

European Commission Releases "Blueprint" for Intellectual Property Rights to Boost Creativity and Innovation

On May 24, 2011, the European Commission presented its overall strategic vision for “boosting creativity and innovation” through a true Single Market for intellectual property (the “IPR Strategy”).¹ The IPR Strategy reflects the growing importance of online activities and is intended to adapt existing intellectual property legislation to new business models. The IPR Strategy forms part of the Commission’s overall agenda to foster growth and sustainable job creation in Europe and to improve Europe’s global competitiveness.

The IPR Strategy outlines a series of short- and long-term policies that the Commission intends to adopt during its current mandate. The Commission’s communication comes shortly after the Commission presented its proposals for unitary patent protection (the “EU Patent”), which are targeted for approval in the second half of 2011. Concurrently with the IPR Strategy, the Commission published a proposal for a new directive on orphan works and a new customs regulation. In the second half of 2011, among other things, the Commission intends to propose revisions to the Community Trade Mark Regulation and the Trade Mark Directive, and a new directive on the multi-territorial collective management of copyrights.

I. PATENTS

The fragmentation of the European patent system and the high costs of validating patents in Europe have long been considered significant impediments to Europe’s competitiveness and strategy for growth.

EU Patent

On April 13, 2011, the Commission presented two proposals for enhanced cooperation on a single EU patent for 25 participating member states (Italy and Spain so far have decided not to participate).² The first of these proposals sets out the regime

¹ 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) 287 final, <http://tinyurl.com/3obuer9>.

² Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, April 13, 2011, COM(2011) 215 final; Proposal for a Council Regulation implementing enhanced cooperation in the area of the

applicable to the unitary EU Patent, while the second sets forth the applicable translation arrangements. On May 30, 2011, Italy and Spain lodged a complaint with the Court of Justice of the European Union (the “CJEU”), claiming that the proposed translation arrangements were discriminatory. An extraordinary Competitiveness Council will be convened on June 27, 2011 to agree on a general political approach regarding the EU Patent. The Commission hopes that the text of the two proposals will be agreed in the second half of 2011. The European Commission targets the issuance of the first EU Patents in 2013.³

EU Patent Court

Patent disputes must currently be litigated in different national courts, which results in high litigation costs and the risk of inconsistent rulings. To increase legal certainty, the Commission suggests creating an independent, multilateral court established by international agreement among the participating Member States only, rather than a court open to all members of the European Patent Convention as previously proposed. This court would have jurisdiction on disputes involving EU Patents and the other patents valid in the territory of the participating Member States. The Commission targets approval of the international agreement in the first half of 2012.

II. TRADEMARKS

In the last quarter of 2011, the Commission will present proposals aiming at making the EU trademark system more effective, efficient and coherent. These measures include simplifying and speeding up the registration process, increasing legal certainty, clarifying the scope of trademark rights, increasing cooperation between the Office for Harmonization in the Internal Market (OHIM) and the national trademark offices, and aligning the Trade Mark Directive and the Trade Mark Regulation in several areas.

III. COPYRIGHTS

Collective Management of Copyrights

In the second half of 2011, the European Commission intends to submit proposals to create a legal framework for the collective management of copyright. This legal framework will aim, first, at establishing common rules on governance and transparency, as well as providing clearer rules on copyright licensing and distribution of revenues and, second, at enabling multi-territorial and pan-European licensing, amongst others through the creation of European “rights brokers” able to license and manage musical works on a multi-territorial level. The framework will also seek to develop better rights-management infrastructure and databases to facilitate cross-border licensing.

creation of unitary patent protection with regard to the applicable translation arrangements, April 13, 2011, COM(2011) 216 final; <http://tinyurl.com/44khwmb>.

³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, “Single Market Act – Twelve levers to boost growth and strengthen confidence – ‘Working together to create new growth’”, COM(2011) 206 final, Key action no. 3, <http://tinyurl.com/3rso97k>.

European Copyright Code

The Commission will also assess the feasibility of creating a European copyright code encompassing the existing body of EU copyright directives. This would also provide the Commission with the opportunity to review whether the current exceptions and limitations to copyrights under the Copyright in the Information Society Directive need to be updated or harmonized at the European Union level. The Commission intends to report on this proposal in 2012.

