The future of intellectual property
Creativity and innovation in the digital era
International Conference   │   Brussels   │   April 23rd – 24th, 2009

Conference Report
Introduction

The era of digital networks has given rise to new problems in the area of intellectual property. They include the question of how best to deal with the massive numbers of downloads of film, music and software via peer-to-peer file sharing. They also open up copyright issues arising out of the digitalisation of entire public libraries.

The issues affect many different interest groups, ranging from large film and music industry corporations to individual authors and artists trying to make a living from their work, as well as teenagers who risk being prosecuted after posting copyright-protected material on YouTube or comparable websites.

At the same time, digitalisation offers totally new opportunities for the worldwide exchange of knowledge. It facilitates a new kind of creativity with music and films that in the past have only been passively consumed. And it potentially opens up opportunities for innovative business models like flat rate all-you-can-eat subscriptions or advertising-financed music services.

The conference “The future of intellectual property” addressed a range of issues that are raised by this exciting policy area. Above all: How can the concept of intellectual property be adapted to the realities of the digital era, and at the same time not become outdated and inefficient?

The conference, which contributed to the European Year of Creativity and Innovation 2009, was initiated by the Goethe-Institut Brussels and realised in co-operation with the Committee of the Regions of the European Union and the network of EU Institutes for Culture, EUNIC Brussels.

The conference “The future of intellectual property” was realised with support from the European Commission’s “Europe for Citizens” programme. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.
Panel I: Intellectual property and European Union policy

From left to right:
Ruth HIERONYMI (D), European Parliament
Philippe AIGRAIN (F), Society for Public Information Spaces
Carole TONGUE (UK), Sovereign Strategy (Moderator)
Monica HORTEN (UK), University of Westminster
David BAERVOETS (NL), European Commission

Core statements of panel I: The EU should re-align its policy-making on copyright, and alternative ways of revenue generation and finance for creative works are needed.

MEP Ruth Hieronymi said that the 2001 copyright directive is fine for the past and for the present, but it does not address the new problems raised by the Internet. We must try to find new legal solutions and develop new models for the Internet and convergence. In her opinion, the legislation on copyright does not have to be re-invented, but it does have to be adjusted according to the new technical opportunities.

However, she criticised the unstructured approach of the EU in copyright policy. In policy-making terms, this unstructured approach leads to conflicts between the member states and the EU, and between the EU institutions. Hieronymi expressed her disappointment that the European Commission copyright policy is led by the Internal Market directorate which has no responsibility for culture. The impact is that cultural policy is determined by economic factors alone and she is not in favour of that approach. She said that the internal market was not the right basis for regulating cultural issues. That was why the Audio-visual Media Services (AVMS) directive was important, and why the Creative Content Online initiative had been launched. On the
other hand, the European Parliament has a wider brief and may consider cultural matters alongside copyright.

MEP Hieronymi wants to see a strong creative industry in Europe, which is not all US companies, but allows for European companies to grow. She would especially like to see smaller artists enter the value chain. She wants to see more balance in favour of the cultural industries.

She said the Telecoms Package (review of EU telecoms framework legislation) was not a perfect solution. If the market is left to itself, the big labels will get more and more powerful. She said we need not only a strong creative industry, but also the new technology that provides the opportunity for individual artists themselves and SMEs to enter this value chain and to profit from it. But in her opinion the market cannot achieve this by itself. New forms of regulation have to be found, “culture flattrates” being a possibility, but not a perfect one. She suggested that artists and representatives of the creative industries could discuss the different possibilities of micro-payments and then raise them in the policy debate.

David Baervoets, representing the European Commission, talked about the Green Paper on copyright in the Knowledge Economy and the associated consultation. The Commission has received 400 responses, which reflect polarised attitudes to copyright. It is currently reading through them and plans to come out with a review.

One of the Commission’s concerns relates to the exceptions in the 2001 Copyright Directive, which have not been implemented in many cases by the member states. He said some policy questions had come up in light of the consultation. For example, should we open up licensing, given that most of the exceptions in the Directive have not been implemented by the member states? Should any of the exceptions be mandatory, such as the exception for blind people? The Commission is also concerned about the role of libraries as opposed to the stimulation of the industry, and especially the preservation of books. Private copies are a sensitive issue in this context.

