives to their work. Tradition is not only about imitation and reproduction; it is also about innovation and creation within the traditional framework. Therefore, traditional creativity is marked by a dynamic interplay between collective and individual creativity. From an IP perspective, in this dynamic and creative context it is often difficult to know what constitutes independent creation. Yet, under current copyright law, a contemporary adaptation or arrangement of old and pre-existing traditional materials can often be sufficiently original to qualify as a protected copyright work.

The challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities, require cultural policies to maintain a balance between the protection and preservation of cultural expressions (traditional or otherwise) and the free exchange of cultural experiences. A further challenge is to balance a wish to preserve traditional cultures with a desire to stimulate tradition-based creativity as a contribution to sustainable economic development. Addressing these challenges provokes some deeper questions. To whom, if anyone, does a nation’s cultural heritage “belong”? What is the

relationship between IP protection and the promotion of cultural diversity? Which IP policies best serve a creative and multicultural “public domain”? How, if at all, should current IP systems recognize customary laws and protocols? When is ‘borrowing’ from a traditional culture legitimate inspiration and when is it inappropriate adaptation or copying? Is there a relationship between the “preservation” of cultural heritage and the IP “protection” of TCEs, and, if so, what is it?

While the artistic heritage of a community plays significant social, spiritual and cultural roles, it can also, as a source of creativity and innovation, play a role in economic development. The use of traditional cultural materials as a source of contemporary creativity can contribute towards the economic development of traditional communities through the establishment of community enterprises, local job creation, skills development, appropriate tourism, and foreign earnings from community products. Here IP can play a role. By providing legal protection for tradition-based creativity, IP protection can enable communities and their members to commercialize their tradition-based creations, should they wish to do so, and/or to exclude free-riding competitors. The marketing of artisanal products also represents a way for communities to show and strengthen their cultural identity and contribute to cultural diversity. Here IP can assist in certifying the origin of arts and crafts (through certification trademarks) or by combating the passing off of fake products as “authentic” (through the law of unfair competition), for example. Communities have used their IP to exercise control over how their cultural expressions are used, and to defend against insensitive and degrading use of traditional works.

Traditional cultural manifestations are also a source of inspiration and creativity for cultural industries, such as the entertainment, fashion, publishing, crafts and designs industries. Many businesses today, small, medium and large, in developed and developing countries, create wealth using the forms and materials of traditional cultures. For example, vibrant publishing, music and audiovisual industries in India and Nigeria draw upon local cultural materials.

Current activities

(e) WIPO’s work on TK and TCEs is diverse in character. Important elements include the report on the fact-finding consultations with holders of TK in 1998-1999, and a series of case studies, surveys of legal mechanisms, analytical tools, and practical capacity-building tools. But the recent focus has been on the work of the IGC, which is addressing the international dimension of the protection of TK and TCEs against misuse and misappropriation. Two sets of draft provisions have been developed and are currently under consideration; these aim to distil the essence of protection of TK and TCEs, as a basis for more concrete outcomes at the international level, and may in the future be the subject of ongoing consultation and debate.

Questions to consider

- Does IP misappropriate and inappropriately commodify traditional cultures, or can it enhance their integrity and appropriate cultural development and exchange in the Information Society, or both?
- Can the IP system recognize, preserve and enhance distinctive cultural identities in a globalizing international environment?

- Does protection of traditional cultural heritage necessarily restrict the free flow of information? What is the appropriate balance between cultural and intellectual exchange, and appropriate protection against misuse and misappropriation?
- How can the public interest in open access to information and cultural materials be reconciled with interests in the preservation of cultural heritage and respect for the concerns, values and customary norms of traditional communities?
- How can the IP system best support traditional communities when sharing their intellectual heritage in the Information Society, while maintaining confidence and trust that it will not be misappropriated or illegitimately used?

Discussion synopsis

The 19 comments received on this theme reflected the immense diversity of perspectives on how IP and the interests, values and identity of traditional communities interplay within the Information Society.

Some commentators pointed out that the impact of the Information Society on traditional communities, just like its interaction with the IP system, can be positive or negative.

“While the uses, and exploitation of technology may certainly effect change in positive and/or adverse ways, the technology itself is agnostic to its own use.”

Posted by Jarrett L. Wold, June 7, 2005.

On the one hand, information technology could facilitate misappropriation of traditional cultural materials; on the other hand, it can provide a positive avenue for custodians of traditional cultures to engage in creativity and the exchange of ideas.

“The spread of Internet, along with effective protection measures for intellectual property, should help to further diversify the cultural products available throughout the world by giving creators from developing countries the boost they need to become known on a global basis.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

Some commentators considered existing IP instruments to be inappropriate tools for traditional communities – for example, they are “far too blunt to effectively support traditional knowledge” (Posted by Danny Butt, ORBICOM International Network of UNESCO Chairs in Communications, June 14, 2005). And one referred to a “freely available diverse public domain” as the best way to guarantee diverse content in the future.” (Posted by Stijn Vandamme, June 6, 2005). The development of technology could enable traditional cultures to express themselves in new ways, for a wider public.

“In future, as digital film production tools become more widespread across the developing world ... This will help free up creativity and make original low-budget film making a more approachable medium for many film companies and individual talents.”

Posted by Bertrand Moullier, International Association of Film Producers Associations (FIAPF), June 15, 2005.

IT could be used in ways that would minimize its adverse effects while, at the same time, maximizing the opportunities for traditional communities.

For some, respecting the needs of traditional cultures required a specific legal approach.

“The protection of traditional cultural heritage is not necessarily the same as protection of Patents, Copyrights and Trademarks.”

Posted by Taran Rampersad, June 8, 2005.

Based on the Draft UN Declaration on the Rights of Indigenous People, one commentator argued that indigenous peoples should have a “right to special measures to control, develop and protect their sciences, technologies and cultural manifestations” (Posted by Vincent Böhre, June 14, 2005). Other comments suggested that effective use and better access to the existing IP system was needed.

“Good copyrights laws are the key to safeguarding the cultural and linguistic diversity of all the world’s countries and regions. ... These communities need good copyright laws if the anticipated cultural and societal benefits of the information society are to materialize.”

Posted by the International Video Federation, June 15, 2005.

