

Internet Society Issues Paper on Intellectual Property on the Internet

Executive Summary

Over the past years, the idea of how to reconcile intellectual property rights and the Internet technologies and platforms has become a pivotal point of all Internet governance discussions. With the emergence of the Internet as a means of communication, creativity, innovation and ideas and with the increasing accessibility to information, traditional concepts of intellectual property appear increasingly antiquated and inapplicable in a space where information is democratized, people become increasingly more empowered to create, exchange and distribute content and innovation and creativity proliferate.

For the Internet Society, policy and technology discussions regarding the relationship between the Internet and intellectual property should continue to address the multiple challenges imposed by the nature and architecture of the Internet. At the same time, we feel that the time is right for the Internet community to reflect and strategize on how to create a harmonious nexus between Internet platforms and intellectual property regimes. In this respect, we believe that a good starting point is the setting of some minimum standards of process and substance that could facilitate and guide such discussions.

An important point for the Internet Society in submitting this issues paper is the understanding that intellectual property discussions, irrespective of whether they reflect trademark, copyright or patent considerations and, as long as they primarily relate to Internet concerns or propositions, are part of the wider Internet governance discussions. This pragmatic rationalization is significant in making some subsequent determinations relating to the structure, design and ultimate approach of such discussions.

To this end, the Internet Society urges all intellectual property considerations of policy to submit to the following minimum standards:

- **Intellectual Property and Multistakeholder Governance:** All discussions about intellectual property in the Internet should be conducted under a multistakeholder framework.
- **Intellectual Property and Transparency:** the need for transparency is reflected both in the Geneva Principles as well as in the Open Government Paradigm. The Internet Society believes that this need should further be reflected in agreements like the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership Agreement (TPP) and the Canada-Europe Comprehensive Agreement (CETA).

- ***Intellectual Property and the Rule of Law:*** Intellectual property should be based on principles such as due process, equality of rights, fairness, transparency, the right to be heard and legal certainty.
- ***Intellectual Property and Internet Architecture:*** The Internet Society has long recognized that the infringement of intellectual property rights is a critical issue that needs to be addressed, but, at the same time, it must be addressed in ways that do not undermine the global architecture of the Internet or curtail internationally recognized rights.
- ***Innovation without permission:*** All intellectual property laws and policies should bear in mind the Modern Paradigm for Standards Development, shaped by adherence to the following principles: cooperation; adherence to principles including due process, consensus, transparency, balance and openness; collective empowerment; availability; and, voluntary adoption.

Based on these observations and taking stock of the way the debate has been unfolding over the past few years, the Internet Society would like to take the opportunity and make some propositions, which we believe should transpire all policies on intellectual property. At its most basic and fundamental level, the Internet Society believes that all issues pertaining to the way intellectual property rights are expressed in the Internet space can only be addressed efficiently and systematically through an inclusive and open framework. This makes multistakeholder governance a top priority for us, because we believe that it is currently the only sustainable governance model for (public policy) issues relating to the Internet and its platforms.

Introduction

Over the past years, the idea of how to reconcile intellectual property rights and the Internet technologies has become one of the cornerstones of the Internet governance discussions. With the emergence of the Internet as a means of communication, creativity and innovation and with the increasing accessibility to information, traditional concepts of intellectual property appear increasingly antiquated and inapplicable in a space where information is democratized, people are empowered to generate and exchange content and, innovation and creativity proliferate.

The central issue regarding the relevance of intellectual property – in particular copyright – in the age of information and open standards networks continues to challenge the relationship between intellectual property and the Internet. Questions are now focusing on whether intellectual property – under its current form – is able to support the innovative wave in the Internet, whether it is in the position to ease access to the network or whether it can encourage existing and new forms of creativity. In this regard, Neelie Kroes, Vice President of the European Commission of the Digital Agenda, speaking on the subject of copyright, stated that we need to take a close look into the existing copyright model and how it fits into the realm of the Internet:

“We can't look copyright in isolation: you have to look at how it fits into the real world. So let's ask ourselves: how well is the current system achieving [its] objectives, in the world we live in today? [...] Are current copyright rules favorable to potentially life-saving scientific research or do they stand in its way? Do they make it easier or harder for people to upload and distribute their own, new creative content? And, is that the best way to boost creativity and innovation?”¹

The Internet Society takes the view that discussions regarding the relationship between the Internet and intellectual property should continue to address the various ongoing challenges. We further believe that the time is opportune for the Internet community to reflect and strategize on how to create a nexus between Internet platforms and intellectual property regimes. In this respect, we feel that setting some minimum standards of process and substance could facilitate such discussions.

