



COPYRIGHT UNDER A MAGNIFYING GLASS: THOUGHT PROVOKING IDEAS

A report from a workshop co-organised by the Internet Society (Christine Runnegar) and the World Intellectual Property Organization (Victor Vazquez) at the UN Internet Governance Forum (IGF) on 29 September 2011 at Nairobi, Kenya.

INTRODUCTION

Considerable efforts are being undertaken across the world to develop new transborder solutions to online copyright infringement. Countries, regional and international organisations are also reviewing legal frameworks to assess whether they need to be updated in light of technological developments in content distribution (e.g. the Internet) and the general trend towards globalisation. Examples include: ACTA, the EC review of Directive 2004/48/EC, the PROTECT IP bill, work being undertaken by WIPO, OECD and others on Internet intermediaries.

Our objective for this workshop was to facilitate a robust multi-perspective discussion and generate thought provoking ideas regarding:

- Opportunities for the creation, distribution and monetisation of digital content
- New challenges for the protection of copyright
- Deriving value from digital content (old and new models)
- Perspectives on future content delivery
- Opportunities for improving licensing systems
- Challenges (including technical) to detecting infringement and identifying infringers
- Deep Packet Inspection and other means for detection
- International policy work on Internet intermediaries (OECD and WIPO)
- Internet intermediaries and the protection of copyright
- Technical enforcement measures
- Complications copyright enforcement can create for public access intermediaries
- Challenges in balancing copyright with other rights enjoyable in the Internet environment, such as free expression, access to information, education and culture
- Potential solutions

The organisers

The Internet Society (ISOC) is a non-profit organisation founded in 1992 to provide leadership in Internet related standards, education, and policy. With offices near Washington D.C., USA, and in Geneva, Switzerland, the Internet Society is dedicated to ensuring the open development, evolution and use of the Internet for the benefit of people throughout the world. www.isoc.org

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest. WIPO was established by the WIPO Convention in 1967 with a mandate from its Member States to promote the protection of IP throughout the world through cooperation among states and in collaboration with other international organizations. Its headquarters are in Geneva, Switzerland. www.wipo.int

The panellists

- Paul Brigner, Senior Vice President and Chief Technology Policy Officer, Motion Picture Association of America
- Stuart Hamilton, Senior Policy Advisor, International Federation of Library Associations and Institutions
- Malcolm Hutty, Head of Public Affairs, London Internet Exchange (LINX) and President, EuroISPA
- Pedro Less Andrade, Senior Policy Counsel Latin America, Google Inc.
- Kurt Opsahl, Senior Staff Attorney, Electronic Frontier Foundation
- Karine Perset, Administrator, Organisation for Economic Co-operation and Development (OECD)
- Shane Tews, Vice President for Global Public Policy and Government Relations, VeriSign, Inc.
- Victor Vazquez Lopez, Senior Legal Counselor, World Intellectual Property Organization (WIPO)

Unfortunately, two additional panellists, Marisella Ouma, Executive Director, Kenya Copyright Board and Sisule F. Musungu, President of IQsensato were unable to participate due to other commitments.

The chair and moderators

Christine Runnegar, Senior Policy Advisor, Internet Society (moderator)
Maria Casey, Internet Society Returning IGF Ambassador¹ (remote moderator)

The participants

The workshop was very well attended and included active remote participation.

¹ The IGF Ambassadors Programme is part of the Internet Society's *Next Generation Leaders Programme* (see <http://www.isoc.org/leaders>)

Background papers

- [Perspectives on policy responses to online copyright infringement: An evolving policy landscape](#)²
Internet Society
- [Perspectives on Domain Name System \(DNS\) filtering](#)³
Internet Society
- [Copyright through a magnifying glass: thought-provoking ideas](#)⁴
Presentation of WIPO's Activities for the IGF Workshop
World Intellectual Property Organization (WIPO)
- [Statement on Internet intermediary liability](#)⁵
International Federation of Library Associations and Institutions (IFLA)
- [A Better Way Forward: Voluntary Collective Licensing of Music File Sharing](#)⁶
Electronic Frontier Foundation (EFF)
- [Google, Content Creators and Copyright](#)⁷
Google Inc
- [The Role of Internet Intermediaries in Advancing Public Policy Objectives](#)⁸
Organisation for Economic Co-operation and Development (OECD)

The opening

Following a very short welcome and introduction of the panellists by the moderator, Victor Vazquez (WIPO) started the discussions with an opening statement outlining relevant work being undertaken in WIPO. These are some of the highlights from that statement:

Copyright should not be considered in isolation from the socioeconomic and cultural context that supports it and from the public interest it is meant to serve. In this regard, copyright law is necessary but not sufficient. In the digital environment, it is necessary to develop consensual approaches to infrastructure and technology to facilitate the diffusion of creativity in the digital environment. In a number of areas WIPO is seeking to partner with stakeholders and governments to move from making things possible to making things happen. These areas include: copyright infrastructure; licensing and contracts; and the Role and Responsibility of Internet Intermediaries.

A copy of Mr. Vazquez's unabridged opening statement is available here <http://www.isoc.org/pubpolpillar/docs/igf2011-wipo.pdf>.