Traditional communities may be bound by indigenous customary laws and may be concerned to preserve their cultural identities in the face of globalization. Thus, legal and cultural obligations and fear of loss of identity can lead communities to withhold their traditional knowledge from a wider Information Society. External laws need to be applied to respect these concerns.

“Those would do not wish to participate in this ever expanding noosphere such as certain Aboriginal tribes, African tribes ... should have protection and recourse available to them.”

Posted by Jarret L. Wold, June 7, 2005.

Some other commentators argued that there was no realistic option of excluding any link with the Information Society; indeed, one commentator suggested that:

“all protectionist philosophies are bound to fail.”

Posted by Jacob Champlin, June 6, 2005.

Some considered it important to empower the communities so they could exercise informed choices for themselves; awareness of the IP system was crucial.

“It is up to the traditional communities to decide what should be commoditized or not.”

Posted by Taran Rampersad, June 8, 2005.

“Traditional knowledge is rich in content and can be used to make our lives better especially when it come to health ... By exploiting ignorance of the African traditionalists, information has emerged that the medicine has been patented overseas. Ignorance has led us not taking advantage of the IP system ...”

Posted by Wilson Rading Outa, June 15, 2005.

Different approaches may be needed in view of the customary relationship between an individual and the group to which he or she belongs, which differs from the individualism of some western societies.

“IP as it is now can provoke misappropriation and unfair use of traditional knowledge, because it was designed from the ground to protect individuals and legal entities described by ‘modern’, ‘western’ civilizations. As such, traditional knowledge belonging to a community, and not to an individual or legal entity as described by westerners, is not protected from stealing or inappropriate use.”

Posted by Stéphane Bruno, June 9, 2005.

This different kind of knowledge system may have to be recognized, from a moral, political and legal point of view. Any optional participation by traditional communities in the Information Society should therefore be based on the wider recognition of the value of TK, for example in the process of patent examination. Databases and other kinds of registers were mentioned as an option.

Commentators explored the effect of adapting the IP system to include customary practices so that traditional communities could engage with the system on their own terms, instead of integrating or subordinating traditional values to the IP system – IP laws should afford “the same protection for traditional communities as it does for corporations, if the community decides to place such information in these systems.” (Posted by Taran Rampersad, June 8, 2005). But there was caution about the effects of engaging in the system.

“What are the guarantees for traditional societies not to be trapped and entangled in a ‘modern’ setting of international IP-rights which are basically foreign to them?”

Posted Vincent Böhre, June 14, 2005.

Other comments pointed to the role of copyright in ensuring cultural diversity. And others again believed that communities have no choice but participating - “learn to change or become obsolete” – provided there was a fairness in their participation in the IP system and the Information Society.

“The field is not a level one: those who merely provide resources or information that they cannot protect as works of intellectual property are at a profound disadvantage.” (quoting Rosemary Coombe)

Posted by Danny Butt, ORBICOM International Network of UNESCO Chairs in Communications, June 14, 2005.

If diversity was to be protected (as all seem to accept), traditional communities may need systematic and sympathetic attention by policy makers, who had to show a “a strong commitment to multi-stakeholder approaches in policy development” as the “surest way of gaining the diversity of local perspectives needed of responsive policy.” (Posted by Danny Butt, ORBICOM International Network of UNESCO Chairs in Communications, June 14, 2005). To achieve this, legal developments were needed, but political will was a key factor.

“There is an enormous need of international treaties to protect cultural diversity and intellectual property rights in most of the world. However, there is even more a need for willingness to make investments in countries and regions of the world, where local, regional and national cultural production is threatened by poverty as well as by the overwhelming economic power of the global, commercial entertainment industry.”

Posted Mikael Waldorff, Secretary General, Danish Actors' Association, June 14, 2005.

Theme 9 – Emerging business models for distributing intellectual property online: opportunity or threat?

(a) The digital environment presents a revolutionary business proposition for intellectual property (IP) creators and consumers. When the World Wide Web (WWW) was first developed in the 1990s, it transformed the Internet from a technological infrastructure into a popular network, linking diverse communities around the world and enabling people to exchange ideas, information and goods and services. IP has gradually migrated online and the Internet, together with the applications upon it, is changing the way in which a great deal of IP is produced and consumed. Numerous dot.com companies, such as Amazon and eBay, have developed business models that profit from trade in tangible IP goods, such as books, DVDs and CDs. Many more enterprises use the Internet as a powerful tool for marketing and reaching consumers for IP products in dispersed new global markets. Increasingly, however, content protected by IP rights is being created in or converted to digital form, and business models are evolving that correspond to the opportunities and challenges posed by the Internet.

(b) In the online world, the gap between producer and consumer has narrowed. Users of IP are no longer passive consumers, but have become interactive players in the value chain, customizing products and, in some circumstances, becoming involved in the creative process itself. One independent music label in the United Kingdom, Loca Records, releases music under a Creative Commons license that allows any fan to listen, share and remix the tunes, provided they are not used commercially.¹⁰⁰ In this way, listeners become creators. The musician David Bowie has taken the view that, in the future music industry, rather than relying upon copyright protection, freely available songs will function as advertisements for touring and live performances. In 2004, Bowie released a song from his *Reality* album and invited fans to “mash-up” or remix it, to be submitted in a contest in conjunction with his Reality Tour.¹⁰¹ The ready availability of digital technology and media has lowered the threshold for becoming a content provider and, as a result, many more people are creators and authors, effectively IP rightsholders, with choices to make as to how to exercise their IP rights.

There is debate over whether there is a need for the copyright system to adapt to support this interactive, collaborative creativity; there is also concern that copyright law, if restrictively applied, could stifle these emerging forms of creativity. Take the case of unauthorized sampling of music, which may violate copyright in a sound recording (usually owned by the artist or record company) and in the underlying song itself (usually owned by the songwriter or music publishing company): a decision in 2004 by the US 6th Circuit Court of Appeals ruled that the author’s permission was required to remix a minimal 1.5 second

¹⁰⁰ See Loca Records, at <http://www.locarecords.com/mission/html>. See also Katie Dean, “Record Label Sings New Tune” Wired News (November 20, 2003), at http://wired-vig.wired.com/news/digiwood/0,1412,61282,00.html/wn_ascii.