One key point the Internet Society would like to stress at the outset is the view that intellectual property discussions are unequivocally part of the wider Internet governance structure. Just like issues relating to cybercrime, security, spam or privacy constitute key features of national, regional and international attention, intellectual property occupies a pivotal space in various governance fora. In this regard, we believe that a significant portion of the intellectual property debate has reached a substantive impasse. Although discussions about piracy are important and actors should continue to seek ways to address it, it is equally important to focus on the pragmatic obligation to identify ways to bring intellectual property rights in line with the Internet, which will subsequently allow intellectual property rights to achieve their original purpose in promoting creative and innovative ideas, in enhancing the economic rights of old and new business establishments and in defending non-commercial expression and use. On the basis of this logic, enforcement is another issue that deserves attention. It is vital that intellectual property policies and laws are based on rationalizations, which do not place the State or courts in the awkward position of having to prioritize intellectual property rights over the Internet's technical operation or the users' ability to create and share content legally. In this regard, the Internet Society has suggested that effective enforcement of intellectual property rights online requires a multi-pronged approach and that, at the very minimum, enforcement measures should be technology neutral.²

Based on these observations as well as taking stock of the way the debate has been unfolding over the past few years, the Internet Society would like to take the opportunity and put forth some propositions, which we believe should transpire all initiatives on intellectual property. With this issues paper, the Internet Society (ISOC) expresses some of its views on issues relating to (Internet) intellectual property and digital content. At the most basic and fundamental level, the Internet Society believes that all issues pertaining to the way intellectual property rights are expressed in the Internet space can only be addressed efficiently and systematically through an inclusive framework. This makes multistakeholder governance a top priority for us, because we believe that it is currently the only sustainable governance model for (public policy) issues relating to the Internet and its platforms.

Intellectual Property and Multistakeholder Governance

With the emergence of the Internet, intellectual property law and policy making have been challenged on many fronts, including the one concerning the procedures that traditionally have been employed by policy makers and legislators to create, draft and implement intellectual property regulation. Generally, the authority and responsibility to conclude laws and reach decisions at national, regional and international fora was reserved exclusively to governments and governmental representatives. This was rarely challenged and, overall, it was the norm in conducting negotiations, holding discussions and making legal determinations.

This approach was further consistent with the idea that intellectual property laws and policy, even the ones reflecting international cooperation, are premised on the notion of territoriality – on a structure of clear physical boundaries, where the role of the State as the creator and enforcer of intellectual property laws is clearly delineated. Although this approach continues to retain its legitimate status in various intergovernmental bodies (e.g. WIPO) for a number of intellectual property issues, for others it is challenged by the Internet and its design. Given that the Internet recognizes no geo-political boundaries, the issue concerning how to address intellectual property rights online automatically becomes a centerpiece of the Internet governance discourse. To this end, a question that emerges concerns the process that should reflect intellectual property discussions relating to the Internet.

Back in 2005, during the World Summit on the Information Society (WSIS) in Tunis, Heads of States and government committed to the Tunis Agenda,³ which included a section on Internet Governance. Paragraph 34 of the Tunis Agenda, described Internet governance as follows:

“[Internet governance is] the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet”.

By accepting this working definition, Heads of States and government have subscribed to the fact that all issues pertaining to the Internet, including those of public policy should evolve and include all stakeholders in a governance arrangement, based on cooperation, collaboration and partnership. Under the Tunis Agenda, Internet governance is to be conducted through a multistakeholder framework, where stakeholders participate in their respective roles offering different perspectives. In particular, article 68 of the Tunis Agenda states:

“[...] We also recognize the need for development of public policy by governments in consultation with all stakeholders”.

The message stemming from the Tunis Agenda should not be taken lightly, but, at the same time, it should not be considered as an all-inclusive governance solution. However, at a conceptual and pragmatic level, the multistakeholder model resonates with the multifaceted characteristics of the Internet – the combination of technical standards, issues of public policy and commerce generated in cyberspace and which cannot be addressed without the partnership and dialogue between all interested actors. To this effect, the Internet Society feels that multistakeholder mechanisms can offer some notable advantages.

