

7th Communia Workshop
**Digital Policies: the Public Domain and Alternative
Compensation Systems**

1-2 Feb. 2010, National Library of Luxemburg

Programme and Abstracts

MONDAY 1st February

10:00 Welcome:

Monique Kieffer *Director, National Library of Luxembourg* and
Maximilian Herberger *University of Saarland*

Keynote 1:

Jill Cousins *Director, Europeana*

Keynote 2: Does the public domain travel from analogue to digital?

Lucie Guibault *IViR, University of Amsterdam* and **Paul Keller** *Kennisland*

The Public Domain Manifesto is available at: <http://publicdomainmanifesto.org/>

11:00 morning session **What Policies for the Public Domain in the 21st Century?**

Chairperson: **Juan Carlos De Martin** *Coordinator, COMMUNIA Project*

Panelists:

Richard Owens

WIPO, Director, Copyright Law Division

WIPO project on Intellectual Property and the Public Domain

Excerpts from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3.doc

Component (1) Copyright and Related Rights:

Uncertainty over copyright ownership and status of works may result in works not being made available to the public, even where no living person or legal entity asserts claims to ownership of copyright, or where the owner has no objection to such use. With respect to works of unknown authorship or in respect of which the owner cannot be identified ("orphan works"), uncertainty can undermine the economic incentive to create, imposing additional costs on subsequent users/creators wishing to incorporate material taken from existing works into new creations. In recent years, commentators have highlighted the importance of registration/deposit of copyright and related rights in the evolving digital environment, beyond the traditional functions of facilitating the exercise of rights, for example, as a means to prove the existence and/or ownership of a work, and to identify works that have fallen into the public domain. In relation to copyright registration systems, the role of Rights Management Information (RMI) has tremendous potential for identifying and locating content. RMI is increasingly used in the networked environment, which helps users to customize their searches, find the content they are seeking, and where appropriate, enter into licensing agreements with right owners. Understanding how different registration and deposit systems function (both those established in the public sector, as well as the emerging private ones) will thus prove useful in order to identify works that have fallen into the public domain. It is important to understand how different jurisdictions define the public domain, directly or indirectly, and to identify the existing initiatives and tools, technical and legal, which can facilitate access to, use, identification and location of public domain material. In addition, there is a need to clarify the relationship between copyright limitations and exceptions and the public domain, including legal, conceptual and functional aspects.

Surveys and studies proposed for the Development Agenda should be able to take advantage of work which has already been undertaken by WIPO for different purposes in the area of registration of copyright works, such as a Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights (SCCR 13/2) undertaken at the request of Member States, in November 2005, and the WIPO Seminar on Rights Management Information which took place in 2007.

Component (3) Patents:

One of the essential elements of the patent system is the public disclosure of patent information, which includes both technical and legal information relating to patents. Information dissemination policies, the legal framework and technical infrastructures all play an important role in supporting access to and use of publicly available patent-related information and in facilitating the identification of technology that is in the public domain. In the context of the Standing Committee on Patents (SCP), discussions were held on two studies prepared by the Secretariat; "Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights" and "Dissemination of Patent Information" (SCP 13/3 and 13/5)." These studies include useful information about the role of the patent system in the identification, access and use of technology that is in the public domain. As explained in the study on dissemination of patent information, the public domain in relation to patent law consists of knowledge, ideas and innovations, over which no person or organization has any proprietary rights. Subject matter in the public domain with respect to patents, could be identified by confirming the absence of legal restrictions on use (i.e., exclusion from patent protection under applicable laws), the rejection of a patent application, the expiration of patent protection, non-renewal, and revocation or invalidation of a patent. However, in practice, it is often hard for the public to identify the validity of relevant patents due to the lack of effective tools in many jurisdictions such as patent legal status databases accessible to the public.. "

Pier-Virgilio Dastoli *Permanent Forum of Civil Society*

Javier Hernandez-Ros *European Commission, DG INFSO, Head of Unit*

Francesco Fusaro *European Commission, DG Research*

Access to scientific information in the digital age - FP7 Open Access Pilot Project

Abstract:

In order to become an increasingly competitive knowledge-based economy, Europe must not only improve the production of knowledge but also its dissemination and application. For this reason the European Commission has been analysing over the past years the new opportunities for the dissemination of research results offered in the digital age. After extensive consultations with the numerous stakeholders, the European Commission launched in August 2008 an open access pilot project for its research funding programme to experiment with open access as a means to enhance the dissemination of research findings and maximise the returns on investment in R&D.

