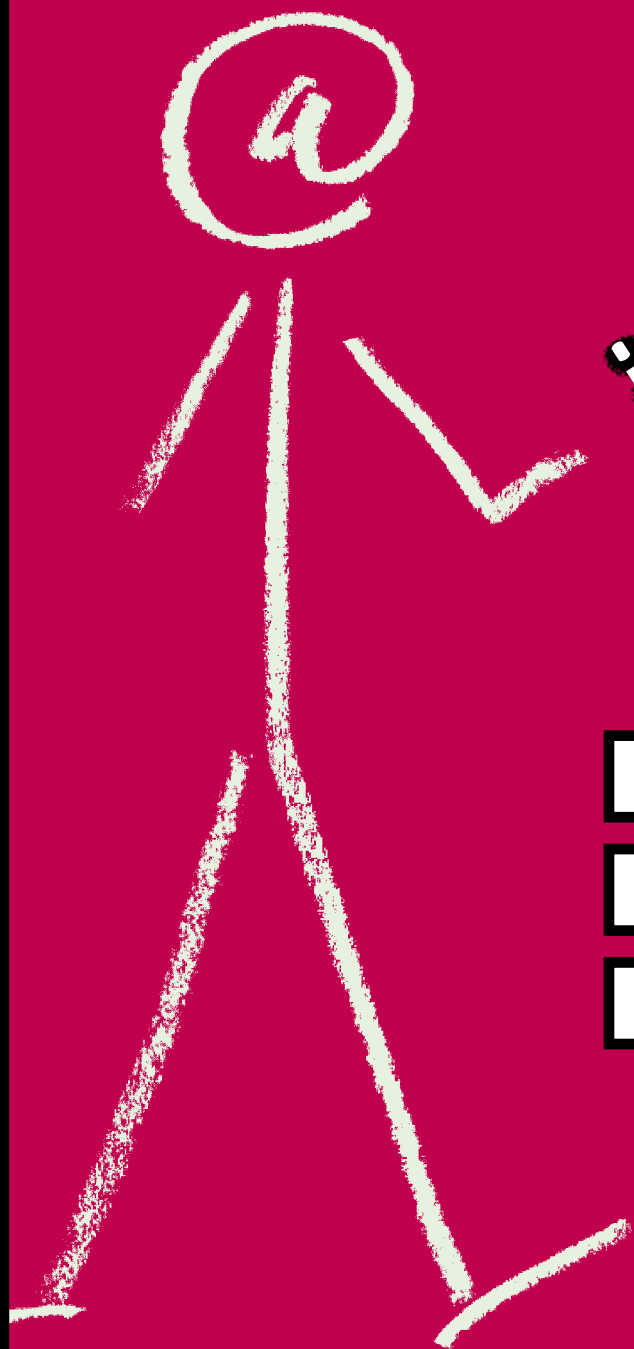




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Final Report and Proceedings

Rapport final et Actes

Informe Final y Actas

PARIS 13-15 NOVEMBER/ NOVEMBRE/ NOVIEMBRE 2000

Infoethics 2000

Ethical, legal and societal challenges of cyberspace
Third International Congress
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Final Report and Proceedings

Infoéthique 2000

Les enjeux éthiques, juridiques et sociétaux du cyberspace
Troisième Congrès international
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Los desafíos éticos, jurídicos y societales de ciberespacio
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13-15 de noviembre de 2000

Informe Final y Actas

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PREFACE

Information and communication technologies and the phenomenon of globalization are radically changing our working, learning and living environments. They provide new and unprecedented opportunities to use and share information and knowledge for educational, scientific cultural, and social transformations. Today, all countries have a vital interest in the development of a global information society and in the benefits that flow from better access to and provision of information.

It is essential, however, that this global information society ensures that everyone is able to benefit from these opportunities and that it supports initiatives to provide affordable and equitable access for all to our multicultural and multilingual human heritage. All means should be explored to remedy the existing disparities and inequalities among countries and communities between the “information rich” and the “information poor” and to protect dignity and privacy in cyberspace.

These concerns require proactive measures at both national, regional and international levels. They should deal with the commercial as well as the societal impact of the new technologies. UNESCO is particularly concerned that any measures recommended include, among others, the provision of universal access to public information by promoting the availability of this information on the global networks and a balance between the legal issues of intellectual property rights and exemptions to copyright and those of privacy and freedom of expression.

Infoethics 2000, the third in a series of Congresses organized by UNESCO on ethical, legal and societal challenges in cyberspace, focused its debates on these problems which the Information Society will have to resolve in order to secure the Right to Universal Access to Information in the 21st Century.

As for the two preceding Congresses, the main objective of Infoethics 2000, was to lay down the basis for reflection on the fundamental ethical principles which should inspire trans-national political action in the cyber era. Three main themes were discussed:

- the role of public authorities in access to information;*
- the application of legal exemptions to copyright in the Information Society;*
- the protection of human dignity in the digital age.*

The proceedings, summary conclusions and full texts of interventions of this Congress are presented in this report. They reflect the views of leading specialists from a wide range of countries and international organizations. These texts are also available on the UNESCO Web site: <http://webworld.unesco.org/infoethics2000/index.html>

We express our sincere thanks to all who participated in the preparation and holding of this Congress.

Mrs VIGDÍS FINNBOGADÓTTIR
Chairperson of the Congress

VICTOR MONTVILOFF
Secretary of the Congress

PRÉFACE

*L*es technologies de l'information et de la communication et le phénomène de la mondialisation sont en train de transformer radicalement nos environnements professionnels et éducatifs et notre cadre de vie. Ils offrent des possibilités inédites, d'une ampleur sans précédent, d'utiliser et mettre en commun l'information et le savoir pour transformer l'éducation, la culture, la société et la science. Aujourd'hui, il est de l'intérêt vital de tous les pays que se développe une société de l'information planétaire et que se réalisent les avantages découlant d'un meilleur accès à l'information et de sa meilleure diffusion.

Il est toutefois essentiel que cette société de l'information planétaire veille à ce que chacun puisse profiter de ces possibilités et qu'elle appuie les initiatives propres à assurer que le patrimoine multiculturel et multilingue de l'humanité soit accessible à tous à un coût abordable et dans des conditions équitables. Il convient d'étudier tous les moyens d'éliminer les disparités et inégalités existantes entre les pays et les collectivités, entre les « info-riches » et les « info-pauvres », et de protéger la dignité et la vie privée de chaque utilisateur du cyberspace.

Des mesures anticipatoires doivent être prises d'urgence, aux niveaux national et international pour répondre à ces préoccupations et infléchir les incidences commerciales aussi bien que sociétales des nouvelles technologies. L'UNESCO est particulièrement soucieuse de voir les mesures recommandées viser, entre autres, à universaliser l'accès à l'information publique en encourageant la diffusion sur les réseaux planétaires et à arbitrer de manière équilibrée entre les considérations juridiques ayant trait, d'une part, aux droits de propriété intellectuelle et aux exceptions au droit d'auteur et, d'autre part, à la protection de la vie privée et de la liberté d'expression.

Infoéthique 2000, troisième d'une série de congrès organisés par l'UNESCO sur les défis éthiques, juridiques et sociétaux du cyberspace, s'est penché sur ces problèmes que la Société de l'information va devoir résoudre pour garantir le droit à l'accès universel à l'information au XXI^e siècle.

Comme les deux congrès précédents, Infoéthique 2000 avait pour objectif principal de poser les bases d'une réflexion sur les principes éthiques fondamentaux qui devraient inspirer l'action politique transnationale dans le contexte du cyberâge. Trois grands thèmes ont été examinés lors de ce troisième congrès :

- le rôle des pouvoirs publics dans l'accès à l'information ;*
- l'application des exceptions légales au droit d'auteur dans la société de l'information ;*
- la protection de la dignité humaine à l'ère numérique.*

Le présent rapport regroupe le compte rendu des débats du Congrès, un résumé de ses conclusions et le texte intégral des interventions qui y ont été faites. Celles-ci reflètent les vues des meilleurs spécialistes d'un large éventail de pays et organisations internationales. Elles peuvent également être consultées sur le site Web de l'UNESCO : <http://webworld.unesco.org/infoethics2000/index.html>

Nous tenons à exprimer notre sincère gratitude à tous ceux qui ont collaboré à la préparation et à la tenue de ce congrès.

Mme VIGDÍS FINNBOGADÓTTIR
Chairperson of the Congress

VICTOR MONTVILOFF
Secretary of the Congress

INTRODUCTION

BACKGROUND

If the Information Society is to be both open and universal it should develop along the principles embodied in the Universal Declaration of Human Rights. They are, among others, the right to freedom of expression, free access to information, the right to education and the right to participate in cultural life.

Governments, industry and the civil society are seeking to apply these long accepted principles to the electronic information environment, but these efforts are hampered by major difficulties and challenges, including the critical issue of how to ensure fair conditions for developing countries, which are entering the digital age at a major disadvantage.

A number of international consultations are showing that clearer policy guidelines are needed in the increasingly open, interactive and global information environment. Such guidelines should cover all aspects of the global information networks – technological and economic, but also educational, scientific, cultural and social. Today, however, most national and international debate is concentrating on technological and economic aspects, because of their more immediately perceived impact, often to the detriment of other issues which will ultimately have a deeper, more fundamental significance in achieving an Information Society for All.

OBJECTIVES

The goal of the UNESCO Infoethics Congresses is to enrich these debates with a truly international reflection on the importance of the ethical and societal aspects of the Information Society. For this reason, they bring together participants from the largest possible number of countries with the widest range of technological, educational, scientific, cultural and social environments.

The conclusions of INFOethics'97 and INFOethics'98 emphasized the vital role UNESCO should play in promoting progress on elucidating the ethical and societal aspects of the application of information and communication technologies. Both Congresses considered that among these, raising awareness of these issues, promoting free access to information content, particularly in the

public domain, and protecting cyber-users from abuse required urgent UNESCO action.

These conclusions largely contributed to the decision of the General Conference of UNESCO at its 30th session (November 1999) to create a new UNESCO intergovernmental programme that aims to respond to these challenges. The vision, values and objectives of this new programme emphasize the provision of a platform for global reflection on information access, on the participation of all in the global information society and on the ethical, legal and societal impacts of the information and communication technologies.

Additional follow-up to these meetings includes the creation and regular updating of the UNESCO Observatory on the Information Society Web site, the launching of regional awareness campaigns on Infoethics issues and of more targeted programmes such, as the promotion of universal access to public domain information on the UNESCO Webworld site and multilingualism on the Internet.

The more specific objective of Infoethics 2000 is to build up a consensus on the ethical and legal principles applicable in cyberspace. The aim is to develop expert proposals, which will help further consolidate UNESCO's information society programme.

INTRODUCTION

CONTEXTE

Pour être ouverte et universelle, la société de l'information doit se développer sur les principes directeurs consacrés par la Déclaration universelle des droits de l'homme. Ce sont, entre autres, le droit à la liberté d'expression y compris la liberté d'accès à l'information, le droit à l'éducation et le droit de participer à la vie culturelle.

Les pouvoirs publics, les entreprises et la société civile s'efforcent d'appliquer au monde de l'information électronique ces principes acceptés depuis longtemps mais ils se heurtent à des difficultés et des défis de taille, notamment au problème crucial de savoir comment assurer des conditions équitables d'entrée dans l'ère numérique aux pays en développement qui abordent celle-ci dans une position de faiblesse évidente.

Il ressort de nombreuses consultations internationales qu'il conviendrait de définir des principes directeurs plus précis face au contexte actuel de l'information, caractérisé par un degré d'ouverture, d'interactivité et de mondialisation croissant. Ces principes directeurs devraient porter sur tous les aspects – technologiques et économiques, mais aussi éducatifs, scientifiques, culturels et sociaux – des réseaux mondiaux d'information. A l'heure actuelle, toutefois, le débat national et international se concentre sur leurs aspects technologiques et économiques, aux effets plus immédiatement visibles, souvent au détriment de leurs autres aspects, qui joueront pourtant, en fin de compte, un rôle plus profond et plus déterminant dans la constitution d'une société de l'information pour tous.

OBJECTIFS

Les congrès Infoéthique de l'UNESCO ont pour but d'enrichir les débats en suscitant une réflexion véritablement internationale sur l'importance des aspects éthiques et sociétaux de la société de l'information ; ils réunissent à cette fin des participants originaires du plus grand nombre de pays possible et qui représentent la plus vaste gamme possible d'environnements technologiques, éducatifs, scientifiques, culturels et sociaux.

Les conclusions des congrès *INFOéthique*'97 et 98 ont fait ressortir le rôle décisif que l'UNESCO devrait jouer pour promouvoir les différentes dimensions éthiques et sociétales de l'application des nouvelles technologies de l'information et de la communication. Ces deux congrès ont estimé notamment que l'UNESCO devait agir de toute urgence pour sensibiliser davantage l'opinion à ces questions, pour promouvoir le libre accès aux contenus informationnels, en particulier ceux qui sont dans le domaine public, et protéger les utilisateurs contre les abus commis sur le Web.

Ces conclusions ont largement contribué à la décision prise par la Conférence générale de l'UNESCO à sa 30^e session (novembre 1999), d'élaborer un nouveau programme intergouvernemental afin de relever ces nouveaux défis. Dans son optique comme dans les valeurs et objectifs qui le sous-tendent, ce nouveau programme met l'accent sur la nécessité de créer un cadre de réflexion à l'échelle mondiale sur l'accès à l'information, la participation de tous à la société mondiale de l'information et l'impact éthique, juridique et sociétal de l'utilisation des technologies de l'information et de la communication.

Parmi les actions de suivi complémentaires de ces congrès figurent la création et l'actualisation périodique de l'Observatoire en ligne de l'UNESCO sur la société de l'information, le lancement d'une campagne régionale de sensibilisation aux thèmes d'Infoéthique et la mise en route de programmes plus ciblés visant, par exemple, à favoriser l'accès universel à l'information du domaine public sur le site Web de l'UNESCO, et à promouvoir le multilinguisme sur l'Internet.

Infoéthique 2000 a pour objet précis de dégager un consensus quant aux principes éthiques et juridiques applicables au cyberspace. Il vise à amener les experts à élaborer des propositions en vue d'aider à consolider encore le nouveau programme de l'UNESCO relatif à la société de l'information.

INTRODUCCIÓN

ANTECEDENTES

Para ser abierta y universal, la Sociedad de la Información ha de desarrollarse bajo los principios rectores básicos consagrados en la Declaración Universal de Derechos Humanos. Se trata entre otros de los derechos a la libertad de expresión incluida la libertad de acceso a la información, el derecho a la educación y el derecho a participar en la vida cultural.

Los gobiernos, el sector empresarial y la sociedad civil están intentando aplicar estos principios, aceptados desde hace tiempo, al ámbito de la información electrónica, pero estos esfuerzos se ven obstaculizados por importantes dificultades y problemas, tales como la cuestión crucial de cómo garantizar unas condiciones justas a los países en desarrollo que entran en la era digital en una posición de clara desventaja.

En numerosas consultas internacionales está quedando de manifiesto que se necesitan unas normas de orientación claramente definidas en un ámbito de la información cada vez más abierto, interactivo e internacional. Estas normas deberían abarcar todos los aspectos de las redes mundiales de información (tecnológicos, económicos, políticos, éticos y sociales). Sin embargo, la mayoría de los debates nacionales e internacionales de hoy en día centran su atención en los aspectos tecnológicos y económicos debido a que sus repercusiones se perciben de manera más inmediata, ello a menudo en detrimento de los demás aspectos que, en última instancia, revestirán una mayor importancia en el logro de una sociedad universal de la información.

OBJECTIVOS

El objetivo de los congresos Infoética de la UNESCO es el enriquecer estos debates con una reflexión realmente internacional sobre la importancia de los aspectos éticos y societales de la Sociedad de la Información, reuniendo a participantes del mayor número de países posible y de entornos económicos, políticos, tecnológicos, culturales y sociales igualmente variados.

En las conclusiones de los congresos INFOética'97 e INFOética'98 se hizo hincapié en el papel fundamental que debería asumir la UNESCO en la promoción de progresos relativos a los diferentes aspectos éticos y societales

de la aplicación de las nuevas tecnologías de la información y la comunicación. En ambos congresos se estimó que, entre estos aspectos, se requerían iniciativas urgentes de la UNESCO tendentes a conseguir una mayor sensibilización acerca de estas cuestiones, el fomento de un acceso abierto a la información, en particular la de dominio público, y la protección de los usuarios frente a los abusos en la red.

Estas conclusiones contribuyeron en gran medida a la decisión que adoptó la Conferencia General de la UNESCO en su 30ª reunión (noviembre de 1999) de crear un nuevo programa intergubernamental en la Organización destinado a responder a estos problemas. La visión, los valores y los objetivos de este nuevo programa se centran en la creación de una plataforma de reflexión mundial sobre el acceso a la información, la participación de todos en la sociedad mundial de la información y las consecuencias éticas, jurídicas y societales de la utilización de las tecnologías de la información y la comunicación.

Entre otras medidas adoptadas a raíz de estas reuniones figuran la creación y la actualización periódica del sitio Web del Observatorio sobre la Sociedad de la Información de la UNESCO, el inicio de una campaña de concienciación regional sobre Infoetica, y la puesta en marcha de programas específicos relativos por ejemplo al fomento del acceso universal a la información de dominio público a través del sitio Webworld de la UNESCO, las medidas destinadas a impedir la utilización de Internet para la pedofilia y la promoción activa del plurilingüismo en la red.

Infoetica 2000 tiene como objetivo específico el alcanzar un consenso sobre los principios éticos y jurídicos aplicables al ciberespacio. El congreso pretende que los expertos formulen proposiciones que permitan consolidar el nuevo programa de la UNESCO relativo a la sociedad de la información.

SUMMARY REPORT

ORGANIZATION

The third UNESCO Congress on the ethical, legal and societal challenges of cyberspace, Infoethics 2000, was held at UNESCO Headquarters in Paris from 13 to 15 November 2000. The meeting, was opened by the Chairperson of the Congress, Ms Vigdís Finnbogadóttir, who is Chairperson of the World Commission on the Ethics of Scientific Knowledge and Technology and former President of the Republic of Iceland, and by the representative of the Director-General of UNESCO, Mr Alain Modoux, Assistant Director-General for Communication and Information. The key note address was delivered by Mr David Konzevik (Mexico) on “The information society and the expectation revolution”.

The debates proceeded as planned in six half-day sessions. A total of 32 speakers from 19 countries and five international intergovernmental organizations participated in the six discussion panels. The reports prepared by the moderators on their respective sessions are incorporated in the present proceedings. The Congress was attended by more than 300 participants, mainly governmental officials, lawyers, academics, media and representatives of civil society, from 66 countries and 53 non-governmental organizations,

The closing speech was delivered by Mr Bernd Niehaus, Vice President of ECOSOC 2000 and Ambassador and Permanent Representative of Costa Rica to the United Nations, and by Mr Philippe Quéau, Director of the Information Society Division, UNESCO, representing the Director-General.

The background documents provided for the discussions included:

- four thematic studies prepared by the moderators prior to the Congress;
- four reports of Infoethics regional workshops, organized over the year 2000 in Africa, Asia and Pacific, Europe and Latin America and one national report from Egypt;
- papers presented by the 32 speakers during the sessions;
- several additional papers submitted by participants on the discussion topics.

A Web site (<http://webworld.unesco.org/infoethics2000/index.html>) created prior to the holding of the Congress was kept up to date during its proceedings.

CONTENT

The debates reconfirmed the importance and relevance of the issues highlighted by the Congress for the future development of the Information Society. Strong emphasis was placed on the need to ensure that the human rights principles already in place should be preserved and reinforced in the new digital environment and in cyberspace. In this context, the right of access to information for all remains a fundamental right that should be upheld with greater efficiency and imagination in a spirit of equity, justice and mutual respect.

The special studies, the aspirations expressed in the conclusions from the regional workshops and the interventions in the different sessions all showed, once again, the complexity of the ethical, legal and societal issues and their impact on the users of information and communication technologies (ICTs). Therefore, much greater attention should be given to the provision of affordable access to information, particularly information in the public domain, and to information technologies in all countries, including developing countries and countries in transition. To this end, appropriate balances should be sought between the legitimate rights of producers and users of information and the protection of both in the electronic media. Raising awareness and enhancing education at all levels were seen as the areas with the greatest potential for meeting this challenge.

It was also generally recognized that the organization of Infoethics 2000 was part of a long term objective to include the ethical, legal and societal issues linked to equitable access of information in the debates of the planned World Summit on the Information Society in 2003. UNESCO's role in dealing with those issues and in bringing them to the attention of this Summit was strongly reaffirmed.

The richness of the debates and the issues raised during the Congress are reflected in the reports of the different panels summarized below.

Theme A : THE ROLE OF PUBLIC AUTHORITIES IN ACCESS TO INFORMATION

Session 1:

Broader and more efficient provision of public content

Public authorities (which include central and local governments) are currently the most significant source of public sector information and have a critical role to play in facilitating access to it.

Public sector information forms part of our “intellectual commons”. It is critical for research, education, innovation, social and economic inclusion and is an essential foundation for an informed, participatory and global society. Such information is akin to a “global public goods” and therefore should be presumed to be publicly available (that is, as in the “public domain”¹). Greater public benefit is to be derived if such information resources and knowledge are shared with the broadest possible audience, rather than allowing exclusivity (in terms of the control of the information) or private interests, to prevail in the management of this resource.

As the guardians and interpreters of the “public interest”, public authorities have a responsibility to the citizens on whose behalf they act to:

- resist the enclosure of the intellectual commons and preserve existing resources of public domain information;
- expand the proportion and improve the quality of knowledge resources that are available to the public;
- facilitate more equitable access to this information.

The participants particularly stressed the following:

Information availability

- Governments need to demonstrate leadership by making governmental and other official information (subject to exceptions to protect national interests) available electronically to their citizens. They should, in particular, provide critical public sector information to their citizens, such as information on their rights and entitlements, on laws and regulations, on health and on the government’s obligations to its citizens. They should also promote the development of services and content which reflect local culture, values, history, language and heritage;
- Public authorities should inform citizens by making more meaningful and high quality public sector information available online in formats and through communication channels and systems which: 1) are designed to serve the citizens’ needs, are familiar and in a form which facilitates understanding and is easy to download, and 2) do not require high specification equipment or technology;

- Support and funding initiatives should be provided to develop the appropriate policy standards and systems to facilitate the inter-operability, digitisation, preservation and availability of library collections, research journals, archives and other heritage resources. Priority should be given to the information resources to be made publicly available, sufficient budgetary resources should be allocated to the immediate digitisation of high priority collections, and the digitisation of other less urgent resources should be planned;
- Ways should be sought to engage the civil society and to provide interactive access, including activities which solicit input from citizens and NGOs on issues of public policy or interest and online discussion groups for this purpose should be established;
- Partnerships between the public and private sectors to find means of funding or providing incentives for knowledge-creation should be promoted. Where such partnerships include public funding, public authorities should ensure that knowledge components which have the characteristics of a “global public good”² are subsequently made publicly available so as to balance the public’s interest in access with the private sector interests in commercialising the knowledge;
- There is a need to consider specific initiatives that will encourage investment by and partnerships with the private sector, targeted at the provision of public content that is of public benefit in the supply of bandwidth and technological infrastructure;
- Promotion of attitudes which welcome collaborative efforts such as partnerships, information exchange and are geared towards active cooperation with other stakeholders (including private and commercial interests).

