

**Subject: ISOC draft Issues Paper on (Internet) Intellectual Property Policy
- comments and suggestions for discussion, Webinar, 13 June 2013**

Dear Friends and Colleagues:

With a view to the webinar scheduled on Thursday afternoon, I would have a few comments and suggestions on the draft paper that Konstantinos Komaitis has sent us. In general it would be appropriate to make more clear the distinctions between over-arching values and principles such as the rule of law and the Universal Declaration of Human Rights, and procedures and methods such as multistakeholder governance and open standards.

In the recent past we used to discuss the 'virtual' world, the Internet, as something distinct from the 'real' traditional world and to treat the rules in each sphere as somehow different, and Internet 'users' were a distinct group from the rest of society. But nowadays, that distinction is no longer useful because the Internet increasingly pervades everything that society and individuals can do.

Thus, the draft ISOC paper needs to start from the general values and principles and then discuss the methodology of IPR discussions – and decisions – recognising that whatever may apply to the Internet will in due course apply generally, if it is not already the case. Indeed we get a hint of the problem in the title of the paper. (Internet) is in brackets! But the paper still discusses IPR in the Internet as if it is still a distinct 'space'. What happens to the argument if (Internet) is deleted?

If we could clarify this dichotomy, it would no doubt be less difficult to resolve some of the other issues which arise in the draft paper. For instance:

1. It would be helpful to have a clearer concept as to *what ISOC actually means by “multi-stakeholder governance”*. From one point of view, representative democracy is the ultimate form of multi-stakeholder governance. Does society need anything more? Particularly as one is no longer talking about the application of real-world laws to the virtual world, but rather that the whole of legislation now has to be considered in the Internet context, since – at least in most of the developed world – the Internet is now all-pervading, or will shortly become so.

The other point of view is that elected governments are not competent to undertake Internet governance on their own but those governments *need to be supplemented or even replaced by a multi-stakeholder alternative*. In this case the actual composition and relative weights to the private stakeholders becomes critical. I would argue in this context that Intellectual Property law in recent decades has been strongly influenced by certain interested stakeholders. But there has been a total lack of balance among the participants.

As an advocate of multistakeholder governance, does ISOC recognise the first or the second version? In the second case – which seems to be the burden of the draft paper – what is the role of ISOC?

2. The paper argues on several occasions, that *discussions of Intellectual Property should adhere to minimum standards*, evoked in some detail on page 3.

This is all very well as far as it goes, but there are practical limitations:

- some stakeholders, notably some IPR and telecommunications associations, have in practice rejected principles of balance and transparency (c.f. ACTA, WTIC). They would have to be persuaded by their peers or coerced by their governments to participate in a

discussion disciplined by these minimum standards;

- regarding the Modern Paradigm for Standards Development, if this is not to become a dead letter before its time, some effective publicity would be appropriate. ISOC and IETF might undertake a more proactive role in encouraging the respect of these principles, for instance in the ITU.
- specifically, with respect to Internet Architecture, ISOC needs to be very cautious about using the term 'technology neutral'. As this concept is usually understood, the Internet is anything but technology neutral. Whether it is the global Root, IP addressing, the DNS, TCP/IP or HTML, ISOC and IETF have argued consistently for a unique technology ('TINA').

There are plenty of voices in the ITU, among ITU members and elsewhere, which would be quite happy with a technologically neutral internet.

3. As I warned in a previous posting, an ISOC paper in this area will have *difficulty in treating copyright and patent law in parallel*, in the hope and expectation that the same principles may be applied in practice throughout all areas of intellectual property, particularly if that is to apply in general and not only in the Internet 'space'. In that context it is rather unfair to put the confusion into the mouth of Commissioner Kroes (p.5) where she is reported to be talking about copyright when actually she refers to patents (c.f. "life-saving scientific research ...")
4. It is not clear to what extent ISOC considers that the same governance principles that should apply to the Internet should also apply to the rest of society and the economy?

References to the 'rule of law' and the Universal Declaration of Human Rights, suggest the generality, but in the details (c.f. p.12), the paper specifically to the need for multistakeholder processes "in this space"; presumably referring to the Internet, alone. Which is it?

5. Finally, there is the question: *Who is doing What, and specifically what will ISOC do?* Your paper says that ISOC 'encourages ... multistakeholder collaboration ...' but it does not say what ISOC proposes to do in this context. That is disappointing, particularly as ISOC sometimes argues that it is in-and-of-itself the primary multistakeholder platform in the Internet. Even when governance is based in principle on open, bottom-up multistakeholder participation (c.f. ICANN) there is a severe problem of maintaining balance among the stakeholders and ensuring respect of the public interest.

The principal lacuna being the weak participation from civil society. Indeed, *ex post facto*, justifying, if not inviting, intervention by governments, albeit often then criticised for being heavy handed and late in the game.

Some of us have – over recent years – worked to encourage the Internet Society to undertake a whole hearted role arguing for users of the Internet and for the public interest. But it has become increasingly clear that the internal composition of ISOC, its Board of Trustees and its staff have effectively stymied that option.

It is all very well arguing for an open multistakeholder process, but who, then will ISOC speak for? On the other hand, if ISOC considers that it can conduct multistakeholder governance itself then it should be (a) more proactive than this draft paper suggests and (b)

improve and strengthen the balance of representation and participation among its constituent parts.

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I look forward to our discussion on Thursday afternoon. There are a few other minor points that I could take up at some stage, but I would prefer to do so on the basis of the next draft, which might take into consideration the above considerations. Needless to say, I would suggest that publication of the present draft would be premature.

Regards

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