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## Europe's New Strategy for the Future of IPRs in the Digital Age: Launch of a Legislative and Regulatory Debate

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On May 24, 2011, the European Commission published its long-awaited strategy on the future of intellectual property rights (IPR Strategy).<sup>1</sup> The strategy focuses on IPR regulation in the digital age; it is particularly timely and relevant given the increasingly active public debate on Internet regulation that has followed the recent eG8 meeting in Paris.

Key elements of the Commission's IPR Strategy include:

- a debate about ISP liability and the role of copyright protection in the Internet age;
- further efforts at Europe-wide harmonization of the patent system (including a European patent court);
- a new instrument for valuation of IPRs from an accounting perspective;
- further reform and strengthening of the external dimension of the EU's IPR policy, including reinforcement of IPR-related border controls and sanctions (evoking parallels to Section 337 in the US); and
- efforts to increase IPR enforcement in non-EU countries, including through the EU's ever-growing network of bilateral or regional Free Trade Agreements (FTAs); in international organizations such as WIPO, the WTO and the UPOV; and through ACTA, the Anti-Counterfeiting Trade Agreement.

We discuss some of the key elements of the IPR Strategy below and include a notional timeline of coming legislative events. The Commission's IPR Strategy sets the agenda for an active EU-wide debate on the future of IPR. Member States have already begun to position themselves through

unilateral domestic action and policy statements. Interested companies are well advised to become actively involved (if they have not done so already). Although the Commission has until 2014 (end of its mandate) to implement the new IPR Strategy, the vast majority of action items are currently scheduled for adoption in 2011-2012.

## **1. ISP Liability**

The issue of ISP liability has already been the subject of an active debate in EU Member States and the EU courts. An April 12, 2011 opinion by Advocate-General Pedro Cruz Villalón of the European Court of Justice in the *Scarlet/SABAM* case is one of the more recent examples (a judgment should be expected later this year). Key issues include the scope of ISP liability, safe harbors provided to ISPs and other Internet-based businesses, and the effect of the EU's liability regime on digital innovation and the EU's digital economy as a whole.

The Commission's new IPR Strategy sets the agenda but does not resolve the debate. In terms of ISP liability, it focuses on ISPs that either infringe copyrights directly or "knowingly facilitate or sustain piracy of others and profit from it."<sup>2</sup> Beyond that, the Strategy does not identify a specific standard of care for ISPs, although the Commission declares that its proposed approach will not alter existing liability rules set forth in the e-Commerce Directive.<sup>3</sup> It will be important to follow how that interpretation will evolve, including in light of active advocacy from various EU Member State governments, the interests of copyright and information technology industries, and the *Scarlet/SABAM* judgment later this year.

## **2. Copyright Levies and Collective Copyright Management**

Private copying of copyright-protected works within the EU is currently remunerated through levies on recording media or recording equipment (photocopiers, printers, MP3 players, CDs and DVDs). But different national rules and tariffs apply across Member States. There is an active legal and political debate on whether the current system of copyright levies should be replaced by a new digital licensing system.<sup>4</sup>

The IPR Strategy proposes the appointment in 2011 of a high-level independent mediator whose function it will be to harmonize the different methodologies used to impose levies; and to improve the administration of levies, the setting of tariff rates, and the interoperability of the various national systems in light of their cross-border effects.

The Commission also published, on the same date as the new IPR Strategy, a proposal for a directive on so-called orphan books, which aims to create a legal framework to ensure lawful, cross-border online access to orphan works contained in online digital libraries or archives. The IPR Strategy also provides for adjustments to the existing licensing system for orphan works.

The IPR Strategy announces the planned reform of the EU's system of collective management of copyrights. In particular, the aim is to create a multi-territorial and pan-European licensing system

(as opposed to the current national systems), with a focus on the cross-border management of copyrights in the online environment through the creation of European "rights brokers." The Commission plans to propose a legal instrument to create a European framework for online copyright licensing in late 2011. Current national fragmentation of copyright license management is seen as a serious impediment to development of EU-wide online media and content offerings that weakens European online competitiveness.

### **3. A European Copyright Code**

Another approach to the creation of a pan-European licensing system presented in the IPR Strategy foresees the creation of a European Copyright Code.