Information policies

- Promotion of coherent information policies, including providing overviews, links to and directories of the public sector information resources which are publicly available;
- Ensuring that national copyright laws promote the maintenance of a robust “public domain” as a necessary condition for maintaining intellectual and cultural heritage;
- Review of the pricing policies to remove or reduce financial barriers to accessing public sector information;
- Appropriate telecommunications market conditions and regulatory structures, which will encourage the development of ICT infrastructures and technical capacity to serve the technological needs of the public authorities and citizens;
- Information strategies should reach out to all levels of society, through the facilitation of local community projects and the development of local ICT leaders and mentors;

- Development of models for facilitating community access to ICT in developing countries and in rural areas and for people with disabilities and/or special needs;
- Guidance on policies to assist communities in attitudinal changes required for electronic literacy and in building confidence and trust in the implementation and use of ICT. The development and implementation of best information practices in online systems and activities;
- Promotion of ethical behaviour and respect for community standards and values in respect of the activities and content of information producers, users and service providers. Public authorities should ensure that all ICT training within their national jurisdictions includes training on ethical awareness and standards and not just on technical competence;
- The focus should be on the pre-requisite of developing and nurturing “human infrastructure”, including integrated education, ICT training and skill-based programmes.

International co-operation

- Encourage the development of legal frameworks, which include freedom of information and protected disclosures laws (tailored to reflect the national and societal values); Advocate the harmonization of legislative frameworks between countries and regions, and work to minimize inconsistencies in this regard;
- Greater provision of public sector information to citizens at the “pan” and regional level, including that provided by international organisations which serve the global public interest;
- Participation in exchanges with other countries, organisations and stakeholders who are pursuing the same goals so as to share knowledge, rationalize resources and encourage collaboration;
- Negotiation to ensure that international copyright laws reflect the special role that the information commons or “public domain” information must play in the fabric of the knowledge society;
- Encourage co-operation among the different international governmental and non-governmental organizations (FAO, IUT, UNDP, UNEP, World Bank, etc.) with a view to building up a universally accessible body of knowledge, particularly for the benefit of developing countries, from the massive amount of information produced through the development projects and programmes;
- The compilation of an international inventory of legislation, regulation, plans of action and programmes on the generation and dissemination of public domain information, in close collaboration with leading organizations in this domain such as WIPO.

Session 2: Facilitating access to networks and services

Facilitating education about, and access to, telematics networks and services, such as the Internet service connection, must become a high priority on the development agendas of governments, especially in developing countries and countries in transition, as they are essential prerequisites for ensuring equitable access to information. In particular, the Internet service should be considered as a public utility service in the same way as basic telecommunication services, water, and electricity; public service institutions, such as schools, academic organizations and public libraries should have concessionary rates for Internet access. The international community should recognize and support the concept of universal access to telematics networks and services and foster the development of regional cost sharing (peering) arrangements of National Access Providers (NAP's), and increase the political awareness of the long term implications of a central "world hub".

The participants particularly stressed the following:

- Telecommunication access should be built upon the principles of affordable public access, standardized infrastructure/protocols, clear, established regulatory and legal frameworks;
- Mechanisms should be established for better transparency and accountability to provide the cross-subsidization of Internet access costs and telecommunication necessary to ensure equitable access to the Internet and its information content, with special consideration for the needs of public service institutions;
- National regulatory authorities could assist this effort by establishing concessionary rates for Internet access in public service institutions such as schools, academic organizations and public libraries. Also, by encouraging dialogue between ICT vendors and information providers and national and regional educational (schools, universities and research centres) and cultural institutions (libraries), so as to negotiate access by these institutions to ICTs at reduced prices, taxes and custom duties. National authorities should also support the development of "public service sector information and community technology consortia";
- Strengthening the intra-regional networks, in particular by combining commercial and public service traffic;
- The interconnection, on an equal cost sharing basis, between national Internet access points in developing countries (which bring together the traffic of private and non-profit Internet service providers (ISPs) and access points in other countries (whether developing or industrialized), independently of the respective traffic flows should be encouraged. A survey on Internet connectivity costs, particularly ISP connections and domain name costs, should be undertaken;

- Establishing high capacity regional backbones to connect each country within a multi-hub global network in which no one body dominates connectivity – as is already under consideration;
- Encouraging information and knowledge access by local communities, particularly in remote and rural areas, as well as by disadvantaged people and other target groups, through the establishment of community public services and regulatory incentives facilitating access to new ICT and the Internet.

Theme B: THE FAIR USE CONCEPT IN THE INFORMATION SOCIETY

Session 3:

The Fair use concept in education, science, culture and communication

and

Session 4:

Application of legal exemptions to copyright for developing countries (through international conventions)

The foundations and goals of copyright are, on one hand, to encourage creation by granting exclusive rights to the creator for a limited period of time and, on the other, to support and regulate the spread of cultural goods, knowledge and ideas. Copyright therefore relies on balancing the interests of protecting original works and their creators and guaranteeing public interest and fundamental freedoms (such as access to culture and freedom of speech). Present developments in intellectual property, especially in the field of copyright and neighbouring rights, could threaten this balance. It is also true however that new technologies represent a threat for the normal exploitation of copyright-protected works. The preservation of this balance between the legitimate interests of the right holders and the equally legitimate interests of users to have access to information and culture, is of crucial importance in the framework of the Information Society.

The participants particularly stressed the following:

- Intellectual property rights are in essence based on the protection of creative works and technological innovations and are not intended to protect investments. Copyright should be limited to the protection of creative works. The creation of new *sui generis* rights or neighbouring

- rights protecting investments as such is not consistent with the essence of intellectual property;
- Information as such is essentially in the public domain. The non-proprietary character of information as such has been re-affirmed in the Trade related aspects of intellectual property (TRIPs) agreement (art. 10.2) and in the WIPO Copyright Treaty (art.5). National legislation should not lead to a monopolization of the information contents that are incorporated in secondary works (such as databases);
 - The importance of copyright exemptions (such as Fair use and equivalent exemptions) must be reasserted in the digital environment. Exemptions are an essential part of the necessary compromise between private and public interests;
 - Enjoyment of exemptions should not be denied on the pretext that a potential market, notably one that has been introduced through technology, could contractualize such enjoyment (“market failure” theory), particularly when the exemption is based on the exercise of fundamental rights such as freedom of expression or the right to access to information;
 - Reviews of existing national and international intellectual property rights legislation (including any WTO review of the TRIPs Agreement) should include an assessment of the social and economic implications of any new extension of intellectual property rights and should re-affirm the Fair use doctrine; in particular, the extension of copyright periods may have a more adverse effect, especially in developing countries, than the actual suspension of certain limitations;
 - In considering the application of the Fair use doctrine, attention should be paid to the economic, cultural and social context in which the copyrighted work is used. The definition of Fair use could vary taking these circumstances into account (notably the fact that the use is made in a developing country and for the internal needs of this country);
 - Protection of technical means must be sought in common law, not in intellectual property law. The neutralizing of technological means should not be sanctioned by intellectual property law, nor especially by copyright;
 - Any legal protection regime for technological means must be enacted with due regard for legitimate use and access to information and to the public domain and must permit the legitimate exercise of copyright exemptions;
 - An international observatory to consider the effects of introducing technological means into copyright protection on access to information and to the public domain, and on the exercise of limitations on copyright, could be set up under the aegis of UNESCO;
 - The publishers representatives stressed the fact that the copyright exemptions system could be detrimental to investments in the developing countries: “If there is not sufficient copyright protection, the return on investments (and thus the investments themselves) related to the spread

of cultural goods and information in the developing countries could be threatened”;

- Although the improvement of the copyright system will not solve all the problems of the developing countries moving towards the Information Society, it should be encouraged as it will stimulate local creativity and entrepreneurship and increase the capacity for competition in developing countries, thus reducing the influence of the industrialized countries;
- The public service mission of libraries, educational institutions and museums in the digital age needs to be clearly defined and re-evaluated in light of the technological changes, so that their core functions in disseminating information for education, research and democracy building are preserved without competing with commercial providers of such services;
- The very complex issues associated with copyright on collective (tribal, oral traditions, etc) cultural heritage, that crosses national borders and cannot be attributed to any particular author, should continue to be actively addressed by the competent bodies such as WIPO and UNESCO.

Theme C: PROTECTING HUMAN DIGNITY IN THE DIGITAL AGE

Session 5:

**Protection of privacy on global networks
and**

Session 6:

Freedom of expression in electronic media

The Universal Declaration of Human Rights makes clear the need to safeguard the rights of privacy and of freedom of expression. But new technologies pose new challenges to these essential rights. Interactive technology makes widespread surveillance of private life possible. Software filters can restrict access to information that might otherwise be freely available.

The participants particularly stressed the following:

- The close association between privacy protection and the protection of human dignity and the need to ensure that in the “gratuity economy” privacy should not depend on the economic and cultural capability to resist market pressure;

- The development of a comprehensive strategy, including cultural, political, and institutional activities to protect personal privacy, and the possibility that UNESCO would pursue an international convention on privacy that would recognize a wide range of methods to protect personal privacy, including codes of conduct, self-regulation, and Privacy Enhancing Techniques;
- The implementation of Fair Information Practices and specific “commandments” for the protection of Internet privacy. These principles could be set out in model law;
- New information technologies will pose new challenges to privacy. Some of these challenges arise from problems in the conflict of laws and the multiple jurisdictions in which electronic commerce will take place. There are also important matters of national security and computer crime that should be addressed. Solutions could include the adoption of model laws and new treaties with strong, enforceable provisions;
- There will be new technologies to address issues of human dignity, but techniques are imperfect and technology alone is not a solution;
- Support for the development of model laws, conducts of conduct, public education, and the responsibility of citizens and the consideration that privacy may be of interest for the family as well as for the individual;
- Issues concerning the Internet and human dignity must be evaluated on a moral basis, and freedom of expression and the dignity of the citizen are both important aspects of this morality. It is also necessary to prepare the legal and the ethical grounds for the Internet in developing countries;
- The protection of privacy and the promotion of free expression must be viewed as complementary goals in the digital age. Both principles are clearly set out in the Universal Declaration of Human Rights. Increasingly, new challenges to human dignity will affect both these areas;
- At a time when scientific progress is excluding much of humanity, we must recall that we are all part of one world and efforts should be made to view challenges and opportunities on a common basis;
- Central to the protection of human dignity in the digital age is the active participation of civil society organizations in decisions concerning the future of the Internet. Successful policies for the Internet must include the voices of consumers and citizens.

CONCLUSION

In the concluding statements, the participants were informed that the present report and proposals will be taken into account in the finalization by an International Committee of Experts of a Recommendation on Universal access and promotion and use of multilingualism in cyberspace that will be submitted to the General Conference of UNESCO in November 2001 for adoption by its Member States. The report will also guide the Secretariat in preparing UNESCO's contribution to the World Summit on the Information Society planned in 2003 under the auspices of the United Nations. In this regard, Infoethics 2000 may be considered as an important step in a process that will hopefully lead to the adoption of international norms of conduct based on the concept of equitable access to information for all.

References:

1. Refer to range/examples of possible "public domain" information listed in para 2.2.3., p.204, Longworth's Study.
2. Of economic definition in para 23, Longworth's Study.

RÉSUMÉ DU RAPPORT

ORGANISATION

Infoéthique 2000, troisième Congrès de l'UNESCO sur les défis éthiques, juridiques et sociétaux du cyberspace, s'est tenu au Siège de l'UNESCO, à Paris, du 13 au 15 novembre 2000. Ce troisième Congrès a été ouvert par sa Présidente, Mme Vigdís Finnbogadóttir, présidente de la Commission mondiale d'éthique des connaissances scientifiques et des technologies et ex-présidente de la République d'Islande, et par le représentant du Directeur général de l'UNESCO, M. Alain Modoux, Sous-Directeur général pour la communication et l'information. C'est M. David Konzevik (Mexique) qui a prononcé l'allocution liminaire de présentation du thème du Congrès, intitulée «La société de l'information et la révolution des attentes».

Les débats ont été organisés comme prévu en six séances d'une demi-journée chacune. Au total, 32 intervenants, représentant 19 pays et 5 organisations intergouvernementales ont participé aux travaux des six groupes de discussion correspondants. Les rapports établis par les modérateurs de chacune de ces séances ont été intégrés au présent compte rendu des débats. Le Congrès a rassemblé plus de 300 participants – essentiellement des fonctionnaires, juristes, universitaires et représentants des médias et de la société civile – venant de 66 pays et 53 organisations non gouvernementales.

L'allocution de clôture a été prononcée par M. Bernd Niehaus, vice-président du Conseil économique et social (ECOSOC 2000) et ambassadeur et représentant permanent du Costa Rica auprès de l'ONU, et par M. Philippe Quéau, directeur de la Division de la société de l'information de l'UNESCO, représentant le Directeur général. Les documents de travail destinés à faciliter les débats comprenaient :

- quatre études thématiques établies par les modérateurs avant le Congrès ;
- les quatre rapports d'ateliers régionaux Infoéthique organisés au cours de l'an 2000 en Afrique, dans la région Asie et Pacifique, en Europe et en Amérique latine, et un rapport national émanant de l'Égypte ;
- les communications présentées par les 32 intervenants au cours des séances ;

- plusieurs autres communications soumises par des participants sur les thèmes des débats.

Un site web, (<http://webworld.unesco.org/infoethics2000/index.html>), a été créé avant la tenue du Congrès et mis à jour au fur et à mesure de son déroulement.

DÉBATS

Les débats ont à nouveau confirmé l'importance et la pertinence des questions mises en relief par le Congrès pour le développement futur de la société de l'information. On a fortement insisté sur la nécessité de veiller à la sauvegarde et au renforcement des principes déjà en vigueur en matière de droits de l'homme dans le nouvel environnement numérique et le cyberspace. Dans ce contexte, l'accès à l'information pour tous demeure un droit fondamental qu'il faut défendre avec davantage d'efficacité et d'imagination, dans un esprit d'équité, de justice et de respect mutuel.

Les études spéciales, les aspirations exprimées dans les conclusions des ateliers régionaux et les interventions faites aux différentes séances ont prouvé une fois de plus la complexité des questions éthiques, juridiques et sociétales et leur impact sur les utilisateurs des technologies de l'information et de la communication (TIC). Il y a donc lieu d'étudier beaucoup plus activement comment assurer à un coût abordable l'accès à l'information, en particulier celle appartenant au domaine public, ainsi qu'aux technologies de l'information, dans tous les pays, y compris les pays en développement et en transition. Cela implique de rechercher de justes équilibres entre les droits légitimes des producteurs et ceux des usagers de l'information, et dans leur protection respective sur les supports électroniques. Sensibiliser l'opinion et améliorer l'éducation à tous les niveaux apparaissent comme les moyens les plus prometteurs afin de relever ce défi.

En outre, il a été généralement reconnu que l'organisation d'Infoéthique 2000 s'inscrivait dans une démarche à long terme visant à faire prendre en compte les problèmes éthiques, juridiques et sociétaux que pose l'instauration d'un accès équitable à l'information dans les débats du Sommet mondial sur la société de l'information prévu en 2003. Le rôle qui incombe à l'UNESCO s'agissant de s'attaquer à ces problèmes et de les porter à l'attention du Sommet a été réaffirmé avec insistance.

La richesse des débats et les questions soulevées au cours du Congrès ressortent des rapports des différents groupes de discussion qui sont résumés ci-dessous.

Thème A : LE RÔLE DES POUVOIRS PUBLICS DANS L'ACCÈS À L'INFORMATION

Session 1 :

Élargir et rationaliser l'offre d'informations appartenant au domaine public

Les pouvoirs publics (aux niveaux central et local) sont actuellement la principale source de l'information détenue par le secteur public et ont un rôle décisif à jouer s'agissant de faciliter l'accès à celle-ci.

Cette information fait partie de notre « espace public intellectuel ». Elle est d'une utilité cruciale pour la recherche, l'enseignement, l'innovation, et la lutte contre l'exclusion économique et sociale et est l'un des fondements indispensables d'une société mondialisée informée et participative. Assimilable à un « bien public mondial », elle devrait par conséquent être publiquement accessible (c'est-à-dire appartenir au « domaine public »¹). Le profit général sera d'autant plus grand que ces ressources informationnelles et connaissances seront mises à la disposition du public le plus large possible, plutôt que d'être gérées d'une manière qui permette une mainmise exclusive sur l'information ou la suprématie d'intérêts privés.

En tant que gardiens et interprètes de « l'intérêt public », les pouvoirs publics assument, à l'égard des citoyens au nom desquels ils agissent, les responsabilités suivantes :

- lutter contre le clôturage de « l'espace public intellectuel » susmentionné et préserver les ressources informationnelles du domaine public existantes ;
- accroître la proportion des connaissances mises à la disposition du public et en améliorer la qualité ;
- favoriser un accès plus équitable à cette information.

Disponibilité de l'information

Les participants ont souligné en particulier ce qui suit :

- Les pouvoirs publics doivent donner l'exemple en mettant, par les moyens électroniques, l'information officielle gouvernementale et autre (sous réserve des exceptions nécessaires à la protection des intérêts nationaux) à la disposition des citoyens. Ils devraient en particulier fournir à leurs citoyens des informations cruciales détenues par le secteur public, par exemple des renseignements sur leurs droits, sur la législation et les réglementations sur la santé et sur les obligations du gouvernement à l'égard des citoyens. Ils devraient également promouvoir le développement des

- services et des contenus qui rendent compte de la culture, des valeurs, de l'histoire, de la langue et du patrimoine locaux ;
- Les pouvoirs publics devraient informer les citoyens en mettant en ligne davantage d'informations utiles et de qualité détenues par le secteur public, et ce sous des formes et par des moyens et systèmes de communication qui : (1) soient conçus pour répondre aux besoins des citoyens, leur soient familiers et facilitent la compréhension et le téléchargement et (2) n'exigent pas de matériel ou une technologie très élaborés ;
 - Des initiatives en matière d'aides et de financement devraient être prises en vue de l'élaboration de normes de conduite et de systèmes propres à faciliter l'interopérabilité, la numérisation, la préservation et l'accessibilité des fonds des bibliothèques, des périodiques consacrés à la recherche, des archives et d'autres ressources du patrimoine. La priorité devrait être donnée à la mise des ressources informationnelles à la disposition du public, des crédits budgétaires suffisants devraient être alloués à la numérisation immédiate des collections les plus prioritaires, et des plans devraient être établis en vue de la numérisation d'autres ressources pour lesquelles cette mesure serait moins urgente ;
 - Il faudrait rechercher des moyens de mobiliser la société civile en lui offrant des possibilités de communication interactive, notamment dans le cadre d'activités qui sollicite les apports des citoyens et des ONG sur les problèmes de politique gouvernementale ou d'intérêt public et créer dans ce but des groupes de discussion en ligne ;
 - Il faudrait promouvoir les partenariats entre les secteurs public et privé, afin de trouver des moyens de financer la création de savoirs ou de la stimuler par des incitations. Là où ces partenariats impliqueraient un financement public, les pouvoirs publics devraient veiller à ce que les connaissances qui présentent les caractéristiques d'un « bien public mondial »² soient ensuite mises à la disposition du public d'une façon qui serve de manière équilibrée l'intérêt que ce dernier peut avoir à accéder à ces connaissances et l'intérêt que le secteur privé peut avoir à les commercialiser ;
 - Il faudrait, dans le contexte de l'offre de bande passante et de la mise en place d'infrastructures technologiques, examiner les initiatives spécifiquement propres à encourager les investissements du secteur privé et les partenariats avec le secteur privé visant la diffusion d'informations publiques d'intérêt général ;
 - Il s'agit d'encourager les attitudes favorables aux efforts de collaboration tels que les partenariats et échanges d'information et orientées vers une coopération active avec d'autres acteurs concernés (y compris des entités privées et des entreprises commerciales).

Politiques de l'information

Il faudrait :

- Promouvoir des politiques de l'information cohérentes, y compris en publiant des synopsis et des répertoires des ressources informationnelles du secteur public qui sont mises à la disposition générale de la population et en fournissant des liens d'accès à ces ressources ;
- Veiller à ce que les législations nationales sur le droit d'auteur favorisent l'existence d'un vigoureux « domaine public », en tant que condition nécessaire de la sauvegarde du patrimoine intellectuel et culturel ;
- Réexaminer les politiques de tarification en vue d'éliminer ou de réduire les obstacles financiers à l'accès à l'information détenue par le secteur public ;
- Faire en sorte que les conditions du marché et les cadres réglementaires concernant les télécommunications encouragent le développement d'infrastructures et de capacités techniques relatives aux TIC qui répondent aux besoins technologiques des pouvoirs publics et des citoyens ;
- Faire en sorte que les stratégies en matière d'information soient propres à toucher toutes les couches de la société, en facilitant les projets des collectivités locales et le perfectionnement des responsables et conseillers locaux dans le domaine des TIC ;
- Mettre au point des modèles en vue de faciliter l'accès des communautés locales des pays en développement et des régions rurales ainsi que des personnes handicapées et/ou ayant des besoins spéciaux aux TIC ;
- Dispenser des conseils sur les mesures qui aideront les collectivités à opérer les changements de mentalité indispensables à l'acquisition de connaissances électroniques de base, ainsi qu'à renforcer la confiance dans la mise en œuvre et l'utilisation des TIC ; concevoir et mettre en œuvre des pratiques d'information optimales sur les systèmes et dans les activités en ligne ;
- Promouvoir les comportements éthiques ainsi que le respect des normes et valeurs collectives dans les activités des producteurs et utilisateurs d'information et des prestataires de services, comme dans les contenus qu'ils proposent. Les pouvoirs publics devraient veiller à ce que toute formation aux TIC offerte sur le territoire national porte, entre autres, sur l'éthique et les normes et non pas simplement sur les compétences techniques à acquérir ;
- L'accent devrait être mis, à titre d'impératif primordial, sur la mise en place et l'enrichissement de « l'infrastructure humaine », y compris par l'éducation intégrée, la formation aux TIC et les programmes de développement des compétences.

Coopération internationale

Il faudrait :

- Encourager l'élaboration de cadres juridiques incluant des lois sur la liberté d'information et la divulgation protégée (adaptées au système de valeurs national et sociétal); préconiser l'harmonisation des cadres législatifs des différents pays et régions et œuvrer à réduire autant que possible les incohérences dans ce domaine;
- Accroître la diffusion aux citoyens de l'information détenue par le secteur public, aux niveaux planétaire et régional, y compris de l'information émanant d'organisations internationales qui servent l'intérêt public mondial;
- Participer aux échanges avec d'autres pays, organisations et autres entités qui poursuivent les mêmes objectifs, de manière à mettre les connaissances en commun, à rationaliser l'emploi des ressources et à encourager la collaboration;
- Procéder à des négociations, afin d'assurer que les législations internationales sur le droit d'auteur tiennent compte du rôle particulier que le bien commun que constitue l'information du domaine public doit jouer dans la structuration de la société du savoir;
- Encourager la coopération entre les différentes organisations internationales, gouvernementales et non gouvernementales (FAO, UIT, PNUD, PNUE, Banque mondiale, etc.) en vue de constituer, à partir de la masse d'information issue des projets et programmes de développement, un corpus de connaissances universellement accessible, au bénéfice des pays en développement en particulier;
- Établir un inventaire international des législations, réglementations, plans d'action et programmes sur la création et la diffusion de l'information du domaine public, en collaboration étroite avec les organisations qui jouent un rôle majeur dans ce domaine telle que l'OMPI.

