



**STATEMENT OF ELECTRONIC FRONTIER FOUNDATION TO  
WIPO COMMITTEE ON DEVELOPMENT AND IP 4<sup>th</sup> SESSION  
16-20 November 2009**

Mr. Chair, we congratulate you on your election. Thank you for the opportunity to express the views of the Electronic Frontier Foundation and its members worldwide. We commend Member States and the Secretariat for the progress they have made on developing a concrete work plan to implement the Development Agenda recommendations. We wish to comment briefly on several of the proposed thematic projects in agenda item 5.

On the thematic project on IP and the Public Domain (CDIP/4/3), we support updating the 2005 report on voluntary registration systems to include a survey of national legislative and private party approaches to identifying and facilitating use of orphan works. Uncertainty about ownership of orphaned copyright works is one of the most pressing problems facing countries across the world. In relation to the stocktaking of existing initiatives and legal and technical tools to identify material in the public domain, to provide Member States' policymakers with appropriate guidance in considering these complex issue we believe it would be important for the study to provide wider context on the legislative and technical framework in which rights management information systems operate, and the public policy implications of the various initiatives currently underway. While we strongly support voluntary identification regimes such as that created by the Creative Commons organization, we note that the ACAP automated rights management information system created by several major publishers that featured in the 2007 WIPO seminar could create the technical infrastructure and incentives for Internet intermediaries to filter Internet communications of citizens, and for search engines to censor search results.

On the thematic project on information and communications technologies, access to knowledge and the digital divide (CDIP 4/5), we strongly support the proposed study on using copyright to promote access to knowledge. In addition to providing case studies on the use of flexible licensing approaches such as Creative Commons and free and open source software licences, the study could provide Member States with information about the benefits for education and scientific research of Open Innovation and User Driven Innovation models. These new approaches to innovation are being explored by WIPO stakeholders in the developed world and have the potential to radically reshape collaboration and innovation in the developing world. WIPO could undertake a study of the impact of these new innovation methods on development to identify the impacts of standardized, low-transaction cost licensing and a survey of the various Open and Public Access policies being considered in the US, Europe, Australia, Brazil and Canada, to assist Member States to identify how the outputs of publicly funded research could be managed to best promote innovation in science and education. The study could also include empirical data on copyright related obstacles to access to knowledge and technology and recommendations for addressing them, focusing on the economic and social importance of exceptions and limitations, and the impact of copyright term extension and different legal protection regimes for rightsholders' technological protection measures. This could build on the empirical research being done by the African Copyright & Access to Knowledge project, the research institutions in the A2K Global Academy and the Consumers International IP Watch network.

On the thematic project on IP and Technology Transfer (CDIP/4/7), we note that the project does not seem to contemplate informal technology transfer via reverse engineering of software and hardware, which is an important part of access to technology in many countries. We respectfully

recommend that the high level expert forum consider the role of reverse engineering, and other informal non-licensing mechanisms for access to technology.

We support the second of the studies proposed as input for the High Level Expert Forum. In identifying existing IPR policies and initiatives to promote technology transfer to developing countries, the study could include data on the availability of national copyright exceptions and limitations permitting reverse engineering. We note that the Secretariat has produced a draft questionnaire for the SCCR's work to better understand Member States' national copyright exceptions and limitations, Part VI of which includes questions about reverse engineering. The results of that work could provide useful data for providing recommendations to Member States on crafting Three Step Test compliant exceptions that would facilitate innovation. It would also be useful for the study to identify IP-related barriers to access to technology, and provide policy and legislative recommendations for addressing them. For instance, it would be valuable to understand how overbroad legal protection for copyright owners' technological protection measures can interfere with reverse engineering to create interoperable products and local customization of software and hardware technology. We assume that any recommendations made by the high level expert forum on the basis of this study would need to comply with the requirements of recommendation 22.

Finally while we appreciate the need to eliminate duplication and streamline discussions, we note that mainstreaming the development dimension involves more than completion of this set of projects. WIPO's implementation of the Development Agenda is being closely watched by academics and civil society around the world. They understand that it is intended to reorient the Secretariat's norm setting and technical assistance work and create lasting institutional reform in the areas of accountability and transparency. In this regard, we join with others in expressing concern that many of the proposed activities in the thematic projects (including, in particular, the projects implementing recommendation 10), appear to be a continuation of existing Secretariat activities repackaged as Development Agenda activities. We do not believe that merely recharacterizing the status quo as being "development-oriented" will deliver the results sought and expected by stakeholders.

We encourage the development of criteria for evaluating both the end goals and activities being undertaken for the 19 immediately implementable recommendations described in documents CDIP/3/5 and CDIP/3/INF/2, to ensure that they deliver development oriented results. We support the development of a comprehensive results-based management approach and independent evaluation of WIPO's current work as described in CDIP/4/8, but suggest that this should be reported to CDIP. In relation to agenda item 6, we believe that the creation of effective coordination, assessment, and external reporting mechanisms is essential to make progress on the Development Agenda implementation and strengthen the institutional capacity and relevance of WIPO to meet the needs of all its Members.

Thank you for your consideration.

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