Philippe Aigrain highlighted how techniques for the production of creative works, that were previously only possible for large industries, are now in the hands of individuals. This means that we now need new ways to organise the economy of creation. He believes that 80 per cent of users would agree to pay for creative products online, if presented with the right kind of offers and his suggestion was that creation should be funded by a flat-rate levy or ‘contribution creative’. For Mr Aigrain, this “contribution creative” is a social contract, because the action of sharing culture is more important than the copyright in a single artwork (for example the download of a single song). Sharing cultural goods is, in his opinion, fundamental to society. Thus, the ideal solution for him would be a flat-rate-system linked to Internet subscriptions.

Monica Horten said that it no longer makes sense to the digital generation to be told they cannot watch something because they are in the wrong country. New ways need to be found to restructure the digital distribution chain. It is important to fund creative works and permit users to watch and listen in ways that make sense to them.

She said that much of the current enforcement activity is about industrial control, and suggested that the approximately 20 million people who use The Pirate Bay rep-
resent a large audience, and that such an audience can also be a valuable commodity for advertisers. If we consider the issue of file-sharing in this new way, we can see it as an industrial fight, rather than simply one of individual wrong-doing.

She also suggested that in the digital era, copyright can no longer be viewed in isolation, and policy-makers should take account of the impact of their decisions on other aspects of policy. As an example, she pointed to the Telecoms Package, where measures that are intended to support copyright enforcement, may also have the effect that the networks can take control of content.
Panel II: The book sector and digital libraries

From left to right:
Toby BAINTON (UK), EBLIDA
Myriam DIOCARETZ (NL), European Writers’ Council
Gabriele BEGER (D), University Library Hamburg (Moderator)
Anne BERGMAN-TAHON (B), Federation of European Publishers
Andreas BOGK (D), Chaos Computer Club

Core statements of panel II: Representatives of libraries and publishers have different views on the necessity of mandatory exceptions in EU copyright law. Demands for better digital publishing contracts for professional writers are voiced.

Toby Bainton addressed the issues of copyright for libraries in the digital era. One of their main problems is that they need perpetual access, but the controls imposed by publishers, via copyright, do not always permit this. Publishers increasingly do away with the exceptions to copyright (as in the 2001 Copyright directive). The exceptions are important so that people can use the copyrighted works for academic study and personal use. An example of such an exception is a software licence to permit a perpetual record to be created. In his opinion, it is happening more and more often that publishers do not permit the exceptions, even where the law does. He made a plea to policy-makers for the law to be changed so that publishers could not eliminate exceptions.

Further commenting on the 2001 Directive, he said that it has meant that reading a piece of digital material is a restricted act, because the law implies that the rights-holder’s permission is needed in order to read a book. Libraries frequently have to renegotiate permissions to read. Moreover, libraries have to deal with over 200 different licences, as each publisher has drawn up slightly different terms and conditions.
This situation is unsustainable for the longer term, and he made another plea for the publishers to standardise their licences.

**Andreas Bogk** spoke of other issues related to digital libraries. He said that the benefit of digital libraries was to preserve culture for posterity but he expressed concern that digital libraries should not become merely an outlet for the major publishing houses. They should not preserve old business models, which are limited by geography. For example, why can he as a German not access a digital library in the UK, just because they cannot get a licence? He said that as long as publishers lean so heavily on copyright, users will not get full access to digital libraries.

There are problems however, in setting up digital libraries, and he cited the efforts by Google to scan in books. But, he said, the libraries negotiated badly on this deal and did not get the data back from Google, in return for supplying the works to be scanned. He implied that this will make it more expensive for them to set up their own projects, because they will have to duplicate the scanning effort.

**Anne Bergman-Tahon**, speaking for the publishers, suggested that the answer to the title of the conference ‘The future of intellectual property’ was that an efficient regime of copyright was required to promote intellectual creation in the digital era. She said that publishing is fundamentally the management and dissemination of content. The basic publishing impulses are the same in the digital as in the analogue age: we invest; we create; we manage creativity; we innovate.

She said it was a myth that electronic publishing was cheaper than printing books. She also pleaded for a balanced environment where the readers will download books also from bookshops and not only through libraries. She said that the alternative way was fully subsidised literature which was a disaster for freedom of expression, giving the example of the former Soviet Union.