While the future content of such a code remains unclear, its impact may be significant. The Commission's IPR Strategy suggests that it could encompass a comprehensive codification of the present body of EU copyright directives, which would harmonize and consolidate copyrights (and related rights) at the European level. The Commission also foresees a review of the current IPR Enforcement Directive 2004/48/EC with a view, in particular, to reconciling IPR enforcement in the digital environment while safeguarding fundamental rights and taking into account data protection, freedom of expression and other concerns.

### **4. Further Harmonization of EU Patent Law and Creation of the EU Patent Court**

The Commission also continues to advocate the creation of a common EU patent protection system. Twenty-five of the EU's 27 Member States have already agreed to a unified EU Patent. Italy and Spain did not agree, objecting to the languages of the EU Patent continuing in line with the current European Patent Office (EPO) practice, i.e. English, French and German for claims, and in one of those languages for the specification.

The Commission's main objective is to simplify administrative procedures by eliminating the requirement that patents be validated in each individual Member State. In addition, the IPR Strategy foresees the deployment of machine translation systems. Both reforms are expected to yield substantial cost savings, make patent application more affordable to companies regardless of their size, and create a more unitary, pan-European patent system.

In this context, the IPR Strategy also proposes the creation of a unified and specialized EU patent court, which is intended to decrease litigation cost and should help avoid the same cases being dealt with in multiple national courts, sometimes with diverging results; and it indicates the Commission's intention to develop an IPR 'valorisation' instrument aimed at valuing intangible IPR assets in accounting terms in order to increase opportunities for companies to get better value out of IPR and leverage financing. In this respect, the new Strategy announces the Commission's launch of a comprehensive analysis and feasibility study to further review and develop the concept – another issue that IPR-driven enterprises with activities in Europe may well wish to monitor or

become involved in.

## 5. International IPR Policy Including Border Enforcement and ACTA

The IPR Strategy devotes substantial attention to the international dimension of the EU's IPR policy.

In particular, the Strategy reflects the Commission's objective to strengthen customs enforcement of IPR through the adoption of a new Customs Regulation, replacing Regulation 1383/2003 and expanding, among other things, the list of IPR infringements that may result in product seizures or other sanctions at the EU's borders.<sup>5</sup> In addition to patent and copyright infringements, the new regulation would also include such infringements as illegal parallel trade and lookalike trademarks. The revised list of protected rights would also include trade names, topographies of semiconductor products, utility models, devices to circumvent technological measures and non-agricultural geographical indications. A standard procedure for the destruction of infringing goods would be made mandatory in all Member States for counterfeit and pirated goods.<sup>6</sup> While not as powerful as the US Section 337 process, the EU's customs approach already has real teeth and the Commission seems intent on broadening and further encouraging its use.

The IPR Strategy also proposes increased focus on IPR customs enforcement in non-EU countries and cooperation to that effect in the framework of bilateral and multilateral trade agreements and through coordination with international organizations such as WIPO, the WTO and the UPOV. The Strategy references the key EU bilateral trade negotiations that are currently ongoing and notes that in negotiating FTAs, the Commission will continue to seek agreement on IPR clauses that offer "identical levels of IPR protection to those existing in the EU while taking into account the level of development of the countries concerned." The Strategy notes that "[t]he right balance also needs to be struck between protection of IPR in third countries and access to knowledge. IPR policy... can support inclusive and sustainable growth if it is part of an overall development strategy aiming at enhancing the business environment, promoting research calibrated to development needs and ensuring that health, biodiversity or food security objectives are properly taken into account".<sup>7</sup>

Finally, the IPR Strategy announces that the Commission will table its proposal for an EU decision to sign the Anti-Counterfeiting Trade Agreement (ACTA) "in the coming weeks." The Strategy repeats the Commission's mantra that ACTA is consistent with existing EU law, but an open question remains whether the European Parliament will seek a legal opinion to that effect from the EU Court of Justice. Latest developments suggest that it may hold off on doing so, but those in favor of such an initiative may still succeed in triggering a vote.