¹⁰¹ See “David Bowie Fans Get the Chance to Alter ‘Reality’” Sony Media Software (April 7, 2004), at <http://www.sonymediasoftware.com/news/ShowRelease.asp?ReleaseID=574&CatID=>.

sample of Funkadelic's "Get Off Your Ass and Jam" song, even if the sample was unrecognizable in the new song.¹⁰²

(c) As IP has transitioned from analog to digital form and as digital technologies themselves have evolved, the way that IP-protected content is used or exchanged is also changing, often in unanticipated ways. Peer-to-peer (P2P) file sharing, for example, was not foreseen as a global phenomenon but now seems an integral part of the end-to-end, distributed character of the network, consistent with the anonymous nature of online communication and philosophies of hacking, sharing and open access which characterize many online communities. By 2005, P2P file sharing accounted for an estimated 60% to 80% of all Internet traffic by volume. The total number of persons logged onto the major P2P networks at any one time is approximately 10 million users, sharing over 10,000,000 GB (10 Petabytes) worth of data.¹⁰³

For the IP industries, these trends represent a significant threat and a potentially valuable opportunity. The sizeable uptake of P2P technologies may provide a profitable business model, if IP rightsholders can employ these popular systems to exchange authorized IP goods. However, content in digital form is vulnerable to copying, perfectly and in infinite quantities for global distribution at the click of a mouse. Currently, it is estimated that more than 90% of files shared over P2P systems are unauthorized; according to estimates by the International Federation of the Phonographic Industry (IFPI), in January 2005 alone some 870 million copyright infringing music files were available online. The film industry, initially protected from widespread unauthorized use of its works by the comparatively large size of audiovisual files and lack of bandwidth, is also increasingly threatened by unauthorized file sharing of films as bandwidth increases and compression technologies improve. The Motion Picture Association (MPA) estimates that 400,000 to 600,000 films are illegally downloaded every day. Unauthorized copies of the recent blockbuster, *Star Wars III: Revenge of the Sith*, could be downloaded using the BitTorrent P2P software six hours before it was released in theatres and, within 24 hours, it had been downloaded 10,000 times.¹⁰⁴ This file sharing was also made simpler by the broad commercialization of CD burners, portable MP3 players and rewritable DVD players.

(d) Increasingly, IP-based industries and individuals are developing new business models that harness the growing popularity of digital distribution models. These address the problem of hacking and unauthorized copying either by applying technological protection measures to condition access and limit copying, or innovative business practices that maximize the value of the IP by encouraging rather than seeking to limit distribution.¹⁰⁵ For

¹⁰² *Bridgeport Music, Inc. v. Dimension Films*, 383 F. 3d 390 (6th Cir. 2004). The decision is under appeal. See Katie Dean, "Remixing to Protest Sample Ruling" *Wired News* (September 22, 2004), at <http://wired-vig.wired.com/news/digiwood/0,1412,65037,00.html>. For background, refer to Ben Challis "The Song Remains the Same: A Review of the Legalities of Music Sampling" *MusicJournal.org*, (December 2003), at <http://www.musicjournal.org/03thesongremainsthesame.html>.

¹⁰³ Source - CacheLogic.com.

¹⁰⁴ See Andrew Zangrilli, "DOJ Takes Down BitTorrent" *The Blogbook* (May 25, 2005), at http://blogbook.org/tech_ip/archives/000356.html.

¹⁰⁵ See "The Digital Dilemma: Intellectual Property in the Information Age" Committee on Intellectual Property Rights and the Emerging Information Infrastructure, Computer Science and Telecommunication Board, Commission on Physical Sciences, Mathematics and Applications, National Research Council (National Academy Press, Washington DC, 2000), at Chapter 6, available at http://www.nap.edu/html/digital_dilemma/notice.html.

example, some businesses such as iTunes and Yahoo! Music rely on a traditional sales model based on mass market distribution with convenient purchasing at low prices, aiming to make legitimate purchase more attractive than unauthorized copying and thereby achieve high volume sales. Other IP businesses, including online news sites such as The New York Times, and software providers such as Adobe Systems Inc.¹⁰⁶ and Hewlett Packard¹⁰⁷, effectively give away some of their IP products but rely upon revenue from complementary and value-added services or products like advertising, customer support or upgrades. The widespread uptake of a company's free software can help its product become widely accepted and used, thereby creating a vibrant market for the company's fee-based services.

Interestingly, the abundance of free information online has changed public perception of what is or should be "free". The lack of effective quality control on the Internet has also heightened the need for an intermediary entity to filter, or otherwise vouch for content. In the analog world of the creative industries, this role was traditionally filled by the music recording labels or motion picture studios, who selected, developed and marketed creative works of music or film by attaching their brand, and quality assurance, to the product. To date, this critical role has been largely unfilled in an online environment where the problem is often described as too much information, not too little.

(e) Changes in the way that we use domain names to navigate the Internet has also had an impact on the IP system; in this case, relating to the use of trademarks and service marks. Domain names are user-friendly addresses that correspond to the unique Internet Protocol numbers that connect our computers to the Internet and enable the network routing system to direct data requests to the correct addressee. Domain names were originally intended to perform a purely technical function in a user-friendly way, but because they are intuitive and easy to remember they now perform a function as business or personal identifiers. Many businesses advertise their domain names to signal a Web presence, whether they conduct commercial activities online or not. Therefore domain names, although not a form of IP, now perform an identifying function similar to that of a trademark. Because of the way in which people and search engines traditionally operate, most businesses use their trademark or trade name as their domain name, and this caused conflict by cybersquatting (involving the pre-emptive registration of trademarks by third parties as domain names).¹⁰⁸ The way in which we use domain names has evolved naturally along with the way we use the Internet, but is not a reflection of trademark law. The challenge, then, has been to find ways for domain names to coexist in the existing legal framework of trademarks – the two WIPO Internet Domain Name Processes, and ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) are efforts to provide a solution.¹⁰⁹

¹⁰⁶ See <http://www.adobe.com/>.

¹⁰⁷ See <http://opensource.hp.com/>.

¹⁰⁸ WIPO Report "Intellectual Property on the Internet: A Survey of Issues" (WIPO Document 856), at para.29, available at http://www.wipo.int/copyright/ecommerce/en/ip_survey/ip_survey.html. See also Report of the First WIPO Internet Domain Name Process "The Management of Internet Names and Addresses: Intellectual Property Issues" (WIPO Publication No.439), available at <http://arbiter.wipo.int/processes/process1/report/index.html>.