² <http://www.isoc.org/wp/newsletter/?p=3530>

³ <http://www.isoc.org/internet/issues/dns-filtering.shtml>

⁴ <http://www.isoc.org/pubpolpillar/docs/igf2011-wipo.pdf>

⁵ <http://www.isoc.org/pubpolpillar/docs/igf2011-ifla.pdf>

⁶ <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>

⁷ <http://www.isoc.org/pubpolpillar/docs/igf2011-google-copyright.pdf>

⁸ http://www.oecd.org/document/62/0,3746,en_2649_34223_44949886_1_1_1_1,00.html

"Rapid-fire Q&A"

Christine Runnegar (ISOC), acting as moderator, challenged the panellists to provide pithy insightful statements across a wide range of Internet-related copyright issues. The questions and the key elements of their responses are set out below. Please refer to the transcript⁹ for full details.

What new opportunities does the Internet present for the creation, distribution and/or monetization of digital content?

Malcolm Hutty (LINX)

- The Internet changes everything – it provides huge opportunities
- Commercially-produced content is going to continue to have a place

Paul Brigner (MPAA)

- I see incredible opportunities, particularly with the distribution of content
- We can look at cloud-based infrastructures that will be released very soon, such as Disney Studio All Access¹⁰ and the UltraViolet¹¹ initiative. There is a lot to look forward to and it is very exciting.

Pedro Less Andrade (Google)

- On top of democratisation and the creation of content, online advertisement has been proven to be a great way to monetise content. I think this medium for monetisation is very important to satisfy the different needs of the content providers and mediums, and it brings new opportunities for new ways of licensing.

Shane Tews (VeriSign)

- VeriSign is involved in the how part. We are trying to do our best to make sure that you get it there efficiently, and to work with the copyright community to make sure that you do not receive things that you are not supposed to.

Kurt Opsahl (EFF)

- The Internet presents new opportunities, only limited by one's imagination. We have crowd-sourced funding, collaborative user-generated projects, free and open software. The opportunities are endless. One I want to highlight is "pay what you want". An example of this is Humble Bundle (www.humblebundle.com). You can pay whatever you want for this. They raised far more than they would have going through the regular distribution channels, with no DRM and no restrictions on the software.

⁹ <http://www.intgovforum.org/cms/component/content/article/108-transcripts/872-ei-79-copyright-under-a-magnifying-glass-thought-provoking-ideas>

¹⁰ <http://disney.go.com/disney-studio-all-access>

¹¹ <http://www.uvu.com>

Stuart Hamilton (IFLA)

- The Internet gives libraries the ability to realise equitable access to information for all. The cross-border flow gives library to library-user the tremendous opportunities that come from that democratisation.
- You can create content yourselves, distribute it, monetise it if you want. That will cut out a lot of old intermediaries and bring along a lot of other further problems and opportunities for both libraries and their users.

What new challenges does the Internet present for the protection of copyright?

Malcolm Hutty (LINX)

- Two fundamental problems basically. One is practical. Controlling copying is hard. Copying is not hard anymore. There have been various sticking points to make it hard again. They are doomed to failure, whatever limited success they may have in the short term. More broadly, there is a moral problem. The expression "public good" is massively over-used to mean the goods that the public wants. Actually, it means it is non-excludable and has non-rivalrous consumption, and digital goods are starting to look like that. I don't believe that means the government must take control of artistic production, of course not, but it does mean that intellectual property is not the same as the regular property.

Paul Brigner (MPAA)

- Artists have to be incentivised to create their content. Copyright is fundamental to that. The theft of content online is constantly evolving and changing. Yesterday may have been the day of BitTorrent, and today we are looking at cyber lockers, streaming and direct downloads. The way content can be stolen on the Internet is constantly evolving.
- We must work together to stop these free riders from lowering the compensation that goes to creators so we can continue to have a vibrant ecosystem on the Internet.

Pedro Less Andrade (Google)

- One of the biggest things for copyright protection is to get a balance between copyright protection and other rights, such as freedom of expression, access to information, education, and also privacy.

Shane Tews (VeriSign)

- The biggest challenge that we have is getting the filtering and takedown mechanisms at the right layer in the architecture.
- It is the artists versus the technologists versus the lawyers. The artists want to protect it. The technologists are trying to figure out how to do it. The lawyers are telling them what they can and cannot do it, depending on where their interests lie.

Kurt Opsahl (EFF)

- New technologies present challenges to copyright business models – where traditional intermediaries are finding less of a role – where you can connect directly with artists and users generate content. The challenge then, is to find a business model that works with the new paradigm, instead of against it.

Stuart Hamilton (IFLA)

- Clearly, the ease of digital copying is a main challenge. The ease of avoiding detection when copying digital content is also another major challenge. We also need to look at the fact that we have a generation of users with a different cultural outlook towards sharing, remixing and distributing content that does not fit with our existing business models.
- The major challenge is the idea that because we can monitor the flow of copyrighted material online, we should. This is an impossible task we are setting for ourselves. It is a never-ending request for IP monitoring.

Does the motion picture industry rely solely on copyright to derive value from films or use other means? At what point is copyright most important?