One such advantage relates to the ability of the multistakeholder model to bring people together and this can add great value to discussions as well as identifying ways of finding balanced and reasoned solutions. Another advantage is the volume of information shared, which is normally attached to multistakeholder processes: the more inclusive a process is, the wider the information that can be communicated to respective communities. And, in a (governance) space where information is vital in making informed decisions, allowing different voices to contribute, shape or, otherwise, engage in issues that affect many different views is an opportunity that should not be missed.

It is, therefore, reasonable to expect that some aspects of intellectual property will continue to be driven by national/regional concerns, reflecting national/regional aspects and addressed through national/regional fora. However, other, more specific aspects of intellectual property relating to the Internet will have to be adjusted to the reality and legitimacy of the multistakeholder model. It is, ultimately, part of the responsibility of all actors to identify and distinguish which intellectual property issues should be addressed through multistakeholder processes.

Transparency

Transparency is another value that has become increasingly important in light of the Internet. Notwithstanding the Internet space, transparency represents a feature of rule-making that can enhance the quality and legitimacy of rule-making processes; on the one hand, it refers to the ability of the public to have access to information held by those with the power to make decisions and, on the other, to the obligation on those in power to make the information available to members of the public in a timely, easy and cost-effective way. Further, it helps “*ensure meaningful and informed public participation, and meaningful and informed public participation informs agency rule making*”.⁴ Moreover, the general notion is that transparency helps achieve democratic goals, by allowing and making room for robust review of the decision-making processes; and, finally, transparency contributes to the substantive goals of sound decision-making by providing more information to the public, whilst opening the opportunity for independent review and appeal by adversely affected actors.

All in all, transparency and information walk hand-in-hand. The same way that information is central to robust rule making, it is central to the Internet. Access to information allows for more informed decisions and the Internet is in the position to facilitate this sort of access in an organic and harmonious way. Similarly, applications and services offered via the Internet allow information retrieval and analysis in ways that were never before imagined. Through transparency, questions like “is this right or fair” (legitimacy), “are we doing this right” (truth/efficiency) and “what is our personal integrity and organizational identity” (authenticity) can proliferate and manifest themselves. To this end, transparent processes provide a framework for participation with a specific purpose and support decision-making. Moreover, the close nexus transparency shares with multistakeholder governance, facilitates participation without compromising the ability of stakeholders to maintain their independence and integrity; at the same time, it enhances and reinforces the value of accountability.

In the context of intellectual property policy and law-making, transparency has become a pivotal issue, at least in relation to the way international intellectual property agreements are being negotiated. With the Internet encouraging the exchange of information, users are questioning any policy direction that is premised on secrecy, lack of information and/or behind-closed-doors negotiations. This became particularly evident in the array of discussions concerning the Anti-Counterfeiting Trade Agreement (ACTA) as well as the proposed Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA).

For the Internet Society, the need for transparent and open processes is critical. In this regard, at the time the ACTA agreement was negotiated, the Internet Society stated:

“We are disappointed that the ACTA participants only released two versions of the agreement under negotiation throughout the eleventh formal rounds of negotiations – one after the eight round and one after the final round. We are also disappointed that the ACTA participants did not adopt a truly open, transparent and inclusive multistakeholder approach to the development of the substance of the proposed agreement at least with respect to those terms which pertain to the Internet”.

In a similar vein, in a statement concerning the Trans-Pacific Partnership Agreement (TPP), co-signed by the Electronic Frontier Foundation (EFF) InternetNZ, Knowledge Ecology International (KEI), Open Media, Global Voices Advocacy and the International Federation of Library Associations and Institutions (IFLA), the Internet Society noted:

“[...], the TPP has followed a procedural path that, in our view, has not been sufficiently inclusive and transparent. The process of negotiations has hitherto followed the traditional route of involving only governments and governmental representatives. We understand this approach to the extent that, historically, trade - related agreements have always been conducted under a similar, behind-closed-doors process. But, this is not a typical trade agreement; it involves issues that also extend to the Internet and its platforms and, this raises valid questions regarding process. [...] It is only through an inclusive process that all interested parties can effectively engage and provide input on issues that will, ultimately, have an impact on the way users experience the Internet and its services”.