The Commission has also pledged to examine the feasibility of creating an optional unitary copyright title to allow right holders to choose whether to license and enforce their copyrights nationally or on a multi-territorial level. Proposals to that end, if any, are not expected before 2013. The Commission also intends to explore the issue of user-generated content to strike a balance between the rights of content creators and the need to take account of new forms of expression.

Private Copying Levies

Private copying levies vary significantly across the European Union, and these differences impede the smooth cross-border movement of goods that are subject to those levies. The Commission intends to appoint a high-level mediator tasked with brokering stakeholder agreement on the categories of equipment subject to those levies, the methodology used to set tariffs, and measures aiming at improving the cross-border functioning of disparate national levy systems.

Orphan Works

Concurrently with the IPR Strategy, the Commission presented its proposal for a directive on orphan works.⁴ Orphan works are copyrighted works whose authors are not identifiable, and from which copyright permissions may not be obtained. Orphan works account for a significant part of the collections held by European libraries, and they may not be digitized and displayed online legally unless common rules are developed. Large-scale digitization projects, such as the Commission's "Europeana" portal, depend on such rules. If adopted, the directive would allow institutions to digitize and display online literary, cinematographic and audiovisual orphan works in their collections after a diligent search was performed to identify a right holder. The search need only be performed in the Member State where the work was first published. Once established, its orphan status will be recognized across the European Union.

Audiovisual Works

The Commission plans to launch a consultation in October 2011 on the online distribution of audiovisual works with a view to reporting in 2012. The consultation will address copyright issues, video-on-demand services, the cross-border licensing of

⁴ Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, <http://tinyurl.com/3bnw3sz>.

broadcasting services, licensing efficiency, promotion of European works, the status of audiovisual authors and their participation in the revenue streams.

Artists' Resale Rights

In October 2011, the Commission will report on the implementation and effects of the Resale Right Directive. This report will build on the current public consultation process, which addresses amongst others the impact of the Directive on the internal market, the competitiveness of the EU market in modern and contemporary art, and the effect of the introduction of the resale right in Member States that did not apply it before the entry into force of the Directive.

IV. TRADE SECRETS AND NON-GEOGRAPHICAL INDICATIONS

The legal protection granted with respect to trade secrets and parasitic copying differs considerably throughout the EU. The Commission intends to launch an external study of and a stakeholder consultation on the impact of this fragmentation, as well as the economic benefits that would result from an EU initiative in those areas, in 2012.

The Commission will also conduct a feasibility study to consider EU-wide protection of geographical indications for non-agricultural and non-food products. This study will also examine the existing Member State legal frameworks, stakeholders' needs and the potential economic impact of protection for such geographical indications. The results of this study are due in the second half of 2012.

V. COUNTERFEITING AND PIRACY

The IPR Strategy identifies a need to strengthen the existing enforcement framework for IPRs. According to the Commission, this entails increasing public awareness, reviewing the IPR Enforcement Directive in the spring of 2012 and exploring to what extent voluntary measures involving rights holders, internet platforms and consumers could reduce the sale of counterfeit goods over the internet.

In light of the rapid changes in the online sphere, the Commission is considering extending the tasks of the European Observatory on Counterfeiting and Piracy (the "Observatory") to encompass the design and organization of public awareness campaigns, training for enforcement authorities, research on innovative enforcement and detection systems, and coordinating international cooperation. Since the Observatory will require more resources, the Commission suggested entrusting the Observatory's tasks to the OHIM.

VI. INTERNATIONAL DIMENSION OF IPR

The Commission will seek to enhance effective co-operation and engagement with third countries in international fora such as the World Intellectual Property Organization and the World Trade Organization. The European Union should be in a position to ratify the Anti-Counterfeiting Trade Agreement in the course of 2011.

The Commission will also continue to negotiate IPR provisions in its free trade agreements with third countries to offer protection as close as possible to that in the European Union. The Commission will also seek to foster cooperation with those countries through political and technical dialogues.

Finally, to strengthen customs enforcement, the Commission proposed a new Customs Regulation on May 24, 2011⁵ and is currently developing a central EU database (named COPIS) to store all companies' applications for customs action.

The Commission will also collaborate with national customs authorities to enforce IPRs effectively, amongst others to prevent the import of IPR-infringing goods sold over the internet.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under "Intellectual Property" under the "Practices" section of our website at <http://www.clearygottlieb.com>.

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⁵ Proposal for a Regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, COM(2011) 285, <http://tinyurl.com/5r3djde>.

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