Paul Brigner (MPAA)

- Certainly copyright is critical, especially in the early phases of release, but also through the entire lifecycle of a creative work. The economic incentives for creators are spread over the entire lifecycle of that work. So it is critical, but there are also technological measures that we can put in place so that it is not all based on copyright protection. But, it is certainly a very critical part.

Google provides platforms for distribution of user generated content. YouTube and Blogger are two well-known examples. How does Google derive value from those services?

Pedro Less Andrade (Google)

- We have several strategies for monetisation of online content. For example, in YouTube we have more than 15000 partners (including major record labels and producers). We have more than 3 billion YouTube visits monetised so far. This has been helping a lot of people - from the biggest producers to the small producers. In fact, the small producers, hundreds of partners, are making more than \$100,000 per year.

What new models for access to and licensing of content are emerging? (Is there a need for new exceptions and limitations?)

Kurt Opsahl (EFF)

- Over the last decade, we have seen a multitude of new paradigms like Creative Commons licenses and older paradigms achieving greater success, like free and open source software. We have seen user-generated content occur, and take advantage of the exceptions and the limitations on copyright to make beneficial uses of pre-existing material.
- So we need to have limitations and exceptions of copyright law that allow libraries, teachers, individual innovators, cover artists and others to provide their contribution to society.

Stuart Hamilton

- Librarians have been very much involved in Creative Commons and open access models. There are a lot of new licensing models and we need to have a renewed focus on protecting the public interest.
- There are many countries around the world that already have good copyright exceptions and limitations, and many other countries that do not have these. We see a role for WIPO to let developing countries have the same access. There should be a strong focus on letting everybody have access to these things.

What innovations or changes might we expect to see in the next 10 years concerning the way content is delivered on the Internet?

Paul Brigner (MPAA)

- Ten years is a very long horizon on the Internet. I don't know that I would be so bold to make that prediction. I can tell you what is exciting to me. In the near future, aside from all the services I mentioned earlier, is the better incorporation of social networking and personalisation into the consumption of content.
- Copyright is sometimes viewed as something that hinders innovation, but that is absolutely wrong and the opposite of what is actually the case. Copyright helps us to develop new innovations, and it drives innovation.

Kurt Opsahl (EFF)

- We will have both technological innovation and business model innovation over the next ten years. Broadband will become widespread at home – mobile broadband – Wi-Fi, and it will become ubiquitous in some places. This means that consumers will be interested in being able to get access to all sorts of content, everywhere they go, without restrictions as to when they can access their material.
- We will probably see more alternative business models, “pay what you want”, crowd-sourcing, advertising, supported free distributions, and consumers will start to migrate towards options that provide the most flexibilities with less DRM and less restrictions on their rights.

Stuart Hamilton (IFLA)

- Speaking from the libraries’ perspective, in the next decade or so, we will see some sort of system of peer review, moving into the way we produce journals and academic publishing. Speaking as someone who loves music, I think we will see collaborative information, and turntable F.M. We are likely to see more use of what we call “the darknet”, a two-tier Internet and more criminalised users.

What is the greatest challenge for rights holders in identifying the person against whom enforcement action should be taken? How would you like to solve this?

Paul Brigner (MPAA)

- I wouldn't say it is the person that needs to be identified for enforcement. It's those who facilitate infringement that are the major issue that we need to address. Working together as an Internet community and working with Internet intermediaries we can identify the facilitators that are the real issue here.

What are some of the technical issues associated with trying to detect infringement and identify infringers on the Internet?

Malcolm Hutty (LINX)

- The user is not the same as the ISP's customer. The ISP can't tell who is sitting behind the screen. So whatever you might do to figure out what somebody is doing, you don't know who that person is, which creates some problems for identification. There are also proxies and almost anything can be a proxy. Not just traditional Web proxies, but actually any kind of Internet service that gets data from something else, like an aggregator. But, if you do an encrypted session, it's not acting within the control of the regulatory regime. Then, pretty much anything can happen.

Pedro Less Andrade (Google)

- We identify content and act upon it. We developed a technology called Content ID. In YouTube there are three options. You can monetise, you can block the content or you can leave it as it is and see how people respond to it. It is a really good tool for copyright holders and it is a way to educate the users to respect copyright.

What are your views on DPI and other means to detect infringement and infringers?

Kurt Opsahl (EFF)

- Mandating copyright filters by ISPs will not be technologically effective because they can be defeated by encryption, and network-level filtering will likely involve deep packet inspection (DPI) of citizens' Internet communications. This raises considerable concerns for citizens' civil liberties and privacy rights as well as the future of the Internet innovation. Even a seemingly reasonable DPI can turn into a tool for widespread privacy violations.

Stuart Hamilton

- Libraries do not condone any copyright infringement. We always work within the law and librarians are trying to look at copyright very clearly in their jobs.
- Libraries at the moment are getting caught up in graduated response schemes. We are very much against this sort of issue. If you look at something like the U.K. Digital Economy Act, libraries provide Wi-Fi as a public access and they could be held responsible for their users' infringement and have their services cut back. It is a very worrying prospect.

The OECD has produced two reports on Internet intermediaries. Can you tell us why the OECD undertook this work on Internet intermediaries? What are the next steps?