Quintessentially, all processes relating to, and affecting, the Internet should be conducted through clear and transparent processes. This is also reflected in the principles articulated in the Geneva Declaration of Principles, which afforded formal recognition to the idea of the multistakeholder governance model in the Internet. Under “the Geneva Principles,

*“The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations”.*⁵

Finally, the importance of transparency is also reflected in the “Open Government Declaration”⁶, signed by 60 governments, which states:

“We acknowledge that people all around the world are demanding more openness in government. They are calling for greater civic participation in public affairs, and seeking ways to make their governments more transparent, responsive, accountable, and effective.

We recognize that countries are at different stages in their efforts to promote openness in government, and that each of us pursues an approach consistent with our national priorities and circumstances and the aspirations of our citizens.

We accept responsibility for seizing this moment to strengthen our commitments to promote transparency, fight corruption, empower citizens, and harness the power of new technologies to make government more effective and accountable.”

Intellectual Property and the Rule of Law

Intellectual property, just as any other facet of law, is premised upon the fundamental notion of the rule of law. This entails a system of governance that is based on non-arbitrary rules and linked to notions of justice; it incorporates ideals of accountability and fairness, relating to the protection and vindication of rights.

Today, the concept of the rule of law is so fundamentally relevant that it is reflected in the Universal Declaration of Human Rights, which recognizes that:

“[...] it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [...]”.

Moreover, the concept is also embedded in the Charter of the United Nations, and has been defined as:

*“a principle of governance in which all persons, institutions, entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.*⁷

The rule of law, therefore, should not be perceived entirely as an abstract concept with arbitrary connotations; rather, it should be seen as a legal maxim that incorporates principles of due process, equality of rights, fairness, transparency and legal certainty. These are fundamental values that should pervade all policies and laws irrespective of whether they pertain to the Internet or not. It is crucial, therefore, as we consider ways to address issues of copyright and trademarks on the Internet, to use the rule of law as a foundational benchmark. The rule of law can provide the justifications, legitimize processes and, generally, create balanced frameworks of principles and rules.

However, some legislative attempts on the intellectual property front have, arguably, taken an approach which appears to be incompatible with the rule of law, putting into question due process requirements, promoting an unbalanced set of rights, and were characterized by non-transparent processes as well as their failure to provide equally enforceable safeguards to all interested parties. More specifically, ACTA raised significant and valid procedural and substantive questions relating to the rule of law (transparency, lack of balance of rights, lack of accountable processes, etc.), whilst the ongoing negotiations of the TPP have been following a similar path. Likewise, in the US, SOPA and PIPA generated heated discussions especially in relation to their enforcement

provisions⁸, which appeared to undermine the role of the courts, and systematically sought to exercise extralegal pressure with an end that goes beyond that of intellectual property law.⁹ We can see a similar, rigorous enforcement-focused shift proliferating in Latin America, which, traditionally, it was considered as a region with one of the most balanced copyright policies in the world.¹⁰ Finally, we can also observe a consistent pattern in the Asia-Pacific region, where countries like Japan¹¹ and New Zealand¹² have been active in updating or implementing new copyright enforcement measures.

Ultimately, these policy attempts could be challenged on the basis of scope and proportionality. In this context, concerns were raised by Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who stated in his report to the United Nations General Assembly:

“The Special Rapporteur is deeply concerned by discussions regarding a centralized “on/off” control over Internet traffic. In addition, he is alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights. This also includes legislation based on the concept of “graduated response”, which imposes a series of penalties on copyright infringers that could lead to suspension of Internet service, such as the so-called “three-strikes law” in France and the Digital Economy Act 2010 of the United Kingdom.”¹³

All this is significant when bearing in mind that intellectual property is an all-inclusive framework for creators, innovators and entrepreneurs at all levels; it traditionally reflects principles of fair use and fair dealing, associated with the respect for and the protection of human rights and fundamental principles; it, quintessentially, exists to provide incentives and promote progress. To this end, the rule of law should underpin all discussions and policy decisions concerning intellectual property rights and their protection. For the Internet Society, creating and enforcing intellectual property laws that are proportional and compatible with the rule of law is key for moving forward and for addressing issues of infringement.