Session 2 :

Faciliter l'accès aux réseaux et aux services

Faciliter la connaissance des réseaux et services télématiques – des moyens de connexion aux services de l'Internet par exemple – ainsi que l'accès à ces réseaux et services doit figurer au premier rang des priorités dans les programmes de développement des gouvernements, en particulier dans les pays en développement et les pays en transition, car ce sont là des conditions essentielles de l'instauration d'un accès équitable à l'information. L'Internet doit en particulier être considéré comme un service public, au même titre que les services fondamentaux de télécommunication, d'eau et d'électricité; les institutions de service public telles que les écoles, les organismes universitaires et

les bibliothèques publiques devraient bénéficier de tarifs préférentiels d'accès à l'Internet. Il faut que la communauté internationale reconnaisse et appuie la notion d'accès universel aux réseaux et services télématiques, encourage les systèmes de partage régional des coûts (peering) entre les fournisseurs d'accès nationaux et accroisse la sensibilisation politique aux incidences à long terme de l'existence d'un unique «centre nodal mondial».

Les participants ont souligné en particulier ce qui suit :

- L'accès aux télécommunications devrait se développer selon les principes suivants: accès public à un coût abordable, normalisation des infrastructures/protocoles, institution de cadres réglementaires et juridiques clairs ;
- Il faudrait instituer des mécanismes qui améliorent la transparence et la responsabilisation s'agissant de mettre en place les subventions croisées visant les coûts d'accès à l'Internet et des télécommunications qui sont nécessaires pour assurer un accès équitable au Réseau et à son contenu informatif, eu égard en particulier aux besoins des institutions de service public ;
- Les autorités nationales de régulation pourraient faciliter ces efforts en instituant des tarifs préférentiels d'accès à l'Internet pour les établissements de service public telles que les écoles, les organismes universitaires et les bibliothèques publiques, ainsi qu'en encourageant le dialogue entre les entreprises du secteur des TIC et fournisseurs d'information et les institutions éducatives (écoles, universités et centres de recherche) et culturelles (bibliothèques), nationales et régionales, de manière à négocier l'accès de ces établissements aux TIC à des tarifs et moyennant des taxes et droits de douane réduits. Les autorités nationales devraient également appuyer le développement de «consortiums de service public dans le domaine des technologies de l'information et de la communication» ;
- Il faudrait renforcer les réseaux intrarégionaux, en particulier en combinant trafic commercial et trafic de service public ;
- Il faut encourager l'interconnexion, sur la base du partage égal des coûts, des points nationaux d'accès à l'Internet dans les pays en développement (qui centralisent le trafic géré par les prestataires de services Internet (PSI) privés et sans but lucratif) et des points d'accès situés dans d'autres pays (en développement ou industrialisés), et ce indépendamment de leurs volumes de trafic respectifs. Il faudrait entreprendre une étude des coûts de connexion à l'Internet et en particulier de ceux de la connexion aux PSI et de l'attribution des noms de domaine ;
- Il faudrait mettre en place – comme on l'envisage déjà – des dorsales régionales à haut débit reliant chaque pays à un réseau mondial multi-nodal où aucun organisme n'aurait un rôle dominant en matière de connexion ;

- Il faudrait encourager l'accès des communautés locales, en particulier dans les régions rurales et reculées, ainsi que des personnes défavorisées et d'autres groupes cibles à l'information et au savoir, en créant des services publics locaux et des incitations d'ordre réglementaire qui facilitent l'accès aux nouvelles TIC et à l'Internet.

Thème B : LA NOTION D'USAGE LOYAL DANS LA SOCIÉTÉ DE L'INFORMATION

Session 3 :

Le concept d'usage loyal appliqué à l'éducation, à la science, à la culture et à la communication

et

Session 4 :

Application aux pays en développement des exceptions légales au droit d'auteur (à l'aide des conventions internationales)

Les principes de base et les objectifs du droit d'auteur sont, d'une part, d'encourager la création en accordant aux créateurs des droits exclusifs d'une durée limitée et, de l'autre, de favoriser et réglementer la diffusion des biens culturels, des connaissances et des idées. Le droit d'auteur repose donc sur la réalisation d'un équilibre entre la protection des œuvres originales et de leurs créateurs et la sauvegarde de l'intérêt public et des libertés fondamentales (telles que l'accès à la culture et la liberté d'expression). Les évolutions actuelles de la propriété intellectuelle, en particulier dans le domaine du droit d'auteur et des droits voisins, risquent de mettre cet équilibre en péril. Mais il est également vrai que les nouvelles technologies représentent une menace pour l'exploitation normale des œuvres protégées par le droit d'auteur. La préservation de cet équilibre entre les intérêts légitimes des titulaires de droits et ceux, non moins légitimes, des utilisateurs s'agissant d'avoir accès à l'information et à la culture est d'une importance cruciale dans la société de l'information.

Les participants ont souligné en particulier ce qui suit :

- Les droits de propriété intellectuelle visent par essence la protection des œuvres de création et des innovations technologiques et ne sont pas destinés à protéger les investissements. La protection par le droit d'auteur devrait être limitée aux œuvres de création. La création de nouveaux droits *sui generis* ou de droits voisins protégeant les investissements n'est pas en soi compatible avec la nature même de la propriété intellectuelle ;

- L'information appartient par nature essentiellement au domaine public. Cette caractéristique qui fait qu'elle ne peut, par essence, constituer une propriété exclusive a été réaffirmée dans l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC) (article 10.2) et dans le Traité de l'OMPI sur le droit d'auteur (article 5). Les législations nationales ne doivent pas conduire à une monopolisation du contenu informationnel incorporé aux œuvres secondaires (tel que les bases de données);
- L'importance des exceptions au droit d'auteur (au titre par exemple de «l'usage loyal» et d'autres dérogations équivalentes) doit être réaffirmée dans l'environnement numérique. Ces exceptions sont un élément essentiel de l'indispensable compromis qui doit s'établir entre les intérêts privés et l'intérêt public;
- Le bénéfice de ces exceptions ne doit pas être refusé sous prétexte qu'un marché potentiel, notamment un marché créé grâce à la technologie, peut permettre d'en contractualiser la jouissance (théorie de la «défaillance du marché»), en particulier lorsque l'exception se justifie par l'exercice de droits fondamentaux tels que la liberté d'expression ou le droit d'accès à l'information;
- Les réexamens des législations nationales et internationales existantes sur les droits de propriété intellectuelle (y compris tout réexamen de l'Accord sur les ADPIC par l'OMC) devraient comprendre l'évaluation des incidences socio-économiques de toute nouvelle extension des droits de propriété intellectuelle et réaffirmer le principe de l'usage loyal; en particulier, l'allongement de la durée des droits d'auteur risque d'avoir des effets plus néfastes, notamment dans les pays en développement, que la suspension de fait de certaines limitations;
- Dans l'étude de l'application du principe de l'usage loyal, il convient d'être attentif aux contextes économique, culturel et social dans lequel est utilisée l'œuvre protégée par le droit d'auteur. L'usage loyal peut se définir de manière variable lorsque l'on tient compte de ces circonstances (notamment des utilisations qui interviennent dans un pays en développement et pour ses besoins internes);
- Les moyens de protéger les dispositifs techniques doivent être recherchés dans le droit commun et non dans le droit de la propriété intellectuelle. La neutralisation de ces dispositifs ne devrait pas être sanctionnée par le droit de la propriété intellectuelle, et surtout pas par le droit d'auteur;
- L'institution de tout régime de protection légale des dispositifs technologiques doit respecter dûment l'accès à l'information et au domaine public et leur utilisation légitime, et permettre l'exercice légitime des exceptions au droit d'auteur;
- Un observatoire international des effets que la mise en place de moyens technologiques de protection du droit d'auteur peut avoir sur l'accès à l'information et au domaine public et sur l'application des limitations du droit d'auteur pourrait être créé sous l'égide de l'UNESCO;

- Les représentants des éditeurs ont souligné que le système des exceptions aux droits d’auteur pouvait nuire aux investissements dans les pays en développement : « Si la protection par le droit d’auteur est insuffisante, la rentabilité des investissements (et par conséquent les investissements eux-mêmes) qui concernent la diffusion des biens culturels et de l’information dans les pays en développement risque d’être menacée ; »
- Même si l’amélioration du régime du droit d’auteur ne résout pas tous les problèmes des pays en développement en marche vers la société de l’information, elle doit être encouragée car elle stimulera la créativité locale et l’esprit d’entreprise et accroîtra les capacités concurrentielles dans ces pays, réduisant ainsi l’influence des pays industrialisés ;
- La mission de service public des bibliothèques, des institutions éducatives et des musées à l’ère numérique demande à être définie et réévaluée précisément à la lumière des évolutions technologiques, de sorte que leurs fonctions fondamentales de diffusion d’informations au service de l’éducation, de la recherche et de la démocratisation soient préservées, sans les mettre en concurrence avec les prestataires commerciaux de services de même nature ;
- Les instances compétentes, telles que l’OMPI et l’UNESCO, doivent continuer d’étudier activement les questions très complexes que soulève le droit d’auteur sur les patrimoines culturels collectifs (patrimoines tribaux, traditions orales, etc.) qui transcendent les frontières nationales et ne peuvent être attribués à un auteur particulier.

Thème C : PROTÉGER LA DIGNITÉ HUMAINE À L’ÈRE NUMÉRIQUE

Session 5 :

Protection de la vie privée sur les réseaux mondiaux

et

Session 6 :

Liberté d’expression et supports électroniques

La Déclaration universelle des droits de l’homme énonce clairement la nécessité de sauvegarder les droits au respect de la vie privée et à la liberté d’expression. Or, les nouvelles technologies posent de nouveaux défis à la protection de ces droits essentiels. Les technologies interactives rendent possible une surveillance générale de la vie privée. Les logiciels de filtrage peuvent, par ailleurs, restreindre l’accès à des informations qui seraient en leur absence librement accessibles.

Les participants ont souligné en particulier ce qui suit :

- L'étroit lien entre la protection de la vie privée et celle de la dignité humaine, et la nécessité de veiller à ce que, dans « l'économie de la gratuité », le respect de la vie privée ne dépende pas de la capacité économique et culturelle de résister aux pressions du marché ;
- La nécessité d'élaborer une stratégie globale, comprenant des activités culturelles, politiques et de développement institutionnel, afin de protéger la vie privée des personnes ; l'UNESCO pourrait œuvrer à l'établissement d'une convention internationale sur le respect de la vie privée qui reconnaîtrait tout un éventail de méthodes destinées à protéger la vie privée des personnes, y compris les codes de conduite, l'autoréglementation et les moyens techniques de renforcer la confidentialité ;
- La nécessité de mettre en œuvre des pratiques d'information loyales et des « commandements » spécifiques visant la protection de la vie privée sur l'Internet. Ces principes pourraient être érigés en loi-type ;
- Le fait que les nouvelles technologies de l'information vont poser de nouveaux défis au respect de la vie privée. Certains découlent de problèmes tenant aux conflits de lois et à la multiplicité des ressorts territoriaux dans lesquels s'opère le commerce électronique. Il s'agira également de résoudre d'importantes questions concernant la sécurité nationale et la criminalité informatique. Les solutions pourraient comprendre l'adoption de lois-types et de nouveaux traités dont les dispositions seraient rigoureuses et exécutoires ;
- De nouvelles technologies permettront de tenter de résoudre les problèmes de protection de la dignité humaine ; cependant, la technologie est imparfaite et ne constitue pas en soi une panacée ;
- Il s'agit de favoriser l'élaboration de lois-types et de codes de conduite, l'éducation du public et la responsabilisation des citoyens et l'idée selon laquelle le respect de la vie privée peut être dans l'intérêt des familles aussi bien que des individus ;
- Les problèmes qui concernent l'Internet et la dignité humaine doivent être évalués du point de vue moral ; la liberté d'expression et la dignité du citoyen sont deux aspects importants de cette moralité. Il est également nécessaire de poser les fondements juridiques et éthiques de la mise en place de l'Internet dans les pays en développement ;
- Protéger la vie privée et promouvoir la liberté d'expression doivent être considérés comme des objectifs complémentaires à l'ère numérique. Ce sont là deux principes énoncés clairement dans la Déclaration universelle des droits de l'homme. Les nouveaux défis à la protection de la dignité humaine se répercuteront de plus en plus sur ces deux domaines ;
- À une époque où le progrès scientifique exclut une grande part de l'humanité, nous devons nous rappeler que nous faisons tous partie de la même planète et nous efforcer d'envisager dans une optique collective les défis et les promesses ;

- La participation active des organisations de la société civile à la prise des décisions sur l'avenir de l'Internet est d'une importance cruciale pour la protection de la dignité humaine à l'ère numérique. Pour être efficaces, les politiques relatives à l'Internet doivent refléter les avis des consommateurs et des citoyens.

CONCLUSION

Dans les allocutions de clôture, les participants ont été informés que le présent rapport et les propositions qu'il contient seront pris en compte lors de la mise au point finale, par un comité international d'experts, d'une recommandation sur l'accès universel au cyberspace et la promotion et la pratique du multilinguisme dans le cyberspace qui sera soumise en novembre 2001 à la Conférence générale de l'UNESCO pour adoption par ses États membres. Le présent rapport servira également de guide au Secrétariat lorsqu'il établira la contribution de l'UNESCO au Sommet mondial sur la société de l'information prévu en 2003 sous les auspices de l'ONU. A cet égard, Infoéthique 2000 peut être considéré comme une étape importante d'un processus qui débouchera, espère-t-on, sur l'adoption de normes de conduite internationales fondées sur la notion d'accès équitable à l'information pour tous.

Références :

1. Voir la gamme/les exemples des informations pouvant appartenir au « domaine public » mentionnés au paragraphe 2.2.3, p. 204, de l'étude d'Elizabeth Longworth.
2. Voir la définition économique qui en est donnée au paragraphe 23 de l'étude Longworth.

RESUMEN DEL INFORME

ORGANIZACIÓN

Infoética 2000, tercer Congreso de la UNESCO sobre los desafíos éticos, jurídicos y societales del ciberespacio, se celebró en la Sede de la UNESCO en París del 13 al 15 de noviembre de 2000. La apertura del Congreso estuvo a cargo de su Presidenta, Sra. Vigdis Finnbogadóttir, Presidenta de la Comisión Mundial de Ética de Conocimiento Científico y de la Tecnología y anterior Presidenta de la República de Islandia, y, en representación del Director General de la UNESCO, el Sr. Alain Modoux, Subdirector General de Comunicación e Información, y el discurso inaugural de presentación del tema, *La sociedad de la información y la revolución de las expectativas* fue pronunciado por el Sr. David Konzevik (México).

Los debates tuvieron lugar, según se había previsto, en seis sesiones de medio día cada una. En total, 32 oradores de 19 países y cinco organizaciones intergubernamentales internacionales participaron en los seis grupos de discusión. En el presente informe de las deliberaciones figuran los informes preparados por los moderadores de las distintas sesiones. Asistieron al Congreso más de 300 participantes – principalmente funcionarios de organismos oficiales, abogados, universitarios, representantes de los medios de comunicación y de la sociedad civil – de 66 países y 53 organizaciones no gubernamentales.

Pronunciaron sendos discursos de clausura los Sres. Bernd Niehaus, Vicepresidente del Consejo Económico y Social en 2000, Embajador y Representante Permanente de Costa Rica ante las Naciones Unidas, y Philippe Quéau, Director de la División para la Sociedad de la Información de la UNESCO, en representación del Director General.

Los documentos de antecedentes que se facilitaron para orientar los debates fueron los siguientes:

- cuatro estudios temáticos preparados por los moderadores antes del Congreso;
- cuatro informes de los talleres regionales de Infoética celebrados a lo largo de 2000 en África, Asia y el Pacífico, Europa y América Latina, y un informe nacional, preparado por Egipto;
- los documentos presentados por los 32 ponentes durante las sesiones;
- varios documentos presentados por los participantes sobre los temas que se debatieron.

Antes de la celebración del Congreso se creó una página Web (<http://webworld.unesco.org/infoethics2000/index.html>) que se fue poniendo al día a medida que avanzaban las deliberaciones.

DEBATES

Los debates volvieron a confirmar la importancia y pertinencia de las cuestiones destacadas por el Congreso para el futuro desarrollo de la sociedad de la información. Se hizo especial hincapié en la necesidad de velar por que los principios ya consagrados en materia de derechos humanos se mantengan y refuercen en el nuevo entorno digital y en el ciberespacio. En este contexto, el acceso a la información para todos sigue siendo un derecho fundamental que debe defenderse con más eficacia e imaginación, en un espíritu de equidad, justicia y respeto mutuo.

Los estudios especiales, las aspiraciones expresadas en las conclusiones de los talleres regionales y las intervenciones realizadas en las diferentes sesiones demostraron, una vez más, la complejidad de las cuestiones éticas, jurídicas y societales y sus repercusiones para los usuarios de las tecnologías de la información y la comunicación. De ahí que se deba prestar mucha más atención a la forma de garantizar, a precios asequibles, un acceso a la información, especialmente la del dominio público, y a las tecnologías de la información en todos los países, comprendidos los países en desarrollo y los países en transición. Con este propósito, hay que buscar puntos de equilibrio entre los derechos legítimos de los productores y los usuarios de la información y la protección de ambos en los medios electrónicos. Se consideró que las actividades que más posibilidades ofrecían para poder hacer frente a este desafío eran las de sensibilización y fomento de la educación en todos los niveles.

También se reconoció en general que la organización de Infoetica 2000 formaba parte de un objetivo a largo plazo, esto es, que los problemas éticos, jurídicos y societales que plantea un acceso más equitativo a la información se abordaran en los debates de la Cumbre Mundial sobre la Sociedad de la Información prevista para 2003. Se reafirmó vehementemente la función que incumbe a la UNESCO a la hora de tratar estos asuntos y señalarlos a la atención de la Cumbre.

Los informes de los diferentes grupos de debate, que se resumen a continuación dan cuenta de la riqueza de las deliberaciones y de las cuestiones planteadas durante el Congreso:

Tema A: LA FUNCIÓN DE LOS PODERES PÚBLICOS EN EL ACCESO A LA INFORMACIÓN

Sesión 1:

Ampliar y hacer más eficaz el suministro de contenidos públicos

Los poderes públicos (en los planos central y local) son hoy en día la principal fuente de información del sector público y desempeñan una función decisiva a la hora de facilitar el acceso a la misma.

La información del sector público forma parte de nuestros “espacio público intelectual”. Es crucial para la investigación, la educación, la innovación, la integración económica y social y constituye uno de los cimientos esenciales para construir una sociedad informada, participativa y mundial. Dicha información, semejante a un “bien público mundial” debería, por lo tanto, estar a disposición del público (es decir, formar parte del “dominio público”)¹. El beneficio para el público será tanto mayor si esas fuentes de información y conocimiento se comparten con el mayor público posible, en lugar de permitir que en la gestión de estos recursos prevalezcan la exclusividad y los intereses privados (en cuanto al control de la información).

Como guardianes e intérpretes del “interés público”, los poderes públicos tienen responsabilidades para con los ciudadanos en cuyo nombre actúan, esto es, las de:

- oponerse al cercamiento del espacio público intelectual y preservar los recursos existentes de información del dominio público;
- ampliar la proporción y mejorar la calidad de los conocimientos que están a disposición del público;
- facilitar un acceso más equitativo a esta información.

La disponibilidad de la información

Los participantes hicieron especial hincapié en lo siguiente:

- Los gobiernos deben ser los primeros en tomar la iniciativa de poner la información gubernamental u otro tipo de información oficial (salvo en las excepciones necesarias para proteger los intereses nacionales) a disposición de los ciudadanos gracias a los medios electrónicos. En particular, deberían proporcionar a los ciudadanos, información del sector público de importancia fundamental como información sobre sus distintos derechos, sobre las leyes y los reglamentos, sobre sanidad y sobre las obligaciones del gobierno para con los ciudadanos. Asimismo, deberían fomentar el desarrollo de servicios y contenidos que reflejen la cultura, los valores, la historia, el lenguaje y el patrimonio del lugar;

- Los poderes públicos deberían informar a los ciudadanos haciendo accesible en línea más información útil y de calidad que maneja el sector público, en formatos y mediante canales de comunicación y sistemas que: 1) estén diseñados para responder a las necesidades de los usuarios, que éstos estén familiarizados con ellos y que faciliten la comprensión y sean sencillos de descargar, y 2) que no necesiten tecnologías o materiales altamente especializados;
- Deberían preverse iniciativas de apoyo y financiación con miras a elaborar normas de conducta y sistemas apropiados para facilitar la interoperabilidad, la digitalización, la preservación y la disponibilidad de las colecciones de bibliotecas, revistas de investigación, archivos y otros recursos del patrimonio. Poner a disposición del público los recursos de información debería considerarse una prioridad absoluta; deberían asignarse suficientes recursos presupuestarios a la digitalización inmediata de las colecciones que mayor prioridad tengan, y debería planificarse la de otros recursos que se necesiten con menos urgencia;
- Se deberían encontrar formas de atraer a la sociedad civil y de proporcionar un acceso interactivo, comprendidas actividades que supongan aportaciones de los ciudadanos y de las organizaciones no gubernamentales sobre cuestiones de política o de interés público; con este propósito deberían crearse grupos de discusión en línea;
- Deberían fomentarse las asociaciones entre los sectores público y privado con el fin de encontrar medios para financiar la creación de conocimiento o incentivarla. En los casos en que esas asociaciones supongan una participación financiera del Estado, los poderes públicos deberían asegurarse de que los conocimientos que reúnan las características de un “bien público mundial”² estén más adelante al alcance del público, para así equilibrar el interés que éste puede tener en el acceso con el interés del sector privado en la comercialización de ese conocimiento;
- En el contexto de la oferta en cuanto al ancho de banda y las infraestructuras tecnológicas, habría que examinar iniciativas específicas que fomenten las inversiones del sector privado y las asociaciones con éste para difundir contenidos públicos que presenten un interés general;
- Se deberían fomentar actitudes que favorezcan la colaboración, como asociaciones e intercambios de información, y que se orienten hacia una cooperación activa con otras partes interesadas (comprendidos los representantes de empresas privadas y comerciales);

Las políticas de información

- Fomentar políticas de información coherentes, entre otras cosas mediante la publicación de reseñas y directorios de los recursos de información del sector público que estén a disposición del público y proporcionando enlaces con los mismos;
- Velar por que las leyes nacionales de derecho de autor fomenten el mantenimiento de un “dominio público” sólido, como condición necesaria para preservar el patrimonio intelectual y cultural;
- Examinar las políticas de fijación de precios para eliminar o reducir los obstáculos financieros que se oponen al acceso a la información del sector público;
- Proporcionar las condiciones apropiadas para un mercado y estructuras reguladoras de las telecomunicaciones que fomenten el desarrollo de infraestructuras de las tecnologías de la información y la comunicación, y la capacidad técnica para cubrir las necesidades tecnológicas de los poderes públicos y de los ciudadanos;
- Las estrategias en materia de información deberían hacer que ésta llegara a todos los niveles de la sociedad, mediante el fomento de los proyectos de las comunidades locales y de las capacidades de los dirigentes e instructores locales en cuanto a las tecnologías de la información y la comunicación;
- Elaborar modelos para facilitar el acceso a las tecnologías de la información y la comunicación de las comunidades de los países en desarrollo y las zonas rurales y de las personas con discapacidades o con necesidades especiales;
- Brindar orientación sobre las políticas que ayudarían a las comunidades a favorecer los cambios de actitud necesarios para adquirir las nociones básicas de electrónica y para aumentar la confianza y la seguridad en la aplicación y el uso de las tecnologías de la información y comunicación. Elaborar y aplicar prácticas modélicas de información en los sistemas y las actividades en línea;
- Fomentar el comportamiento ético y el respeto por los valores y las normas de la comunidad en las actividades de los productores de la información, los usuarios y los proveedores de servicios y en los contenidos que comunican. Los poderes públicos deberían garantizar que toda la formación que se imparta dentro de su jurisdicción nacional en materia de tecnologías de la información y la comunicación incluya una dimensión ética y relativa a las normas y no se limite sólo a la adquisición de competencias técnicas;
- Se debería hacer hincapié, como requisito previo, en el desarrollo y el fomento de la “infraestructura humana”, entre otras cosas, mediante la educación integrada, la formación en tecnologías de la información y la comunicación y programas de fomento de las competencias.

