EGIL Report

2010 - 2011

EGIL's mission

The mission of EBLIDA's Expert Group on Information Law, EGIL, is

- to maintain a good general awareness of legal issues that affect the provision and circulation of information, especially where libraries and archives are concerned
- to address the European institutions by making proposals regarding laws, or changes to laws, that would improve the legal position of libraries and archives
- to cooperate and work with other organisations and institutions for these purposes

EGIL's primary focus is on copyright legislation in the European Union, but also legislation in other areas, like data protection, which has effects on whether and how information may be available are of interest to EGIL

Members

NAME	ASSOCIATION
Kristine Abelsnes	Norwegian Library Association, Norway
Núria Altarriba	Fesabid, Spain
Jennefer Aston	Library Association of Ireland, Ireland
Emilija Banionyte	Vilnius Pedagogical University Library, Lithuania
Michèle Battisti	ADBS, France
Pekka Heikkinen	National Library of Finland, Finland
Harald von Hielmcrone (Chair)	State and University Library
Aleksandra Horvat	Croatian Library Association
Rosa Maiello	Associazione Italiana Biblioteche
Wilma Mossink	Stichting SURF, The Netherlands
Harald Mueller	BID (Federal Union of German Library and Information Associations), Germany
Kjell Nilsson	Library Associations of Sweden
Christian Recht	Austrian Association of Librarians, Austria
Jorge Resende	Fundacão Calouste Gulbenkian, Portugal
Jerker Ryden	National Library, Sweden
Barbara Stratton	CILIP: the Chartered Institute of Library and Information Professionals, United Kingdom
Barbara Szczepanska	Polish Librarians Association, Poland
Ben White	British Library, UK
Vincent Bonnet	EBLIDA

Activities

Since the last Council meeting in 2010 EGIL has met three times: May 6
In Helsinki, September 1-2 in Copenhagen, and April 12, 2011 in The Hague.

At these meeting we have discussed work form and resources, strategic positions in relation to upcoming issues and concrete issues of immediate relevance for lobbying activities.

Resources

Regarding resources to EGIL work, 2010-2011 has been a difficult year. Wilma Mossink has been so kind as to take the Minutes from the meetings, and members have been very active in contributing, but most of the paper work had to be done by the chairman. This is OK for a limited period with special demands, but not sustainable in the long run.

Stakeholder Dialogue

The one overshadowing issue has been the clearance of rights in relation to large scale digitisations projects, often referred to as the Orphan Works Problem.

It is a mistake to define the problems of clearing rights in mass-digitisation projects as primarily being an Orphan Works issue. The focus on orphan works has misdirected the search for solutions and has led to an under exposure of the problems with respect to the clearing of rights for works which are not orphan. The real issue is how to clear the rights for large numbers of works of a certain category.

It was a recognition of this that led the Copyright Office of the EU Commission to invite to the Stakeholder Dialogue on Out of Commerce Works in order to draw up some main principles which might form the basis for agreements between right holders and libraries.

EBLIDA, IFLA and LIBER as well as some National- and University Libraries which were estimated to be important players in this area were invited to take part in the meetings. The result was that besides the library organisations also British Library, Deutsche Nationalbibliothek, The National Library of Sweden, The Royal Library in Copenhagen and Gent University Library attended the meetings. This loose and informal way of selecting the representatives had the advantage of broadening the representation, but made it difficult to organise and establish a firm position *vis à vis* the rights holders. The chairman of EGIL, Harald von Hielmcrone, was selected as spokesman for the libraries.

The dialogue was centred on three main principles:

1. The definition of Out of Commerce Works
2. The extension of the agreement to cover also those authors or right holders who are not members of the Collecting Society
3. The cross border access to digital libraries within the European Union.

On the basis of the discussion of the first two meetings the Commissions presented a proposal for a solution. The main idea of the proposal is that it provides the framework but leaves it to the contracting parties to negotiate the agreement. This has the advantage that it is always

easier to find concrete solutions to specific problems than to try to solve them in terms of general rules and principles.

Basic to these agreements are

a) the possibility for rights holders to opt out if they so wish, and
b) that rights holders are entitled to remuneration.

These two principles were not contested by any of the parties in the dialogue. However, on other issues opinions were divided, and whether the proposal ultimately will be accepted is still open to question. So far there have been 5 meetings, and a 6th is scheduled for June 14.

In the mean time a small working group met in London in order to finalize the text regarding Principle 1 and 2 and investigate for a solution regarding the Cross Border issue – or else hope for new initiatives from the Commission at the June meeting.

ACTA

Another issue which has required attention is the negotiations concerning ACTA, The Anti-Counterfeiting Trade Agreement. Negotiations were initiated by the major industrialized countries, USA, EU and Japan, started in 2008 and were conducted in secrecy with a relatively small group of countries. They have so far ended with a draft treaty in 2010. Because of the secrecy there were lots of rumours about draconic measures against copyright infringements.

EGIL concentrated especially on the provisions regarding the liability of intermediaries. From different versions of leaked drafts one could see that the opinions of the negotiations parties differed, and there were both hardliners arguing for 3-strike provisions, and softies who wanted more moderate measures. EU insisted on the rules of the E-Commerce Directive. This means that intermediaries cannot be held liable unless in cases of gross negligence.