Self-regulation and voluntary schemes for copyright enforcement

The Internet Society is observing with interest the increasing volume and range of self-regulatory initiatives that seek to address and curb infringing activity online. We are, generally, in favor of industry-based initiatives to address online issues, including those related to intellectual property, provided there is judicial and regulatory oversight and due process. As self-regulation refers to initiatives produced and enforced by independent bodies, private appropriately qualified entities could prove beneficial in overseeing market participants’ actions through different processes such as standard setting, certification, monitoring, brand approval, warranties, product evaluation and dispute resolution.

For self-regulatory mechanisms to be successful they should include standards for valid consent – the ability of both parties to enter and conclude contractual agreements on an equal footing, based on good faith and with a comprehensive understanding of their respective rights and responsibilities. Overall, but also more specifically, in cases where consent is not present or cannot be obtained, public legal institutions are required to specify the criteria that entitle private regulatory regimes to acquiescence and immunity. But, ultimately, it is important to understand that all initiatives based on self-regulation are expected to operate under minimum standards of justice and fairness. Rules, consequential to private regulatory efforts, should provide for a paradigm that promotes equal opportunities and a balanced set of rights.

With this in mind, private regulation offers some notable advantages in ensuring that the fundamental values, which normally are at stake in the construction of cyberspace, can be protected by allowing interested parties to participate in the formation of rules and principles that are not subject to the cumbersome nature of traditional law making. As professor of law David Post accurately put it:

*“We don't need a plan but a multitude of plans from among which individuals can choose, and the market [...] is most likely to bring that plenitude to us”.*¹⁴

However, industry regulation also has some significant disadvantages, mainly relating to the legitimacy of the authorities created under self-regulatory models to deal with issues emanating from cyberspace. A valid concern relates to the ability of such authorities to create policy and enforce rules that traditionally fall within the ambit of the democratic State.¹⁵

Given this understanding, one of the most worrying aspects of private regulation is, arguably, that many of its advantages are based on false premises and loose criteria. Amongst other things, private regulation may easily fail to protect democratic values; it can neglect basic standards of justice; it is often less accountable compared to traditional governmental rule making; and, because of the Internet, it is increasingly and mostly imposed through computer code, which by nature circumvents legal and political institutions that ideally ensure just and democratic values. On this basis, a concern of private regulation relates to issues of accountability – or its lack thereof - and to the fact that no mechanism – be it governmental or self-regulatory – should be allowed to circumvent the obligations of due process and equal protection through the creation of formal private intermediaries for policy making.¹⁶

The Internet Society is of the opinion that it is the use of certain tools that will ultimately determine the efficacy, future and overall success of self-regulatory intellectual property regimes. The availability of an easy to use appeals process through traditional adjudication or alternative dispute resolution (ADR) paradigms should be an unyielding feature as it can provide the basic internal and external checking mechanisms that allow a self-regulatory mechanism to evolve into a reliable system of equitable norms and rules. Moreover, and because such self-regulatory copyright enforcement mechanisms highly depend on the collection of users' data, it is essential they are equipped with systems that are both technically and legally artful so that users' privacy is respected. For this reason, transparency has again a unique role to play. Users should be, generally, aware of how or where their data will be used and for what purpose.

Given all this, the Internet Society believes that industry-based initiatives focusing on the enforcement of intellectual property rights should be subjected to periodic independent reviews as related to their efficiency and adherence to due process and the rule of law. Moreover, and in order to ensure that such systems do not lack the necessary and essential democratic safeguards, it is further crucial that such mechanisms operate under strict, transparent rules and are created through robust, open and inclusive processes.

Internet Architecture and Intellectual Property

The Internet Society has consistently and strongly advocated that legal frameworks should support the open and unrestricted development of Internet technologies. Technology can be used for beneficial and, sometimes, unforeseen and surprising purposes. That is the essence of innovation in the Internet environment.