14:00 afternoon session 1: **Digital Heritage**

Chairperson: **Ulrike Elteste** *Creative Commons Luxembourg*

Abstract:

This panel will attempt to explore how different stakeholders - public and private bodies, nonprofit organisations and corporations - can cooperate in preserving Europe's cultural heritage. In particular, the panelists will discuss how intellectual property rights - over the assembled content as well as the machine readable bibliographical information *about* the content - can and will be managed. How will the licensing schemes chosen by different parties undertaking digitalisation projects today affect the creation and maintenance of digital archives in the future? In particular, how will they affect the possibilities of cooperation and exchange of content and metadata between different projects, and the accessibility and usability of the assembled content for and by the public?

Panelists:

Lionel Maurel *Gallica/Bibliothèque nationale de France*

French policies regarding the reutilisation of the national cultural heritage

The BnF's new licensing scheme

Patrick Peiffer *EUROPEANA/Bibliothèque nationale de Luxembourg*

Which licensing scheme for Europeana? An overview of *the discussions between the countries contributing to Europeana*

Antoine Aubert *Google*

Mathias Schindler *Wikimedia DE*

16:00 afternoon session 2 **Economic and Social Value of the Public Domain**

Chairperson: **Federico Morando** *economics working group lead COMMUNIA project*

Debate reporter/facilitator: **Peter Troxler** *Waag Society*

Panelists:

Federica Rossi *University of Torino and University of London*

Intellectual Property (IP) Governance and Strategic Value Creation

Abstract:

Setting the scene:

The presentation is based upon the results of an original exploratory empirical study about:

- what forms of intellectual property (IP) appropriation mechanisms do firms engage in, taking into account both proprietary IP (patents, copyright) and non proprietary IP (open source, non-patented innovations);
- what kind of strategic value (related to finance, innovation, strategic relationships, competitive advantage & market positioning) do firms seek when they exchange these different forms of IP through different governance forms (selling, buying, licensing, etc.);
- what obstacles (related to IP search, transparency, contract negotiation and enforcement issues, as well as regulation) do firms encounter when attempting to create value through the exchange of IP.
- whether there is a relationship between the value firms seek or the experienced obstacles, and the type of IP marketplaces (patents, copyrights, open source, or no protection) firms participate in, or the governance structures (such as licensing in or out, cross-licensing, pooling, etc. in the case of patents) they apply.

Pilot case studies have been realized on three sectors where the problem of the extent to which IPR should be enforced has been particularly debated. This allows us to derive some general implications from our findings. The sectors of investigation include ICT (software and hardware) firms and public research organizations in the UK, as well as pharmaceutical firms in Germany.

The survey data that contribute towards the data analysis of this paper are obtained through a large scale questionnaire. This research is forming part of the EU 6th Framework Project U-KNOW (Understanding the relationship between knowledge and competitiveness in the enlarging European Union)

which is an EU Specific Targeted Research Project (STRP) where Birgitte Andersen was a work package coordinator of "An IPR Regime in Support of a Knowledge Based Economy".

Contribution:

With respect to IP activity, we find that most firms in all three sectors exchange IP rather than just holding it, and that most firms exchange more than one type of IP, usually including non-proprietary IP (open source, non-patented innovations), either exclusively or in combination with proprietary IP (patents, copyright). The exchange of product and process innovations that are not formally protected involves a high share of firms in all three sectors and generates a relatively higher number of transactions. Consequently, better understanding of the processes of value creation through IP governance requires us to understand how firms engage in different forms of IP transactions, including paying attention to the exchange of product and process innovations that are not formally protected. In all sectors, different models of value creation from IP exchange coexist, with size (in ICT firms and public research organizations) and research intensity and size (in pharmaceutical firms) seemingly associated with different models.