La cooperación internacional

- Impulsar la elaboración de marcos jurídicos que incluyan leyes sobre la libertad de información y la divulgación protegida (adaptadas a los valores del país y la sociedad de que se trate); propugnar la armonización de marcos jurídicos entre países y regiones, y actuar para reducir al máximo las incoherencias en este sentido;
- Aumentar la difusión a los ciudadanos de la información que maneja el sector público, a escala global y regional, comprendida la facilitada por organizaciones internacionales que están al servicio del interés público mundial;
- Participar en intercambios con otros países, organizaciones y partes interesadas que persiguen los mismos objetivos, para compartir conocimientos, racionalizar recursos y fomentar la colaboración;
- Tomar parte en negociaciones para garantizar que las leyes internacionales de derecho de autor tomen en cuenta la función especial que ese espacio común que es la información de dominio público debe desempeñar en la estructura de la sociedad del conocimiento;
- Fomentar la cooperación entre las diferentes organizaciones internacionales, gubernamentales y no gubernamentales (la FAO, la UIT, el PNUD, el PNUMA, el Banco Mundial, etc.) con el propósito de constituir con la masa de información obtenida por conducto de los distintos programas y proyectos de desarrollo un conjunto de conocimientos accesible universalmente, especialmente en beneficio de los países en desarrollo;
- La construcción de un inventario internacional de leyes, reglamentos, planes de acción y programas sobre la creación y difusión de información de dominio público, en estrecha colaboración con las organizaciones más destacadas en este ámbito como la OMPI.

Sesión 2: Facilitar el acceso a redes y servicios

Fomentar el conocimiento de las redes y servicios telemáticos y facilitar el acceso a los mismos como, por ejemplo, la conexión a Internet, debe convertirse en una de las principales prioridades programáticas de los gobiernos, especialmente en los países en desarrollo y los países en transición, ya que son requisitos previos esenciales para garantizar un acceso más equitativo a la información. En particular Internet debería considerarse como un servicio de utilidad pública, al igual que lo son los servicios básicos de telecomunicaciones, el agua o la electricidad. Las instituciones del servicio público como las escuelas, las instituciones universitarias y las bibliotecas públicas deberían acceder a Internet con tarifas reducidas. La comunidad internacional debería reconocer y apoyar el concepto de acceso universal a las redes y los servicios telemáticos, fomentar el desarrollo de acuerdos regionales de participación en la financiación de los

gastos (*peering*) entre los proveedores nacionales de acceso y fomentar la toma de conciencia política de las repercusiones que tendría a largo plazo la existencia de un único “centro mundial de distribución” (*world hub*).

Los participantes destacaron en particular los siguientes aspectos:

- El acceso a las telecomunicaciones debería fundarse en los principios de: un acceso público a un precio asequible, unos protocolos e infraestructuras normalizados y el establecimiento de regímenes jurídicos y reglamentarios claros;
- Deberían fijarse mecanismos para mejorar la transparencia y la responsabilización cuando se vayan a instituir subvenciones cruzadas para los gastos de acceso a Internet y de las telecomunicaciones, necesarias para asegurar un acceso equitativo a Internet y a su contenido informativo, teniendo especialmente en cuenta las necesidades de las instituciones del servicio público;
- Las autoridades nacionales encargadas de la regulación podrían apoyar estos esfuerzos concediendo a las instituciones del servicio público como las escuelas, instituciones universitarias y bibliotecas públicas, un acceso a Internet con tarifas preferenciales, fomentando el diálogo entre los proveedores de tecnologías de la información y la comunicación (TIC), los proveedores de información y las instituciones educativas (escuelas e institutos, universidades y centros de investigación) e instituciones culturales (bibliotecas), nacionales y regionales, con el fin de negociar el acceso de éstas a las tecnologías de la información y de la comunicación con precios, impuestos y derechos de aduana reducidos. Las autoridades nacionales también deberían apoyar el desarrollo de “consorcios de servicio público en el sector de las tecnologías de la información y la comunicación”;
- Se deberían reforzar las redes intrarregionales, en particular combinando el tráfico comercial con el de servicio público;
- Debería fomentarse la interconexión, independientemente del tráfico respectivo, con arreglo a una distribución equitativa de los gastos entre los puntos de acceso nacional a Internet en los países en desarrollo (que reúnen el tráfico administrado por proveedores de servicios de Internet privados y sin fines de lucro) y puntos de acceso en otros países (en desarrollo o industrializados). Debería llevarse a cabo un estudio sobre los gastos de conexión a Internet, especialmente la conexión a los proveedores de servicios de Internet (PSI) y los gastos de adjudicación de nombres de dominio;
- Se deberían crear – posibilidad que ya se está contemplando – ejes centrales regionales de gran capacidad para conectar a cada país a una red mundial de múltiples centros de distribución en la que ningún organismo predominaría en cuanto a la capacidad de conexión;

- Habría que fomentar el acceso a la información y al conocimiento de las comunidades locales, en particular de las zonas rurales y alejadas, y de las personas desaventajadas y otros grupos de destinatarios mediante el establecimiento de servicios públicos locales e incentivos de carácter regulador que faciliten el acceso a las nuevas tecnologías de la información y la comunicación (TIC) y a Internet.

Tema B: EL CONCEPTO DE USO LEAL EN LA SOCIEDAD DE LA INFORMACIÓN

Sesión 3:

**El concepto de uso leal en la educación, la ciencia,
la cultura y la comunicación**

y

Sesión 4:

**Aplicación en favor de los países
en desarrollo de excepciones legales al derecho de autor**
(por medio de los convenios internacionales)

Los principios y objetivos del derecho de autor son, por una parte, fomentar la creación garantizando derechos exclusivos al creador por un periodo de tiempo limitado, y por otra, apoyar y regular la difusión de los bienes culturales, conocimientos e ideas. En consecuencia el derecho de autor depende de un equilibrio entre la protección de la obra original y de sus creadores y la del interés público y las libertades fundamentales (como el acceso a la cultura y la libertad de expresión). Las tendencias actuales de la propiedad intelectual, especialmente en el ámbito del derecho de autor y los derechos conexos, podrían amenazar este equilibrio. Pero también es cierto que las nuevas tecnologías representan un riesgo potencial para la explotación normal de las obras protegidas por el derecho de autor. Mantener este equilibrio, entre los intereses legítimos de los titulares del derecho y los igualmente legítimos intereses de los usuarios que desean acceder a la información y a la cultura, es de crucial importancia en el contexto de la sociedad de la información.

Los participantes destacaron en particular los siguientes aspectos:

- Los derechos de propiedad intelectual apuntan básicamente a proteger las obras creativas y las innovaciones tecnológicas y no están destinados a proteger las inversiones. El derecho de autor debería limitarse a la protección de obras creativas. La creación de nuevos derechos “*sui generis*” o de derechos conexos para proteger las inversiones como tales no es compatible con la naturaleza de la propiedad intelectual;

- La información como tal pertenece esencialmente al dominio público. El carácter común de la información como tal, vale decir, que no es objeto de un derecho de propiedad exclusiva se ha reafirmado en el Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Artículo 10.2) y en el Tratado de la Organización Mundial de la Propiedad Intelectual sobre Derecho de Autor (Artículo 5). Las legislaciones nacionales no deberían conducir a una monopolización del contenido de información que también consta en obras secundarias como las bases de datos;
- La importancia de las excepciones legales al derecho de autor (tales como el “uso leal” y demás excepciones equivalentes) se debe reafirmar en el entorno digital. Esas excepciones son un elemento esencial del necesario equilibrio entre los intereses públicos y privados;
- No deberían negarse las excepciones so pretexto de que un posible mercado, en particular un mercado creado gracias a la tecnología, podría dar forma de contrato a dicho disfrute (teoría del “fracaso del mercado”), principalmente cuando la excepción se funda en el ejercicio de derechos fundamentales como la libertad de expresión y el derecho a acceder a la información;
- Las revisiones de las legislaciones nacionales e internacionales existentes sobre los derechos de propiedad intelectual (comprendida toda revisión por la Organización Mundial del Comercio del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio) deberían incluir una evaluación de las repercusiones económicas y sociales de toda nueva ampliación de los derechos de propiedad intelectual, y reafirmar la doctrina del “uso leal”; en particular, la prórroga de la duración del derecho de autor podría producir un efecto más negativo, especialmente en los países en desarrollo, que la suspensión efectiva de algunas limitaciones;
- Al examinar la aplicación de la doctrina del “uso leal” se debería prestar atención al contexto económico, cultural y social en el que se usa la obra protegida por el derecho de autor. La definición del “uso leal” puede variar en función de estas circunstancias (en particular el hecho de que se utilice en un país en desarrollo y para las necesidades internas de ese país);
- La protección de los medios técnicos se debe buscar en el derecho consuetudinario y no en el derecho de la propiedad intelectual. La neutralización de los medios tecnológicos no debería estar sancionada ni por el derecho de la propiedad intelectual ni menos aún por el derecho de autor;
- Todo régimen de protección legal de los medios tecnológicos se debe comenzar a aplicar respetando debidamente el uso legítimo, el acceso a la información y al dominio público y debe permitir el ejercicio legítimo de excepciones al derecho de autor;
- Se podría crear con los auspicios de la UNESCO un observatorio internacional de los efectos que tendría la introducción de medios tecnológicos de protección del derecho de autor en el acceso a la información y al dominio público y en la aplicación de las limitaciones del derecho de autor;

- Los representantes de las editoriales subrayaron que el sistema de excepciones al derecho de autor podría ser perjudicial para las inversiones en los países en desarrollo: “Si el derecho de autor no garantiza una protección suficiente, el rendimiento de las inversiones (y, por ende, las propias inversiones) relacionadas con la difusión de los bienes culturales y de la información en los países en desarrollo podría verse amenazado”;
- Aunque una mejora del sistema del derecho de autor no resolverá todos los problemas de los países en desarrollo encaminados hacia la sociedad de la información sí debería fomentarse ya que estimulará la creatividad local y la actividad empresarial y aumentará la capacidad de competir en los países en desarrollo, y reducirá de este modo la influencia de los países industrializados;
- Debe definirse y reevaluarse de forma clara, habida cuenta de los cambios tecnológicos, la misión de servicio público de las bibliotecas, las instituciones educativas y los museos en la era digital para que mantengan sus funciones básicas de difusión de información al servicio de la educación, la investigación y la construcción de la democracia sin competir con los proveedores comerciales de servicios análogos;
- Los organismos competentes como la OMPI y la UNESCO deberían seguir estudiando de forma activa la muy compleja problemática relacionada con el derecho de autor en el patrimonio cultural colectivo (ya sea éste tribal, de tradición oral, etc.) que trasciende las fronteras nacionales y no se puede atribuir a un autor determinado.

Tema C: PROTEGER LA DIGNIDAD HUMANA EN LA ERA DIGITAL

Sesión 5:

La protección de la vida privada en las redes mundiales

y

Sesión 6:

La libertad de expresión

y los medios de comunicación electrónicos

La Declaración Universal de Derechos Humanos enuncia claramente la necesidad de salvaguardar los derechos al respecto de la vida privada y a la libertad de expresión. Ahora bien, las nuevas tecnologías plantean nuevos desafíos a estos derechos fundamentales. La tecnología interactiva hace posible una vigilancia generalizada de la vida privada. Los programas filtros pueden restringir el acceso a la información a la que, de no existir éstos, se podría acceder libremente.

Las participantes destacaron en particular los siguiente aspectos:

- La estrecha relación entre la protección de la vida privada y la protección de la dignidad humana y la necesidad de velar por que en la “economía de la gratuidad” la vida privada no dependa de la capacidad económica y cultural para resistir a la presión del mercado;
- La necesidad de elaborar una estrategia global que comprenda actividades culturales, políticas e institucionales destinadas a proteger la vida privada de las personas; la UNESCO podría propiciar un convenio internacional sobre el respeto de la vida privada que reconociera la validez de una amplia gama de métodos destinados a proteger la vida privada de las personas, comprendidos los códigos de conducta, la autorregulación y medios técnicos para mejorar la protección de la vida privada;
- La necesidad de prácticas de información leales y de “mandamientos” específicos que apunten a proteger la vida privada en Internet. Estos principios podrían constituir una ley tipo;
- Las nuevas tecnologías de la información plantearán nuevos desafíos al respeto de la vida privada. Algunos de ellos surgen a raíz de los conflictos entre las leyes y los múltiples territorios en los que tendrá lugar el comercio electrónico. También habrá que resolver importantes asuntos de seguridad nacional y relacionados con la delincuencia informática. Entre las posibles soluciones podría figurar la adopción de leyes tipo y de nuevos tratados con rigurosas disposiciones de fuerza ejecutiva;
- Si bien es cierto que se contará con nuevas tecnologías para tratar de resolver los problemas que afectan a la dignidad humana cabe recordar que las técnicas son imperfectas y por sí solas no constituyen una solución;
- Habría que apoyar la elaboración de leyes tipo, códigos de conducta, la educación del público y la responsabilidad de los ciudadanos y tener en cuenta que el respeto de la vida privada puede beneficiar a la familia y al individuo;
- Los problemas relacionados con Internet y la dignidad humana deben evaluarse desde una perspectiva moral; la libertad de expresión y la dignidad del ciudadano son aspectos importantes de esa moralidad. También es necesario preparar las bases jurídicas y éticas para la implantación de Internet en los países en desarrollo;
- La protección de la vida privada y el fomento de la libertad de expresión deben considerarse objetivos complementarios en la era digital. Ambos principios se consagran claramente en la Declaración Universal de Derechos Humanos. Los nuevos desafíos para la dignidad humana repercutirán cada vez más en estos dos ámbitos;
- En una época en la que el progreso científico está excluyendo a gran parte de la humanidad, es preciso recordar que todos formamos parte de un mismo mundo; debemos esforzarnos por analizar los desafíos y las oportunidades con una perspectiva común;

- La participación activa de las organizaciones de la sociedad civil en la adopción de decisiones que conciernen al futuro de Internet es fundamental para la protección de la dignidad humana en la era digital. Para que las políticas relativas a Internet sean eficaces deben hacerse eco de la opinión de los consumidores y de los ciudadanos.

CONCLUSIÓN

En las declaraciones de clausura se hizo saber a los participantes que el presente informe y las propuestas se tomarían en cuenta en la versión final que un comité internacional de expertos preparará de la Recomendación sobre la promoción y el uso del plurilingüismo y el acceso universal al ciberespacio, texto que se presentará a la Conferencia General de la UNESCO en noviembre de 2001 para su aprobación por los Estados Miembros. El informe también servirá de guía a la Secretaría cuando tenga que preparar la contribución de la UNESCO a la Cumbre Mundial sobre la Sociedad de la Información que está previsto celebrar en 2003 con los auspicios de las Naciones Unidas. En este sentido, Infoetica 2000 puede constituir un paso importante en el proceso que, es de esperar, conduzca a la aprobación de normas internacionales de conducta basadas en el concepto de un acceso equitativo a la información para todos.

Referencias:

1. Véanse la gama/los ejemplos de información que pueden incluirse en “dominio público” enumerados en el párrafo 2.2.3, pág. 204 del estudio de Longworth.
2. Véase su definición económica que figura en el párrafo 23 del estudio de Longworth.

OPENING ADDRESSES

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Ladies and Gentlemen,

It is a genuine pleasure for me to open this third UNESCO International Congress devoted to Cyberspace, in particular because I had the privilege to deliver the Closing Address at the second InfoEthics Congress in Monaco, in 1998. Hence, today I find myself acting as a sort of *fil conducteur* and, by chairing this Congress, I represent the continuity of the reflection over the years.

I would also like to express my warm welcome and thanks to all the participants, whose presence emphasizes the importance of our task during these three days.

The explosion of new information and communication technologies is bringing down, day after day, the barriers of space and time and, as these technologies enter into the many aspects of our everyday existence, substantially altering our ways of life. In such a rapidly changing situation, our societies are challenged to demonstrate their adaptability and their judgmental capacities, as the deep-rooted conditioning and reshaping effects of the Internet are increasingly felt upon the social fabric.

As you are aware, the main purpose of Infoethics2000, is to stimulate worldwide reflection and debate on the ethical, legal and societal challenges of the Information Society.

The reason for gathering such a great number of people from all over the world, and from the widest range of intellectual disciplines at UNESCO Headquarters, is to tackle a series of crucial info-ethical concerns; concerns we express and experience everyday, without having had, so far, any viable, long-lasting, prospective solution for them.

In these three days, our reflection should thus lay the foundations for, and examine the possibilities of building up an international consensus on a series of appropriate principles – which need to be ethical, before being legal – to be applied in the virtual space of the Internet.

I note with satisfaction that this undertaking complements the action of the *World Commission on the Ethics of Scientific Knowledge and Technology*

(*COMEST*), which I have the honour to preside. In 1997, UNESCO established the *COMEST* as a Forum of Reflection to define principles, which can provide decision-makers in sensitive areas with criteria, other than strictly economic ones, for making choices. The ethical reflection of the *COMEST* is therefore, intended to set the limits between what is possible and what is acceptable, and to provide a keystone for a new culture of responsibility and solidarity.

The *COMEST* initiative on the Ethics of the Information Society and the work of this Congress may thus be seen as complementary efforts, which also aim to provide inspiration for UNESCO's position at the *World Summit on the Information Society*, in 2003.

Setting and guaranteeing universal access to information in the XXIth century – this is the main topic we have in front of us today.

As we all know, the *Universal Declaration of Human Rights* embodies a series of rights and freedoms, which stand at the very basis of our reflection, such as the right to education, freedom of expression, including the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.

Day after day, the challenge to put into operation the principles inspiring these rights stands before us as a major endeavour, either when we seek to apply them to the complex *web* of media which constitutes the Information Society at large, or when we focus specifically on the virtual reality of cyberspace.

On the one hand we feel the urgent need to take rapid and resolute action. On the other, we are aware of the need for great caution in our ethical and legal reflection on the possibilities for translating principles into policy guidelines, and subsequently into practice. We are dealing today with a reality in frantic, often unpredictable, evolution. And taking hasty decisions would put society and humankind in even greater danger.

Nor can we ignore the major dangers – which we are also called to fully envisage, and to address – facing developing countries, which are indeed entering the digital age at a major disadvantage. They undeniably require fair conditions of access to information. But, what is most important, they need the assurance that they will not automatically inherit a whole series of dysfunctions, which the information society has generated within the industrialised countries.

It is essential to bear this in mind before attempting to transfer the paradigms of our information society to other parts of the world.

In his *“Future of Mankind”*, Karl Jaspers reminds us that *“Freedom is the most-used word of our time. What it is, seems obvious to all... Yet there is nothing more obscure, more ambiguous, more abused”*.

If this is overlooked, we would fail to notice that freedom of the media – if and when misused – sadly entails dangerous misinformation of individuals. In the same way, a poor understanding, and or mismanagement of cyberspace

would certainly demonstrate how the virtual and immaterial dimension of today's reality could have very concrete influences – and serious impacts – on an unprepared humankind.

Furthermore, when listening to the call for clearer policy guidelines, urgently needed in the increasingly open 'global information context', it should be remembered considered that most of the national and international debate today is concentrating solely on technological and economic aspects; undoubtedly because their impact appears to be more immediate.

But, as we know, such discussions are detrimental to other aspects, that will have, in the medium and long run, a deeper, more essential significance. These are the social, cultural, ethical aspects that we are urged to reflect upon, and which will have fundamental consequences in the fields of education science and culture, for participation in social life, and for self-determination of our lives.

We are gathered here to reflect upon the right to universal access to information. But if access to information is the way for individuals and communities to reach authentic self-determination, our attention should also be focused on the need for another fundamental right to be guaranteed for all. The right not to be overwhelmed and alienated by the uncontrolled plethora of information coming from outside. The right to *responsibly adapt*, information and to make it *appropriate* to one's own needs and ways of life. A right that I would call, *appropriation*. The right to appropriate information, which is dependent upon access being sustainable before it is universal.

Whilst the notion of 'sustainable development' has gained a wide acceptance during the last decades, that of 'sustainable information' is still to be explored. Thus, when reflecting upon the right to universal access to information, I would suggest that we also bear in mind that a principle of '*sustainable access to information*' has to be fully put in place, in order not to dehumanise the technology.

Technology in all forms is only a means. Learning – and increasing in knowledge – is indeed not the simple consequence of access to information. It is a process determined, but not restricted, to external inputs. Learning is an inner process whereby the subject selects new information and integrates it into existing patterns of knowledge. And, as we know, this selection and integration are based more on the quality than the quantity of external inputs.

The advantage of having access to on-line resources on the Internet is an undeniable opportunity for today's students. But, at the same time, we should be aware that, having access to a dictionary or to an encyclopaedia does not *per se* make someone more intelligent, or a better person. And the picture does not necessarily change by simply increasing the number of accessible books.

Learning is a human activity in which the interaction between teacher and learner is of the highest importance. And, in any cognitive interaction, a teacher is not just an *information provider*, but rather a *facilitator of knowledge*. This

is an aspect we should carefully analyze, as the ‘information supplying systems’ of today should never be mistaken for ‘knowledge managers’.

If we truly want to preserve – and to promote – human dignity in the digital age, we still have a long way to go in evolving mentalities which can properly draw the line of development, along which information becomes *knowledge* from communication *understanding*. If we ignore this aspect our societies will undergo a mere technological change, which will encourage passive automatism, and dampen the critical mind.

Ladies and Gentleman,

I do not think this is what we want for our children. I believe we want them to be full-fledged human beings. We want them to survive the impact of the society of the XXIth century; to grow stronger, healthier, more independent and self-determined.

We certainly do not want them to be *info-poor* or *info-deprived*. We surely want them to be *info-rich*; but definitely not *info-plagued*. We do not want to see them overwhelmed by a pseudo-richness they are not in a position to master. In a word, we want them to be *info-empowered*.

In the end, I believe we want them to be free. Which implies for them to be, first of all, freethinkers, who are provided with conceptual instruments indispensable to deal with the complex issues raised by the new global dimension of today’s world.

If this is true, we have also to provide them with a most precious element, more and more often overlooked: *silence*.