Karine Perset (OECD)

- As the Internet permeates the economy and society, there is increasing pressure, both at the national level and at the international level to get intermediaries to help, for example, improve security, protect intellectual property rights, but also to protect children, help reduce fraud, or help with other objectives depending on the countries involved, such as controlling illegal online gambling or ensuring the free flow of information across borders.

- The problem is that in some cases we are seeing ad hoc and inconsistent approaches at national and international levels, between countries and within countries. These create uncertainty for intermediaries and for other stakeholders involved, with potential negative impacts on innovation, competition, and even on the free flow of information across borders.
- We have two reports: the first report focuses on the economic and social benefits that intermediaries provide in supporting the Internet economy, Internet access and use, and innovation processes; the second report focuses more on the roles and the responsibilities that these actors have, or might have, for the actions of users of their platforms. This includes legal responsibilities and self-regulatory initiatives as well as individual business practices.
- We are currently working on an OECD recommendation on the role of intermediaries in advancing public policy objectives. This is expected to be ready in the coming few months. This recommendation tries to provide some basic criteria and principles to help governments evaluate whether and how to involve intermediaries in public policy strategies generally, in a holistic manner which respects fundamental rights.

The WIPO commissioned some studies examining the roles and responsibilities of Internet intermediaries in the field of copyright. Can you tell us why WIPO undertook this work? What are the next steps?

Victor Vazquez (WIPO)

- Internet intermediaries are the main driver for change in the distribution of content. We are moving from a dual scenario, with two players – the creator and the distributor, be it a producer or a publisher – to another scenario where the intermediary has a role that is increasingly important.
- WIPO has a long history of being connected to this topic, beginning with the Internet treaties in 1996, which clarified for the first time that the mere provision of physical facilities to enable the communication does not amount to a communication. So, we clarified on that occasion that Internet intermediaries are not directly responsible for the content that is transmitted over the Internet, and that opened the way for the discussion on indirect responsibility, which was addressed by national and regional legislation, such as the DMCA or the European Electronic Commerce Directive.
- WIPO organised a big event in 2005 on copyright and Internet intermediaries. (We probably first coined that broad term at the international level, because at the time, ISPs was the term usually employed and we realised that we were not dealing with only ISPs.)
- We are developing two studies now. One, by Professor Lilian Edwards, has already been published. It examines the interface between technology and copyright, and analyses the evolving role of Internet intermediaries. The second study is a comparative legal analysis of 30 countries (including civil law and common law), with the idea of finding some common trends or commonalities in their consideration of the indirect responsibility of intermediaries. This study still ongoing and will be published in due course.

What has your experience been with efforts to manage this challenge at the international level? Lessons learned so far?

Karine Perset (OECD)

- From our experience, out of the many issues that we have been dealing with in the wider work on Internet intermediaries, copyright protection has been the most polarising topic.
- There are very different approaches to intermediary responsibility between countries and also within countries. Countries do not always seem to be able to learn from the experiences of other countries and this brings me to the most important point that I would like to make – We need significantly more data on the costs and benefits of various enforcement measures to really be able to undertake informed policy making. We have some data, but we need more, much more.

Victor Vazquez (WIPO)

- We realise that it is very important to associate ourselves with ISOC, with the stakeholders themselves, because in doing these activities together with ISOC we are much better able to take stock of what is really the state of play.
- Another important element has been the involvement of developing countries. In some of the events that we have organised, we have been able to showcase the experience of countries like India and Kenya. That experience is very significant because there are developments that are taking place in developing countries that are very important and are sometimes ignored.
- On the side of the lessons learned, I would say that, thanks to ISOC, we have been able to realise that it would not be appropriate to follow a sequential balance in the preparation of these events. I will try to explain this. We first envisioned that we would prepare a series of meetings, focusing on different types of stakeholders. So we would focus on governments, on civil society, etc. The interaction with ISOC has enabled us to realise that each event, each iteration needs to have a complete balance. I think that reflects a little bit the way the Internet also works. It is not so linear. Every instance has to be complete and there also has to be a complete balance for each of our activities, rather than a sequential balance.

Content is shared via the Internet legally and illegally using many different services, applications and protocols. What would you say is the method of online copyright infringement that is of most concern to rights-holders? Why?

Paul Brigner (MPAA)

- Any time content is being stolen online, all of those methods are very concerning. As a technologist, what worries me right now is that there are websites that look completely legitimate – that a casual Internet user would really not be able to know are involved in criminal activity. To stop sites like those, you really have to be able to take away all of the intermediary services that they use, like payment processing, ad networks, search engines, etc. Being able to take them out effectively from the Internet ecosystem is what we need to do.

Should Internet intermediaries play a role in online copyright protection or enforcement? (Explain) What might be some of the intended and unintended consequences?

Shane Tews (VeriSign)

- As a definite intermediary in this process, we are one of the many tools that can be used but we don't think we should be the first or the last.
- The challenge is you take the Web domain out, but it tends to just move to another place.
- We like to be part of the overall solution set that takes the entire system down, but sometimes coming to us first is just a "warning shot" that they are going after you and you just become a little more clever. So I don't think that resolves the problem. But, we are definitely interested and have been a long-standing partner in being a part of the solution.

