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DIGITALEUROPE Considerations on the new Commission IP Action Plan

Introduction

DIGITALEUROPE welcomes the publication by the Commission of its new Action Plan on Intellectual Property ('IP Action Plan')¹ from November 2020. We are glad to see the Commission recognise the value of IP as a driver for economic growth and we fully support the IP Action Plan's ambition to strengthen Europe's creative and innovative industries, speed up the green and digital transition, and ensure that EU industry remains globally competitive.

In the past months, DIGITALEUROPE has analysed the proposals of the IP Action Plan in more detail. With this paper, we outline our considerations on and suggest improvements to various elements from the IP Action Plan.

Unitary Patent and Unified Patent Court

As the IP Action Plan acknowledges, the Unitary Patent system has the potential to considerably simplify the patenting process in the EU. Together with the centralised litigation before the Unified Patent Court (UPC), this long-awaited balanced reform can significantly reduce costs and simplify procedures for obtaining, maintaining, and enforcing patent protection in Europe

DIGITALEUROPE has consequently supported the Unitary Patent and UPC since its inception. Unfortunately, the actual realisation of its ambitions has been delayed considerably. We hope that the process can be successfully realised and ratification of all the participating countries can be concluded.

Compulsory Licenses

DIGITALEUROPE notes with concern the IP Action Plan's reference to ensuring that effective systems for compulsory licenses are in place, which can be used as a means of last resort when all other efforts to make IP available have failed.

¹ COM(2020) 760 'Making the most of the EU's innovative potential – An intellectual property action plan to support the EU's recovery and resilience' - <https://ec.europa.eu/docsroom/documents/43845>

DIGITALEUROPE urges the European Commission to proceed with the utmost caution in this regard.

Despite the many challenges the EU has faced during the current COVID19 crisis, intellectual property rights have demonstrably not been an obstacle to the development and deployment of vaccines or other related technologies.

We urge the Commission to keep in mind that:

- ▶▶ Compulsory licensing systems are an extreme deviation from the successful combination of property rights and freedom of contract. The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) makes clear that, while governments may enact laws that allow for compulsory licenses, they must do so as a narrow exception and temporary measure², i.e. in limited and exceptional circumstances. Compulsory licensing should therefore only be used as a last resort, as a broader application would severely harm the innovation ecosystem.

Instead, corporate social responsibility and other innovation-sharing industry initiatives could be encouraged, where appropriate, towards voluntary limitation of patent exclusivity, license fees or other encumbrances (see for example so-called ‘patent pledges’).

- ▶▶ If such compulsory licensing system is to be applied, then the objectives, parameters and functioning of this, including a possible emergency co-ordination mechanism between the Member States, should be further specified and detailed. Any such system must be narrowly limited to the specific and present need.



IT & Software

In context to certain issues raised in the Commission’s IP Action Plan, DIGITALEUROPE would like to add specific comments as relevant for the area of IT and software. This sector has become indispensable for innumerable innovations and beneficial achievements across all branches of industry.

On software copyrights

More and more inventions nowadays are based on software. One problem regarding the IPR protection of this innovation, is that the granting of patents often comes much later in time than the market launch of such software-based, patent-protected technologies. Software copyrights therefore play a

² See TRIPS Article 30.

complementary role and can alleviate some of these difficulties found in the patenting practice.

DIGITALEUROPE consequently welcomes then the Commission's approach, but we note that there is a remaining need for clarification and room for improvement. We suggest in this context to explore the creation of a European software register.

Need for clarification

When introducing its goals on copyright, the Commission refers to the previous findings published under the Finnish Council Presidency on "Developing the Copyright Infrastructure"³. We note that these previous findings are dealing with copyright data management throughout all kinds of classical creative sectors and works (including the publishing, music, images and the audio and visual sectors), however omitting software copyrights.

We recognise this omission is done on purpose, since software copyrights are subject to specific provisions originally stemming from Directive 91/250/EEC on the legal protection of computer programs. Software copyrights are also not subject to Collective Management Organisations (CMOs), nor are they fit to integrate into any existing or future infrastructure of such kind.

Therefore, the issues identified in context of 'classical' copyrights data management cannot be simply transferred to software copyrights.

Consequently, DIGITALEUROPE would ask the Commission to clarify its plans on creating a 'copyright infrastructure', whether this is potentially intended to cover software, and to elaborate on the extent of this proposal.

Room for improvement

As one possible alternative approach for software copyrights, DIGITALEUROPE suggests that it might be worth considering to examine the creation of a European copyright register, which permits the registration of software. This would not be a constitutive element in any sense for the copyright protection of software, but rather a voluntary and purely informative tool. Similar such software registers already exist in the USA or in China, within the overall copyright framework of the Berne Convention.

Without final conclusions on this matter, we would consider this as an important missing action point in the published IP Action Plan. Such a voluntary copyright register may help support proof of ownership of software and assist in licensing

³ Council document 15016/19 - <https://data.consilium.europa.eu/doc/document/ST-15016-2019-INIT/en/pdf>

in this space. It would also make registering software in the EU a trustworthy alternative to other registers and could also help to provide notice of IPR protection and facilitate the identification of the rightholder.