Indeed, an authentic protection of privacy is guaranteed not only by establishing rules for access personal data, but also, and foremost, by preserving for each individual a personal space of reflection. An innermost space of tranquillity away from external noise where knowledge can be internally structured; as notes echo in silence to produce music.

I truly hope that the XXIth century will be the one where the Right to a *Sustainable* access to information will be guaranteed for all.

To do so, I trust that the value of personal spaces of reflection will be fully recognized, as the sole means to ensure responsible adaptation and appropriation of information for each human being.

This would indeed result in an authentic emancipation of each individual; the spiritual, intellectual, ethical, moral emancipation of the minds that alone can induce genuine material independence, and long-lasting self-determination.

As a conclusion – and paraphrasing Martin Heidegger – I would ask that we bear in mind the fact that technology “*does not think*”. It is high time to be fully aware that all responsibility for reflection lies with us.

It is only by establishing our reflection on a thorough, critical approach, that we will be able to address our social, legal and ethical concerns and to reposition human beings squarely at the centre of their own existence.

VIGDÍS FINNBOGADÓTTIR

Chairperson of Infoethics 2000

Madame la Présidente,
Excellences,
Mesdames et Messieurs,

La tenue de ce Congrès Infoéthique 2000, que j'ai le privilège d'inaugurer aujourd'hui au nom du Directeur général, M. Matsuura, est l'aboutissement de nombreuses consultations qui ont eu lieu à Paris et dans plusieurs régions du monde. Il démontre l'attachement résolu de l'UNESCO aux principes et valeurs contenues dans la Déclaration universelle des droits de l'homme, notamment le droit à l'information et à la libre expression, le droit à l'éducation, le droit à la dignité, le droit à l'expression culturelle.

Aussi, en vous accueillant à cette conférence, j'ai la conviction que votre participation permettra d'avancer encore plus dans la réflexion, en vue de réaffirmer et renforcer ces principes fondamentaux dans le nouvel environnement informatique, des multimédia et des réseaux interactifs qui caractérisent notre époque.

Nous sommes naturellement très attentifs aux préoccupations de nos États membres et des nombreuses organisations non-gouvernementales avec lesquels nous travaillons en étroite collaboration. L'émergence de «la société de l'information» peut entraîner non seulement un accroissement de la prospérité et de la richesse des uns, mais aussi un appauvrissement accentué des autres, creusant ainsi encore plus le fossé entre «info-riches» et «info-pauvres» dans tous les domaines de l'activité humaine.

Le rôle de l'UNESCO est à la fois d'explorer les possibilités extraordinaires qu'offrent les nouvelles technologies de l'information et de la communication et d'étudier les voies et moyens d'éviter la création de nouvelles formes de ghettos, les ghettos de l'information des cyber-analphabètes, des démunis, des minorités défavorisées et des pauvres. Dans cette optique, l'UNESCO a choisi d'axer ses activités futures autour de trois objectifs, tous relevant des thèmes de ce Congrès : l'accès à l'information pour tous, la promotion de la diversité, notamment culturelle et linguistique, dans le cyberspace et le partage de la connaissance.

Les technologies de l'information et de la communication offrent des moyens inespérés de promouvoir l'accès à l'information, et en particulier, de rendre l'information du domaine public accessible au plus grand nombre. La protection de ce bien commun répond à la vocation de l'UNESCO, qui est de préserver et renforcer, dans ses domaines de compétence, les principes, normes et standards fondés sur les valeurs éthiques et sociales, dans le respect de la dignité humaine et des droits de l'homme universellement reconnus.

Comme le souligne le rapport du PNUD sur le développement humain de 1999 :

« ...une carte globale des technologies se dessine à une vitesse telle que la plupart des gens ne peuvent en saisir les implications, et encore moins à y répondre, et plus vite que quiconque soit capable d'en maîtriser les impacts éthiques et sur le développement. »

Mesdames et Messieurs,

L'accès à l'information pour tous dans le cyberspace est donc l'une des premières priorités de l'UNESCO. Tous les pays, non seulement les plus industrialisés, ont un intérêt vital à ce que la société de l'information s'organise et se développe de manière telle que chacun puisse bénéficier d'un accès optimal à l'information, considérée comme étant un bien public global. Il est encourageant de noter que, dans la Charte d'Okinawa sur la Société Globale de l'Information, le G8 a réaffirmé, en juillet dernier, son engagement pour la formulation et la mise sur pied de stratégies mettant à la portée de tous l'accès universel à l'information et aux réseaux de communication. Cette action, nous le pensons fermement, doit reposer sur l'amélioration de l'accès aux technologies en tant que telles, mais également sur l'amélioration de la qualité et de la diversité des contenus.

Les technologies de l'information et de la communication ont le potentiel d'ouvrir l'accès à une masse infinie de connaissances émanant de nombreuses sources publiques et privées. Aujourd'hui, cet accès demeure, cependant, inabordable pour un très grand nombre de personnes, en raison des contraintes socio-économiques rencontrées dans la plus grande partie du monde.

Cette profonde inégalité constitue un défi éthique de taille pour la communauté internationale. Gouvernements, organisations intergouvernementales, secteur privé et société civile doivent ensemble, de toute urgence, concevoir et mettre en place les stratégies permettant de relever ce défi. Les lois du marché, à elles seules, ne peuvent représenter la solution. Un juste équilibre doit être trouvé entre les intérêts privés axés principalement sur la commercialisation de l'information et l'intérêt général qui exige qu'une partie de cette information appartienne au domaine public, et, par conséquent, demeure accessible à tous et partout dans le monde.

Dans cette perspective, nous souhaitons travailler en étroite collaboration avec les organisations sœurs du système des Nations Unies et les organisations non-gouvernementales concernées pour que les politiques tarifaires et les prix pratiqués pour l'accès à l'Internet soient adaptés aux capacités économiques des pays en développement et des zones reculées défavorisées.

Dans le domaine des droits relatifs à la propriété intellectuelle et aux droits d'auteur dans le cyberspace, il est certes légitime que soient protégés les droits des créateurs. Néanmoins, il est tout aussi essentiel de préserver les exceptions à ces droits déjà communément admises, parmi lesquelles la doctrine de l'usage loyal (le *Fair use*), exceptions que certains souhaiteraient réduire. Alors même que nous nous engageons dans un environnement de réseaux électroniques permettant un accès plus facile aux connaissances, ce délicat équilibre inhérent au régime de la propriété intellectuelle devrait être maintenu, afin de pouvoir réutiliser certaines œuvres, sans risquer d'être en infraction avec les règles concernant les droits d'auteur.

Il est un fait notoire que les droits relatifs à la propriété intellectuelle sont concentrés dans un nombre restreint de pays industrialisés. Aussi l'exigence de la diversité culturelle, à laquelle nous sommes profondément attachés à l'UNESCO, pourrait être sérieusement mise en péril par le renforcement de ces droits dans l'environnement électronique, car il est évident que ceux-ci rendent aléatoire la participation de la plupart des pays en développement dans le domaine de la création. Cela pourrait aussi devenir un obstacle majeur à l'enseignement à distance où le système actuel des licences constitue un frein à son expansion universelle. La créativité pour tous, y compris les pays en développement, dans les communautés pauvres ou défavorisées, de même que l'expression de la diversité culturelle doivent être au cœur de nos préoccupations. D'où l'importance des réflexions et échanges qui vont avoir lieu pendant ces trois journées.

(Mr Modoux continued in English)

Madam Chair,
Ladies and Gentlemen,

This major concern relates to the scope of the second UNESCO objective, which is to **enhance human diversity** in all its forms, including cultural and linguistic diversity. The Organization, according to its constitutional mandate, is called upon to build bridges between cultures and nations. The preservation of the richness and diversity of the universal human heritage is a concept that is enshrined in many international texts and national constitutions and legislations. It should be reaffirmed in application to the cyberspace.

Access to knowledge content on the interactive networks is another important issue with many ethical, legal and societal aspects that require the full

attention of the international community. Fostering the quality and reliability of information resources on these networks is an endeavour that can be carried out only with the participation of all, both from the private and public sectors, in close collaboration with the civil society.

The application of information and communication technologies in multi-lingual and culturally diversified environment has not been fully exploited, especially in developing countries. Consideration needs to be given to the provision of services in minority languages and to the adaptation of services to specific cultural requirements. The Ministers of Culture in their last meeting in Mexico in 1999 insisted on the necessity to preserve and facilitate cultural and linguistic diversity in the information society and, on this occasion, recognized UNESCO's key role.

UNESCO has already taken steps to launch concerted actions at the international level in putting ICTs to work in building digital bridges and to improve the capacity of all countries, particularly developing countries and countries in transition to participate in the knowledge-based economy. The holding of Infoethics meetings at the international and regional levels is one example of this effort.

Infoethics'97 and *Infoethics'98* have already committed the Organization to campaign for a different type of norms based on a minimum standard of universal access to information. An access that, quoting from your intervention in Monaco in '98, Madame Chair: *"will aim at transferring more information in the public domain so that all people ... can acquire for themselves ... knowledge that can be spread as never before through the marvel of information technology"*.

The Director-General of UNESCO participating recently in the ECOSOC meeting in New York strongly emphasized the role of UNESCO in promoting the use of ICTs to make educational material in the public domain widely available.

We are also preparing, in close co-operation with our Member States, a recommendation related to the promotion and use of multilingualism in and universal access to cyberspace that, with the approval of our governing bodies, should lead to the establishment of guide lines at a world level. In this regard, the outcome of this Congress will make a valuable contribution to the work of the international expert meeting that will be finalizing the concrete terms of this recommendation in spring 2000.

UNESCO has also adopted a new programme which aims at increasing the volume of public domain information available on the Internet. We, indeed, believe that government and publicly funded institutions should be equipped, should share and should make available their information in the public domain. An important effort is still necessary in promoting the principles of **knowledge sharing**. This is the third objective of the Organization. In this matter, all should be empowered to participate on an equal footing, including women and youth.

Of course, the prerequisite for access to information and knowledge sharing is the free flow of information and, in particular freedom of expression. This is a fundamental principle to which UNESCO is totally committed, according to its Constitution. This issue is of the highest importance for the future of the information society.

This being stressed, the Organization is also concerned with both privacy and dignity to which every citizen is entitled. Those are equally well established rights in international and national law. Nevertheless, the increase in the use of technologies in governments, business and communities poses a serious threat to these rights. It is, in our opinion, great time to lay down some ethical principles or best practices on which policies on the exercise of these two very fundamental human rights in cyberspace should rest.

Madam Chair,
Ladies and Gentlemen,

Information is not knowledge and knowledge is not necessarily wisdom. Access to information resources and to information and communication technology can be made available, even in the most remote areas of the world, with sufficient political will and commercial incentives. Access to information and communication technology can enhance our knowledge of peoples, of their customs, achievements, societies and so forth. Access to information and communication technology, does not however, produce wisdom.

It cannot be sufficiently emphasized that the basis of all is education. Education of individuals to use these technologies, education of communities and education of societies as a whole, through their decision makers and leaders. It is not enough to possess the skills required for the use of the information and communication technologies to gain wisdom.

Wisdom comes from our understanding of what the ICTs can be used for, how they can be used and with whom they can be used, so as to enhance our professional and personal lives. Our understanding of the ethical, societal and legal implications of the information and communication technologies for human beings is essential.

UNESCO strongly advocates that all of these issues become part of the educational systems throughout all our Member States in order to raise the awareness of their populations as to how the new technologies and access to knowledge can help them in alleviating their daily problems of health, poverty, discrimination and hunger and, in so doing, enhance their wisdom for their best management.

Education, in its fullest sense, is, in my opinion, the ultimate answer to universal access to information and knowledge sharing. The knowledge society depends on it. For this reason, I believe that the themes you are about to discuss

should be brought to the attention of all the international organizations concerned and to all national authorities. UNESCO will make every effort to do this.

UNESCO intends, in particular, to bring these concerns to the agenda of the World Summit on the Information Society that is being planned in 2003 by ITU in close cooperation with interested United Nations Agencies with a “*view to develop a common vision and understanding of the information society and to draw up a strategic plan of action for its concerted development*” and “*to articulate a clear statement of political will*”.

We need, however, to establish the concrete benchmarks to define the principles, norms, standards and practices that should be encouraged in the establishment of national legislation and the reinforcement of international instruments, so that cyberspace and the knowledge society become a space where everyone has the same chance for education, respect, justice and prosperity.

You, the experts in these fields, coming from all horizons, different sectors of society with different cultural and educational backgrounds can assist us in delivering this message throughout the world. We need your ideas, knowledge and experience to guide us and to help us participate in this endeavour essential for the future of the emerging knowledge society.

It is only through such international consultations that we can achieve this endeavour and I am pleased that UNESCO can provide the opportunity for such platforms.

I am confident that your contributions to the forthcoming debates will reinforce the importance of the issues under consideration. I wish you all the best in your deliberations and thank you for your attention.

ALAIN MODOUX

Assistant Director-General
Communication, Information and Informatics
(UNESCO)

THE INFORMATION SOCIETY
AND THE EXPECTATION
REVOLUTION

LA SOCIÉTÉ DE L'INFORMATION
ET LA RÉVOLUTION
DES ATTENTES

LA SOCIEDAD
DE LA INFORMACIÓN
Y LA REVOLUCIÓN
DE LAS EXPECTATIVAS

On starting the new millennium we ponder on the fact that civilization has developed through three revolutions: the agrarian revolution, the industrial revolution and the information and telecommunication revolution. Today, however, in almost all emerging countries, these three revolutions have not happened sequentially. Rather, they coexist with serious implications, not only for the countries experiencing them, but for all nations. Dr. Konzevik, as a corollary to his original postulates on “The Expectation Revolution,” “The Schizophrenia of Contemporary Man” and “The Lost Generation” believes that the policies to be proposed on the accessibility to information, copyright laws and freedom of expression should be considered within a framework that takes into account two basic tenets:

- The need to differentiate absolute poverty from relative poverty and*
- The urgent need to stop the growing and wide-spread tendency to confrontation, which is progressively more violent, between the haves and the have-nots.*

A l’aube du nouveau millénaire, le fait que la civilisation ait progressé à travers trois révolutions – la révolution agraire, la révolution industrielle et la révolution de l’information et des télécommunications – est pour nous un sujet de réflexion. Cependant, dans la quasi-totalité des pays émergents, ces trois révolutions ne se sont pas produites l’une après l’autre. Elles s’y poursuivent simultanément, ce qui a de graves conséquences non seulement pour les pays qui y sont confrontés, mais aussi pour l’ensemble des nations. D. Konzevik estime, opinion qui est le corollaire de ses postulats originaux sur « The Expectation Revolution » (La révolution des attentes), « The Schizophrenia of Contemporary Man » (La schizophrénie de l’homme contemporain) et « The Lost Generation » (La génération perdue), que les orientations à proposer en ce qui concerne l’accès à l’information, la législation concernant le droit d’auteur et la liberté d’expression devraient être analysées dans un cadre qui tiennent compte de deux considérations essentielles :

- La nécessité de faire la distinction entre pauvreté absolue et pauvreté relative;*
- La nécessité d’enrayer d’urgence la tendance – qui s’amplifie et se généralise – à un affrontement de plus en plus violent entre les nantis et les pauvres.*

A comienzos del nuevo milenio estamos sopesando el hecho de que la civilización se haya desarrollado gracias a tres revoluciones: la revolución agraria, la revolución industrial y la revolución de la información y las telecomunicaciones. No obstante, hoy en día, en casi todos los países emergentes estas tres revoluciones no han seguido por ese orden. Al contrario, todas ellas coexisten, lo cual acarrea repercusiones graves no sólo para las naciones que viven esa situación, sino para todas las del mundo. Como corolario de sus postulados originales expuestos en “The Expectation Revolution” (La revolución de las expectativas), “The Schizophrenia of Contemporary Man” (La esquizofrenia del hombre contemporáneo) y “The Lost Generation” (La generación perdida), el Dr. Konzevik estima que las políticas que se propongan en materia de posibilidad de acceso a la información, de legislación sobre el derecho de autor y de libertad de expresión, se deben contemplar en un contexto que tome en consideración dos principios básicos:

- La necesidad de diferenciar la pobreza absoluta de la pobreza relativa; y*
- La necesidad urgente de poner un término a la tendencia creciente y generalizada al enfrentamiento entre poseedores y desposeídos, que está adquiriendo perfiles cada vez más violentos.*

I wish to express my sincere thanks to UNESCO for giving me the opportunity to speak today.

I will try to give a very short speech with some very provocative ideas, to push you into the discussion about the subject of this conference. First of all, I think the most important issue in our generation is the emergence of the virtual or digital world. No one aspect in our life will be the same after the 1980's. – Politics and economics, education, professions and business, will be changed forever after the emergence of the virtual world, father of “the information revolution”

About 80 years ago, in this city, Gertrude Stein, coined a term: *the lost generation*, which at that time related to those people who had fought in the First World War. “They are the lost generation they turn to alcohol and drugs”. Most of us are the *new lost generation*, because this revolution took us in our middle years. Those born after the 80's are the new generation in this new revolution.

It is not by chance that there is a new watch, the Internet watch. Why? Because there is a new generation of young people who want to chat with people all over the world and they need to arrange for the time difference between a boy in Shanghai, and a girl in Buenos Aires or in Mexico City or in Paris. But, with the new Internet watch they only need to say: “We will meet at 2, Internet time”.

This “information revolution” is the last of three very important revolutions in the history of humanity.

Number one, was the agrarian revolution and number two was the industrial revolution. *The agrarian revolution* human beings on the land, *the industrial revolution* in the city and “the information revolution” changed the concept of time and space forever.

In almost every emerging country the three revolutions coexist, with enormous implications for those countries and for the whole world. The fact that the three revolutions are coexist in emerging countries in an interdependent world which communicates in real time, makes me think that the future is really black, unless we make several very drastic decisions now.

Why? Because “the information revolution” has three children: number one, **globalization**, number two, **the knowledge explosion** and number three, which is my main contribution to this discussion, **the expectation revolution**.

What is globalization now? **Globalization** means that for the first time in human history the benchmarking in every aspect of life is changing. In a world without borders, to be the best in your market you need to be the best in the world, not the best in your city or in your country. When **East** confronts West, the rules of the game are not the same. When the **West** puts family before work and in other places they put work before family, then business is not as usual anymore.

The knowledge explosion means that three decades ago, knowledge changed every 20 or 30 years.

today the average is 5 years, and in information technology it is 6 months or one year. For this reason the new illness of our generation is **professional obsolescence**.

The first paradigm I mention in my new book about globalization is that a degree or diploma is no longer synonymous with knowledge, unless you continue to study for the rest of your life. The *knowledge explosion*, brought about by “the information revolution”, pushes us to invest a lot of money in new and more efficient technologies for education because every day in every science there is new knowledge which destroys existing knowledge. The only way to cope with this speed is to learn to learn quickly. (And by the way, this is probably, the only reason to go to school).

A doctor who got a degree 20 years ago and went to live in the countryside, if unable to read a journal or go to conferences, or in a nutshell, unable to continue studying, could be prescribing a drug which last week may have been found to produce exactly the opposite result of what the doctor used to know. The perception of this gap between general knowledge and our individual knowledge explains why every professional, all over the world today, is afraid of the future, because the future is not what it used to be.

In earlier times, people were unable to distribute their time in a satisfactory way between work and family. In this new working environment we need to divide scarce time among three different and confronting objectives: *work, family and study*. If not, we will be on the streets, totally unemployed, unable to compete with the new graduates.

“The Expectation Revolution”: Who is poorer? The poor today, or the poor of 100 years ago?

I ask the same question everyday in lectures in different places, and the answer is always the same. Some say today, others say yesterday’s people were poorer, others reply they are in the same situation – and only a handful – and this is the big challenge for UNESCO, the World Bank and Governments – make a distinction between **absolute poverty** and **relative poverty**.

If we don't distinguish between absolute poverty and relative poverty, we will miss the target and we don't have time to make new mistakes at this crucial point.

If we look at emerging countries we will see that in the 18th century a man or a woman knew in his or her entire life no more than 20 world news items. Today, in the time it takes you to shave, you have the same amount of international information.

A hundred years ago an individual in the countryside of an emerging country knew, during a life time 200 people, all poor. In the year 1930, an individual would have known, during a life time around 1000 people, in the same poor situation. Today, at 8 o'clock or 9 o'clock at night an individual watches tv and for half an hour or an hour, in real time, looks at what is happening around the world. And for the first time, **never forget this**, a poor man or woman has emerged, who knows what happens all over the world in real time, and has elements of comparison he or she lacked in the past, including the new visual dimension.

The information society and the access to information has a **hidden trap**. I coined a principle: "*when your knowledge grows 1 percent, your expectations grow 5 percent*". Not one emerging country, anywhere in the world, is growing as fast as the expectations of the poor. The poor Indians, who have lived with the same clothes, food and medicine for thousands of years are, for the first time, no longer comfortable with their situation. For the first time, they are asking for hospitals and medicine, roads and doctors, schools and teachers, foods and rights, all together, right now.

Where is the hidden trap? We know that we want to go from here to there, from lack of information to global access to information. But the dynamics of the process are totally unclear, because the first step is to give access to information, and this information will immediately raise the expectations for more goods and services and human rights. This is what we are seeing in most emerging countries today.

Of course, this *expectation revolution* does not affect only the poor, but it is their situation which is clearly a matter of great concern about social unrest. Look at what is happening today in many emerging countries and you will see that social unrest is not a thing of the future. It's happening now. *The first well-informed, rebellious poor individual has been born, with a lot of political, economic and social implications.*

The "information revolution" and its three children bring new and difficult choices to our generation.

Number one: "standard of living" or "quality of life". Number two: which is also related to UNESCO's activities. Our children will be **specialists** in more and more narrow fields and they will be "illiterates" who know more and more about less and less, or will we have **generalists** able to understand the whole picture?

Think, in your countries, in your governments, and your corporations, who is able to look at the whole picture? **Pico de la Mirandola**, centuries ago, was the last man who knew all the knowledge of his time.

We have a big question to confront: the knowledge explosion pushes us to narrow our fields of expertise more and more, resulting in an inability to see the whole picture. However, if we decide to be generalists, we cannot know the state of the art in different fields.

I have no time on this occasion to develop my ideas about the solution to this extraordinary puzzle.

This is a time of permanent change for everybody, but there are some priorities we need to deal with and, in my opinion, the main priority at the start of the new millenium is how we will manage "the expectation revolution". The question is: will we be in time to defuse the bomb of the expectations revolution in emerging countries?

This is no longer a problem of a little country which does not affect the rest of the world. Look at the United States. In the next 20 years, the composition of the population will change dramatically, because the hispanic influence will probably become decisive and crucial.

Driven by expectations, local and international migration will increase. When I want to know if a country is in good shape, I don't go to economic or social indicators, I ask only one question: "how many people want to go to live in this country and how many citizens want to emigrate?" A hundred years ago, people from Europe, mainly from Italy and Spain, migrated to Argentina. Today, in Argentina, indicating clearly the economic situation, 33% of the young people, grandchildren of those immigrants, want to go to live in Spain and Italy.

We are out of time. I don't think we have time for byzantine discussions. We need to discuss how we will deal with the most important and urgent problem of our generation which is totally related to global access to information.