¹⁰⁹ See WIPO Arbitration and Mediation Center's Frequently Asked Questions on Domain Names, at <http://arbiter.wipo.int/center/faq/domains.html#5>.

Questions to consider

- Does the IP system encourage or hinder the emergence of new business models in the IP industries, such as music and film?
- Does the IP system have a role to play in facilitating the transition of traditional analogue business models to the digital environment?
- How can peer-to-peer (P2P) file sharing most appropriately be regulated, if at all?
- What role does IP protection for information and communications technologies play in developing infrastructure for digital networks to sustain the Information Society?
- What is the relevance of identifiers such as trademarks in electronic commerce and how can they be protected?
- Does abuse of such private identifiers affect society at large or is it a purely private problem?
- The UDRP provides trademark owners with efficient enforcement mechanisms against abuse of their rights in the domain name system - does it also take account of the interests of domain name registrants?
- Are there other identifiers that may need protection from abusive registration and use as domain names?

Discussion synopsis

The 30 comments received on this theme focused on the need for flexibility in the development of new business models in the IP industry, and reflections on the relative roles of the IP system and business interests in adapting IP-based industries to the digital environment. The end-to-end technologies, typified by the Internet and World Wide Web, have revolutionized the chains of production and consumption of information products, and cultural industries have faced significant challenges, posed by the speed and scale of such change as much as the unprecedented levels of infringement.

“The IP system encourages and hinders a lot of things, but I don’t think it does either when it comes to business models. The unwillingness of the recording and movie industries to embrace new models is a result of their corporate culture, not the IP system.”

Posted by James Quintana Pearce, June 3, 2005.

“It’s important to note that the dispute is not really between IP and technology. It’s between businesses that own IP and businesses that want to use IP.”

Posted by David Moser, June 8, 2005.

“It should not be the intent of IP policy to protect specific participants in the IP market, or even particular business models, but rather to maximize net social benefit without regard to any particular members of society.”

Posted by IP Justice, June 14, 2005.

Some criticism was directed at intermediaries in the value chain, such as publishers and distributors, who it was felt treated creators unfairly and raised the costs of the products to the consumer unnecessarily. Commentators expressed the importance of focusing IP policy on creators and their audiences. One commentator noted that high levels of infringement may be partly due to the lack of flexibility demonstrated by IP-based industries in answering consumers’ needs. While other commentators noted that the process of change to new business models, that best meet consumer needs, was severely hampered by infringement and lack of trust in the digital marketplace.

“...the root of why people are breaking IP rights at the moment, ie, because:

- They don’t want to pre-pay for something they may not like.
- They want access to more content than they can afford.
- They want a ‘content on demand’ system.
- They want to watch content in their homes in their comfy chair on their big screen instead of at a movie theatre.
- They want access to media when everyone else gets it, not months later when it gets to their county.
- They want high quality content, which may not be available in their country, (HDTV).

And the final thing to consider is, people don’t want to break the law. People just don’t see any way at the moment to get the quality and quantity of media they want. Once a way exists for users to pay a reasonable amount and get what they want I firmly believe over 80% of the media piracy will stop suddenly.”

Posted by Psi, June 6, 2005.

“Unfortunately, creators cannot move ahead with innovative business models for delivering content online unless the Internet is safe from piracy. At the same time, the marketplace must be left free of governmental intrusions in order to foster the development of these new business models. ... Although the commentary describes some innovative business models that are seeing some success, there is simply no business model that can ‘compete with free’. Online piracy harms creators, deprives governments of valuable sources of tax revenue, and deprives the public of access to legitimate works presented as the artists who created the works wish them to be presented.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

In the same vein, one commentator remarked that voluntary compliance with IP law would be promoted by improvements in the management and administration of IP systems. Some described the IP system as complex, and expressed the need for clarification so that users could be aware of what works were protected by IP, what uses were authorized and

how to gain authorization where necessary. However, other commentators considered that the system was relatively easy to use.

“There is no comprehensive, easily accessible, database containing information regarding intellectual, copyright, trademark and patent holdings. Further, each of these holdings is subject to a multiplicity of options regarding access, distribution and reuse. Appropriately, it is difficult to ascertain even simple questions such as to who owns the rights to certain content. An individual may create the property, but a company may own all the rights to that property. The success of ensuring effective regulation is that all parties understand what property is to be regulated and what is not.”

Posted by Jarrett L Wold, June 6, 2005.

“It is true that IP rights can sometimes make it difficult for people to make certain types of users such as Mix CDs as you mentioned. However, even this isn’t always the case. It’s generally not that hard to request a license & you wouldn’t need a lawyer to do so.”

Posted by 193.5.93.35, June 10, 2005.

While some commentators were pessimistic about the emergence of legitimate new business models, others were optimistic that IP-based industries are responding creatively to the digital environment.

“Rather than hindering the emergence of new business models in IP industries, ACT sees a flourishing of new models – Creative Commons Initiative being one. The hallmark of these new models is their reliance on intellectual property as a tool to given them life and force.”

Posted by Jonathan Zuck, ACT, June 15, 2005.

Theme 10 – What are the challenges for enforcement of intellectual property rights in the Information Society?

(a) Some of the most controversial legal issues associated with the online use of intellectual property (IP)-protected material relate to enforcement of the rights involved. The inherent international character of the Internet, along with its potential for anonymous operation, challenges existing enforcement mechanisms and concepts. This creates considerable uncertainty, not only for businesses operating in this environment¹¹⁰, but also for consumers that, lacking a predictable framework, may similarly be dissuaded from engaging in online contracts. The following summarizes some of the issues involved.

(i) Identification of the infringer

Faced with illicit uses of IP-protected material on the Internet, a first concern from the rightsholder's perspective will often be the identification of the alleged infringer. However, whether or not disclosure of the identity of the user, and other related information, may be requested from service providers, depends on national legislation. Under international standards, the so-called "right of information", as provided for under the TRIPS Agreement (Art. 47)¹¹¹, does not cover such claims against parties other than the infringer. Some countries' laws have, however, introduced a more detailed right which may, in principle, allow information claims against service providers, while trying to strike the balance with obviously conflicting interests, such as the protection of confidentiality of information sources, or the processing of personal data.¹¹²

(ii) Private international law issues

To sue for infringement of IP-protected material in relation to online uses frequently involves cross-territorial action. This will raise questions as to jurisdictional competence, applicable law, and, eventually, the enforcement of a judgment abroad, touching upon complex issues of private international law and procedure. In general, these issues do not form an entirely new debate. Private international law doctrines and principles have long been developed around the globe, and it is certainly not necessary to question these principles altogether. Nevertheless, there is a difference in both degree and nature when applying these concepts to disputes relating to the Internet.

