

Thesis Paper on Intellectual Property

18 October 2006

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1 Intellectual Property is our most important future capital

- The protection of intellectual property is crucial to Europe. The digital age, which has just begun, demands clearly stated positions today.
- Industrialized nations such as Germany cannot afford to base their economic success on material resources (e.g. raw materials). Intangible capital is a far more important requirement for innovation. It is the key to success: capital in the 21st century comes from the mind.
- Innovations sometimes require large investments. Correspondingly, investments must amortize, or they will not be transacted. But without specific protection, intellectual property cannot be utilized. Intellectual property presents the opportunity to benefit from one's own innovative efforts.

2 Intellectual Property needs protection and acceptance

- Innovation emerges when it is worth the effort and the inventor can rely on proper legal protection.
- It is the financial gains that are granted exclusively to authors or inventors: the knowledge itself remains in the public domain. Freedom of knowledge and intellectual property are in no way contradictions, a fact that is often overlooked.
- It is necessary to inform comprehensively about intellectual property and clarify its value to the general public. This needs to be fostered next to protection efforts. The acceptance of intellectual property requires a consciousness of how it works.

3 Authors must be appropriately compensated

- Copyright laws also comprise provisions for the intangible economic goods of "knowledge" and "creativity". Sustainable copyright laws must achieve a balance between the interests of the originator, the licensees and the general public.
- Authors should be appropriately compensated for the concession of rights and the use of their works.

4 System Change: where possible, copyright levies must be replaced by individual means of compensation (DRM)

- As an exception to the absolute right of the author to his work, the copyright law allows for private copies. The author receives compensation from the copyright levies that up until now have been demanded primarily from producers of copying machines and blank media.
- The system of copyright levies is a makeshift solution from the analogue world that can no longer afford the necessary balancing of interests for all involved parties. DRM and individual licensing offer sustainable alternatives. This system change is both anticipated and supported in European law.
- Endorsing individual licensing is dogmatic:
It imparts a higher awareness of the law. With copyright levies, many people believe that unlimited private copying is legal.
- Individual licensing is more just:
Contrary to copyright levies, the actual users will be charged instead of third parties (the producers and other customers) The individual compensation for the copyright holder can be calculated by the actual use and the extent of use, or rather, the granted rights of use. With today's copyright levies, each user, independent of actual use, is charged.
- Licensing is "internet compatible":
In the digital environment (e.g. the internet), Digital Rights Management (DRM) and technical protection measures must prevail, since they make individual and usage-oriented compensation possible. Copies on the internet must therefore be excepted from the levies.

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- Individual licensing would prevent distortion of competition:
There are few EU countries in which the broadening of device levies are as laboured as in Germany. The United Kingdom, for example, has absolutely no levies. Poland has introduced a percentage-based levy which lies noticeably under 5%. The aftereffects include distortion of competition, company relocation, loss of jobs, etc. As soon as the consumer sidesteps into neighbouring levy-free countries (e.g. internet shops), the levies fail.
- The economic framework supports the system change:
The market for online-content (paid on an individual basis) such as video on demand, music on demand or e-newspapers is growing exceptionally. It will leave the importance of copyright levies far behind with its ascent.

5 Copyright levies are only justifiable in the analogue range

- Copyright levies should only be imposed in the analogue range where individual licensing is not possible.
- The proposal for the next copyright reform¹ introduces a ceiling of levies at 5% of the devices' street price. This is constitutionally demanded for legal certainty reasons as well as in consideration of the affected producers. Specifically, it should ensure proportionality between the compensation amounts and the economic gains of the producers. Competition and locational disadvantages for producers, importers and merchants must be avoided.
- The proposed “de minimis” provision must be upheld: under it, only devices that are to be used for relevant copies on a significant scale are dutiable - effectively assuring that not each and every device is subject to levies. Constitutional law demands to limit the interference on the civil rights of device producers to a constitutionally uniform amount.
- The realm of online services should be explicitly exempted from copyright levies: here, individual licensing is the method of choice.