Go to any emerging country and you will no longer see the political stars of the 60's or 50's. you will see the stars of today which are the role models of this generation. Look at China, which is probably the best example of a big change in a very short period of time. And look at those whom young people imitate or want to emulate. Then you'll understand how global this world is, in terms of news and publicity. More expectations everywhere.

What will we do now?

Last night, in the rue de Rivoli in this wonderful city, I saw a plaque in the building where the discussions for the "Marshall Plan" to help Europe in 1945, were held nearly 50 years ago. It said, "*we need to put money to avoid hunger, despair and chaos*".

It is the same situation today, but with a totally different problem. It is not only a question of giving access to information, it is what we will do with people who are informed, when they don't have any possibility of accessing

the goods and services that they are dreaming of. And this is a world problem, not only an emerging countries problem. I think that the approach of many organizations is totally wrong, saying to the rich people: donate money to save the poor. No, in the best tradition of **Adam Smith**, give money to save yourself!

If you go to emerging countries you will see that rich people have bodyguards and in some cases a private army. They are living in ghettos, because for the first time “the expectation revolution” has changed the rules of the game regarding property and rights. In this city again, in the 1968 student revolt, someone wrote “imagination rules”. We will need a lot of imagination to cope with this problem.

Let me insist in the hidden trap of *the information society*. If you give information to poor people you raise expectations. And because of these increased expectations the poor will push their governments to give them today what they didn't have for thousands of years. Then we need to think about the information society, with a new approach. Things here are not so simple and of course not easy to solve.

The old left is in total crisis because as we enter into a *knowledge society*, what will they propose? to confiscate real estate and factories? This is not the new source of inequality in income distribution . the new source of inequality is **knowledge**. I expect no-one on the old and obsolete left will propose to confiscate and redistribute brains...

The poor are entering this race to the “knowledge society” with two major handicaps. First, they don't have money to pay for good schools, secondly, they also lack knowledge. Thus, the gap between the haves and the have-nots will probably **broaden before it narrows**. But will we achieve peacefully this golden age of global access to information and equal opportunities or we will confront social pressures all over the world between the have's and the have-nots?

I invite everyone here to bear in mind, when making proposals, that we are running against time in the battle of expectations. This is a subject one could go on talking about for hours and I only have 20 minutes. It's time to finish.

I would like to do so by remembering that Jorge Luis Borges, probably the most important and influential writer of the last century, gave me, in our natal Argentina, a little piece of advice: “Never, never give a lecture for more than 20 minutes”. I replied, “you know normally my lectures last four hours”. So he said, “after 20 minutes no one in the audience listens to you but much more important: after 20 minutes you don't have any idea of what you are talking about...”

So I want to finish here, but I can't. Mr Alain Moudoux from UNESCO, said to me: “you always speak but never use audiovisual. we will pay you only if you use some audiovisual”. So I will show you some useless slides to comply with UNESCO's rules.

But seriously, I think these short sentences will reinforce the presentation and make you to think in a new way about this touchy subject, which ultimately is the primordial task of a speaker.

- A) “THE SINGLE MOST IMPORTANT ISSUE OF THE TWENTIETH CENTURY IS THE EMERGENCE OF THE VIRTUAL WORLD”. David Konzevik
- B) “THE INFORMATION REVOLUTION HAS CAUSED THE COLLAPSE OF COMMUNISM AND IS RADICALLY CHANGING CAPITALISM”. David Konzevik

In capitalism, there is a Copernican Revolution. The corporation is no longer at the centre of the system. The consumer is. If corporations don't understand that, they will be out of business very soon. “The information revolution” has put in the hands of consumers two tools they didn't have ten years ago: **instant information** and **options**.

- D) “THE INFORMATION REVOLUTION HAS SPAWNED THREE CHILDREN: GLOBALIZATION, THE KNOWLEDGE EXPLOSION AND THE EXPECTATIONS REVOLUTION”. David Konzevik
- E) “THERE IS ONLY ONE THING WORSE THAN BEING CAUGHT UP BY GLOBALIZATION, AND THAT IS NOT BEING CAUGHT UP AT ALL”. David Konzevik

All over the world, a lot of people are misdiagnosing the problem. They say we are against globalization. No, no, no, the father of globalization is “the information revolution”. Globalization is a consequence. As Napoleon used to say: “when the time of an idea comes, the best army in the world cannot stop it” no one can stop “the information revolution”, with all the good and bad implications for our generation.

- F) “THE INFORMATION REVOLUTION AND GLOBALIZATION DID NOT CREATE POVERTY. THEY DID, HOWEVER, LIFT THE VEIL THAT KEPT IT CONCEALED”. David Konzevik

Do not kill the messenger for bringing bad news.

- G) “TO GLOBALIZE IS DANGEROUS, NOT TO DO IT IS SUICIDE”. David Konzevik

Because this is the only viable way for emerging countries to narrow the gap and to save time on their way to well-being.

- H) “IN A GLOBALIZED WORLD, POWER IS LIKE A VIOLIN. IT IS TAKEN WITH THE LEFT HAND BUT PLAYED WITH THE RIGHT”. David Konzevik

You know it in Europe and we also know it in Latin America . No matter what a candidate's agenda is, once in power, reality is reality and not wishful thinking.

- I) "THE KNOWLEDGE EXPLOSION BREAKS UP OLD PARADIGMS. THE NEW DISEASE IS CALLED PROFESSIONAL OBSOLENCE". David Konzevik
- J) "WHO IS POORER, A POOR MAN TODAY OR A POOR MAN 100 YEARS AGO? THE ANSWER DEPENDS ON WHETHER WE ARE TALKING ABOUT ABSOLUTE POVERTY OR RELATIVE POVERTY". David Konzevik

The concept of relative poverty is a tricky one and a marvelous bridge to unhappiness in modern society, and not only related to poor people. This year a magazine in New York published an excellent article: "Why is everybody unhappy in New York?" The first chapter was about people who make more or less \$6000 per year. The second was about those who make around \$100,000 per year and the final chapter about the ones who make around \$1 million per year.

My explanation rests in human nature. Unfortunately, we live and work, not in absolute terms but in comparative terms. "Keeping up with the Jones" used to be only an American phrase. Not anymore. It's an universal disease.

- K) "THE EXPECTATION REVOLUTION IS IN EMERGING COUNTRIES THE MOST IMPORTANT AND URGENT SOCIAL, POLITICAL AND ECONOMICAL PHENOMENON OF OUR TIME". David Konzevik.
- L) "FOR EVERY 1% YOUR KNOWLEDGE GROWS, YOUR EXPECTATIONS GROW 5%". The Konzevik Principle
- M) "THE EXPECTATION REVOLUTION HAS RESULTED IN AN UNPRECEDENTED PHENOMENON: MODERN SCHIZOPHRENIA". David Konzevik

Briefly, individuals today are divided into two different personalities: one as a consumer and the other as an income producer. As consumers they want cheap prices, sophisticated goods, businesses open 24 hours a day 365 days a year, the best quality, comprehensive and longer-term warranties, quick service and a wonderful buying experience. They push the provider in every aspect they can.

As professionals, they want to work only 8 hours a day and rest on Saturdays and Sundays and enjoy long vacations. And especially they don't want to work in a very stressful atmosphere.

We are divided for the first time. Due to time constraints, I cannot elaborate on this idea now. I just want to present it and leave my thoughts with you.

- N) "TIME IS MONEY OR MONEY IS TIME?". David Konzevik

For decades, people in the United States were wrong. They said “time is money”, time is not money. No, it’s not. Our discovery is that **“money is time!”** as time is the only scarce resource in life we cannot borrow. If we lose time, we cannot recover it. You can recover money, but you cannot recover time.

It’s interesting to think about what happens when you ask someone what their most scarce resource is: time or money. Think how many people in a global world will give the first as an answer and how many will give money as an answer.

- O) **“IN A KNOWLEDGE-BASED SOCIETY, MARX NEEDS TO BE UPDATED: “PROLETARIAT OF THE WORLD: GET TRAINED”.** David Konzevik

Otherwise, they will not enter into the knowledge society. The unemployed all over the world are knocking at the door to enter into the system. If we don’t allow them to enter they will bring down the doors of the building. The problem is that our unemployment is totally different from the one in the past. It’s related, in many cases, to lack of knowledge of the new languages of globalization.

Francis Bacon used to say: “we are what we know”. Totally true in this new society, but the following phrase is better:

- P) **“KNOWLEDGE IS IMPORTANT, BUT MORE IMPORTANT IS IMAGINATION”.**
Albert Einstein

We need imagination now!

- Q) **“WILL WE IN EMERGING COUNTRIES GET THERE IN TIME TO DEFUSE THE EXPECTATIONS REVOLUTION BOMB?”.** David Konzevik
R) **“TRUE CIVILIZATION WILL HAVE BEEN BORN THE DAY DOGMAS BECOME IDEAS”.** David Konzevik

This is at the heart of today’s conflicts in many parts of the world. I don’t know if we, in our generation, will see this civilization, the day when we will be able to discuss ideas instead of fighting for or against dogmas.

Our hope is in our children. My strong belief is that in “the information revolution”, through the Internet and other devices, our children are going to talk daily with children of different environments, religions, political beliefs. Then they will know each other, they will learn from other boys and girls and finally they will discover, without our prejudices, that they have a lot of things in common and this is the only possibility for survival in this dogmatic world. Then, and only then, will dogmas fade away and open the door to ideas.

- S) **“THE FUTURE IS NOT A GIFT, IT IS A CONQUEST”.** (Anonymous).

In order to perform our generational duty and leave to our children a better world than the one we received, we must rethink the way we are living and working and pave the way for a new civilization. And the only way is to build it is to base it on our agreements so that we don't destroy each other on the basis of our disagreements.

Finally, the pace of change, makes forecasting the future extremely difficult. Read most of the books about forecasting, especially in economics and business, years later, and it is the best comic script you can read. After a couple of years many writers want to destroy their books. The velocity of change has no precedent in the history of humanity.

True, it's very difficult to forecast the future. Instead:

We can and must invent it!

Thank you very much, ladies and gentlemen.

DAVID KONZEVIK

Economist and Futurologist.

President & CEO of "Konzevik Y Asociados"



THE ROLE
OF PUBLIC AUTHORITIES
IN ACCESS
TO INFORMATION

LE RÔLE
DES POUVOIRS PUBLICS
DANS L'ACCÈS
À L'INFORMATION

LA FUNCIÓN
DE LOS PODERES PÚBLICOS
EN EL ACCESO
A LA INFORMACIÓN

SESSION
SESIÓN

1

BROADER AND
MORE EFFICIENT PROVISION
OF PUBLIC CONTENT

ÉLARGIR ET RATIONALISER
L'OFFRE D'INFORMATIONS
APPARTENANT
AU DOMAINE PUBLIC

AMPLIAR Y RACIONALIZAR
LA OFERTA DE INFORMACIÓN
DE DOMINIO PÚBLICO

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The changing shape of information and the role of government

This paper will look at ways in which governments can facilitate better access to information in both the public and private sector. The particular emphasis is on the growing influence of the Internet on all sectors of society. The role of the Internet and the growth of electronic democracy, are briefly explored. This is to set the parameters for discussion on how an information intensive society is changing the expectations of the citizen. In particular, the paper contends that in our information rich environment we need to find ways for the citizen to be better informed. In the emerging knowledge economy it is time we looked at the whole question of information rights from a new perspective. In the past, the push has been access to official government information. Much of this is codified in law in many developed countries (with laws currently emerging in England and Scotland). These laws have resulted in government accountability. But, the rise of the Internet has created new expectations and citizens are now beginning to demand accountability from private sector organizations. Thus, governments have a role in providing not only better access to government information, but also leading discussions on how private sector organizations will be more accountable to the citizen and contemplating what legislation might be necessary.

Évolution de la forme de l'information et rôle de l'État

Cette communication examine les moyens par lesquels les gouvernements peuvent contribuer à améliorer l'accès à l'information dans les secteurs tant public que privé. Elle s'intéresse en particulier à l'influence croissante de l'Internet sur tous les segments de la société. Le rôle de l'Internet et l'extension de la « démocratie électronique » sont examinés brièvement, le but étant de poser les paramètres d'une analyse de la manière dont une société grosse consommatrice d'information modifie les attentes des citoyens. La thèse défendue est en particulier que dans notre environnement riche en information il faut trouver des moyens de permettre aux citoyens d'être mieux informés. La nouvelle économie du savoir qui se dessine appelle à réexaminer sous un nouvel angle toute la problématique des droits relatifs à l'information. Jusqu'à présent, les efforts ont visé à élargir l'accès à l'information officielle émanant des administrations. Dans bien des pays développés, ils ont en grande mesure abouti à des lois (des législations sont en train de prendre corps en Angleterre et en Écosse). Ces lois ont eu pour effet d'amener les pouvoirs publics à rendre des comptes aux citoyens. Cependant, l'avènement de l'Internet a créé de nouvelles attentes et les citoyens commencent maintenant à demander des comptes aux organisations du secteur privé. Il incombe en conséquence aux pouvoirs publics d'intervenir non seulement pour améliorer l'accès à l'information qu'ils détiennent, mais aussi de mener le débat sur les moyens de rendre les entreprises davantage comptables envers les citoyens et d'étudier les dispositions législatives à prendre éventuellement à cette fin.

La transformación de la información y la función del gobierno

En esta intervención se examinará en qué forma pueden los gobiernos facilitar un mejor acceso a la información en los sectores público y privado. Se hará hincapié en la creciente influencia de Internet en todos los sectores de la sociedad. Se estudiarán brevemente la función de Internet y el desarrollo de la democracia electrónica. Se establecerán así los parámetros del debate sobre la manera en que una sociedad de información intensiva está transformando las expectativas del ciudadano. Se sostendrá, en particular, que en nuestro entorno rico en información es preciso encontrar medios de que el ciudadano esté mejor informado.

En la incipiente economía del saber ha llegado el momento de que examinemos el tema de los derechos a la información desde un nuevo punto de vista. Anteriormente, se insistía en el acceso a la información oficial gubernamental. Este se ha codificado en gran medida en la legislación de muchos países desarrollados (en la actualidad se están promulgando nuevas leyes en Inglaterra y Escocia). Estas leyes han tenido como consecuencia la obligación de que el gobierno rinda cuentas. Sin embargo, el desarrollo de Internet ha creado nuevas expectativas y los ciudadanos están comenzando a exigir que las entidades del sector privado también rindan cuentas. Así, la función de los gobiernos es no sólo proporcionar mejor acceso a la información gubernamental, sino también orientar los debates hacia cómo las entidades del sector público podrán rendir cuentas ante el ciudadano y qué legislación puede resultar necesaria.

Introduction

This is perhaps one of the most interesting times in history to be alive. We are witnessing a phenomenal abundance of change in societies around the world in a very short period. The source of most of this change is new technologies and the Internet. In the past decade, we have seen every aspect of the lives of individuals and organizations go through many evolutions and uncertainties. Large, medium and small corporations alike have discovered the need to adapt to the new technologies, or sink in the emerging global knowledge economy. There is no facet of life in the industrialized world that has not undergone some form of shift. The resultant new information economy has brought with it different approaches to work. There has been a surge in tele-workers, entrepreneurs and home run businesses. Corporations have downsized and knowledge workers migrate from company to company, open to the highest bidder and the organization with the best deal. The highly proficient, intelligent and innovative knowledge worker is in demand. Knowledge itself seems to have become a commodity in the marketplace of ideas. The pace of change has been so dizzying to some they have difficulty in meeting the challenges these shifts have brought. We now live in an information intense driven society.

Nowhere has this been more evident than with governments, who are constantly having to cope with the persistently emerging new technologies and demands from citizens. In today's wired world, the interactive citizen is one of the fundamental cornerstones of change. The Internet has put new power into the hands of the citizen. Governments can no longer simply be dispensers of information, even in the sophisticated forms being developed by many governments. But governments have not been passive observers and are rising to many of the challenges. New technologies are being used not only to deliver services to the public, but also to enhance government administration and facilitate businesses.

This section looks at the means by which some governments are moving to electronic governance and what role information will play in the future. In this context, governance can be seen as both a means of using new technologies to deliver services to the citizen, and ways in which to change and improve the efficient methods of administration within governments themselves.

The impact of the Internet

At this stage of development, few governments have effectively been able to involve their citizenry electronically in the democratic process. Many governments have been effective dispensers of information, which often passes as a means of enhancing the democratic process. There are many government initiatives seeking to help citizens to get online, to seek feedback on government reports online, and to develop discussion groups to elicit the views of the citizens. There are also many groups actively participating in online activities in the hope of influencing government policies. But for the most part, governments are far behind the activities of citizens online around the world. Those actively engaged in online activities involving social or political change see the Internet as a medium to foster, enhance and change the way people have traditionally engaged in the democratic process.

The story of the Internet and electronic democracy is a cautionary tale. Much of the enthusiasm and hope for new forms of democracy and citizen input into public issues, sound very like the gushing optimism expressed about the potential of television in its early years. It is not yet known if the potential offered by the Internet will be met. Will the Internet become like television, an arid desert with only a small oasis of excellence? This is an important question because the potential is there for the Internet to become dominated by a few large, corporate interests, or subsumed by government regulation that could inhibit the freedoms offered by this new technology. There is also the danger, revealed in a recent trend, indicating that people are increasingly spending more time in isolation sitting in front of their computer terminals.

A recent survey of 4,113 adults conducted by Stanford University's Institute for the Quantitative Study of Social Sciences found that "55 percent of Americans have access to the Internet at work or at home, and approximately 20 percent of regular Internet users spend more than 5 hours a week online. Of those 20 percent, 13 percent spend less time with family and friends, 8 percent attend fewer social events, and 25 percent spend more time working at home in addition to spending a full day at the office. The findings of the study also support the assertion that Americans are abandoning traditional forms of mass media, such as newspapers and television, in favour of the Internet".¹ There is wide potential for change here for the way people will interact as a society as the Internet continues to grow.

Suffice to say at the moment the Internet is creating major changes both positive and negative. One of these changes is in the ways citizens are engaging in the democratic process and beginning slowly to alter the face of democracy. The next section looks at some of the initiatives and the reshaping of the face of democracy which online citizen participation is bringing.

We are the Internet: information as a democratic tool

This could well be the anthem for all those netizens who want to continue to recognize their particular identities on a medium that is increasingly being dominated by the corporate world. “We are the Internet” could well be the clarion call stating loudly and clearly that this medium is for all the people, that this is the medium, which will bring new forms of expression of the democratic will of the people. However, “we are the Internet” is taking on a more prosaic meaning in that the growing connectivity with many forms of media is making all users of the Internet increasingly one with technology.

Within the next decade, or sooner, we will probably not even use the word the Internet, or the Net, because the actual convergences of technologies is creating a new phenomenon. Now an individual can be connected to the online world through a variety of technologies. In an experimental stage in the laboratories there are glasses you will wear that will bring the online world to your lenses. You wont need to boot up and go through all the messy programmes commands, as these glasses will be linked to a micro cellular device which will be voice activated. You will just say what you want, get your email, send a message, take a virtual tour of the office, meet others in virtual meeting spaces, go there anonymously with created identities, book a holiday, look for new online or whatever any of the things you want to do. You will be in cyberspace, disconnected from the physical offline world except for the glasses you are wearing.

Experiments are currently underway to have automated automobiles on the highways so all you have to do is programme your destination (probably by voice) and off you go. The car, as it travels, will not necessarily take the route you (once known as the driver) will tell it, as it is will be connected to a GPS (GeoPositioning Satellite) which will alert your autocar to any potential traffic jams or road problems ahead. Thus, your car (or, rather, the machine the technological masters are letting you occupy) will be diverted as needed to the most desirable and quickest route. This mapping of cars is not a fantasy or possible scenario for the future but a reality, as mapping programmes already exist to get you to your destination by the quickest route. In the industrialised world, most countries are already mapped electronically, thanks to satellite technology, and the maps are available on the Internet. Other ideas for the Internet include the wired home in which everything from your electricity to your heating to your refrigerator would be connected to the Internet and connected to whatever company is providing you with the service. Thus, the electricity corporation can adjust uses of electricity and your refrigerator can alert you when you are low on milk or, more probable still, send a message to your grocery to send more supplies to you. This is all very efficient, and perhaps even a time saver for the consumer, but do we want our lives to be governed by disparate pieces of technology? For the sake of efficiency and time do we really all want to be wired to a seamless technological mosaic? But this is just one small example of the technological world we are building.

That is not to say there are not intrinsic values to the Internet and the new technologies and that many have benefited. The Internet has been a tool of enrichment for large numbers of our populations. It has allowed diversity to flourish, the rise of the entrepreneur, the mushrooming of home businesses, the bringing together of family and friends through instant communications. The Internet has been a voice for many who for too long did not have the means to express themselves, because earlier communication media have been controlled by the few. The Internet has been many things to many people. New, advanced medical technologies and scientific breakthroughs have lengthened our average life span and brought us better health and lifestyles.

On the Internet, there are pockets of dissent and discourse. There are many who use the new technologies for learning, to facilitate their businesses, to get a service, whether from government or business, play games with each other over long distances, keep in contact through email and a thousand and other good usages that can benefit the individual. We know the benefits, we know of the attempts of many professionals who seek to use the Internet to both gain knowledge and dispense and share knowledge. Perhaps, the most important feature of the Internet is that it has allowed individuals to communicate in ways not available before. This is an important new channel through which communication, ideas and knowledge can flow. The Smithsonian Institute in the United States, the British Library along with a wider consortium of universities and libraries are joining together to put online the Magna Carta, the Lindisfrane gospels and the entire contents of the Smithsonian. Their purpose is to take the massive volumes of knowledge available in off line libraries and to make them available online for the whole world to benefit. The intent is simple: what an individual can get by going to a library should be available to the world through the Internet. But as with all things in life there are positive benefits and negative impacts. The questions now we must ask ourselves collectively are: how do we manage to increase the benefits while neutralizing many of the negative elements? And there are many negatives surfacing as technological advances far outstrips society's ability to determine the direction we will go as a result of the developments.

Technology is the modern spider that has increasingly built a web around our lives. The collective question for us as a society is: are we the fly now captured in this complex, intricate web or are we still the masters of our destiny? Where is the debate, discussions about the social, cultural and political impacts of technologies on our lives and what these technological changes are doing to our humanity? Has society become the fly willingly ensnared in this new web (and not simply the Web on the Internet) actually created by a few and used to drive the new economy and the engine of consumerism? Has electronic commerce and the burgeoning global information economy so subsumed the agendas of world governments that we can no longer objectively look at where we should be going? It can be persuasively argued that throughout history all new technologies have changed the way the world lives and operates as a society. Transportation brought the world together and television resulted in the

global village that brought all of us on the planet closer together as a people (though not necessarily in a harmonious way). Now tourism is the world's second largest industry with millions of people on the move all around the world, experiencing and sharing in other cultures.

Of course, these millions are mostly from the rich nations. It appears we see nothing wrong in going to exotic and culturally challenging parts of the world, in the quest for something new and exciting and the next best thing to experience, and then pay scant attention to the many more millions of poor. Ironically, many will argue that tourism brings needed dollars and helps these economies. But even this does not ring with the hallowed sound of truth as studies show that those who benefit most are the western multinational recreational chains and others who sell their wares globally to all and sundry. Usually, the locals benefit only to the extent that they receive minimum wages.

The point here is not a quick analysis of the rich versus the poor, but rather that we as a people who experience the offline world as we do, and are often blinded to the consequences, might be just as blinded to what technology is doing to us. The message might also be that most people don't really care and are happy to carry on enjoying the new wealth and comfort that technologies are bringing.