## NOTIONAL TIMELINE OF LEGISLATIVE EVENTS

The following is a notional timeline of key events, as outlined by the Commission. This will obviously be subject to change over time, but provides an initial indication of key dates on the legislative and regulatory agenda:

	Action	Description	Timing
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1	Unitary patent protection	Proposals for Regulations of the European Parliament and of the Council on (1) a unitary EU patent and (2) translation arrangements.	The Commission adopted proposals on points (1) and (2) on 13 April 2011.
2	IPR valorization instrument	Comprehensive analysis on the basis of ongoing feasibility study and report to the European Council.	Report to be submitted before the end of 2011.
3	Revision of the Community Trademark Regulation and the Trademark Directive	Proposals will aim at rendering the EU trademark system more effective, efficient and coherent.	Second half 2011
4	Orphan works	Legislative proposal for a Directive on certain permitted uses of orphan works.	First half 2011
5	Multi-territorial Collective Management of Copyright	Proposal for a legal instrument to create a European framework for online copyright licensing in order to create a stable framework for the governance of copyright at the European level.	Second half 2011
6	Audiovisual works	Green Paper public consultation on various issues relating to the online distribution of audiovisual works.	Second half 2011
7	Further measures in the area of copyright	To report following the stakeholder consultation and assess the need for further measures to allow EU citizens, online content services providers and right holders to benefit from the full potential of the digital internal market.	2012
8	Private copying levies	Appointment of a high-level mediator with a view to brokering stakeholder agreement on private copying levies.	Second half 2011
9	User-generated content	Stakeholder consultation.	Second half 2012
10	European Copyright Code	Assessment and discussions with stakeholders and reporting back.	2012 and beyond

11	Review of Directive 2001/29/EC	Report on the application of Directive 2001/29/EC as required by Article 12 of that Directive.	2012
12	European Observatory on Counterfeiting and Piracy	Proposal for a Regulation on entrusting the Office for Harmonisation in the Internal Market (OHIM) with certain tasks related to the protection of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Counterfeiting and Piracy.	May 2011
13	Rights Complementing IPR	Study to assess the economic and societal impact of infringements of trade secrets and practices of "competing at the edge of the law" like parasitic copies and to assess the economic benefits of an EU approach in this area.	End 2012
14	Non-agricultural Geographical Indications (GIs)	Feasibility study to consider an EU-wide protection of GIs for non-agricultural products. This study will provide an analysis of the existing legal frameworks in the Member States and an in-depth assessment of the stakeholders' needs and the potential economic impact on protection for non-agricultural GIs.	Second half 2012
15	Review of the IPR Enforcement Directive	Review of the Directive aimed at creating a framework allowing, in particular, to combat more effectively IPR infringements via the Internet at their source.	First half 2012
16	Replacement of the Regulation concerning customs action against goods suspected of	Proposal for a new Customs Regulation to strengthen customs enforcement of Intellectual Property Rights and create conditions for effective action, while streamlining procedures.	May 2011

	infringing intellectual property rights		
17	Voluntary measures of stakeholders targeting IPR infringements	Stakeholder agreement (Memorandum of Understanding) on the sale of counterfeit goods over the Internet and follow-up process.	MoU signed on 4 May 2011, evaluation and review by mid-2012
18	EU database COPIS	Development of database to ensure efficient management of companies' applications for customs action and produce statistics of customs detentions.	First half 2012
19	Review of the Commission's 2004 strategy for the protection and enforcement of IP rights in third countries	Redefined strategy to adapt it to recent needs and evolutions, to ensure higher standards of IPR customs enforcement in third countries and cooperation in the framework of trade agreements.	End 2011

<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Single Market for Intellectual Property Rights; Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM (2011) Provisional Version, presented on 24 May 2011, available [here](#).

<sup>2</sup> See MEMO/11/332, Brussels, 24 May 2011, Intellectual Property Strategy – Frequently Asked Questions.

<sup>3</sup> See MEMO/11/332, Brussels, 24 May 2011, Intellectual Property Strategy – Frequently Asked Questions.

<sup>4</sup> One recent study, for example, estimated that by abolishing levies, prices for consumer electronics would likely decrease. This would prompt consumers to buy more devices, in turn driving an increased demand for digital music. The report is available at [www.oxera.com/main.aspx?id=9521](http://www.oxera.com/main.aspx?id=9521). According to the study, the economic welfare gain of abolishing copyright levies would be between EUR 975 million and EUR 1.88 billion per year.

<sup>5</sup> See MEMO/11/327, Brussels, 24 May 2011, Customs enforcement of intellectual property rights – Frequently Asked Questions.

<sup>6</sup> Currently, the anticipated destruction of goods (applied in 50% of all detentions in 2009) is not made compulsory

in all EU Member States. A specific procedure for the anticipated destruction of counterfeit and pirated goods contained in small postal consignments is also proposed. See MEMO/11/327, Brussels, 24 May 2011, Customs enforcement of intellectual property rights – Frequently Asked Questions.

<sup>7</sup> See FN 1.

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