¹¹⁰ See, for instance, references in International Chamber of Commerce (ICC) Roadmap for Internet Governance, 2005, available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016892.pdf>.

¹¹¹ Article 47 of the TRIPS Agreement reads: "Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution." See http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

¹¹² See, for instance, Article 8 of Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004, on the enforcement of intellectual property rights, available at http://europa.eu.int/comm/internal_market/en/indprop/piracy/.

As an illustration, in order to assert jurisdiction in matters relating to tort – including IP infringements - the instrument governing jurisdiction in the European Union establishes special jurisdiction at the courts of the place where the “harmful event” occurred¹¹³, understood to refer to both the places of the causal event and of the damage. Here, the effects of global Internet transmission are easily felt: would, for instance, the mere online accessibility of allegedly infringing content in a forum be deemed sufficient for localizing a damage in that forum, and thus for a court to exercise jurisdiction? Would such jurisdiction extend over adjudication upon compensation for the entire damage suffered, potentially, in a large number of countries? How should forum-shopping practices be dealt with if redress can be sought in multiple courts?¹¹⁴ Case law has, over the past few years, gradually developed standards for the application of private international law principles in this online environment. It is notable, however, that, since these issues are largely unharmonized, the different national or regional private international laws systems continue to coexist.¹¹⁵

(iii) The risk of being sued abroad

From a legal point of view, an important and specific feature for trading in IP online is that compliance with the laws of the country where the company operates may no longer be sufficient to assure an acute and predictable management of legal risks. A company may well comply with the applicable IP standards as to uses on its own territory, but use on the Internet, obviously, results in instant accessibility in numerous fora, where the resulting uses may not be legitimate. While a number of international treaties provide for harmonized minimum standards of protection of the various areas of IP, national laws may, under certain circumstances, make use of limitations of these standards, or, on the other hand, formulate higher standards of protection. For instance, in the area of copyright, a number of countries provide for extended terms of protection, or apply different positions as to the subject matter of protection.

To operate entirely safely in such an environment would require compliance with the highest standards of protection available on a global scale - a hardly practicable solution. Indeed, such inherent risks have been identified as a realistic concern for

¹¹³ Article 5 (3) Council Regulation EC 44/2001, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf.

¹¹⁴ For instance, as concerns alleged trademark infringements on the Internet, it has been suggested to restrict jurisdiction of courts in a country to cases where the content of the website in question is - allegedly - “directed” towards this country; see for instance, decision I ZR 163/02 - “*hotel-maritime.dk*”, of the German Supreme Court in Civil Matters of October 13, 2004. Another question relates to potential forum shopping *within* a jurisdiction, here, countries increasingly seek to concentrate jurisdiction in specialized chambers or courts, see the International Bar Association (IBA) “Survey of Specialized IP Courts” (2004), at <http://www.comml-iba.org/pdf/ipsurvey.pdf>.

¹¹⁵ In the field of contractual business-to-business relations, though, it should be noted that the debate of an international instrument has advanced considerably: under the so-called “Judgments Project” of the Hague Conference of Private International Law, a draft Convention is being developed which aims to establish a predictable framework for both jurisdiction and the recognition and enforcement of foreign judgments in cases where parties have agreed upon (exclusive) forum selection clauses.

e-commerce business.¹¹⁶ In practice, companies often try to refrain from transacting business in jurisdictions which they consider, by their protection standards, as “risk” jurisdictions, by, for instance, trying to identify the physical location of a user through user registration or self-identification, or by tailoring their online presence to particular jurisdictions.

With respect to the use of trademarks on the Internet, one possible way to alleviate concerns of conflict with existing rights in other fora has been proposed by the international community in the WIPO “Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet”.¹¹⁷ The Joint Recommendation provides that the mere visibility of a sign used on the Internet will be considered as “use” of the sign in a forum only if the use has a “commercial effect” in that particular forum, taking into account, for instance, whether the user of the sign is doing business in that forum, as well as the level and character of commercial activity of the user in relation to that forum.¹¹⁸

This problem of conflict arising with different legal standards of protection, and, eventually, being taken before the courts of a foreign jurisdiction, is not limited to IP protection, but may also raise concerns in other areas of law, such as defamation and libel, or goods that are banned from sale in certain jurisdictions. Much debated court decisions such as *Gutnick v Dow Jones & Co Inc*¹¹⁹ and *Yahoo! Inc. v LICRA*,¹²⁰ have confirmed that these are considerations to be taken seriously by any company operating online.

(b) There is a tension between the international – or ‘a-national’ – character of the digital environment and the largely national and territorial character of court litigation. Whoever engages in online activity may have to protect their rights, or be held liable, in potentially any jurisdiction, and under the law of potentially any country, that is connected to the Internet. Since national laws and practices differ widely, multi-jurisdictional litigation always carries the risk of producing inconsistent results. In addition, courts cannot always respond to the efficiency demands of parties who are used to the speed of online transactions, and provide only few confidentiality safeguards which may be needed to preserve a reputation or a vital business relationship. Finally, the expertise needed to properly address the increasingly complex technical issues involved in online disputes is not always readily available in national court systems.

¹¹⁶ International Chamber of Commerce (ICC)/ American Bar Association (ABA) survey “Global Internet Jurisdiction” (2004), available at <http://www.mgblog.com/resc/Global%20Internet%20Survey.pdf>.

¹¹⁷ Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, available at http://www.wipo.int/about-ip/en/development_iplaw/pub845.htm.

¹¹⁸ Articles 2 and 3, WIPO Joint Recommendation, available at http://www.wipo.int/about-ip/en/development_iplaw/pub845.htm.

¹¹⁹ *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (August 28, 2001), Judgement of the Supreme Court of Victoria, Australia, available at <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html>.

¹²⁰ *Yahoo! v. Licra*, US Court of Appeals 9th Circuit, August 23, 2004., reversing *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D.Cal. 2001), available at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D079531C495BC5E288256EF90055E54C/\\$file/0117424.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D079531C495BC5E288256EF90055E54C/$file/0117424.pdf?openelement).