In response to Mr Bainton, she said the 2001 Directive permits libraries to make copies but it is up to Member States to implement it and allow format shifting. The high-level group of experts chaired by Commissioner Reding, including librarians and publishers, has made recommendation concerning format shifting, migration but also how to clear rights for orphan works and out of print books. Authors, publishers and librarians have signed a Memorandum of Understanding on the due diligence guidelines to use before to consider a work as orphan.

**Myriam Diocaretz**, representing professional writers, outlined some of the problems in respect of contracts between authors and publishers. The contract will usually only give the writer between 8-10 per cent, and in contracts for electronic distribution, where they exist, the standard royalty payment is now as low as 4-5 per cent. In many cases, however, writers have had to give up their rights to digital reproduction, which is wrapped up in a clause stating that they agree to copying ‘in technologies yet to be invented’.

She made a plea for improved contracts for authors, which address electronic distribution. She would like the writers’ contracts re-formatted for e-books, so that books can be read anywhere and give writers a reasonable payment.
Panel III: The future of the film and music sectors

Core statements of panel III: Internet Service Providers (ISPs) say that rights holders have a duty to change their business model. Collecting societies say that the European Commission does not listen to creators. Film directors call to draw a distinction between professional creators, who have to live off their creation, and the amateur, who creates for a hobby. Plus the pros and cons of a levy to fund creation.

Eduardo Bautista Garcia’s concern was about author’s rights and to make sure that the market for the digital era is not built to the detriment of the creator. Speaking for GESAC, he said if authors can create, and be paid for it, then there is more repertoire and that is better for society. He said that the Long Tail economy meant that many creative products would have a longer life, but also that authors’ rights would continue to be important.

In response to a question – “why should ‘we’ fix your business model?” – he said that there is no such thing as a zero-cost copy – creators still have to pay bills. He said that if ISPs are making a margin on content, they should share it with the authors. He said that the age of access is great, but questioned why it should be ‘free access.’

He said that the collecting societies have cleaned up their act, that they are coming up with solutions to make business work, and have reformulated their business model.

From left to right:
Danny O’BRIEN (USA), Electronic Frontier Foundation
Innocenzo GENNA (I), EuroISPA
Nicholas LANSMAN (UK), Political Intelligence (Moderator)
Cécile DESPRINGRE (F), Federation of European Film Directors
Eduardo BAUTISTA GARCIA (E), GESAC
for the digital economy. As an example, he said that the Spanish collecting society SGAE has signed an agreement with Nokia.

In response to a question on multi-territory rights – whether they are a show-stopper to legal offers – he said the collecting societies were not the problem, rather it was the European Commission which was not listening to creators.

He believes that it is the government’s task to educate consumers about copyright. On copyright enforcement, he said that with a proper regulatory system, we would not have to resort to punishment.

Cécile Despringre, of FERA, representing European film directors, spoke of respect for droit d’auteur, which, she pointed out is not the same as the Anglo-Saxon ‘copyright’. It focuses more specifically on the rights of the individual ‘author’ to control how their work is used.

In respect of the digital era, she drew a distinction between the professional author or creator, who has to live off their creation, and the amateur, who creates for a hobby. She acknowledged that digital is great for amateurs, but was concerned with the issues for the professional film directors. Development of legal offers is critical, but requires investment, and she highlighted aspects such as cataloguing, storage and retrieval which are complex matters for the film industry to address.

On multi-territory rights, she said it was an economic obstacle and not a legal one, and she cited the complexities of film finance. She said the ‘contribution creative’ which had been discussed in the first panel, was not a credible alternative. However, she also highlighted the issue of cultural policy and the key question of whether culture should be supported or left to the market.

Innocenzo Genna, speaking from the ISP perspective, posed the question ‘what do you do instead of piracy?’ Even if people can be convinced that piracy is unlawful, they currently have no-where else to turn for much of the creative content that they want, he suggested. The only way to fight piracy is to provide a credible alternative.

He commented on the business issues for ISPs in helping to provide such alternative services. The only way ISP can make a margin on content is to bundle it with other services and he stressed that this creates regulatory and competition hurdles, which are too high for the smaller ISPs. It therefore reinforces the oligopoly of network provision – which is another issue for policy-makers.

