Kluwer Copyright Blog

“Only one thing is impossible for God: To find any sense in any copyright law on the planet” (Mark Twain)?

Ana Ramalho (Maastricht University) · Saturday, July 9th, 2011

On the 24th of May 2011 the European Commission has issued a Communication containing its Intellectual Property Rights (IPRs) strategy. The document has a promising title: “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.”

In short, the Communication mentions the need to balance the protection of IPRs with access to works, which is to be done by means of “enabling legislation” – that is, legislation which allows for a more efficient management of IPRs. In relation to copyright in particular, the Communication identifies some issues to be tackled by the Commission. These include, among others: the creation of a European legal framework for collective management; the codification of the acquis communautaire in a European Copyright Code; the feasibility of creating an optional “unitary” copyright title on the basis of Article 118 of the Treaty on the Functioning of the European Union (TFEU); the regulation of private copying levies; the problem of out-of-commerce and orphan works; the extension of the term of protection favouring performers and producers of phonograms; or the ratification of the Anti-Counterfeiting Trade Agreement (ACTA).

However, while the concern with balancing the protection of IPRs and access is praiseworthy, one must wonder whether that concern is not merely theoretical. The document tries to make an argument for the link between strong protection of intellectual property and incentive to create. Arguably, a strong IPR policy is the key to a boosting knowledge economy and all the benefits that come with it. But this begs the question: if the departure point is strong IPRs, what is it left to balance, then?

As many economists have demonstrated – notably, Landes and Posner -, more doesn’t necessarily equal better. The correct measure of “copyrightness” is not found at the strongest level of protection, because there is a moment as from when the protection of copyright is counterproductive to the interests of creators and society at large.

A particularly interesting point is the assumption by the Commission that licensing transactions are impaired by high costs. But this generalization ignores that each intellectual property right has specific problems when it comes to licensing. In the case of copyright, one of the main costs involved is identifying the right holder, which is of course a challenge derived from the fact that copyright, unlike most industrial property rights, doesn’t have to be registered. However, one of the ways to reduce that transaction cost is exactly to broaden the scope of free use of copyrighted

works. In other words, it might be argued that a non-protectionist approach is a solution to address the high transaction costs in copyright licensing.

To be fair, the Commission also notes that there should be a rigorous application of competition rules in order to prevent the abuse of IPRs. But the question is then whether it wouldn't be easier to have less strong IPRs to start with.

Another problem relates to matters of competence. The Communication mentions Article 118 TFEU as the legal basis to create a European copyright title, but fails to refer to other sources of competence that could empower the EU to regulate all the tentative issues enumerated by the Commission. It seems therefore that the Commission assumes that the establishment and functioning of the internal market (Article 114 TFEU) will continue to be the main competence tool.

Yet, that might be a rather simplistic approach. Article 7 TFEU establishes that "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." The internal market policy must thus work in tandem with other objectives and policies of the treaty – namely, with the protection of consumers or the promotion of cultural diversity –, where the Union does not enjoy the same level of legislative power.

Finally, the academic work developed in relation to some of the topics mentioned in the Communication should not be overlooked either. For example, there have been many arguments against the term extension; and the problem of orphan works and the possibility of creating a European Copyright Code have been studied and academically framed as well. Let us hope, then, that such findings are taken into account in the context of the EU's legislative endeavours. And that there is sense to be found in the European Copyright laws of the old continent.

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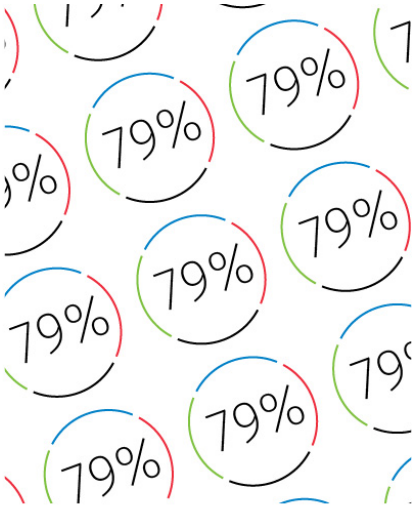

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