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THE DIGITAL MARKET AND IP RIGHTS

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TECHNOLOGICAL CONVERGENCE

"Digital technologies are already changing the way services are delivered, blurring the boundaries between types of service operation and means of delivery, and eroding the technological distinctions between text, audio and video. This process of change is often referred to as convergence."

UK Government Publication 1998

TECHNOLOGICAL CONVERGENCE

- That was a long time ago, but the process described there continued with great speed, and it still continues to day.

CHALLENGES

- International hosting sites and global sharing mechanisms make determinations of jurisdiction and liability extremely difficult.
- Anonymity is possible, and even encouraged, on the Internet.
- Determining liability among the various actors involved in online services is a very thorny issue.

DIRECTIVE 2001/29 COPYRIGHT IN THE INFORMATION SOCIETY

- *Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*
- Aims to adapt legislation on copyright and related rights to technological developments/ the information society, while providing for a high level of protection of intellectual property.
- It implements the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (1996).
- Harmonises key rights granted to authors and neighbouring rights holders (the reproduction right, the right of communication to the public and the distribution right) and exceptions and limitations to these rights.
- Harmonises the protection of technological measures and of rights management information, sanctions and remedies.
- Possible conflict/interpretation issues with the e-Commerce Directive 2000/31 which exempts certain intermediaries from indirect liability under certain, well defined circumstances

Source: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l26053

PROVISIONS ON SOFTWARE PROTECTION - EU

- The EU in 2003 presented a draft Directive on the patentability of software to harmonise national legislation and practices
- The purpose of the Directive was supposed to be twofold: to prevent a drift towards the liberal software patent laws of the US, and to harmonise software patent law in the EU.
- The proposal was rejected in 2005 by the European Parliament

Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions. Presidency compromise proposal. 29 January 2004, Brussels, 5570/04, Council of the European Union

DIRECTIVE 2004/48 ON INTELLECTUAL PROPERTY ENFORCEMENT

- Gradual harmonisation of substantive law on intellectual property rights has promoted the free movement of goods and made rules more transparent but there was initially less harmonisation of means of enforcing intellectual property rights.
- Counterfeiting, piracy, infringements of intellectual property in general, are phenomena that are becoming increasingly widespread and have now taken on an international dimension.
- New and exacerbated risks with modern technologies.
- Provides that owners of intellectual property rights can, in principle, request injunctions against different parties, also information service providers.
- Possible conflict/interpretation issues with the e-Commerce Directive 2000/31 which exempts certain intermediaries from indirect liability under certain, well defined circumstances

Source: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l26057a

INTELLECTUAL PROPERTY RIGHTS AND E-GOVERNMENT

- Certain matters in the public interest like texts of laws, regulations, application forms for public services etc. are in most countries excluded from copyright or other protection but can be used by everyone
- Official symbols (flags, seals etc.) may be protected under special legislation
- If building e-governance solutions on components (software or other) that is protected by intellectual property rights it is important to ensure proper conditions to avoid vendor lock-in or similar
- The right to use intellectual property is given by licences but the moral right stays with the author

PROVISIONS ON SOFTWARE PROTECTION - PATENTS

- Disclosure requirements in the patent process may not fit well with software as the source code used to write software is often confidential
- Software is included in many inventions as an integral part
- Software *as such* is not patentable under the European Patent Convention
- **Article 52**: *(1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.*

(2)The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

(a) discoveries, scientific theories and mathematical methods;

(b) aesthetic creations;

(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;

(d)presentations of information.

Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

US CASE: ALICE

- Australian company Alice, part-owned by the National Bank of Australia, held patents covering a computer implemented scheme for mitigating settlement risk.
- Alice Corporation argued that when an invention needs the use of a computer, even if it includes an abstract idea, it should remain patentable as long as the computer performs a leading role in the claimed invention.
- CLS Bank International (US based) that ran a foreign- exchange settlement system argued that Alice´s patent tried to monopolise an idea that has already for a long time been a part of financial transactions.
- US Federal Circuit Court of Appeals decided that patents owned by Alice were based on abstract ideas and thus not eligible for protection. Upheld by the US Supreme Court, No. 13–298. Argued March 31, 2014—Decided June 19, 2014.

https://www.supremecourt.gov/opinions/13pdf/13-298_7lh8.pdf

US CASE: APPEL V. SAMSUNG

- Several cases between Apple and Samsung, for example on slide to lock/unlock screen technology
- Samsung argued that after Alice, Apple's patent merely referred to an abstract idea. Mere usage of a computer in order to implement a sole idea of shifting a lock from locked to unlock does not make the whole invention patentable.
- Apple asserted that the contested claims were not only ideas, but contained a concept
- Apple, Inc. v. Samsung Electronics Co., Ltd., 678 F. 3d 1314 (Fed. Cir. 2012) Smartphone design – several cases, end result Samsung found guilty of infringement

OTHER SPECIAL RIGHTS: DATABASES

- Databases are often treated as a special category
- The protection varies between countries, no universal system of basic rights
- The effect of special (sui generis) rules is primarily that there is no requirement of originality and creative input for databases in the way there is for copyright, but the law sets out special criteria exactly tailored for databases.
- The importance of databases has increased with computerisation

MAKER OF A DATABASE

- The maker of a database is a person (either natural or legal) who has made a substantial investment, evaluated qualitatively or quantitatively, in the collecting, obtaining, verification, arranging or presentation of data which constitutes the contents of the database.

- ECJ cases: C-46/02, C-444/02, C-338/02

DATABASES IN THE WIPO COPYRIGHT TREATY

- WIPO Copyright Treaty Article 5:
- Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

OTHER SPECIAL RIGHTS: TRADE SECRETS

- Different forms of undisclosed information which has commercial value.
- Protected for as long as there is such value attached to the information and the information is not spread.
- Very specific for each situation what kind of disclosure that may be needed to regard something as no longer secret
- There may be a link with other intellectual property rights like patents. Once an application is made, the main information has to be disclosed to the public – no longer trade secret.

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INTELLECTUAL PROPERTY AND WORLD TRADE

INTELLECTUAL PROPERTY AND WORLD TRADE

- The World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated in the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time.
- Earlier, the extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations.
- The TRIPS Agreement emphasises non-discrimination as a means to reduce distortions and impediments to international trade.
- The TRIPS Agreement states that intellectual property protection should contribute to technical innovation and the transfer of technology. Both producers and users should benefit, and economic and social welfare should be enhanced.

STANDARDS OF PROTECTION IN TRIPS

- The purpose of TRIPS is to ensure that adequate standards of protection exist in all member countries.
- It provides for the enforcement of intellectual property rights and adequate prevention and settlement measures. Members are obliged to ensure that enforcement procedures are available under their national laws to permit effective action against any act of infringement. Such procedures shall be fair, equitable, simple, cheap and timely.
- Members are obliged to provide for criminal procedures and penalties, including imprisonment, fines, seizure, etc. in certain cases where illicit activities are carried out on a commercial scale.
- Border controls are mandated.

STANDARDS OF PROTECTION IN TRIPS

- The TRIPS Agreement provides for a dispute settlement procedure under the WTO, wherein sanctions may be imposed (as opposed to the Berne Convention on copyright which does not provide for any sanctions)
- According to the TRIPS Agreement, WTO members are obliged to legislate to provide the standards of protection laid down therein for the various categories of IPR.
- States are obliged to accord to intellectual property rights owners national treatment – i.e. no less favourable than it accords to its own nationals, discrimination is prohibited.
- The TRIPS Agreement provides for most favoured nation treatment: subject to certain defined exceptions, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.