6 Inventions need patent-protection – otherwise the costs for innovations often can not amortize

- Patents are the stimulus and reward for innovations and thus promote advancements. Patents allow for the sharing of the invention with others while simultaneously protecting the economic value of the invention, e.g. through licensing agreements. This is especially important, since the inventors and their companies do not always have the sufficient resources that would allow them to market the invention completely by themselves.
- Patents provide “breathing time” in competition that allows the costs of a new invention to amortize. Patents might even represent the most important assets of a company. They are often catalysts for further development of a company (e.g. collateral for loans).
- The demands for a competitive patent system are clear: patents must offer the highest level of legal certainty possible. Competency in the competent authorities and courts are important. Trivial patents must continue to remain excluded. The procedure to obtain a patent should be cost-effective.

¹ Government proposal for a revised German Copyright law, 22 March 2006.

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7 The European patent system must undergo further development

- Patent quality:
Protected patents should be as unassailable as possible. Examining the existing patent requirements should be attended by demanding a high level of quality.
- Patent litigation and legal certainty:
Legal certainty is of utmost importance in the enforcement of patents. To guarantee that legal interpretation is standardized to the highest judicial authority, the proposed European Patent Litigation Agreement (EPLA) should be adopted. It is also favored by the EU Commission and the European Patent Office.
- Patent costs:
The high costs for Europe-wide patent protection bring along local disadvantages, which especially affect small and medium-sized businesses. The costs for patent applications and litigation should be kept as low as possible. The ratification of the London Agreement and its accompanying alleviation in translation requirements will be instrumental in this process.
- Community Patent:
A European community patent based on the political agreement from 2003 should not be introduced, because it offers no noteworthy advantages in comparison to the current situation. In particular, it presents no cost and procedural advantages.

8 Product piracy must be contained with the help of effective measures

- Product piracy is growing enormously and brings with it threats to the business location Germany. Sizable problems in the practical execution of several provisions indicate a need for action in this field.
- Flaws in legal specifications and their implementation into practice must be identified to make sure that necessary measures can be accomplished.
- Common efforts by industry, politics and law enforcement should be attempted to lead an effective fight against piracy.

9 Claims for information disclosure in online environments must respect the interests of rights owners and providers as well

- Intellectual property infringements, especially on the internet, are the cause of large damages and represent danger to the business location Germany. The trails of online infringers can usually only be found using the help of access providers. Therefore, it is important that rights owners in the online environment be able to gather information about the identity of an infringer.
- To establish appropriate legal claims for information disclosure, an efficient implementation of the Enforcement Directive² is necessary. However, the legal framework still requires a sense of proportion. The providers are in the middle of the disputing parties and should not be subjected to costs and legal uncertainty.
- The providers also want their services to be used within the legal constraints. The providers themselves do not have the resources to inspect claims for information disclosure by themselves. When the provider concedes unjustified claims for information disclosure, it might be subject to claims for damages by the user, whose data would have then been unwarrantably disclosed. The procedure for providing information must be formulated according to formal criteria only, with specific attention to exempting the provider from liability.
- According to the costs-by-cause principle, the costs of inquiries should be borne by the infringer. As in every legal proceeding, the rights owner has to prefinance these costs.

² Directive 2004/48/EC from 29 April 2004 on the enforcement of intellectual property rights.

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10 The balanced responsibility regime of the E-Commerce Directive should not be overstretched or violated in practice

- The division of labour in internet businesses (access providing, initialization of the platform, uploading of content through different parties) requires well-defined responsibilities of all parties involved. The E-Commerce Directive purports a well-balanced legal framework.
- The national implementation, however, differentiates. German courts widely extend responsibility in parts. The consequences are far-reaching monitoring obligations that are practically impossible to implement.
- It is the task of legislators to take countermeasures to bring the legal practice back in harmony with the E-Commerce directive.
- Monitoring third party content on its lawfulness cannot be practically realized in the massive everyday business. Therefore, constant monitoring of such content should not be demanded by law.
- The provider is unwillingly drawn between the disputing parties when it comes to claims for injunctions of infringements and for other remedies. Providers usually lack the information necessary to evaluate the legal situation. In this case, it would be wise to introduce notice and take down provisions, which would allow the provider by virtue of specific formal criteria to remove content without getting involved into the dispute between right owners and violators.