With respect to value creation, we find that firms create value by applying all forms of IP: firms use both proprietary and non-proprietary IP exchanges in the context of their innovation strategies, in order to gain competitive advantage and to build strategic relationships, as well as for financial gain. At the same time, firms strategically use specific IP governance structures (buying, selling, licensing, and so on) in order to seek specific benefits. These results suggest that non-proprietary IP appropriation mechanisms are used because they confer specific benefits, rather than because of lack of awareness of the potential and usefulness of patents and copyright.

With respect to obstacles experienced by firms during the value creation processes, we find that firms encounter many obstacles when exchanging all kinds of IP. Some obstacles depend on the institutions regulating the marketplace (search obstacles; some transparency problems such as lack of clarity in IPR documents); others depend on the behaviour of agents in the marketplace (opportunistic behaviour, different practices of firms); others depend on the nature of knowledge exchanged, which is often characterized by uncertainty, tacitness, serendipity, and hence makes it difficult to assess its novelty and economic value. Comparatively few firms indicate problems due to fragmented or too restrictive excessive regulations. Therefore, removing the obstacles to value creation through IP exchange is not simply a matter of tightening rules, but may require actions at different levels (at the level of the patent office, of the industry, of the overall legislative framework). Some obstacles may even be impossible to eliminate, such as the difficulty in assessing the value of new knowledge. Furthermore, because obstacles are very often governance-specific, interventions directed at removing some of them should not be "one size fits all" but tailored to specific forms of IP and to specific types of transactions.

Overall, as firms create value from participation in the exchange of several forms of IP, often at the same time, it would be important to promote a legislative framework that allows different models of value creation from IP to coexist.

Rufus Pollock *University of Cambridge*

Mark Isherwood *Rightscom.com*

Project on the Public Domain in Europe

Abstract:

We reports results from a large recent study of the public domain in the European Union. Based on a combination of catalogue and survey data we provide figures for the "size" of the public domain extending across a variety of media. In addition, combining our size figures with material on price, sales and usage we have obtained estimates of the overall "value of the public domain". Our work provides one of the first quantitative estimates of the `size' and 'value' of the public domain in any jurisdiction and also has direct relevance to current policy questions such as term extension and archive digitization.

TUESDAY 2nd February

10:00 – 13:00 morning session **Alternative remuneration systems**

Chairperson: **Philippe Aigrain** *Sopinspace*

Volker Grassmuck *University of Sao Paolo*

From Common Sense to Commons Sense - A Copyright Exception for Monetizing File-Sharing

Abstract:

Common sense tells us that road users need rules, signs and controls, lest they cause accidents. City planner Hans Mondermann, counter-intuitively, did away with all of them and created a "shared space" where participants negotiate their movements ad hoc, at eye level. Common sense tells us a number of things about money and creditors that banker Muhammad Yunus turned on its head. Common sense tells us that software is a high-investment, high-profit good that needs to be protected. Richard Stallman started to give his software away. All three were called crazy in their times. All changed the world and the way we think about it.

If shared space, shared money and shared code work so well why not shared culture? The current copyright regime is built on Mark Stefik's dictum "It's unfortunate but people are dishonest." On the contrary, people prove time and again their willingness to pay creators, if, that is, they are not treated as thieves but as partners. In many forums a new social contract between authors and audiences is being negotiated. It is made up of many elements, including a lump-sum-paid permission to file-sharing. "If you tread people as idiots, they will start behaving as idiots." (Mondermann) Conversely, if we start treating each other as partners in an arrangement where we collectively provide creators whose works we enjoy and share with each other with decent working and living conditions to create them, we will behave accordingly. What is needed is a shift from received common sense to commons sense.