Pedro Less Andrade

- There are many more opportunities on the proactive side – developing new tools for monetising and distributing content. That is where many Internet intermediaries could really help. It is also important to differentiate among the different intermediaries. Some provide connections, some provide hosting, etc. Something that has been very well stated in many laws is that there is no responsibility for intermediaries to police the net. They shouldn't police the net. Even if they have some technical ability, they don't have the knowledge. This is something that is reserved to justice and law enforcement.

Malcolm Hutty (LINX)

- Intermediaries are asked to assist in the identification so that infringers can be brought to justice and to withdraw service so they cannot continue infringing. I believe it is right and proper in appropriate circumstances that intermediaries carry out both these functions, but the big question is: Is this an infringement and who decides?
- There are two main models increasingly used for that. One is where the intermediary is asked to decide whether or not the complaint looks justified. But, intermediaries do not have the economic incentives or the appropriate characteristics to administer what might be an acceptable administrative justice and cannot really resolve those questions. The alternative model, which is increasing being turned to, is asking intermediaries to carry out the request of the complainant. In my view, they are an affront to the rule of law. The intermediary should not be asked to act as a judge and should not carry out sanctions without even hearing the other side of the argument. However, once an independent properly constituted independent authority with proper powers and a proper consideration of the rights of all parties has decided that there is infringement going on, then the intermediary can, indeed execute that judgment.

Kurt Opsahl (EFF)

- As we consider the role of intermediaries dealing with online copyright issues and other issues, it is important that Internet intermediaries have a vital role in facilitating free expression. They are the avenues by which the people participate in the Internet, participate in aspects of their lives. This will become more and more important as we move forward.

- To promote free expression, it is critical to have a policy infrastructure that does not impose liability on Internet intermediaries for user actions. The platform should not be liable for what the speaker has said. We have some notice and takedown regimes, like the Digital Millennium Copyright Act (DMCA) that have had unintended impact on the Internet, not allowing non-infringing material through, and short-term censorship.
- There are campaign videos that were taken down when they were non-infringing. Under the DMCA, you can take something down for 10 to 14 days, which could be the critical time period in a political campaign. You see media criticisms being taken down. We have seen personal non-commercial videos being taken down. These are taking viewpoints out of the marketplace of ideas.
- As we think about these roles, remember a few things: intermediaries cannot take the role of doing an ex-ante judgment on infringement; they don't have the appropriate tools to make legal judgments. Also think about the economics – they are dependent on scale. The benefit of a particular post is trivial, yet the cost to assess the legality could be quite substantial and the risk of getting that wrong could also be quite substantial. What this will mean is that intermediaries become overly cautious and will take down too many things. It also takes time. User-generated websites, once they have public participation, require speedy action. They cannot function with a delay.
- Ex post review at least requires due process. The most appropriate role for an intermediary is forwarding notices of alleged infringement and allowing the judicial system to work.
- Finally, a regulatory system requiring intermediaries to take an expansive role will increase the cost of doing business and make it difficult for new innovative companies to come in. If they have to immediately start taking on massive regulatory roles, they cannot be in business, and then we lose out on some of the great innovation that we've had over the last couple of decades.

Stuart Hamilton (IFLA)

- Libraries are public access intermediaries. We offer Internet access via Wi-Fi and fixed terminals all over the planet. We have been caught up in graduated response legislation, particularly in France, and most particularly in the Digital Economy Act (DEA) in the United Kingdom. I will concentrate on the DEA. There is no clarity as to what libraries, hotels and caravan parks are. We do not know if we are an Internet Service Provider (ISP) or a subscriber. If we are an ISP, we would be legally required to monitor our network and spend a fortune to look over the shoulders of our users. If we are a subscriber, we could actually be held liable, or what could eventually happen is that there could be an infringement and we could have our own Internet access cut off.
- I agree very much with Malcolm about the problem with this sort of legislation – Who decides what is illegal and who is not? And, who is the responsible end user? It is extremely difficult to tell. There could be the removal of public Wi-Fi access. New Zealand is already looking at this. Then there is the human rights aspect which is mentioned by Frank La Rue, in his report. Librarians as police, looking over the shoulders of people, we really dislike this.

Paul Brigner (MPAA)

- I believe it is the responsibility of all Internet intermediaries to play a role in copyright protection and using other technologies to stop other criminal activity online. There are issues that we need to work through, and they have been well

articulated here, but if we cannot have the rule of law online, then we are undermining the future of the Internet. We should all keep that as the primary focus.

- We must use reasonable and rational approaches. Each country is looking at this.
- There are various legislative proposals in the United States. We are looking at the PROTECT IP Act. I have been involved in talking about some of the technical issues on DNS filtering there. There are some who believe that breaks the Internet. I completely disagree. I believe it actually makes consumers have greater faith in the DNS system because when they go to those rogue websites, they will see a message from their government that says you have gone to a site that has been deemed illegal by the United States justice system. These mechanisms build confidence. They do not undermine the Internet.

How effective are technical measures?