Whatever the opinions or views of individuals and governments, it is evident that we need a far deeper debate and discourse on the impacts of technologies. There are concerns over ensuring that all citizens have universal access to the Internet (and are free to use it or not use it as they wish), there are serious, abiding anxieties about the digital divide that is occurring throughout the world. Privacy laws, to protect people's information and ensure their rights over their own personal information, are spreading. But the implementation of such laws is but one small step. Articulation of these issues is just the start. We need deeper discourse. Ironically, it is this medium that affords the opportunity to bring such discourse forward.

This is why online e-Democracy is so important as it represents the power of this technology and how it can be used to embrace democracy and involve people in the social, economic, cultural and political issues of the day. This is a tool that can give people, the individual citizen, the power to influence public policy. Governments are slowly coming to realize that there is an undercurrent of democratic change going on in the world. The face of democracy is beginning to change and a few thousand at the moment are doing it. But this is a change that has the potential for growth.

Technology is a cold and neutral medium. It is people, individuals that bring passion, life and meaning to this medium. It somehow seems that this point is missed as society collectively races to embrace technology. We are the inheritors of our past that we did not bring about but the creators of our collective futures. At this point in our history we have a collective responsibility as to how our society will shape itself. We have the capacity to create change in our societies through speaking out. Many changes do occur in society when

people speak out and spark debate. It is now time for such a discourse over the future of technology. We need to develop a philosophical base about all these new technologies so that society drives technology and not the other way round.

This next section looks at the distinctions between electronic governance and electronic democracy and how the latter is having a wide impact on civil society. The move towards online activism, and the use of the Internet as an information and communications tool to forward common social goals, is important to understand. The mechanisms evolving in the developed world to influence government policy can also be used as tools to help those in the developing world.

Electronic democracy in a wired world

Introduction:

electronic governance versus electronic democracy

Many governments are moving to electronic governance. In this context, governance can be seen as both the means to using new technologies to deliver services to the citizen and the ways in which to change and improve the efficient methods of administration within governments themselves. Another element looked at in this section is the means whereby governments will increasingly be able to involve citizens in the democratic process of government.

As noted above, at this stage of development, few governments have effectively been able to involve their citizenry electronically in the democratic process. For the most part, governments are far behind the activities of citizens online around the world, who see the Internet as a medium to foster, enhance and change the way people have traditionally engaged in the democratic process. Some efforts are being made on different government fronts.

In the United States and the United Kingdom, governments are looking at setting up online voting. The British Electoral Commission recently announced that they would be looking into the feasibility of online voting. A similar announcement was made in California in January 2000. A meeting of the first Internet Voting Technology Alliance took place on February 28, 2000 in Washington, D.C. Initial participants included: Safevote, of San Rafael, Calif.; VoteHere, of Kirkland, Wash.; Modulo Security Solutions, of Rio de Janeiro; International Foundation for Election Systems, of Washington, D.C., and e-Elections, of Oakland, Calif. The group met to get public funding for their activities. The group's goal will be, amongst other things, to develop the proper tools and protocols to ensure online voting is safe and secure for the citizen and is not subject to corruption or manipulation. But this is a tool for voting under the current system of democracy as we know it. People were able to participate online in this opening assembly². Governments, for the most part, are far behind

the public in developing tools for electronic democracy. There are some good initiatives, such as the web sites of the British Prime Minister, which seek to garner public comment, opinion and discussion.

There was also an online consultation run by the British parliamentary Select Committee on Public Administration. It was run from mid-November 1999 for one month, in connection with their inquiry into e-democracy and e-government. The online discussion centred on “innovations in citizen participation in government”. The Committee sent out electronic notices, which were picked up around the world, asking people to send in their experiences in e-democracy and e-governance.

These are real, but limited, steps towards electronic democracy. However, on the whole, governments tend simply to provide information on their web sites and use the Internet, and other technologies, to deliver services electronically. The prime example of this is the US White House site³ which is primarily an information tool and a conduit to executive agency web sites. It was only in January 2000 that President Clinton announced that government had to be interactive with the citizen.

The dispensing of information, without substantial input from the citizen, is not a real interactive transaction. Yet, the Internet in and of itself is an interactive medium. Individuals on the Internet understand this and, for growing legions of people, it is becoming a force that is changing the nature of democracy as we know it today.

But this is just part of the wider picture of developments in electronic democracy. In fact, individuals and groups are coming together online around the world to influence policy. Politicians are also using the web. In the United States every Presidential candidate has a web site. There are also alternative web sites set up by interested citizens or groups who want to have their say about the candidates. There are also other groups who are offering sites which will present in-depth analysis of the issues in the upcoming presidential and congressional elections as well as elections at the local and state level. Those wanting to check out the activities of the US Democratic party or the Republican Party can go to either: <http://www.democrats.org> or <http://www.rnc.org>. If you want in-depth details on the 2000 Elections in the USA you can go to: <http://www.Politicaljunkie.com>. There are also many independent sites that either oppose or satirize the mainstream candidates, or offer alternative in-depth information and analysis of the issues. But the phenomenon of engagement in politics online is not restricted to the United States.

The changing shape of democracy today

There are thousands of individuals, who are active online and attempting either to get more information from their government or to influence policy. The online world of democratic activism is growing around the world. This section looks at the emerging trends in electronic democracy, how citizens active online are changing the nature of democracy as we have understood it, and how governments are

going to have to tap into this emerging trend. This section shows the distinction between online democracy, and what its participants are achieving, and electronic governance.

In the wired world, the online citizen is increasingly playing more and more of a role in the democratic process. There are now hundreds of groups involved, from the community and local level to the national and international stage, in some way working to have an influence on government policies and programmes, and on societal issues of our age.

Because of these changes, the process of government will soon no longer be controlled from the top and micro-managed by a few when it comes to public policy. In the changing wired world, citizens are making their voices heard. Governments may not necessarily be listening, but the thousands upon thousands of people engaging in discourse on the thousand and one issues of the day are certainly listening to each other. This is resulting in powerful currents of change, which are only just beginning to manifest themselves. Electronic democracy is not about citizens voting on a multitude of referendums as laid out by governments. Electronic democracy is citizens engaging in the political process through means chosen by individuals.

E-Commerce currently dominates the mass media as the main phenomenon of the Internet. But the real story lies in the changes being brought by the thousands of groups and people online around the world, who are engaged in some sort of civic activism, political engagement, or just plain discourse and debate, on the issues that are important to them.

The most evident manifestation of this was in Seattle in December 1999, subsequent events at the IMF and World Bank meetings in Washington, D.C. in March, 2000 and the meetings in Prague in September, 2000. The massive protests in Seattle, Washington, D.C. and Prague over the rise of corporate elitism and globalisation on the agendas of governments, demonstrated the power of the Internet in bringing people out to express their demands to be part of the process. These people were determined to have their say. Not only did they express their beliefs and ideas but governments were forced to listen. There is some growing awareness in government that their old dynamics of secrecy, closed meetings, and invitations to the special few to be part of the process, are starting to fade. In Seattle, we saw the first shot fired across the bows of the old world order of democracy as we have known it. What we are witnessing is an emergence from the traditional forms of representative democracy to a new form that has yet to be given a name. For the moment, we can call it cyberism, as an expression of a particular form of politics. But that is still an expression born out of the old paradigm.

The new democracy we see surfacing is more the expression of individual voices that congeal into a collective whole over ideas that the society of peoples online develop into a consensus. And while a consensus might be formed on major issues, people are still in a position to express their individual thoughts and ideas (even if they range from the erudite to the opinionated). In this emerging world

we see the evolution of a true populist democracy (albeit a small one at this point in time). Although people's ideas do not necessarily have to be acted upon individually, the means exist for individuals to communicate freely to an audience. That audience can be large or small, but it represents a freedom for the individual that has not existed up to this point in time. The mass media still hold the reigns of mass communication. It is still important to get that letter to the editor published, so you can reach a wide readership. But with this new medium of the Internet you can write something and it will reach the level of interest in the audience out there.

In Seattle, Washington, D.C. and Prague, the initial protests were organized off line and online. And it was the Internet that gave this movement the international momentum to make it the effective demonstration, and the somewhat collective voice of outsiders, that it became. It was the clarion call for democracy from voices across the world. It has become the symbol not only for the voices able to speak from the Internet, but of the fact that the citizenry has found the ideal tool by which they can bypass all the normal channels of government. This is not a small development at this stage in our history. Many people talk about the "Individual" being in control, or having great power because of the ability to tap into the world through the keyboard, but it is not certain if the real power is understood. It has mostly been identified as the power of consumers to buy the product they want, or read the online newspaper of choice. In fact, what has actually happened is we have collectively opened a Pandora's box. And it really is too early to predict all the changes that will occur. It can be said with certainty that a powerful current of knowledge and ideas is now circulating the world.

What once took months or years to turn into an issue can now do so in less than a day. This is the true power of the citizen. This is the story of the evolution of a truly populist democracy, an emerging democracy in which issues are being transferred from the hands of the elite few to those of the thousands (and one day millions). It is like throwing one seed into the garden and from it a flower grows. Throw the seed of an important idea or issue out onto the Internet and it flowers thousands of times over. This is a key development in our evolution at this point in our history. Central to this development is the degree to which people can communicate, form opinions, make judgments from available data, and then act upon them. The Internet is a medium that allows ideas to flow among thousands of channels. People are empowered not because one can get onto the Internet and get a product, read a newspaper or research out some knowledge. That thinking is from an old paradigm succinctly expressed in the saying: knowledge is power. The new paradigm is the ability to talk back (true interactivity), hold a dialogue and go to whatever source an individual wants to choose. This is not to say there are thousands upon thousands of people out there engaged in political activism. There aren't.

There are legions of people who are out there ruminating and thinking, or engaging in conversation (or whatever activity one chooses). Many of these people are not restrained by the dictates of mass media which tell us what we

must read, what is the story of the day, or what we must listen to on the radio or watch on TV. None of these media afford the independence of operation that the Internet allows. This is another reason why the Internet is developing into such a strong, world political force, not limited by boundaries, time, space or distance. It is true that many in the world still very much reflect their religious beliefs, cultures, ethnic or political bias. Beyond this lies the opportunity to break away from the intellectual and emotional chains of the past and be free as an individual. And this is occurring on the Internet. However, even with these changes, there are still opportunities for governments themselves to benefit from the changes. There are also efforts by many governments, worried about the potential freedoms a medium such as the Internet brings, to curtail both access and content on the Internet.

Because the Internet as a medium is becoming the tool through which the nature of democracy itself is changing and taking new shapes and forms, it is important that governments understand this phenomenon. Increasingly, public officials and elected politicians are going to be faced with not only an informed citizenry but a citizenry that wants to be engaged in the decision making process in some form or another. An analysis of the numerous groups springing up on the Internet on a multitude of issues illustrates that there are voices out there that governments are going to have to listen to.

The Internet has brought about a decentralization of power. In the wired world, individuals can now make their own choices as to which authorities and information sources they will accept. This is leading to a greater democratization of knowledge, empowerment of the individual, and the potential for more informed interactions between the citizenry and organizations, including government. Moreover, since individuals now have ready access to a variety of information resources, organizations have to adopt new proactive measures to compile and disseminate information in a competitive information environment.

A citizenry that is able to seek and obtain information and knowledge from any place in the world through the Internet will, in all likelihood, also expect more from government.

One of the ways in which people can collectively work together to bring about change is through the strategic gathering, absorbing and using of information. Online groups and online activists, researchers and others involved as information professionals, instinctively understand this. It is the understanding of the nature of information and how it influences us as individuals that is going to bring the next big shift in society.

The shape of information to come: democracy's best tool

As the Internet takes hold in our daily lives, and begins to take a new and ubiquitous shape and form, the need for governments to develop information policies to suit the changing nature of these technologies is becoming more evident. In much of the developed world, the Internet is a communications

force that is growing. According to NUA plc, a company in Ireland, that tracks the growth of the Internet and the implication of our growing information technology infrastructure, as of the end of the year 2000, 60% of the population in the United States and Canada will have some form of online access to the Internet.⁴ This can be in the office, the home, an educational institute or some public space, such as libraries, community halls, Internet cafes and other public venues.

In the United Kingdom, over 50% of the population now enjoy some kind of Internet access.⁵ There, much of the growth of the Internet has been stimulated because many companies offer Internet access free. The citizen pays only for local calls. In Europe, the whole question of measured rates is a serious issue, as many contend, this does impede not only access to the Internet, but, even if there is access, then individuals have to be careful about how long they stay online. This is because the cost factor can act as an inhibitor to accessing the Internet and the amount of time spent online. However, despite these problems, there are now over 200 million people online around the world.

We are now awash with information in our new cyber environments. There are currently billions of pages out on the world wide web. There is so much information that no single search engine can go out and suck up all the information an individual might be seeking. In fact, there is such a proliferation of information that many search engine companies now do not give total access to everything that is on the web. What some of the search engine companies are now doing is giving priority to companies who pay to have their company or organization show first on a search, when a given topic or key word is entered into their search engine. This is now giving an edge to those who can afford to pay the necessary fee to be at the top of the list.

The world wide web is now so big that some web sites are not even getting joined to the network of networks because there might be a connection problem in their local area. Also, government and private organizations are now building web sites that can only be accessed through their own Intranets, or by having a specific address for a web site with a password to enter. The world is at the fingertips of the citizen, but the new challenge is actually finding what is out there. The freewheeling, widely democratic, open, ubiquitous, and accessible Internet is still there, but the shadows of secrecy are beginning to move in. The danger exists that corporate dominance, with the economic rules of the market force at play, could inherently impede the free nature of the Internet over time.

When entering cyberspace, the challenges for the citizen who wants an open and accountable society, both from government and the private sector world, are now many. The success of our new information technology environments is going to depend on how much say and control citizens will have over information in the decade to come.

Information is shaping our world. We now live in the Digital Age, in which information, in a global knowledge economy, has become the supreme

commodity. Information is not only a piece of barter for the business world to use for competitive and commercial value. Information is now a precious commodity for the citizen.

In our new Internet environments, citizens are increasingly demanding more privacy rights to protect their personal information. However, there is also a contradiction here, as at the moment, citizens are sharing and using personal and aggregate information more than ever before. But in a cyberspace environment, the citizen is becoming increasingly sophisticated in understanding the impact that information can have on one's life. Individuals want to ensure that their own personal information is not abused. Individuals want the ability to control their personal information environment in cyberspace. At the same time, the individual wants unfettered access to all manner of information. But the sheer amount of information available, the ability to communicate information, and the value that individuals put on information, is bringing a new understanding of the nature of information itself. This understanding is also what is driving the new forces for change in the growing democracy online movement around the world.

Thus, on the side of freedom of information, the public is starting to demand more information for all facets of their lives. We see more data on labels of commercial products; shareholders demand more information about the activities of the companies in which they are investing (not just the usual "hyped" good news about the company's activities in the past year). Citizens are demanding and seeking more information about many activities in society. The Information Age appears to be bringing more demands for accountability. In the years to come, the public will come to expect more and more accountability, in the form of enlightening information, from private sector organizations. The Internet is an open network, which has created open environments. With this openness has come a demand for certain rights, to ensure that the inherent democratic nature of the Internet is maintained. This idea is now spreading into society as a whole, resulting in demands for more and more accountability from all our public and private sector organizations.

Thus, it appears that the next wave of information rights will spread out to the private sector. As the average citizen becomes armed with more knowledge (or at least has the capacity to be armed with knowledge), then it will be private sector organizations, along with governments, who are going to have to become more forthcoming about the information held in their organizations. The private sector here means not just large corporations or businesses, but rather all organizations, including non-profits. Just as privacy moved into the domain of the private sector thirty years ago, when Sweden passed the first data protection law in the world, so will freedom of information become a part of the private sector domain. The shape and form it takes will be different, but the providing of more information to society will occur.

We currently live in an age of individual rights, because in our current climate of the citizen as consumer, the individual is paramount. This will change, as the recognition dawns that it is also aggregate rights that strengthen

the citizenry as a whole. As this idea flourishes, then privacy will hold the same sway, and demands for information on a more sophisticated level will grow. Privacy will become a part of civil society's infrastructure. As the knowledge economy grows, and the knowledge professional comes to be seen as a powerful force in our society, so will the demands for wider swathes of information grow. It might seem at the moment that we already live in a world with too much information. This change of demand for information will be for "organized" information that informs, not overwhelms, the citizen.

Information is now an issue in a new form. Governments are also going to be subject to pressures from emerging information forces in society. For example, the secrecy of governments, at the moment, is defined to the degree that information is shared with the public. The lack of efficacy of a freedom of information law is shown by the narrowness with which government exempts information from public access. Canada's information law is currently under review, because of the criticisms that the statute favours the public sector, and too much information is withheld on specious grounds. Another reason for a review of the Canadian Access to Information Act is that it was developed in the late seventies, and passed by Parliament in 1982, before the emergence of new information technologies. But the challenge of governments now is not just to pass or amend freedom of information laws.

In our new environments, we have to look at information as the force it has become in society. Changing environments bring different attitudes.

For example, as governments go online with electronic service delivery, more content is going to become available to the public. But it is not going to be enough to put information up on a web site. Any information is going to have to be organized.

In many cases, there is too much information on a web site, which makes the site virtually unusable by the citizen. Thus, information management is rising as a discipline within government. This is vital, so that policies can be evolved which ensure citizens are getting the information they need and want (not what someone 'thinks' the public want), while at the same time protecting individual privacy. Once governments put content online, a policy issue will immediately emerge. The private sector learned this in the early days of the web. The growth of online marketing and ecommerce brought with it major privacy and copyright issues. For the citizen, who is going online for government information, if a request is rejected, the issue will become: why can't I have access?

In an information-intensive society, citizens want more from both governments and the private sector alike. The above is simply an overview of the emerging issues and problems. Solutions need to be sought, as these new technologies become even more persuasive forces in our society.

Possible solutions: information as a practical tool

Recommendations

There are numerous ways that governments at the local, national and regional level can facilitate these new forms of democracy that are emerging. One is to take the example of Canada. The Canadian government, through their Community Access Program (CAP) has a goal to establish over 10,000 public access sites in rural and urban communities across Canada. Launched in 1994, CAP has already established over 4,200 sites in approximately 3,000 rural and remote communities and is a key component of the government's "Connecting Canadians" strategy – aimed at making Canada the world's most connected nation." The program is now being expanded to include urban centres with populations over 50,000.

CAP matching funds of up to \$17,000 per site are available to eligible applicants such as educational institutions, public libraries, community organizations, and municipal and territorial governments. The community funds can include cash or "in kind" contributions such as facilities, equipment and staffing of public access sites.

This is a good model to be followed not only by national governments but international organizations. If we are to handle the digital divide between those who have the opportunities to be online and the vast numbers of people who cannot necessarily afford the costs of going online, it is going to be essential to level the playing field. In any populist democracy it is important that initiatives embrace all the people. At the moment it is estimated there are only between 150 and 200 million people online. These are small numbers when our world population has exceeded 6 billion people.

International organizations could also provide programmes to educate people on usage of the Internet. Education then leads to individual usage. It will, naturally, vary from individual to individual but through knowledge of how to use the Internet people can be participants in this new trend in democracy as they see fit. Such programmes can embrace many peoples around the world and ensure that the users who most benefit are not just those in the affluent, industrialized countries.

National Governments should seek the means to engage their citizenry in the process of government. They can do this in many ways such as:

- Making more information available online from government itself to ensure there is an informed citizenry;
- Providing web sites that seek input from people on all manner of government programmes and issues;
- Developing listservs and discussion groups on important national issues and other means to engage the citizenry;
- Providing grants to organizations seeking online democratic activities;

- Developing local community projects that embrace all levels of society from the academic world, to businesses, large and small, to non-profit and volunteer organizations; this can encompass governments in developing countries;
- Develop web sites that allow citizens easy access to web sites;
- Ensure information on web sites is easily attainable, in a form understood by the citizen and can easily be downloaded;
- Provide search engines and hot links to ensure the citizens get what they want in the right format from the right agency;
- In developing countries, where access to the Internet is limited work to develop information policies that encompass all the citizens in the countries;
- Develop programmes to teach local leaders in the communities to become information facilitators;
- UNESCO to form a working group to develop a set of best Information Practices, that can be applied and used in developing countries.

As indicated above, the Internet is a medium that has allowed people to involve themselves in the democratic process in new and unique ways. Governments at all levels and international organizations will increasingly be impacted by these changes. Thus, there is also a need for awareness building within governments and international organizations of the changes that are occurring. This can be accomplished through educational and training programmes.

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Access to information and the public domain in post “Perestroyka” Russia: a paradoxical experience

This paper provides general information on the development of the Internet in Russia over the last 10 years. The issues of access to information and the topology of generally valid informational resources are analyzed. The most important content-projects, state and public regulation of the national network of the Internet are cited as an example. Recommendations on the creation of an efficient system of free access to information and support for the public domain in Russia are formulated on the basis of the analysis of the problems and possibilities of international co-operation.

L'accès à l'information et le domaine public dans la Russie de l'après « Perestroïka » : une situation paradoxale

Cette communication fournit des informations générales sur le développement de l'Internet dans la Fédération de Russie au cours des dix dernières années. Elle analyse en détail les problèmes d'accès à l'information et la topologie des ressources informationnelles globalement valables. Les principaux projets en matière de contenus et la régulation étatique et publique du segment russe de l'Internet sont décrits à titre d'exemples. Des recommandations visant à créer un système efficace de libre accès à l'information et de soutien du domaine public en Russie sont formulées à partir de l'analyse des problèmes et les possibilités de coopération internationale sont examinées.

Acceso a la información y el dominio público en la Rusia posterior a la «perestroika»: una experiencia paradójica

En esta intervención se proporcionará información general sobre el desarrollo de Internet en Rusia en los últimos diez años. Se analizarán minuciosamente los temas del acceso a la información y de la topología de los recursos de información generalmente válidos. Se citarán como ejemplos los proyectos más importantes relativos al contenido, así como las normas estatales y públicas por las que se rige el segmento ruso de Internet. Se formularán recomendaciones sobre la creación de un sistema eficaz de libre acceso a la información y de apoyo al dominio público en Rusia, basándose en el análisis de los problemas, y se debatirán las posibilidades de cooperación internacional.

Nothing seems either simpler and or more complex than the idea of free and equal access to information. It is moreover essential for the development of the modern information society. However, even in truly democratic countries its implementation is associated with the need to resolve multiple conflicts in the spheres of economic interests, copyright, national and cultural mentalities.

I would like to follow the development of the free access to information concept in post-reform Russia, and with the analysis of the advance of Internet technologies as an example, to formulate some recommendations to UNESCO in this regard.

The Internet in Russia is still very young – it is only 8 years old. However, in the whole post-Perestroika period its impact on society was hardly less than that of economic, legal, scientific or educational reforms.

There are a number of reasons for this. The main one is that the birth of the Internet coincided with the period when Russian society was most ready for “openness” and therefore very willing to use the global net and the free access to information it offered.

