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New challenges for copyright protection – Co-Reach in IPR in New Media Workshop II

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ABSTRACT

The Co-Reach IPR in New Media organised a workshop on ISP Liability in London on December 7, 2010 and an EU-China Copyright Policy meeting in Vienna from December 9–12, 2010. The Workshops come at the crucial time when new regulations are being crafted to tighten copyright protection in cyberspace.

1. Introduction by Prof. Sylvia Kierkegaard (sylvia.kierkegaard@iaitl.org) CLSR Editorial Board

Since the establishment of the framework for the IP system in the 19th century, economic globalization and technological revolution has brought drastic changes in both the schemes and the subject of IP protection. These changes are affecting our legal system from top to bottom. In an information society, intellectual property law presents fundamental questions of politics and policy. What is the correct balance between the public domain and intellectual property, or between intellectual property rights and free speech?

The Co-Reach IPR in New Media project explores these issues in a series of workshops.

Co-Reach IPR in New Media (www.coreach-ipr.org) is a network of German, Dutch, Austrian, Chinese and British institutions involved in promoting research co-operation with China in the area of intellectual property rights. The project is funded by the European Union and the aforementioned governments and aims to stimulate joint research between Europe and China by initiating and/or participating in relevant policy discussions about critical research needs and priorities, challenges and opportunities, in both Europe and China.

Prof. Sylvia Kierkegaard, member of the editorial board of CLSR and visiting professor at Southampton Law School, heads the consortium comprising Prof. Ian Lloyd (Senior Research Fellow, Institute for Law and the Web at Southampton University), Dr. Wolfgang Schulz (director of Hans Bredow Institute), Prof. Andreas Wiebe (director of InfoLaw, Vienna), Prof. Li Mingde (director of the IPR Institute of the Chinese Academy of Social Science) and Prof, Wilhem Grosheide of Utrecht University.

The project is currently conducting an in-depth research and clarification on a number of issues involving the scope and rights in the digital networked environment. The project seeks to contribute towards identification and resolution of the most important issues relating to the application and enforcement of intellectual property rights within an online context.

In order to pursue this aim, the project has organised several workshops in key cities to tackle specific topics. The first workshop was held in Beijing, China in 2009 and was attended by the Supreme Court of China, National Copyright

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Enforcement officials, members of the judiciary and legal scholars. This was followed by a second workshop in Hamburg Germany in June of 2010, where representatives of the music industry, judiciary and consumer advocates tackled the contentious debate on regulating the Internet. The third workshop was held in London and Vienna from December 7 to December 12, 2010. The London workshop focused on the role of Internet Service Providers in enforcing copyright protection in cyberspace, while the Vienna Workshop dealt with the issues of collective management of copyright and comparative analysis of the development of copyright in Europe and China.

The Workshops come at the crucial time when copyright issues are reaching boiling point with Hollywood calling out the shots. The controversial the plurilateral Anti-Counterfeiting Trade Agreement (ACTA) narrowly escaped the attempts of US policy makers to impose a secondary liability mandate after Internet companies mounted pressure to remove the secondary liability proposal. On April 19, 2011 the Greens/EFA Group wrote to the President of the European Parliament requesting for an Opinion of the European Court of Justice on this question: *Is the envisaged Anti-Counterfeiting Trade Agreement (ACTA) compatible with the Treaty on European Union and Treaty on the Functioning of the European Union?* The move was in accordance with the decision of the Committee on Constitutional Affairs in the file *REG/2011/2059 EP Rules of Procedure: exercise of Parliament's rights vis-à-vis the Court of Justice, interpretation of Rule 128* in pursuance to Article 218 (11).[1]

There are also fears that the US will include a secondary liability doctrine in the legal text on intellectual property rights at the fifth round of Trans-Pacific Partnership (TPP) negotiations.

In the European Union, the EU has just completed a public consultation process on the "impact assessment" of the European copyright enforcement policy, and of the 2004/48/CE "IPRED" directive (also known as the Fourtou directive),[2] which are heavily influenced by the arguments of the entertainment industry espousing tighter control on the Internet to "avert" piracy. The European Commission backed by the entertainment industry is pushing to transform Internet companies into a copyright police monitoring in the upcoming revision of the IPRED enforcement directive. However, compelling Internet access providers to filter its subscriber's communications to block unauthorized transmission s of copyrighted works are too restrictive and runs counter to fundamental rights.

In the *Scarlet v Sabam* (C-70/10), Scarlet, a Belgian ISP was ordered by a national court to implement technical measures to block all P2P traffic in order to protect intellectual property rights. The court's decision was subsequently referred to the ECJ who has to clarify whether the requirement to implement traffic-filtering mechanisms is consistent with EU legislation and whether a proportionality test has to be applied if this is the case. The European Commission contends that filtering systems did not require any active involvement by the Internet Access Providers and should not be considered a general obligation to monitor information. The Advocate General Pedro Cruz Villalon has opined that

> *The installation of that filtering and blocking system is a restriction on the right to respect for the privacy of communications and the right to protection of personal data, both of which are rights protected under the Charter of Fundamental Rights. By the same token, the deployment of such a system would restrict freedom of information, which is also protected by the Charter of Fundamental Rights. The Advocate General recommended that the European Court of Justice should declare that EU law precludes a national court from making an order, requiring an ISP to install, in respect of all its customers, in abstracto and as a preventive measure, entirely at the expense of the ISP and for an unlimited period, a system for filtering all electronic communications passing via its services (in particular, those involving the use of peer-to-peer software) in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which a third party claims rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at the point at which they are sent.*[3]

The proposed Directive aimed at extending the term of copyright protection for sound recordings from 50 to 70 years is back on the European Council's agenda. The Directive will benefit only a small number of artists and businesses as 96% of the economic returns will go to the major record labels and to the top 20% of performers.[4] This will also result in higher prices for consumers.

In a more controversial move, the Commission has once again demonstrated that it cannot be trusted to handle copyright-related issues in a fair and balanced manner with its appointment of lobbyist Maria Martin-Prat as the new EU head of Unit for the department responsible for copyright-related issue. She was the former director of legal policy the International Federation of the Phonographic Industry and had been vehemently argued that "private copying had no reason to exist and should be limited further than it is".[5]

China is also under intense US pressure to strictly enforce copyright protection, In 2006, China passed the Regulation on Protection of the Right of Communication over the Information Networks of 2006, which is Regulation is based on the US Digital Millennium Copyright Act of 1998 and the EU Copyright Directive. At a news conference held alongside the National People's Congress, Chinese officials from six agencies reported the results of a campaign to strengthen IP enforcement. According to a story in the People's Daily, the campaign was launched at the end of 2010 in advance of President Hu

[1] *http://en.act-on-acta.eu/Letter_to_President_of_the_European_Parliament_for_an_opinion_of_the_ECJ_on_ACTA.*

[2] *This directive was adopted in the first reading with. Janelly Fourtou as rapporteur for the European Parliament. She is married to the then CEO of Vivendi-Universal.*

[3] *Press Release 37/11. (2011). Advocate General's Opinion in Case C-70/10. Available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf.*

[4] *http://www.cippm.org.uk/downloads/Term%2520Statement%252027_10_08.pdf.*

[5] *Love, James (2011) Maria Martin-Prat reported to replace Tillman Lueder as head of unit for copyright at European Commission. Knowledge Ecology International. Retrieved from http://www.keionline.org/node/1105.*