From a European library point of view this is satisfactory, and there was no reason to take action *vis à vis* the Commission in the matter. However, individual Member States may introduce stronger enforcement measures, and some have done so. Therefore, it is important to remain alert at the national level.

Virtual Schengen Border

That there are good reasons to remain alert is the proposal for a Virtual Schengen Border, that is contemplated by the *Law Enforcement Working Party*. This Working Party was unknown to me, but a quick search on the internet revealed that LEWP (Law Enforcement Working Party) is a working Group within the domain 'Justice and Home Affairs' of the Council of the European Union. According the Belgian Federal Police, "The importance of the LEWP working group in the decision-making process within the Justice and Home Affairs Council of the EU can hardly be overestimated."[1]

In the minutes from a meeting held the 17th of February, we can read under the heading of "Cybercrime"

[1] http://police-eu2010.be/mu-eu2010/en/working-groups/police-cooperation-working-party/wg-law-enforcement-party/

"The Presidency of the LEWP presented its intention to propose concrete measures towards creating a single secure European cyberspace with a certain "virtual Schengen border" and "virtual access points" whereby the Internet Service Providers (ISP) would block illicit contents on the basis of the EU "black-list". Delegations were also informed that a conference on cyber-crime would be held in Budapest on 12-13 April 2011." [2]

If these proposals are implemented it may well prove to be the most serious attack on the freedom of information in European history after WW2.

Term of protection

The development regarding the proposal for an extension of the term of protection for producers and performing artists of recorded music is also developing unfavourably. The protection now lasts 50 years after the publication of the phonogram, provided the phonogram is made public within 50 years after the making of the recording.

The Commission has proposed to extend this protection to 95 years. There was established a blocking minority of Member States against this proposal, and so the situation remained undecided for some years. This blocking minority is now crumbling in favour of a compromise proposal of 70 years. At the moment of writing, the last country to decide is Portugal. The decision is postponed until a new government has been formed.

EGIL is against any prolongation of the term of protection. However, when evaluating this particular proposal one should remember that most of the music in question is also protected by the copyright of the authors, i.e. 70 after the death of the composer and the author of the lyrics. Therefore, libraries will not avoid having to negotiate licence agreements for the public performance of such music anyway.

Libraries in some Member States (e.g. UK) may also have an issue regarding the preservation of the recordings because the provisions of the Infosoc Directive (art 5.2.c.) have not yet been fully implemented in their national legislation. However, it is difficult to bring this particular problem forward as a reason for EU not to prolong the term of protection.

An extension of the term of protection will increase the workload and costs for libraries in making recorded music available to users, but we should be careful not to exaggerate the negative effects of the proposal, otherwise we may lose in credibility. We face problems which are by far more serious, like the "Virtual Schengen Border", mentioned above, and e-lending.

E-lending

E-lending, electronic lending of books or other types of protected works is a relatively new concept. EGIL has touched upon the subject several times during the last year. E-lending is a new business model based on the communication to the public right.

[2] OUTCOME OF PROCEEDINGS of: Joint meeting of the Law Enforcement Working Party and the Customs Cooperation Working Party, on: 17 February 2011, Subject: Summary of discussions. Brussels, 3 March 201, 7181/11, ENFOPOL 44, ENFOCUSTOM 13

In order to understand how e-lending differs from the lending of physical copies of books, and the legal consequences of this difference, it is necessary to understand the difference of distribution and communication to the public.

How an author chooses to publish his works makes a decisive legal difference in his ability to control how the work is used. If it is published – distributed – in the form of a physical copy, be it in print or cd-rom, he has no means to control further distribution of the work, e.g. in the form of lending, neither has he any right to do so. (In EU the author also has a "lending right", but this is only a right to obtain remuneration for the lending.)

If the author chooses to publish the work in the form of communication to the public or making it available to the public, e.g. by giving access to it in a database, he remains in full control of the use because he (or the publisher) controls the access to the database, and he also has the legal right to do so. Until the work becomes public domain – approximately 100 to 120 years after publication – libraries are dependent on a license agreement in order to get access to the work.

Now, e-lending is the making available of works in digital formats for a limited period of time. Usually so that the user may download a file which cannot be copied further and which contains a programme that destroys the file at the end of the period.

For libraries the problems arise when a publisher either removes works from the database or refuses to give libraries access to the database or access to certain works in the database. The author or publisher is in a position where he can control the acquisition policy of the library.

This is new. When works, e.g. books, are distributed, i.e. made available for sale on the market, anybody can buy, and the publisher cannot exclude certain buyers, e.g. libraries, from acquiring the books. The library is free to use the book within the limits of copyright or otherwise relevant legislation, and the author or publisher cannot come into the library and remove the books. That would be theft.

With electronic publishing all this changes. In the near future even the methods of publication will change. The downloading of files is becoming obsolete, and users will have access to streamed versions instead. From a technological point of view this is unproblematic, but it makes it even more obvious that the control over the content which libraries may make available to their patrons remains in the hands of publishers.

This raises broad political issues about publishing, about the right to access information, and the future of libraries. EGIL cannot take the lead in this debate, which is basically a political debate about the future of libraries and the primary responsibility of EBLIDA's Executive Committee and Council, but EGIL will take a supportive role in pointing to legal possibilities or changes needed in order to secure access to information.

Harald von Hielmcrone
17 May 2011