In context of copyright data management of any kind, it should be stressed that licensing activities (i.e. rights management) should be exempt from any potential software register. We refer here to the aforementioned Council document which reaches a similar conclusion.⁴

On trade secrets and database protection

While the Commission's IP Action Plan promotes data access and sharing, this necessarily opens tension fields with the Trade Secrets and Database Directives. Therefore it is not without reason that the Commission announces, in parallel, steps to safeguard legitimate interests via clarification of certain key provisions of the Trade Secrets Directive, and through review of the Database Directive. In this context, specific clarification should be added that hacking and cracking encryption and other technical protection measures (often at great expense) cannot be considered to be a permitted 'disassembly' of a product.

As DIGITALEUROPE has been very supportive on the elaboration and adoption of the Trade Secrets Directive, we would like to emphasise our main interest not to go behind the acquis just achieved and freshly implemented through means of the Trade Secrets Directive. The same applies on any possible impacts on database protection, be it by widening or affecting its scope.

As a general observation in these tension fields, preference should always lie on stimulating contractual solutions on a voluntary basis before considering any regulatory approaches that could entail erosion of existing rights.

Currently, it is premature to evaluate any growing plans on data access and sharing, or the new legislative proposals such as the recently announced Data Governance Act. DIGITALEUROPE will certainly be glad to closely monitor these emerging initiatives in networking industrial landscapes where data sharing in safe environments becomes increasingly important. Any access requirements should be on fair and reasonable terms. IT and software industries are in the focus of these trends.

⁴ Page 10, paragraph 2 of Council document 15016/19: Rights management "(...) should be kept separate from the data management, because this is essential to preserve open competition in the right supply chain (...)"



IP Enforcement in Third Countries - Global level playing field

DIGITALEUROPE strongly supports dialogue and cooperation on IP enforcement issues between the EU and its trading partners.⁵ In the context of the IP Action Plan, the on-going IP dialogues between the European Commission and third countries should be maintained and encouraged. DIGITALEUROPE supports their use (together with IP Key programmes⁶) as a tool to foster fair play at a global level.

At the same time, DIGITALEUROPE believes that such dialogues should be accompanied by tangible progress within a reasonable timeframe. Dialogue should not be pursued indefinitely over decades without meaningful evolution. Progress should be adequately noted in the Commission's regular reports on IPR enforcement in third countries, as well as inform on-going discussions with third countries at the highest political level.



Conclusion

DIGITALEUROPE hopes that this contribution and the suggestions within will be taken into account by the Commission when moving ahead with the implementation of the IP Action Plan.

We look forward to engaging with the EU institutions on an ongoing basis to ensure the smooth and effective functioning of Europe's IPR framework, to foster an innovative and globally competitive industry.

FOR MORE INFORMATION, PLEASE CONTACT:



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⁵ See also: <https://www.digitaleurope.org/wp/wp-content/uploads/2021/02/DIGITALEUROPE-consultation-response-on-IPR-and-third-countries.pdf>

⁶ <https://ipkey.eu/en>

About DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE Membership

Corporate Members

Accenture, Airbus, Amazon, AMD, Apple, Arçelik, Autodesk, Bayer, Bidao, Bosch, Bose, Bristol-Myers Squibb, Brother, Canon, Cisco, DATEV, Dell, Dropbox, Eli Lilly and Company, Epson, Ericsson, Facebook, Fujitsu, GlaxoSmithKline, Google, Graphcore, Hewlett Packard Enterprise, Hitachi, HP Inc., HSBC, Huawei, Intel, Johnson & Johnson, JVC Kenwood Group, Konica Minolta, Kyocera, Lenovo, Lexmark, LG Electronics, Mastercard, Microsoft, Mitsubishi Electric Europe, Motorola Solutions, MSD Europe Inc., NEC, NetApp, Nokia, Nvidia Ltd., Oki, OPPO, Oracle, Palo Alto Networks, Panasonic Europe, Philips, Pioneer, Qualcomm, Red Hat, Ricoh, Roche, Rockwell Automation, Samsung, SAP, SAS, Schneider Electric, Sharp Electronics, Siemens, Siemens Healthineers, Sony, Swatch Group, Technicolor, Texas Instruments, Toshiba, TP Vision, UnitedHealth Group, Visa, VMware, Workday, Xerox.

National Trade Associations

Austria: IOÖ

Belarus: INFOPARK

Belgium: AGORIA

Croatia: Croatian

Chamber of Economy

Cyprus: CITEA

Denmark: DI Digital, IT

BRANCHEN, Dansk Erhverv

Estonia: ITL

Finland: TIF

France: AFNUM, SECIMAVI,

Syntec Numérique, Tech in France

Germany: BITKOM, ZVEI

Greece: SEPE

Hungary: IVSZ

Ireland: Technology Ireland

Italy: Anitec-Assinform

Lithuania: INFOBALT

Luxembourg: APSI

Netherlands: NLdigital, FIAR

Norway: Abelia

Poland: KIGEIT, PIIT, ZIPSEE

Portugal: AGEFE

Romania: ANIS

Slovakia: ITAS

Slovenia: ICT Association of

Slovenia at CCIS

Spain: AMETIC

Sweden: Teknikföretagen,

IT&Telekomföretagen

Switzerland: SWICO

Turkey: Digital Turkey Platform,

ECID

United Kingdom: techUK