Alternatives to court litigation, in particular arbitration and mediation, allow parties to avoid many of these disadvantages, and to sidestep the complicated private international law issues of determining a competent jurisdiction and the applicable law. Arbitration and mediation provide a single international forum for resolving a dispute in its entirety – regardless of its territorial links; they can be tailored to fit the efficiency demands of parties, as well as their confidentiality concerns; and they allow parties to select expert arbitrators or mediators who know the business, technical and legal issues that may be involved in the dispute. WIPO, therefore, in 1994 established an Arbitration and Mediation Center to offer arbitration and mediation procedures, which are specifically tailored to meet the specific needs of technology, entertainment and other disputes involving IP.

Since arbitration and mediation are based on a private contract between the parties, they are less suitable in extra-contractual infringement disputes, or if one of the parties seeks to establish a public legal precedent, such as a general declaration of patent validity or invalidity. Arbitration and (in particular) mediation proceedings work best if they can be based on a pre-existing relationship between the parties, such as a license agreement, a franchise, or a distribution contract. Such relationships will often exist in Internet transactions since most of the content distributed over the Internet, as well as much of its infrastructure, is protected by intellectual property rights which are shared through licensing agreements. Thus, e-commerce contracts, both in business-to-consumer (B2C), as well as in business-to-business (B2B) relationships, often involve licensing agreements, and can therefore provide a basis for arbitration or mediation clauses.

(c) Technological protection measures (TPMs), such as passwords and encryption, are increasingly being used by copyright rightsholders as a means of exercising and enforcing their rights in digital content. Countries acceding to the WIPO Internet Treaties (WCT and WPPT) must provide “adequate legal protection and effective legal remedies” against the circumvention of effective TPMs used by authors, performers and other rightsholders to restrict acts which are not authorized by the rightsholders concerned or permitted by law.¹²¹ These treaty obligations are phrased in general, flexible terms, but different approaches have been taken to implementing them in national law, ranging from the US Digital Millennium Copyright Act (DMCA)¹²² approach to the more minimalist Australian approach (at least initially – new legislation is expected to bring the anti-circumvention provisions of the Australian Copyright Act closer into line with the DMCA pursuant to the US-Australia Free Trade Agreement).

The application of TPMs to digital content is at the center of international copyright debates. On the one hand, rightsholders have a legitimate interest in applying TPMs in order to exercise and enforce their rights in digital copyright content; yet it is increasingly argued that rights of access to digital content for certain development purposes, particularly where education and research materials are concerned, should in certain cases take precedence over TPMs as an enforcement mechanism. Even if this proposition were generally accepted, how can it be achieved and who is to decide?

¹²¹ Article 11 WCT, Article 18 WPPT.

¹²² United States Digital Millennium Copyright Act of 1998, at <http://www.copyright.gov/legislation/hr2281.pdf>. Refer also to the United States Copyright Office Summary of the DMCA, at <http://www.copyright.gov/legislation/dmca.pdf>.

(d) Neither the WIPO Internet Treaties nor national laws implementing them *require* (“mandate”, in legal language) the application of TPMs/DRMs to digital copyright content. Rather, the treaties require that where TPMs are applied by copyright rightsholders, national legislation must provide remedies against circumventing TPMs without authorization. This means that at present much *de facto* control over access to and use of digital content to which TPMs are applied is left in the hands of rightsholders, though some recent legislation has tried to build in safeguards to ensure, for example, continued access to content by beneficiaries of copyright limitations and exceptions. In addition, DRM technologies enable data collection concerning users’ online use habits, raising concerns about violations of individual privacy rights which many believe are not addressed adequately or consistently across jurisdictions.

So far, TPMs/DRMs are applied to only a small percentage of copyright content made available to the public overall, but this percentage will increase as ICT penetration, Internet access and digital content offerings increase worldwide. Should rightsholders be subject to new requirements to apply TPMs/DRMs responsibly? Is it appropriate to initiate thought processes towards promoting what might be called the *sustainable use of DRMs/TPMs*?

Questions to consider

- How can IP owners protect their rights in a digital environment? Are traditional enforcement mechanisms through court litigation sufficient?
 - Can territorial IP laws and systems be reconciled with the global character of the Internet to enable digital commerce in IP?
 - Which country’s courts are competent to decide on infringing activity carried out over the Internet, and which country’s law should be applied?
 - Do unresolved issues of private international law (e.g., which law applies to a transaction or dispute, which courts have jurisdiction to decide a case or enforce a judgement) pose a real problem to businesses trading in IP online?
 - What is the role of alternative means of dispute resolution in addressing IP conflicts on the Internet? Should ADR be adapted to the online environment?
 - What can be learned from effective alternative dispute resolution procedures such as the Uniform Domain Name Dispute Resolution Policy, processes and procedures?
 - How can enforcement of IP rights, and the need of rightsholders to protect themselves from economic harm as a result of infringement, coexist with effective safeguards of users’ rights, such as individual privacy?
 - Is there a need for safeguards against inappropriate use of digital rights management technologies? What challenge do digital rights management tools pose to the balance between copyright and exceptions such as fair use? To individual privacy?
 - Is DRM an adequate response to the deficiencies of traditional enforcement mechanisms in an online environment?
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Discussion synopsis

The 54 comments received on this theme addressed both ways to avoid disputes involving IP online, including by protecting IP against misuse through use of tools such as digital rights management (DRM) technologies, and by resolving disputes efficiently through methods of alternative dispute resolution.

Views were mixed on the efficacy and desirability of use of DRM to control access and use of IP works online. While some commentators supported DRM as the best means to enable IP owners to manage their works online, others criticized the inappropriate use of DRM to the detriment of the community, public domain and public interest. Yet other commentators described DRM as a “flawed concept”, which could never offer complete security, and was said to encourage hacking and consequently infringement.

“In the past there has never been such a ‘comfortable’ looking alternative for providing an enforcement of intellectual property rights in the ‘real world’ (not only the internet oder (sic) what is often called the ‘digital world’) as it is today accomplished by means of DRM (digital rights management)-systems: The IP holders simply need to come together with the hardware manufacturers, create new media formats, set up a DRM system from the individual media and throw out all (digital or analog) connections which are not regarded as ‘trusted’”

Posted by Axel Farr, June 1, 2005.

