Kluwer Copyright Blog

Is secrecy the new black in IP?

Ana Ramalho (Maastricht University) · Monday, February 6th, 2012

Secrecy might be the new black for the ones using it. However, the rules introduced by the Lisbon Treaty and the rising public awareness of the need for transparency might mean that such fashion will be outdated soon in Europe.

In the last couple of years, relevant laws and international agreements in the field of intellectual property have been shrouded in secrecy. A very recent example is the Trans-Pacific Partnership (TPP), dubbed ACTA 2.0. It is a trade agreement between Singapore, Chile, New Zealand, Brunei, Australia, Peru, Vietnam and the United States, which includes a chapter on intellectual property. The relevant intellectual property provisions were arguably discussed in secret this past week.

In Europe, the most notable example of this type of secret negotiations is ACTA, the Anti-Counterfeiting Trade Agreement. Its first draft texts were made available through leaks, rather than through official public disclosure by governments, despite various demands for transparency. ACTA's lack of transparency was also noted by the European Parliament in a Resolution adopted in March 2010, where the Parliament not only expressed concern over such transparency issues, but also called on the Commission and the Council "to grant public and parliamentary access to ACTA negotiation texts and summaries." The "secrecy-gate" affair gained yet a new momentum with the recent resignation of Kader Arif, the rapporteur of the ACTA text, who condemned the secrecy of negotiations and the lack of consultation of the civil society.

Allegations of lack of transparency also abound in relation to the EU's legislative processes in internal matters (almost ever since the very creation of the EU). Suffice it to say that lack of transparency was the most common complaint examined by the European Ombudsman in 2010.

So why is secrecy hip? Odds are that it is just simpler to agree on something if there are not many dissenting opinions to begin with. Consensus can be a difficult goal to attain – and the more divergent interests there are, the more difficult it becomes to

achieve it. Unfortunately for secrecy advocates, transparency or openness is, if not necessary, mandatory. In the EU, there is a handful of provisions that impose precise duties on the Union regarding transparency, including: granting access to documents (Article 15 paragraph 3 TFEU); facilitating public discussion of Union's actions (Article 11 paragraph 1 TEU); maintaining a transparent dialogue with representative associations and civil society (Article 11 paragraph 2 TEU); or carrying out broad consultations with parties concerned (Article 11 paragraph 3 TEU).

Several down-to-earth, common sense reasons explain why transparency is necessary. Namely, it may have the effect of conducing to more balanced legislation, since all the interested parties are ideally represented in an adequate fashion. Transparency also leads – at least in theory – to more democratic outcomes, as citizens and interest groups should be let in on the legislative procedures that affect them.

Equally important is the effect that transparency can have on competence matters. The division of competences between the EU and its Member States is still not crystal clear, even though the Lisbon Treaty has significantly contributed to solve that problem. Articles 3, 4 and 6 TFEU determine the areas where the EU has exclusive, shared or supporting competences respectively, but in some cases it is not evident which concrete subjects are covered by each area. That remark is especially accurate with regard to the field of copyright. None of the competence rules above mentions the subject of copyright. Granted, the new Article 118 TFEU affords the EU competence to create an EU copyright title. Outside of that new possibility of creating a unified right, however, one must bear in mind that copyright has a mixed nature, comprised of both economic and non-economic elements. As a consequence, copyright can come under an internal market-based competence (which is a shared competence), under a culture-based competence, (which is a supporting one), and so on.

In that context, transparency can serve as a means to check the legitimacy of the EU to act on the basis of a certain competence. In fact, competence is connected to legitimacy to act: an EU institution has legitimacy to act provided that a competence rule empowers it to. Transparency as a principle is therefore a tool to evaluate the strength of this link between competence and legitimacy. It allows authors, users, intermediaries, and civil society in general, to control whether that competence exists, and hence whether the EU institutions have legitimacy to take action. Should the EU have competence to act, this principle further allows citizens to evaluate the way in which that competence is being exercised.

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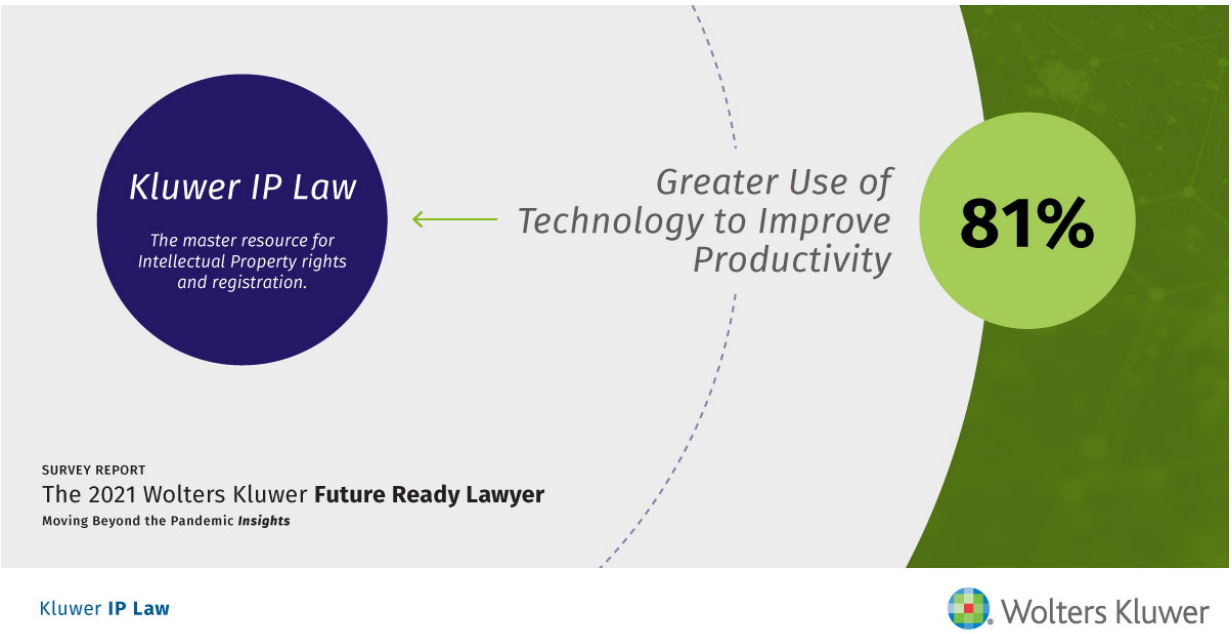

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