Pedro Less Andrade (Google)

- There are some technical solutions such as Content ID that have proven very effective. But, it is not a 100% effective technique. It also needs the collaboration of the copyright holders to upload their libraries in order to be able to detect content on our platform. Our concern is also with abuse of these tools. Sometimes we have seen abuse of the copyright tools to censor speech. It happened, for example, in political campaigns in Mexico. Certain speech on YouTube has been taken down under the DMCA.
- We are looking for other methods to balance this technical solution (that is really our machines making decisions), with some judicial guidance so as to also be able to respect all the rights that are involved.

Malcolm Hutty (LINX)

- If we are talking about the technical measures that for example measure content – that sites like Flickr use to prioritise their complaints management and to identify whether or not a particular item has been seen before, then, yes, they are effective.
- If we are talking about whether we can get network carriers to prevent the infringement of copyright – doomed, I would say.

Shane Tews (VeriSign)

- Yes, they work. They work when they are strategically applied, rather than as a blunt instrument. We work very closely with law enforcement. We find out that bad guys are bad guys. They don't run boutique operations. They pirate multiple products. What we try to do is get to the root of the source and take down hundreds and tens of thousands of websites when we can, rather than taking one which is the "warning shot" I mentioned earlier that just tells them to move off country, go to an area where you can't follow up as quickly. We are also working with multiple governments to start to have a better blanket network as to how we utilize this, so they can't hopscotch around the world and hide in their cloak somewhere.

DISCUSSION

What do artists want?

The rapid-fire Q&A session prompted a discussion among the remote participants as to whether artists actually want the copyright on their work that is lobbied for them and a request from Joly MacFie and Marcin Cieslak for views from the panellists.

Stuart Hamilton (IFLA) responded with an observation regarding the recent European Union extension of copyright on sound recordings. He noted that it was strongly argued that the extension would benefit "the poor penniless bass-player that was living in a basement apartment without a fireplace", but that studies commissioned by the European Commission estimated that ~75% of the monies accrued would go straight into "the coffers" of record companies. Further, about ~20% would go to major artists and only the remaining ~5% would go to the bass-player. Paul Brigner (MPAA) pointed out that there are some active coalitions of artists such as www.creativeamerica.org¹². Stuart Hamilton (IFLA) replied by directing participants to an artists' coalition in the U.K.¹³

Copyright and patents

Patrice Lyons (participant) raised an interesting issue concerning the potential intersection of copyright and patents. Malcolm Hutton (LINX) clarified the issue as follows: Patents are not about the copy of the item. That is copyright. But patents control machines. There are things that you can do, and in the copyright field, we are also seeing other controls of things that you can do with it, through copyright licensing, which is being used to control how you use the work. Through the control of the derivatives work, it is used to control what you can do with it, and whether you can make derivative works and if so, what kind. And, because the consent to make any kind of derivative or to do anything from it is entirely in the hands of the rights holder, that is giving them a power to determine whether or not value is added to their own product. Now, that is not patent law, but it is in an area that patent law seeks to regulate as well, and the interaction of these two, I believe, deserves much greater analysis than is happening at the moment.

Access to knowledge

An anonymous self-identified researcher from the south (participant) raised the issue of access to knowledge. He explained that he does not have access to academic journals etc. through a university and, therefore, is reliant on open sources and sometimes use of copyright content that may be considered infringement. He asked whether WIPO or anyone from the "pro-copyright crew" knew of any author who has made money by publishing an article in an academic journal. Victor Vazquez (WIPO) replied that he does not see the antagonism between copyright and open access. He added that open license

¹² "The Entertainment Community United Against Content Theft"

¹³ After the workshop, Stuart Hamilton (IFLA) provided the following information by way of clarification: Regarding the extension of the duration of copyright, Professor Martin Kretschmer of Bournemouth University used the European Union's own data to show that:

"72 percent of the financial benefits from term extension will accrue to record labels. Of the 28 percent that will go to artists, most of the money will go to superstar acts, with only 4 percent benefiting those musicians mentioned in the European Council press release as facing an "income gap at the end of their life times". (http://www.cippm.org.uk/copyright_term.html)

The research shows that "the bass player" would receive between 4 and 58 Euro extra per year. (http://www.cippm.org.uk/downloads/Term%20Statement%2027_10_08.pdf)

modalities used in the academic environment are an alternative way of exercising and reinforcing copyright.

Historical perspective

Jérémie Zimmermann (participant) brought a historical perspective to the discussion, noting the impact of the advent of new technologies on old technologies. He argued that if you examine the situation from this perspective, the decline in sales of CDs is perfectly natural, as the obsolescence of the medium. He also said studies show that the people who share more also buy more, and that, if one counts revenue from video games as well as movie and music sales, spending is increasing every year.

Paul Brigner (MPAA) argued that movie studios are actually becoming very technology-savvy and future looking, not only in the digital distribution of movies, but also in the development of movies (computer graphics etc.). He encouraged everyone to take another look. Not to only look to what might have been said in the past, but also to look at what the industry is doing now.

Private copy exception

Stating that the technical difference between making copies for distribution to the public and making a private copy has disappeared, Jérémie Zimmermann (participant) asked the panellists for their opinions regarding enhancing the private copy exception for digitally released content in a not-for-profit context.