“DRM systems are always destined to fail. Fundamentally, it is impossible to build a ‘secure’ DRM system, since the consumer has both the hardware, the algorithm, the cyphertext, and the key.”

Posted by Richard Neill, June 6, 2005.

Some commentators stated that, while legal rules should provide for authorized uses of IP material, there should also be rules to regulate how IP rightsholders use DRM and, in particular, to require the distribution of works free of DRM once the term of protection had expired. There was a general concern that DRM technologies, in their current stage of development, are not sufficiently refined to respect the exceptions and limitations that were essential to maintain the balance of interests under copyright law.

“I see three fundamental problems associated with exercising the control granted by the use of DRM.

1. the reach of the control granted by DRM mechanisms is ultimately defined by the apparatus and the data; not by copyright law. This means that it affords the rights holder potentially much greater control than the traditional copyright.
2. DRM creates a legal system in which the playing apparatus is prosecution, judge and jury in one.

3. If any form of DRM is legally mandated, then this requires lawful playing devices not only to implement the DRM algorithm, but to enforce it as well.

The internet has proved the traditional model of providers and passive consumers obsolete, in software, journalism, film and music. Let's not forget that copyright is ultimately just a means for that. DRM would break this creative development in the bud, and would thereby show its true colours: not as a stimulant for creativity and development of art and knowledge, but as something that merely allows a publisher to develop new business models with existing content, and creating any restriction the market will bear."

Posted by Emile van Bergen, June 3, 2005.

A number of commentators reflected on the tension between free speech and copyright, and showed concern that the delicate balance struck by copyright law could be jeopardised by use of DRM. This is because DRM could be applied to works that did not qualify for copyright protection, or were subject to fair use exceptions.

"DRM can be (ab)used by a rightsholder to enforce rules that are outside the boundaries of copyright. Some examples:

- printing of electronic books in the public domain
- playing lawfully purchased DVDs from the USA in Europe, and vice versa
- playing lawfully purchased iTunes songs on other devices
- selling lawfully purchased iTunes songs to a third person, or giving such song as a gift to a family member."

Posted by Pieter Hulsoff, June 6, 2005.

"Besides shrinking fair use rights, the public experiences difficulty in exercising other privileges, including First Sale privileges, which permit an owner to sell or give away her copy of a work. Technological restrictions and license agreements often eliminate the public's First Sale Rights and other limitations on a rightsholder's ability to control a work. It is difficult to ensure that works in the public domain remain freely accessible since public domain works are frequently 'locked up' with technological restrictions."

Posted by IP Justice, June 14, 2005.

"Today 90% of profits for a mass media item are likely to occur within the first few months of its release. The length of copyright should be on a constant downward (rather than its current upward) slope to account for this fact. If copyright were to last 5 years instead of life+70, and a person's rights of fair use were acknowledged by the mass media conglomerates then the general public would be far more likely to respect them and DRM would not be required to enforce those restrictions."

Posted by James McGuigan, June 3, 2005.

However, other commentators emphasized that DRM provided the best available means to protect IP from unauthorized use in an online environment, and thereby to encourage creators to produce and distribute their works online. While the Internet offers significant opportunities to IP rightsholders, commentators reflected on the debilitating

effects of infringement on IP creators and owners, consumers, and on small businesses in particular. In this context, DRM was an important component of IP rightsholders' management of their works in an online environment.

“The key to effective protection of online copyrighted content requires the right mix of enforcement, technology and public education.”

Posted by the International Intellectual Property Alliance, June 15, 2005.

“[T]he growing problem of online piracy poses a significant challenge to the long-term viability of global digital commerce. For instance, it is estimated that the worldwide rate of software piracy is 35% and is significantly higher in many countries. This level of piracy constrains intellectual property industries, prevents the creation of hundreds of thousands of jobs, diminishes governments' tax base in intellectual property industries, and deceives consumers around the world into buying illegal products.”

Posted by Jesse Feder, BSA, June 15, 2005.

Several commentators identified the lack of public awareness of IP, and the livelihoods that depend on authorized use of IP, as a major problem. Whereas technology could provide limited solutions to the problem of infringement, education was needed to change the way that people perceived of IP and respected its ownership.

“The real challenge is public perception. It is clear many (although not a majority) people no longer believe in intellectual property rights. This fact makes enforcement hard; I think the solution is education, and in making the majority, rather than the minority, earn royalties on their intellectual property. A popular blog writer who sees his earning drop from \$100 to \$50 because someone copied his blog in full would understand the meaning of intellectual property in a way that is not clear to many people who never owned any money-yielding intellectual property.”

Posted by Yaniv Pessach, June 6, 2005.

While discussions focused on the challenge of enforcing IP, some commentators questioned how alternative dispute resolution could be used to address and resolve IP conflicts on the Internet. There was optimism that innovative dispute resolution practices could overcome the difficulties of resolving conflicts involving territorial IP laws that arise in the global online environment.

“Reasons why IP disputes may lend themselves to online [dispute resolution] include the numerous international treaties that provide a fairly uniform framework for national IP laws, a feature not found in many areas; and the fact that, by nature, IP people are innovative and not as threatened by change as are many others!”

Posted by Alan L. Limbury, June 1, 2005.

Finally, one commentator noted the difficulty of protecting IP online, where various standards of law and practice applied without adequate harmonization. One example was

the field of domain names, and the more than 240 registries of Country Code Top-Level Domains (ccTLDs) that each administered different registration systems and IP protection policies.