Mr Genna addressed the rights holders directly, saying that it is their duty to find a new business model and find out where their remuneration can come from, and made it clear that their business and cash-flow models must change.

Danny O’Brien, of the Electronic Frontier Foundation in the US, highlighted the difference between commercial piracy and the individual downloading a single copy. He also pointed out that decisions we make about copyright will affect other sectors of industry and society: ‘copyright is vast, but the rest of society is much bigger’ he said.

He said that the nature of the Internet is that it is made up of computers which make copies, any attempt to deter this would require draconian measures. From the crea-
tor’s perspective, he believes that the making of free copies on the Internet ‘removes the biggest problem to any creative endeavour – obscurity’.

On how to make money out of the Internet, he said that the “copy” is no longer the best place to take the money. He favours a voluntary collective licence, where people would pay a small fee on top of their Internet subscription which would be used to pay creators.
Panel IV: Society, creativity and intellectual property in the digital era

Core statements of panel IV - views range from modest reformist to radical:
- A proposal to abolish copyright;
- Demands to look after the freelance workforce of creators;
- Policies for 3-strikes, policing of the Internet, or breaking it up into television-like national webs are seen as a bad outcome for society;
- Plus the proposal of a European internet ‘bill of rights’.

Joost Smiers cited several reasons to abolish copyright. He said it is a form of censorship, it is about investment protection, it gives to the few ‘stars’ but next to nothing to most, and it encourages enforcement to the benefit of private interests.

His suggestion is to the governments should force the divestiture of the large media companies, in order to break up the oligopolies and disperse control of production. In parallel, they should enforce competition policy to regulate the market. He is not in favour of the Creative Commons as an alternative because he claims that it only serves to maintain the current system of copyright, and therefore doesn’t catalyse any real change.

Andy C. Pratt was concerned with the contribution of culture and creativity to the economy. He explained how the notion of “creative industries” is a relatively new
one, and was first used in 1997 in the UK by UK policy-makers. It is now used world-
wide, however, in each country it is defined slightly differently, and there is not a con-
sistent understanding of what it means.

He spoke about the economic issues that arise with a mostly freelance workforce,
and in particular, the tension between the individual creator and the use of copy-
right. For example, many creators are self-employed and give up all rights to their
work to the producers or publishers before publication, with the result that they do
not receive the ongoing royalties. There are therefore long term implications for so-
cial welfare and pensions.

Andy Pratt said he believes that there has been a ‘global failure of copyright’ and
that the copyright system does not function well to serve the interests of such crea-
tors. He would like to see policy initiatives that use ‘more carrot than stick’.

Geert Lovink also discussed economic concerns related to the organisation of media
workers. He called for a radical critique of the ‘free and open ideology’ of the Inter-
net, saying that there are people who have an economic interest in others giving
their rights away for free. He believes the choice for creators in the current Internet
environment, is a tough one – either they have to lock themselves into the existing
copyright regime, or they have to give it all away for free. He would like to see an
alternative to those two options and he likes the idea of micropayments for
downloads.

Speaking on worst case outcomes, he said he would not like to see ‘national webs’
or ‘closed networks’ where the Internet as it is implemented in China becomes the
model rather than the exception, which it is at the moment. He feared the policing
of the Internet using advanced technological control systems.

Juan Carlos de Martín highlighted three false assumptions. Firstly, that there is a mis-
taken assumption of economic damage to the creator, when figures are produced
to show the economic damage caused by piracy. He pointed out that people al-
ways borrow from each other, and the calculation of economic damage should
take into account a trade-off between borrowing and ‘getting for free’.

Secondly, he said that the assumption that ‘the system works fine now’ is not correct.
A few top performers and large intermediary companies are paid well, but many
authors do not get paid. Thirdly, he challenged the assumption that Internet
downloading is always the same thing as ‘piracy’.

Juan-Carlos de Martín cited two worst case scenarios for policy-making on copyright
in the Internet era: turning the Internet into a television; and three-strikes: ‘these guys
do not know what the Internet is’ he said. He would like to see the bi-directional
Internet maintained, and for Europe to have an Internet ‘bill of rights’.

– end of conference report –