Pedro Less Andrade (Google) agreed that what we now consider to be a "private copy" is different. He said "the digital medium is the new canvas" and added that he could not see how a levy on a canvas would foster the art. He expressed that view that we really need to revise "private copying" in light of new technology use and the ability of Internet users to create content. Further, Mr. Less Andrade said we must give the market time to respond to the new challenges that technology presents, noting that the market will accommodate to new technologies, just as it did in the past.

Paul Brigner (MPAA) emphasised that the movie industry sees great opportunity in the sharing of content through social networks and users having greater ability to share their experience even while they are watching the movie. He cited recent developments in Netflix and Facebook in this regard and the ability in many countries to be able to see what your friends are watching and join in that experience at the same time. Mr. Brigner added that he believes sharing is going to increase, expressing a hope that it is going to increase such that creators can be compensated at the same time.

"Fair use"/"Fair dealing" and intermediaries

Bill Smith, PayPal, (participant) started by stating that PayPal supports the rights of copyright holders and the rule of law, but added that he believes in the "law of unintended consequences". He asked the panellists two questions:

- How does the Internet enhance or limit the legal protection for "fair use" and/or "fair dealing" currently, or in the future, with some of the mechanisms that are already in effect or being proposed?
- What is the role of an intermediary, if any, in these determinations of "fair use"?

Pedro Less Andrade (Google) responded that he believes we need to work on a new set of exceptions and limitations, given the new platforms which allow easy content mixing and creation. Taking the perspective of a small ISP in a remote area serving a small

community, upon the receipt of a takedown notice and without a statute prescribing how to proceed, Mr. Less Andrade said that the ISP would have to seek legal advice to proceed. Clear rules for ISPs on how to proceed in these cases, coupled with due process to protect the users, is very important for the development of the Internet ecosystem. He added "it's not a cookie-cutter solution" – what works for Latin America does not necessarily work for Europe – it is also important to be aware of the different legal realities in each region.

Malcolm Hutty (LINX) stated that "fair dealing" is not the same as "fair use" – it is much narrower. He expressed the view that the Internet is creating opportunities for people to make use of things like "fair use" exceptions to create benefits, but politically, the Internet is actually harming "fair use" in that the widespread infringement of copyright is creating enormous political sympathy amongst policymakers to focus entirely on the enforcement issue, and not to give adequate attention to exceptions, to "fair use", and to the kind of interactions involved in value-adding and licensing (discussed above).

Mandatory copyright registration

Joly MacFie (remote participant) asked the panellists whether they agree with David Post's call for a return to a system of mandatory copyright registration on the grounds that it is otherwise impossible to legally administer copyright in the Internet age (David Post – *In search of Jefferson's Moose*).

Stuart Hamilton (IFLA) replied that a copyright registration system with a "use it or lose it" condition has some appeal because the duration of copyright is way too long and copyright not doing what it was originally designed to do. He also noted that WIPO is currently examining existing music registration systems and that the U.K. Hargreaves Report also considers the copyright exchange model.

Victor Vazquez (WIPO) said that the Berne Convention establishes the principle of absence of formalities. In order to establish a mandatory registration system it would be necessary to amend the Berne Convention, which would be time consuming and difficult from the viewpoint of procedure. He explained that in 1896, each country applied its own formalities. Then the system moved to require that foreigners apply the formality of the country of origin. In the 1908 Berlin Act, the Berne Convention formalities were abolished.

Monitoring of Internet users by libraries

Alfred (no surname provided) from Ghana (remote participant) asked the panellists how feasible would it be for libraries if additional responsibilities were placed on them to monitor the activities of Internet users, particularly in developing countries which might not have the ability or capacity to do this.

Stuart Hamilton (IFLA) replied that if libraries are required to do that as a result of laws such as those in France, New Zealand and the U.K., they could be paying millions of GBP/year to implement monitoring requirements. He added that it could only spell very bad news for library systems in developing countries.

Susan Chalmers, InternetNZ, (participant) informed the workshop that Internet New Zealand had just implemented a graduated response procedure with effect from 1 September 2011. She said that this procedure has imposed a lot of costs on the entire Internet community, regardless of whether or not the individual is an infringer. Ms. Chalmers added that it may have a chilling effect on public Wi-Fi as suggested by

Stuart Hamilton (IFLA) and could result in termination on Internet-only accounts. She also referred to other developments beyond graduated response, such as ACTA (open for signature from 1 October 2011) and the TPP negotiations.

The public good

Susan Chalmers, InternetNZ, (participant) said that copyright is frequently explained as an incentive for creators, but also brings a benefit to the public good. She asked the panellists – How could we ensure that the public, the greater Internet community gets something in return for these constantly increasing costs of the use of the Internet and subsequently diminished Internet freedoms? And, how can we re-calculate the system to introduce fairness to end-users?

Paul Brigner (MPAA) expressed disagreement with the idea that rights holders are out to reduce Internet freedom. He said the goal is to bring content to people in ways that they want to consume it, bring it to the devices they want, bring it to them where they want it and when they want it. He added that he believes the Internet provides all of those opportunities. Noting that this is the fundamental goal, Mr. Brigner (MPAA) said it can really only happen if we have good copyright protections and mechanisms to incentivise creators. Further, he said that this is the challenge we need to address and all of the different mechanisms you mentioned are attempts to do that. Stakeholders from countries all over the world are working in developing these proposals. He also said he believes a lot of good reasonable thought is going into them, and that he hopes we will see some success.