BACKGROUND RESOURCES

THEME 1

Intellectual property treaties administered by WIPO (available at <http://www.wipo.int/treaties/en/>)

Convention Establishing the World Intellectual Property Organization – WIPO Publication No. 250 (available at <http://www.wipo.int/treaties/en/convention/index.html>)

Agreement between the United Nations and the World Intellectual Property Organization – WIPO Publication No.111

Berne Convention for the Protection of Literary and Artistic Works (See <http://www.wipo.int/treaties/en/ip/berne/index.html>)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (See <http://www.wipo.int/treaties/en/ip/rome/index.html>)

WIPO Copyright Treaty (WCT) (See <http://www.wipo.int/treaties/en/ip/wct/index.html>)

WIPO Performances and Phonograms Treaty (WPPT) (See <http://www.wipo.int/treaties/en/ip/wppt/index.html>)

Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet (available at http://www.wipo.int/about-ip/en/development_iplaw/pub845.htm)

Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions – WIPO Publication No. 348

Dr. Kamil Idris, Intellectual Property: A Power Tool for Economic Growth (2003) – WIPO Publication No. 888 (available at http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1194&cart_id=426606-18310546)

Hisamitsu Arai, Intellectual Property Policies for the Twenty-First Century: The Japanese Experience in Wealth Creation (2000) (available at http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1160&cart_id=426606-18310546)

WIPO Treaties Guide and Glossary (available at

WIPO Guide to Intellectual Property Worldwide – WIPO Publication No. 479 (available at http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1166&cart_id=426606-18310546)

WIPO Intellectual Property Handbook: Policy, Law and Use – WIPO Publication No. 489 (available at http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1178&cart_id=426606-18310546)

Guide on Surveying the Economic Contribution of the Copyright Based Industries – WIPO Publication No. 893 (available via the e-Bookshop at http://www.wipo.int/ebookshop?cart_id=426606-18310546&lang=eng&cmd=display_pub&cat_id=1198)

Secrets of Intellectual Property: A Guide for Small and Medium-Sized Exporters – WIPO Publication No. ITC/P163 (available at http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1204&cart_id=426606-18310546)

WIPO Arbitration and Mediation Center – Frequently Asked Questions on domain names (available at <http://arbitrator.wipo.int/center/faq/domains.html#5>)

Intellectual Property on the Internet: A Survey of Issues – WIPO Publication No. 856 (available at http://www.wipo.int/copyright/ecommerce/en/ip_survey/ip_survey.html)

World Summit on the Information Society – Declaration of Principles and Plan of Action (available at http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161|1160)

THEME 2

WIPO Guide on Surveying the Economic Contribution of the Copyright-Based Industries (WIPO Publication No. 893) (See http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf)

WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore (See http://www.wipo.int/tk/en/publications/785e_tce_background.pdf)

WIPO Booklet on Intellectual Property and Traditional Knowledge (See http://www.wipo.int/tk/en/publications/tk_ip.pdf).

WIPO Booklet on Intellectual Property and Traditional Cultural Expressions/ Folklore (See http://www.wipo.int/tk/en/publications/tce_ip.pdf)

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http://www.newyorker.com/fact/content/?041122fa_fact)

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and intellectual property conservancies) (See <http://creativecommons.org/about/legal/>)

Yochai Benkler “Sharing Nicely: On shareable goods and the emergence of sharing as a
modality of economic production” (See <http://benkler.org/SharingNicely.html>)

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Alvin Toffler, “*The Third Wave*” (Random House Value Publishing, 1987).

Terri Janke “Minding Culture – Case Studies on Intellectual Property and Traditional
Expressions” prepared for WIPO (See <http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>)

J. Michael Finger & Philip Schuler (eds) “*Poor People’s Knowledge: Promoting Intellectual
Property in Developing Countries*” (World Bank and Oxford University Press, Washington,
2004)

Thomas Homer-Dixon, “*The Ingenuity Gap: How Can We Solve the Problems of the Future*”
(Vintage, 2001)

THEME 3

WIPO “Patents” website (See <http://www.wipo.int/patent/en/>)

WIPO Directory of online access to patent information (See
<http://www.wipo.int/innovation/en/wpis/wpis-07.htm>)

WIPO Patent Cooperation Treaty (PCT) (See <http://www.wipo.int/pct/en/>)

WIPO PCT Frequently Asked Questions (See http://www.wipo.int/pct/en/faqs/article22_faq.htm)

WIPO Industrial Property Statistics (See <http://www.wipo.int/ipstats/en/>)

WIPO Patents for Small and Medium Sized Enterprises (See http://www.wipo.int/sme/en/?wipo_content_frame=/sme/en/patents_and_smes.htm)

WIPO Case Studies on Licensing Intellectual Property (See http://www.wipo.int/sme/en/index.jsp?sub_col=sme-cs&cat=licensing)

WIPO Article, prepared by Christopher Kalanje “Leveraging Intellectual Property: Beyond the Right to Exclude” (SME-ARTICLE/30490) (See http://www.wipo.int/sme/en/index.jsp?sub_col=sme-cs&cat=licensing)

WIPO and International Trade Centre “*Exchanging Value - Negotiating Technology Licensing Agreements: A Training Manual*” (SME-GUIDE/37880) (See http://www.wipo.int/sme/en/documents/guides/technology_licensing.htm)

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United States Patent and Trademark Office – Search Patent Information (See <http://www.uspto.gov/patft/index.html>)

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Biological Innovation for Open Society (See <http://www.bios.net>)

The Online Books Page – Frequently Asked Questions on national copyright terms (See <http://onlinebooks.library.upenn.edu/okbooks.html#whatpd>)

Public Domain Music (See <http://www.pdinfo.com/>)

BBC Creative Archive (See <http://creativearchive.bbc.co.uk/index.html>)

Creative Commons (See <http://www.creativecommons.org>)

Creative Commons Public Domain Dedication (See <http://creativecommons.org/licenses/publicdomain/>)

Wikipedia “Public Domain” (See http://en.wikipedia.org/wiki/Public_domain)

Union for the Public Domain (See <http://www.public-domain.org/>)

Project Gutenberg – producer of free e-books (See <http://www.gutenberg.org/>)

Creative Commons – Legal Concepts (The Public Domain, The Commons, Open Content etc.) (See <http://creativecommons.org/about/legal/>)

Creative Commons White Paper “Cultivating the Public Domain” (See <http://creativecommons.org/about/legal/cultivating>)

Project Gutenberg (Internet-based producer of free e-books) (See <http://www.promo.net/pg/>)

Center for the Public Domain (See <http://www.centerpd.org/>)

University of Houston Libraries list of free Scholarly Journals Distributed Via the World Wide Web (See <http://info.lib.uh.edu/wj/webjour.html>)

GNU Free Documentation License (See <http://www.gnu.org/copyleft/fdl.html>)

The GNU Operating System (See <http://www.gnu.org/>)

Free Software Foundation (See <http://www.fsf.org/>)

Links to resources on legality of the General Public License (GPL) (See <http://www.newtechusa.com/Viewpoints/GPLLegalityLinks.asp>)

Open Source Initiative (See <http://www.opensource.org>)

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