Florian Philapitsch *Austrian Communications Authority*

I Dream of Dodos - Why Collecting Societies Should Play a Major Role in "Alternative Compensation Systems" and Why They Should Be Saved From Extinction

Abstract:

"Alternative Remuneration/Compensation Systems" are the trendy center of the latest copyright-debates. If all ideological ballast is cast aside, two major questions remain: "How does the user get the content" and "How does the

creator get the money”.

Users are increasingly adept at getting the content they want and it would be highly unfair to claim that they would not want to pay for it. However it seems that technology is on their side and creators are left out in the rain, getting no or not enough money for their work. Over the last decades the entities which have made sure that creators get their money were the collecting societies (CS). These CS have established a global network specialized on the licensing of creative content and distribution of remuneration. Not only is it important to realize the strengths and weaknesses of current remuneration/compensation systems it is also mandatory to acknowledge the importance of CS for any future systems. For this, at least the European CS-system has to be modernised and harmonised. CS should be used for the documentation and allocation of the use of content as well as for the distribution of the earned money to the right-holders based on fixed rules. The key points for an “alternative” or simply overhauled system based on CS are transparency and credibility. This can be obtained by European harmonisation and governmental supervision of the CS-system.

Rainer Kuhlen *HU Berlin, ENCES*

John Buckman *Magnatune*

European Collecting Societies need to be non-exclusive, like in the USA

Abstract:

The main change we would like to see in EU law is to require collecting societies in the EU to operate in a non-exclusive capacity, allowing musicians to retain their rights and for them to be able to do their own licenses. This is how collecting societies have operated in the USA for over 60 years and has not negatively impacted their ability to collect in efficient ways in their main competence area. In other words, I would like to see a weakening of the monopoly power of the national collecting societies, to allow competition.

More information:

Magnatune's main business is selling music licenses to business for various uses, such as for independent films, TV ads, web sites, and music feeds to restaurants and stores. Currently, most collecting societies (except in the USA) are exclusive and do not let musicians do their own deals (ie, make a direct sale themselves).

For instance, a UK musician belonging to PRS cannot grant a license to a UK restaurant to play their music. The UK Restaurant would still need to pay PRS.

In the USA the situation is different, and the collecting societies are non-exclusive, because the collecting societies were sued as monopolies and are required under the "consent decree" settlement to be allow musicians to do their own deals.

In practice what this means is that when a European customer approaches us, we:

- 1) can license them any music that not with any collecting society
- 2) can license them any music from a USA musician
- 3) can **not** license them any music from outside the USA, if the musician belongs to a collecting society.

This has two negative consequences for Europe:

- 1) licensing businesses following the Magnatune business model cannot exist in Europe, because the exclusive (monopoly) collecting society system is effectively a "restraint of trade" prohibiting any competition with the national monopoly collecting society
- 2) European musicians belonging to a collecting society are at an economic disadvantage to USA musicians, because they cannot sell their music for public space usage, except to the USA. USA musicians belonging to a USA collecting society can sell their music for public space usage globally.

The main change I would like to see in EU law is to require collecting societies in the EU to operate in a non-exclusive capacity, allowing musicians to retain their rights and for them to be able to do their own licenses. This is how collecting societies have operated in the USA for over 60 years and has not negatively impacted their ability to collect in efficient ways in their main competence area. In other words, I would like to see a weakening of the monopoly power of the national collecting societies, to allow competition.

Here is a paragraph explaining the regime under which the American collecting societies function under.

From <http://www.musicdish.com/mag/index.php3?id=3825>

Licensing 80 percent of all music performed on the radio, ASCAP attracted its first antitrust suit from the Antitrust Division in 1934. The Department contended that ASCAP dominated the radio industry and should be dissolved. The case became dormant after the government received a continuance after a two-week trial. In 1941, the Department sued both ASCAP and BMI on the principal ground that their blanket licenses, which were their sole offerings, were in restraint of trade. Consent Decrees quickly followed that specified, among other things, that licensing practices must be non-exclusive and that licenses and individual members/affiliates should be allowed to directly contract with one another.

Dagmar Heijmans *Sellaband.com*

Mark Cole *University of Luxemburg*

What can we learn from the Private Copy ? Licence global or Flatrate in light of previous experiences