The Internet Society acknowledges that one great challenge in the current online environment relates to the shape law making should take. With social, commercial and governmental activities increasingly moving and depending on the Internet, law making and policy design need to adapt to a new paradigm –one that respects and takes into account technology, network standards and architecture yet, at the same time, remains technology neutral. In this climate, one of the main challenges (and something that became apparent during the discussions of SOPA and PIPA) is that articulating laws on the basis of today's technologies can constrain or limit their true potential, can provide only a snapshot of their current reality and, can prevent their evolution in ways that law makers may neither appreciate nor foresee. In this regard, accurate analysis¹⁷ exists as to how seeking to answer policy considerations through technological solutions can fail to achieve the desired goals or offer viable and sustainable solutions.

More specifically, the Internet Society has taken the position that laws, policies and regulations should consider – to the extent possible – the unique nature of Internet technologies when seeking to address legal issues. The various techniques employed through proposals like SOPA and PIPA, for instance, which required the disruption of DNS infrastructure, whether by filtering results or through domain name seizures, have been seen as having serious deficiencies. These techniques do not solve the problem, interfere with cross-border data flows and services, and undermine the Internet as a single, unified, global communications network. At the same time, DNS filtering and seizure raise significant human rights and freedom of expression concerns, and often curtail international principles of the rule of law and due process. The negative impact of DNS filtering far outweighs the short-term legal and business benefits.

In reality, it is ambitious to expect those engaged in traditional law making to think in terms of technology and it is restrictive to shape policy on any specific technology. What we need to avoid is the situation where technology becomes a proxy for bad policy choices regarding the scope of protection of intellectual property rights in the Internet. This is an additional reason behind the need for multistakeholder processes in this space – it is through the exchange of knowledge and the transfer of ideas that we may prevent laws that can jeopardize the way users experience the Internet and the way developers contribute to its future design.

The Internet Society recognizes that policy makers have an important obligation to address issues like online cybercrime and illegal online content. We encourage technical and policy multistakeholder collaboration to identify solutions based on international cooperation that do not harm the global DNS infrastructure or the overall stability and interoperability of the Internet.

The Value of “Open”

It can be argued that innovation is synonymous with the ability of an individual to express, explore, challenge and contribute through the introduction of newly developed ideas and its definition is accurately captured by the economist Joseph Schumpeter, who considered it as:

“the introduction of new goods [...], new methods of production [...], the opening of new markets [...], the conquest of new sources of supply [...], and the carrying out of a new organization of any industry”.

Following a similar logic, Professor Barbara van Schewick has argued¹⁸ that the Internet's growth should be attributed to innovation, further asserting that the tidal wave of innovation the Internet experiences is not accidental but consequential to the Internet's design and architecture. Consequently, what makes the Internet a driver of innovation and a successful medium is its association with the notion of ‘openness’.

The Internet, a loosely organized international collaboration of autonomous, interconnected networks supports host-to-host communication through voluntary adherence to open protocols and procedures defined by Internet Standards. This is reflected in the 2026 Request for Comments (RFC), which (alongside other RFCs) constitutes the main source for the standards community in describing methods, behaviors, research or innovations related to the operation of the Internet. The importance of standards in the Internet ecosystem is such that there are also many isolated interconnected networks, which are not connected to the global Internet, but use the Internet standards.

In August 2012, five key organizations involved in maintaining and developing Internet standards – the Institute of Electrical and Electronics Engineers (IEEE), the Internet Engineering Task Force (IETF), the Internet Architecture Board (IAB), the Internet Society and the World Wide Web Consortium (W3C) – signed an affirmation of a set of principles capturing key aspects of the Internet development model. The Modern Paradigm for Standards Development is shaped by adherence to the following principles:

- cooperation
- adherence to principles, including due process, broad consensus, transparency, balance and openness.
- collective empowerment
- availability
- voluntary adoption

The Modern Paradigm recognizes that the economics of global markets, fueled by technological advancements, drive global deployment of standards regardless of their formal status. In this paradigm, standards support interoperability, foster global competition, are developed through an open participatory process, and are voluntarily adopted globally. These voluntary standards serve as building blocks for products and services targeted at meeting the needs of the market and consumer, thereby driving innovation. Innovation in turn contributes to the creation of new markets and the growth and expansion of existing ones.

Open standards, however, should not be confused with anarchy. The Internet operates under rules – the standards that have given birth to and supported its constant evolution. This understanding is clearly reflected in RFC 1, which explains that RFCs were designed to assist people in coordinating activity on the Internet:

“After all, everyone understood there was a practical value in choosing to do the same task in the same way. For example, if we wanted to move a file from one machine to another, and if you were to design the process one way, and I was to design it another, then anyone who wanted to talk to both of us would have to deploy two distinct ways of doing the same thing”.