Stuart Hamilton (IFLA) replied that if we are looking at treaties and laws to increase enforcement, then he thought we should look very closely at treaties and laws that introduce adequate exceptions and limitations into copyright laws so that the public interest and the balance is maintained.

Kenyan Gazette (documents recording parliamentary proceedings)

Amagil (surname not provided), from Kenya, asked who holds the copyright in documents recording parliamentary proceedings because Google had recently digitised them and is hosting them on their Google Books website. Grace Mutung'u (participant) responded that the Gazette is public information and not subject to copyright.

CONCLUDING STATEMENTS

To conclude the workshop, Ms. Runnegar asked the panellists a final question:

If you could decide these issues single-handedly, what would be your solution?

(informally known as the "if I were king of the world ..." question)

Malcolm Hatty (LINX)

- I would try to give something to every side of the debate and be benevolent. The various procedures for intermediaries and graduated response schemes are predicated on the notion, that there are widespread problems. The first duty of government is to provide adequate justice, so I would be looking to institute some effective, efficient small claims procedure – not dissimilar for someone shoplifting in a real shop.

- Fundamentally, cultural and information goods must be available as the source of new artistic endeavour and new consumer and business services. Where the permission of rights holders for a collection, for example, of musical works, is needed to provide a new service around those works (such as Pandora and Spotify) that involves the need to negotiate contracts with right holders to offer the services at a price that is acceptable to those rights holders in their arbitrary discretion and only in the territories in which they are willing to do so, and in a manner that is in their own strategic preference, it is harmful to innovation and is deeply problematic.
- This is not the way the ordinary market economy works in physical goods.
- I don't know what the solution is, but we definitely need to look further into this.

Paul Brigner (MPAA)

- All of the content you want to access would be available to you on all the devices you want whenever you want it. That is the goal of the content community and as long as they can be compensated and incentivised for doing that, we have a system that can be vibrant and sustainable.
- The critical issue here is all agreeing that the rule of law must be implemented online. We must have law online and all of us, including intermediaries, must work together to accomplish that. So that's my vision of success going forward.

Kurt Opsahl (EFF)

- I wouldn't want to have graduated response and DRM.
- I wanted to come forward with more of a positive thing and this is harkening back to something that EFF has been proposing since 2003 – voluntary collective licensing, which is an alternative way to get artists paid and making sharing of files lawful. The concept is simple. They would form collecting societies which then offer the user the opportunity to legitimately transfer and have files in exchange for a reasonable, regular payment and then the money collected would be distributed to the artist based on the popularity of their content, as determined by anonymous surveys.
- This would achieve, I think, a dream of having the content available on all devices at all times. I guess we are in agreement there.

Stuart Hamilton (IFLA)

- I also share Paul's dream. All information available at all times on all devices.
- I will go completely blue sky – I would reduce copyright substantially. I would probably make it renewable once, and if not, as many times as needed to be done for big companies like Disney who keep exploiting their copyright, as a “use it or lose it”.
- On the supply-side, I would set up a system that would enable the business models to give us exactly what we want when we want it. So the people in Kenya can watch the same television programs on Hulu and NetFlix that you can watch in the US, which you can't do. I would make sure copyright was completely respected throughout this, and balance this out so we are not criminalising people for routine behaviours. Then we should make sure that we have rule of law and that infringers are taken to court.

Pedro Less Andrade (Google)

- We need to focus on improving offer, access and good pricing structures for the content so we can give more options to users and have more affordable prices, and so the user can get the content in for developing countries, for example.

- We also need to develop better licensing monetisation systems to help small producers of content to distribute their content and also allow people that want to use their content in different mediums to get in contact with the content creator.
- We have been working together with WIPO and many African countries to improve the system of licensing and help local producers have access to the database of content in a streamlined way to be able to monetise the content worldwide.

Shane Tews (VeriSign)

- Taking a slightly different tack on this. I don't want our best Internet days to be behind us. I would say IPv6 allows us to avoid the multitenant concerns and you can be more control over whom you are concerned about. Then the authoritative location could be noted by part of the URL. So, dot MPAA could be the download location for your members and people would eventually know that is the authoritative place to go. Those are two things that I think can enable more positive behaviour in the future.

Victor Vazquez (WIPO)

- If I was to decide this single-handedly, surely, I would get it wrong. I would organize another event and discuss whatever ideas I have.

The workshop was an information sharing exercise and as such the participants did not attempt to reach any consensus conclusions. Further information regarding the workshop conversations is available on the UN Internet Governance Forum website.¹⁴

THANK YOU

The World Intellectual Property Organization (WIPO) and the Internet Society (ISOC) would like to express our sincere thanks to the IGF Secretariat, our expert panellists, remote moderator and participants (in-room and remote) for making this a very successful workshop.

¹⁴ Transcript at <http://www.intgovforum.org/cms/component/content/article/108-transcripts/872-ei-79-copyright-under-a-magnifying-glass-thought-provoking-ideas>