Given, therefore, the unique role of open standards in promoting innovative and creative ideas, the ability to innovate should remain detached and not be restricted by cumbersome legal frameworks.

Comparably, when we talk about innovation without permission, we should not consider innovation that does not obey to any rules. Clayton Christensen, for instance, has argued that innovation could largely raise the probabilities of success if it complies to four rules: 1) taking root in disruption, (2) the necessary scope to succeed, (3) leveraging the right capabilities and (4)

disrupting competitors, not customers.¹⁹ So, when the supporters of the open Internet talk about innovation without permission they refer to the ability of those who want to market new technologies to do so without having to further justify them according to existing business or other related standards. For example, the US Supreme Court has taken a similar view in *Sony v. Universal Studios, Inc.*,²⁰ where it asserted that new technology innovators do not “*carry the burden of persuasion that a new exception to the broad rights enacted by Congress should be established*”. We can, therefore, surmise that it is primarily the open architecture of the Internet that encourages innovation – we can call it “open innovation”.²¹

On the other hand, intellectual property rights (similar to other property rights) constitute exclusive rights, which are often at odds with the rationale of open standards whereby open processes allow for new entrants to drive new ideas. Exclusionary or closed approaches are fundamentally incompatible with the openness of the Internet and the open standards that support it.

Despite this, the Internet Society believes that open standards, innovation and intellectual property can complement each other. In this context, traditional knowledge and copyright can serve as good examples.

There is an apparent and clear need to create incentives to enhance the role of traditional knowledge systems. At a conference organized by the World Intellectual Property Organization (WIPO), it was stated that “*indigenous knowledge and/or traditional knowledge of many local and indigenous communities in the world are declining*” and, to this effect, there is “*a need for the immediate development of incentives for the protection and promotion of traditional knowledge*”.²² The Internet can help address this problem. With much local content becoming increasingly unexploited, the Internet, by encouraging innovation and creativity based on its open standards, can act as the kernel where such local content can be hosted, stored or disseminated to the entire world.

Copyright can take a similar advantage of the Internet’s openness. New business models can encourage the broader dissemination and distribution of intellectual protected material, can complement existing ones and can create new or enhance existing partnerships based on multi-participatory models. For this to occur, however, it requires effective use of intellectual property tools and practices that can help minimize the risks for interested participants and play a major role in enhancing competitiveness of technology-based ideas. It further requires balanced intellectual property frameworks that are able to respect the limitations instructed by the rule of law, operate under substantial due process requirements and encourage non-commercial use.

But, when we talk about a balanced intellectual property framework, we should, additionally, bear in mind a structure that, amongst others, fosters competitive markets and enables new actors to enter. Although intellectual property rights constitute essentially a government grant of a costly private monopoly over ideas, this monopoly is not meant to encourage restrictive structures. Standing alone, intellectual property rights may be able to exclude others, but they should not be used to forestall the introduction of innovative ideas or new business models.

With this in mind, it is important that, in the context of intellectual property, monopoly is measured both in terms of the cost of entry and in terms of ideas. As Tim Wu put it:

*“In an information industry, the cost of monopoly must not be measured in dollars alone, but also in its effect on the economy of ideas and images, the restraint of which can ultimately amount to censorship”.*²³

Conclusion

In January 2013, the newspaper "Economist" published an editorial on innovation, stating amongst others: "[...] *many regulations designed to help innovation are not working well. The West's intellectual-property system, for instance, is a mess [...]*". For some this is a sweeping statement. But, ultimately, what we should all take from such assertions is the need for intellectual property discussions, especially those potentially impacting Internet technologies and platforms, to promote innovation, user choice and encourage creativity.

The Internet Society hopes that discussions concerning the relationship between the Internet and intellectual property will carry on addressing the multitude of issues currently at stake. However, we do also hope that multistakeholder participation, transparency, the rule of law and respect of the Internet's architecture and design will become norms in such discussions. The Internet Society will continue to advocate for open, multi-participatory and transparent discussions and will be working with all stakeholders in advancing these minimum standards in all intellectual property fora.

Endnotes

- ¹ http://europa.eu/rapid/press-release_SPEECH-12-592_en.htm?locale=en
- ² Internet Society: "IPR Infringement in Cyberspace: Technical and Legal Options for Policy Makers Facing New Challenges", second session of the UNECA Committee on Development Information Science and Technology (CODIST-II) in Addis Ababa, Ethiopia (May 2011) – <http://www.internetsociety.org/ipr-infringement-cyberspace-proposed-guidelines-developing-modern-policy-framework>; see also, Internet Society submission to the European Commission Consultation on the Commission Report on The Enforcement of Intellectual Property Rights, (May 2011), <http://www.internetsociety.org/internet-society-submission-european-commission-consultation-commission-report-enforcement>
- ³ <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>
- ⁴ <http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf>
- ⁵ Geneva Declaration of Principles, paragraph 48, <http://www.itu.int/wsis/docs/geneva/official/dop.html>
- ⁶ <http://www.opengovpartnership.org/countries?page=2>
- ⁷ Report of the Secretary-General (2004): "The rule of law and transitional justice in conflict and post-conflict society" - <http://www.unrol.org/files/2004%20report.pdf>
- ⁸ Wendy Seltzer (2012). *Keep Copyright Balance: SOPA and PIPA* - <http://wendy.seltzer.org/blog/archives/2012/01/18/keep-copyright-balance-stop-sopa-and-pipa.html>
- ⁹ See, for example, Yochai Benkler (2011). *WikiLeaks and the Protect IP Act: A New Public-Private Threat to the Online Commons*, http://benkler.org/WikiLeaks_PROTECT-IP_Benkler.pdf
- ¹⁰ *Copyright in Latin America: New Enforcement Measures Pose Major Threats to Internet Users in Panama and Colombia* - <https://www.eff.org/deeplinks/2012/09/copyright-latin-america-new-enforcement-measures-pose-major-threats-internet-users>
- ¹¹ <http://jurist.org/paperchase/2012/10/japan-introduces-tough-new-copyright-law.php>
- ¹² <http://www.stuff.co.nz/technology/digital-living/5528064/Concerns-over-new-copyright-laws>
- ¹³ http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
- ¹⁴ David G. Post, *What Larry Doesn't Get: Code, Law and Liberty in Cyberspace*, 52 Stan. L. Rev. 1439 (2000), at p.1440
- ¹⁵ Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 Cal. L. Rev. 395 (2000), at p.440 ("State-centered law - both legislation and constitutional adjudication - carries considerable weight in legitimizing certain beliefs and practices and delegitimizing others. [...] A cyberauthority, in contrast, would have to start from scratch")
- ¹⁶ Henry H. Perritt Jr., *Towards a Hybrid Regulatory Scheme for the Internet*, U. Chi. Legal F. 215 (2001)
- ¹⁷ *Internet Society Perspectives on Domain Name System (DNS) Filtering: Filtering is not a solution – the real solution is international cooperation* - http://www.internetsociety.org/sites/default/files/pdf/dns-filtering_20110915.pdf
- ¹⁸ Barbara Van Schewick, *Internet Architecture and Innovation*, MIT Press, 2010
- ¹⁹ <http://www.technologyreview.com/featuredstory/401451/the-rules-of-innovation/>
- ²⁰ 464 U.S. (1984)
- ²¹ In this context, Henry Chesbrough defined open innovation as follows: "Open innovation is a paradigm that assumes that [innovators] can and should use external ideas as well as internal ideas, and internal and external paths to markets [...]". (http://openinnovation.berkeley.edu/what_is_oi.html)
- ²² http://www.wipo.int/edocs/mdocs/ip-conf-bg/en/wipo_ectk_sof_01/wipo_ectk_sof_01_3_5.pdf
- ²³ Tim Wu, *The Master Switch*, Vintage, 2011

Internet Society
Galerie Jean-Malbisson, 15
CH-1204 Geneva
Switzerland
Tel: +41 22 807 1444
Fax: +41 22 807 1445
www.internetsociety.org

1775 Wiehle Ave.
Suite 201
Reston, VA 20190
USA
Tel: +1 703 439 2120
Fax: +1 703 326 9881
Email: info@isoc.org