The State and the government establish their relations with the Internet in different ways. In many countries the development of the Net is actively supported, in others it encounters serious limitations. Russia’s developing economy requires a powerful telecommunications infrastructure and that is one of the reasons why the government is willing to support Internet projects. On the other hand, the vast size of Russian territory hinders a rapid solution to this problem. Nonetheless, the national network segment (referred to as “RUNET”) may today be characterized by the following statistics:

- The maximum Internet audience is 6.6 million users (the number of regular users is half this – 3 million people) and constitutes 6% and 3% of the nation’s adult population, respectively;
- The scope of Internet influence on Russian society reaches 22.2 million people (20% of the adult population);
- The Internet is present in every region of Russia in all cities of more than 100,000 residents;
- The Internet activity leaders are Moscow, St. Petersburg and regional centres of the Federation (89 regions);
- The Russian sector of the net carries 50 thousand web sites in Russian on which information is being continuously updated.

As in many other countries, in Russia the Internet emerged primarily in academic and research networks in science and higher education. Despite the rapid development of commercial communications, the academic networks along with the newly formed cultural and educational networks, represent the basic infrastructure. They provide public access to the Internet in research institutes, educational institutions, libraries, museums and archives. In these contexts, over 2 million users enjoy access to the Internet each year.

I would like to stress specifically the role of libraries and universities as gateways for access to information in Russia. The Soviet system left behind a vast network of libraries with a well-developed infrastructure of information links. Earlier, this system had served to support a powerful and far-reaching network of propaganda that enjoyed unlimited funding. The paradox is that it was this very system that opened up the path to free and democratic development and allowed people over the past ten years to gain considerable access to information. In public and specialized libraries that previously offered traditional types of information – printed editions, audio and video materials, – access points to digital resources are now emerging. Among the new and free of charge information services, many libraries are offering access to the Internet (including individual electronic mail boxes and web-pages), resources on CD-ROM carriers, legal databases, on-line full-text periodicals, distance educational programmes and stocks of Russian and foreign libraries. It is also noteworthy that free consulting and mass training in work with digital resources and the Internet are offered in electronic servicing classrooms. This helps provide not only access to information, but also skills in using new technologies.

This situation was largely facilitated by the policies and new type of government practiced by the Ministry of Culture whose area of competence includes more than 75% of all Russia's libraries. A vast number of administrators and specialists in informatics have completed training courses in management, fund raising and new technologies under the programmes offered by international schools and institutes of library science. This knowledge allowed them in a short period of time to develop conceptual programmes of their activities and attract a large number of international organizations and foundations to Russia. These partners helped to initiate the construction of a high-technology telecommunications infrastructure and significant public digital information resources.

All this would not have been possible without substantial governmental support. Why for example, are the megaprojects implemented by the Soros foundation in Russia such a phenomenal success ? These activities from the very beginning were conceived as a collaborative programme in the Soros-Chernomyrdin agreement. It projected the construction of a powerful infrastructure based upon 33 regional university centres and matching financial support from the "Open Society" Institute and the government represented by the Ministries of Science, Culture, and of Education and regional authorities. At present, the university Internet centres and the corporate regional library centres of the "Pushkin library" megaproject are providing access to information to

over 1 million users around the Russian Federation. This number amounts to about a half of all the public access in the country.

Among Russia's specific traits are its vast geographical area and extensive territories outside the capitals and regional centres housing the majority of the population. Development of the Internet is a vital need for these regions: the bigger the country the more it benefits from the development of an information network. However, governmental support of telecommunications development in these regions is dependent upon the interest of the local economy. This situation underlies the information deficit problems in whole metropolitan districts. Most effective in this field are programmes to support cultural heritage towns, whose potential is not directly linked to industrial development. UNESCO's idea to support cultural initiatives to provide public access to information and to preserve the cultural heritage has led to the creation of the "Small Towns" programme, which is being implemented by the "Open Society" Institute in collaboration with local municipalities. The projects are aimed at the comprehensive development of the towns, including the telecommunications infrastructure.

However, communications channels alone do not create an information society. Publicly meaningful "content" is also vital. Despite the clear-cut commercializing tendency of information resources typical of many countries, free-access has been developing and continues to develop in Russia. For reasons of simplicity, my interpretation of the public domain is as follows. *It is publicly useful information in the fields of the daily life, culture, science, education and technologies created by content-providers on legally determined bases. It is available for public use and accessible to citizens of all countries without any additional expenses to finance its content.*

The "official" (created by legal providers) publicly useful information sector exists in Russia but there are also extensive publicly accessible specialised resources (topical news groups, chats, etc.) and no less extensive entertainment resources (pop-music and art sites, jokes, horoscopes, games, hobby-resources, etc.). Analysts of user activity and of the development of a virtual subculture will find those interesting. However, strictly speaking they may hardly be viewed as useful. Here we'll also avoid discussing strictly commercial information which, though undoubtedly useful, is of limited accessibility.

Having adopted these limitations for the sake of simplicity, we may now add that the information content of RUNET's public sector comprises a variety of public domain resources. Such resources have been developed in many countries and differ only in the content available. In Russia these comprise:

- Powerful browser portals that offer up to date and useful information; they maintain user-friendly navigation on the Russian Internet sector that is facilitated by search engines; they publish on a daily basis the ratings of all major information resources (around 10 popular systems of national significance);
- Publicly accessible electronic mass media (including Internet-versions of leading radio and television channels) and news agencies (lenta.ru,

- gazeta.ru, rbc.ru, etc. – over 100 news portals, the leading ten of which are successfully competing with American and European resources by their topic mix and their of hourly renewal of information);
- Electronic versions of periodicals (over 300 Russian newspapers and magazines have electronic versions or digests accessible on-line without subscription; this resource is successfully competing with paid on-line periodical services);
 - Sites of governmental information (over 500 sites of governmental information and statistics including federal, regional and municipal governments);
 - Sites of legal information (over 150 sites of Russian law including full-text data bases of laws and legal affairs (some of these databases have limited individual access but are open to public libraries and legal information centres);
 - Educational and popular science resources (over 200 sites);
 - Sites and projects of cultural heritage (virtual towns, museums, collections) – more than 1,000 large- and small-scale projects on the sites of public organizations – universities, libraries, museums, archives);
 - Publicly accessible on-line catalogues of libraries (over 150 large and medium Web-catalogues, cumulative sites of the 5 biggest corporate library projects offering data search and exchange under the open systems protocol Z39.50);
 - Information sites of publishing houses and book stores – about 30 major publishing houses and dozens of book stores (the information they publish on new editions serves as a free bibliographic resource);
 - Publicly accessible electronic libraries (more than 150 sites of full-text resources in Russian created by both governmental organizations as well as by numbers of enthusiasts);
 - Publicly accessible reference resources (bases of personal data, address reference books, interactive encyclopaedias, dictionaries, translators, etc. – over 200 active projects at various sites and portals);
 - Information sites in Russian covering activities of public organizations, international associations and foundations that implement international projects in culture, science, education and informatics (around 100 sites including 3 UNESCO sites and around 10 sites of UNESCO-associated schools and university departments in Russia).

In a brief overview it is impossible to give a detailed description of the whole sphere of publicly useful and accessible resources. It may just be said that of late, the most popular of them have been grouping around large informational portals and sites whose volume of text information exceeds many hundreds of gigabytes (including art, sound and video information – hundreds of terabytes).

What is specific to Russia and what are the Russian problems in creating publicly meaningful content?

- Publicly meaningful information resources are being produced in both commercial and public sectors. Tensions between the free-access advocates and business information providers that once seemed to be global, are currently becoming more relaxed. Of course, purely commercial sites are charging for access to information (major news agencies like “ITAR-TASS” offer paid financial information). However, the free-of-charge publicly meaningful content is undoubtedly dominant on the sites of popular portals and network mass media that present current news, offer free access to the archives of full-text monographs and periodical articles, analytical reviews, and other useful information. Lack of demand for paid information has rendered paid access to public information resources unprofitable. The income earned by content-providers from banner advertising and other investments is much higher and increases proportionally to the popularity of the information portal, which in turn is dependent upon the quantity and quality of its publicly accessible resources;
- Legal regulation of Internet-associated issues is more and more based on the collaboration between governmental structures and the Internet public. In the mid-90s RUNET was in a chaotic state tending to anarchy (site burglaries by hackers, stolen information, plagiarism, and copyright infringements). However, the adoption of a number of efficient regulations in computer safety and copyright, as well as a number of court trials caused a significant reduction in the number of gross infringements. At about the same time, the government launched some unpopular programmes of stringent Internet regulation (SORM-1, SORM-2, Bill on indiscriminate licensing of Web-sites with electronic mass media status). On the one hand, these measures encountered strong opposition among advocates of free dissemination of information on the Internet. On the other hand, these programmes clearly demonstrated their own ineffectiveness: informational policing in such a vast country turned out to be physically impossible. Paradoxically, the initiative by the Federal Agency of Presidential Information Services (FAPIS) (SORM project) in fact promoted the spread of Internet public sector. Whereas it provided the necessary technology and Internet access channels to many public institutions, the system for stringent surveillance of their work had never become instrumental. Multiple initiatives by the Internet public seem more fruitful in addressing this issue: the formation of Internet-community Codes, founding of a Club of Proper sites, opening of a Russian Internet Academy, reprehension boards for copyright pirates in the RUNET and of course, further improvement of the legislation. The latter tends more toward flexible protection of programme and content copyrights, as well as of the user’s right to free access to information. What we have today is a strategic government policy with regards to the Internet as opposed to rigid State regulation;

- Among important Russian characteristics is the large disproportion between the strong support provided to resource generating projects by the commercial sector (Internet-holdings) and the inadequate funding of the publicly significant RUNET sector from the State budget. Several federal and regional programmes have been developed to provide informational support to science, education and culture, as well as to a programme of electronic libraries. However, they all concentrate more on strategies than on financing issues. The real resources allocated to these programmes lag far behind demand. Non-commercial organizations are receiving certain assistance from public and charitable foundations working in Russia, but this does not offer a comprehensive solution to the problem. At the same time the commercial Internet is experiencing an investment “boom” in the content provision sphere: many “whirligig” sites are being acquired by Russian and mixed capital information companies hoping for instant profits. The overall investment in this sector in the year 2000 alone has already exceeded 50 million dollars. The interest of international investors in Russian content demonstrates its obvious significance;
- Standardization problems. The large number of digital projects in the RUNET that are not compliant with generally accepted strategies, standards and technologies leads to chaotic resources, including incomplete and incorrect data. Copyright protection of these resources is more challenging (here we may refer, for example, to many public electronic libraries whose creators often ignore copyrights and open up access to works without the permission of their authors or publishers). In addition mention should be made of the difficulties experienced by users in their data searches in the vast ocean of information, and the problems associated with the readability of various formats and data exchange. Commercial content-providers and professional communities (for example, libraries, museums and archives) are more successful in coping with these problems, whereas other information providers are faced with serious challenges. The solution seems to lie in the government setting standards of information quality based on international requirements;
- Language problem. Even though quite a rich information content has accumulated in Russia, it is poorly known internationally. It is practically unavailable in other countries, which contradicts the idea of free access to information. The main reason here is the language barrier: most resources are presented in Russian, which is inaccessible to many users abroad. Only recently the problem was quite the opposite – the Russian content was unavailable, and most Internet users in Russia read sites in English. Since then much has been done for the national user. However, the international availability of the resources has slipped out of focus. The English-language versions of Russian sites provide only a general outlook and practically none of the current information is renewed on a daily basis. Resources in other languages are practically unavailable. Most recently a number of competitions were announced by for-profit and

charitable organizations to create multilingual resources. However overall, this continues to be a serious problem;

- There is a steady trend in Russia to develop Internet resources of public (global) interest based on international collaboration. Here, we may identify the following main areas: educational resources, electronic collections, metadata, collaborative development of technologies. Let me refer to only two examples. First, the “Sound encyclopaedia” project is a Franco-Russian initiative to create a multilingual educational resource – a digital archive of lectures by leading university professors from both countries across a wide spectrum of humanitarian disciplines. In Russia, besides university users (students, teachers) the archive is also accessible to users in public libraries. The second example is a collaborative effort of Russia, the Netherlands, Germany, IFLA and the “Open Society” Institute to construct a site of displaced cultural treasures. It is in the interest of every country affected by the Second World War to see a site that publishes a comprehensive survey of displaced treasures together with their digital “analogues”. The value of international collaboration in information projects is extremely high. Not only does it facilitate the development of publicly significant cultural content, but also considerably improves access technologies (coding co-ordination to ensure correct access to data in various languages, compatibility of formats, production of metadata and compatible technologies, and a lot more). Such projects also allow for more adequate approaches to copyright because of their tendency to reconcile the legislative approaches of several countries.

I believe that other countries are experiencing similar problems. I would therefore, like to formulate several recommendations to our forum on the development of an effective system to ensure free access to information and support for the public domain on a global scale:

Provision of access to information

The problem of physical access to information (technical means and communicational channels) is basically a financial issue. Even in countries with well-developed telecommunications infrastructures, people cannot always afford the use of computers and access to the Internet. To address this problem, the following measures may be proposed to governments and other authorities:

- Development of governmental programmes to attract targeted investments and allocate them to the social sphere: universities, schools, libraries, municipal information servicing centres, centres for professional training and retraining, penitentiary institutions. They will serve to establish stations of collective access to electronic information;
- Governmental support for those in the private sector who provide favourable terms of access to the Internet (low service tariffs) to the public sector. In order to encourage service providers to decrease tariffs,

they may be offered preferential service contracts or tax benefits in recognition of their charitable social activities;

- Comprehensive support of collaboration between academic and public networks (universities, libraries) in various countries on the basis of multi-lateral agreements involving communication service providers.

Development of public significant information resources

The main issues in the field of the content of publicly useful electronic information are as follows: publicly useful themes, volume, quality, and accuracy (in various senses) of the information. To achieve the most effective presentation of resources to the global community, the following measures may be recommended to governments:

- Determination of national priorities in the field of public domain in each individual country based on national specificity and publicly significant values; co-ordination of strategic programmes with for-profit information services and charitable foundations, to attract investors to the development of publicly useful information;
- Development of State programmes to create (digitize) a publicly significant, national, electronic collection of the cultural heritage and open access to it;
- Comprehensive support of international programmes and projects for the creation of open-access to existing resources in science, culture, and education, in various languages;
- Support of commercial content-providers creating publicly significant content and providing free access to it in network mass media;
- Support of a flexible publishing policy that would offer libraries, museums, and archives benefits in using electronic editions and interactive databases of full-text resources to expand services to users in collective access zones;
- Development of national quality standards for information resources of publicly accessible content (state certification of databases, compliance with international standards).

Legal aspects

Solutions to the legal problems of the global information society can be provided by collaborative efforts within the frameworks of national and international legal systems. Views can be harmonized and reasonable compromises reached. Legal problems associated with publicly useful information resources – the public domain – represent a novel legal reality. Recommendations to governments in this area are simply some general strategic directions:

- Content providers in the public domain, other content providers, must enjoy legal protection on the basis of the general legislation that regulates all public activities. Otherwise, electronic resource production in the national sector loses effective motivation.
- Special caution is required for the development of international legislation to regulate translocations of electronic intellectual property across national borders. The lack of such legal bases in this field puts limitations on the global utilization of these resources;
- Government measures in the field of information protection must not take the form of rigid regulation of Internet content and police censorship of any types of output. Such regulation could infringe on users' rights to freedom of speech, access to information, and confidentiality. This, in turn, will hinder their adequate participation in information exchange and in the creation of publicly useful resources.

Conclusion

Of course, new technologies constitute the cornerstone of the information society. However this concept is not confined only to computers, the Internet and digital information.

Over a third of the people affluent enough to afford the Internet, do not know that antibiotics won't cure cancer and that humans did not live in the Dinosaur age. Are they really "information-rich"? Will they be able to find their way to "useful knowledge" in the world wide web, or simply prefer mass entertainment?

Of course, 24% of Internet users are ready to sacrifice their sleep and meals to it, and 12% will completely give up outdoor walks. However, we do not yet have enough reasons to believe that electronic libraries, web mass media and virtual chats will universally and for good replace books, traditional libraries and the warmth of real-life communications. Even though the number of web users keeps growing, it is quite possible that this growth may stop. Even today, many of those who have an opportunity to use electronic resources are not planning to do so in the near future. Will they want to entrust themselves to a new Lord (or devil) who may press the wrong keys and rob them of their "memory", which their long-stagnant brain will not be able to recall?

The information society is in the first place publicly useful humanitarian information content in any shape it takes. It originates in the **real** human world inhabited by living people. It is my wish that despite all the problems, we always remember this.

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Public sector information initiatives in the European Union

*Improved access to public sector information is increasingly possible through the use of the Internet and information technologies. Such access is important for citizens, in the context of their democratic rights and new information society/electronic government possibilities. It is also important for industry in order to make its investment strategies and the information industry in particular, which can create value-added information products and services. A number of relevant issues arise : Access rights, copyright, privacy protection, competition rules, pricing policies, access to the Internet. The Commission published a Green Paper last year and a follow-up Communication more recently in which both legislative and practical initiatives are envisaged. It has also launched **e-government** as part of its **e-Europe** initiative with the aim of having e-government throughout the EU by 2003. The issues of public domain and copyright fair use, as well as the protection of human dignity in the digital era are also particularly relevant and have been the subject of a number of EU initiatives.*

Initiatives relatives à l'information émanant du secteur public dans l'Union européenne

*L'Internet et les technologies de l'information permettent de plus en plus d'améliorer l'accès à l'information détenue par le secteur public. C'est important pour que les citoyens exercent leurs droits démocratiques et que les nouvelles possibilités d'instauration d'une société de l'information et d'administration électronique soient exploitées. C'est également important pour que les entreprises et en particulier celle du secteur de l'information, qui peuvent créer des produits et services à valeur ajoutée, déterminent leurs stratégies d'investissement. Un certain nombre de questions se posent néanmoins : droits d'accès, droit d'auteur, protection de la vie privée, réglementation de la concurrence, politiques de tarification, accès à l'Internet. La Commission a publié l'an dernier un Livre vert et plus récemment une communication qui lui faisait suite et où des initiatives législatives et pratiques étaient envisagées. Elle a également lancé, dans le cadre de son initiative d'Europe électronique – l'initiative **e-Europe** – un projet de **gouvernement électronique** dans le but d'étendre l'administration électronique à toute l'Union européenne d'ici à 2003. Les questions relatives au domaine public et à l'usage loyal des œuvres protégées par le droit d'auteur ainsi qu'à la protection de la dignité humaine à l'ère numérique revêtent également une importance particulière ici et ont fait l'objet d'un certain nombre d'initiatives de l'UE.*

Iniciativas del sector público en materia de información en la Unión Europea

*El uso de Internet y de las tecnologías de la información han posibilitado un mejor acceso a la información relativa al sector público. Este acceso es importante para los ciudadanos, en el contexto de sus derechos democráticos y de las nuevas posibilidades que ofrecen la sociedad de la información y el “gobierno electrónico”. Es importante también para que la industria formule sus estrategias de inversión, sobre todo la industria de la información que puede crear productos y servicios de información con valor añadido. Se destacan varios temas importantes: los derechos de acceso, los derechos de autor, la protección de la vida privada, las reglas de la competencia, las políticas de precios, el acceso a Internet. El año pasado la Comisión publicó un Libro Verde y más recientemente una comunicación en que se estudian varias iniciativas legislativas y prácticas. Ha iniciado también el proyecto de **gobierno electrónico** como parte de su iniciativa de **Europa electrónica**, con miras a que se disponga de “gobierno electrónico” en toda la Unión Europea para 2003. Revisten especial importancia los asuntos relativos al dominio público y al uso legítimo del derecho de autor, así como a la protección de la dignidad humana en la era numérica, que han sido objeto de varias iniciativas de la Unión Europea.*

The importance of public sector information policy in the information society

In exercising its duties, the public sector collects, collates, creates and stores vast quantities of information. To give some examples, public sector bodies produce laws and parliamentary proceedings, statistics, population, land, company and car registers, geographic, meteorological, cultural, financial, political, medical, transport scientific, technical, educational and historical information. This information is of use to practically all social, political and economic actors, namely:

- a) the public sector bodies themselves in the context of their duties;
- b) citizens (including their roles as consumers, workers, etc.);
- c) private sector companies: industry at large, acting as information user, and, in particular, the information industry acting as information content provider

The public sector

It is important to note the increasing use of Information and Communication Technologies (ICTs) in the public sector. Apart from improving the performance of its traditional tasks, this also gives the public sector an more and more important role as an actor in the Information Society. Improved information management creates greater awareness of the value of the information assets in the public sector. Moreover, in the European Union process, the exchange of information between administrations of different Member States becomes increasingly necessary.

The citizen

The Information Society certainly provides a tool for increased openness and citizens' participation. But it may also widen the gap between citizens and governments by creating information haves and have nots. And the public sector has a key role in preventing this gap by making sure that essential information is accessible to all citizens.

Within the EU, access to European Union related information will help to develop the consciousness of EU citizenship. This in turn will increase the EU citizens' interest in getting access to public sector information beyond that of his/her national origin and will create a chain reaction that will be to both the citizens' benefit and in the public sector's information management interest.

Industry

1. Industry in general

Much of the information produced by the public sector is also of use for the private sector at large. Legislative, statistical, financial and geographic information are some examples. Quick and easy access to such information, made possible by ICTs, helps companies define their investment strategies and improve their competitiveness.

2. The information industry

More specifically, access to public sector information is of great importance for the information content industry. The information content industry is a big generator of revenue and jobs. It is increasingly obvious that a decisive element in the global information market will now be information content. Europe's comparative advantages have to be used to the full. The rich European content resources held by the public sector need to be made available to Europe's information industry for exploitation.

Some issues to be addressed on the role of the public sector

In the early days of ICT applications, the 1970s and early 1980s, there seemed to be some consensus – with varying degrees of enthusiasm – on the respective roles of the public and private sectors with regard to information dissemination. It was felt that the public sector should basically make available, free of charge or at marginal cost price, the raw data that was produced in the context of its tasks, be it to citizens as part of their democratic and consumers rights or to businesses with a view to commercial reuse. The latter would then add value, both in terms of content and electronic format, and sell at market prices.

As ICT use and information content management were expanded and improved in the late 1980s and early 1990s, the public sector became increasingly aware of the value of its information assets. This awareness came at a time when all countries had public sector budget deficit problems and, at least in some countries, privatisation of public sector bodies was seen as a means

for more efficient performance and lower charges for the taxpayer. Firstly, the distinction between raw data and value-added data made little sense, especially with regard to electronic format, now widely used by the public sector, but also with regard to content, processed and made more useful and user-friendly with the help of ICTs. Secondly, in some cases the public sector had been selling its own information directly at profit making prices. As a result of these developments, different ways of commercial exploitation of public sector information have emerged which, for simplicity purposes, may be divided into five types:

- 1) The public sector commercialises the information itself;
- 2) The public sector gives public service concessions or entrusts the commercial exploitation of its information through exclusive contract arrangements;
- 3) The public sector gives non-exclusive exploitation licenses;
- 4) The public sector gives exclusive contracts for the publication of the raw data – with conditions – and non-exclusive contracts for the production of value-added information products and services;
- 5) Everybody who obtains the public sector information through the right of access has the right of commercial reuse, with specific conditions or with no conditions.

Thus the respective roles of the public and private sectors in the dissemination of public sector information are no longer clearly differentiated. In some cases they may be and have been conflicting.

There is an additional preliminary issue, as regards the concepts of access to and exploitation of public sector information. At the risk of some oversimplification, it may be said that in those countries which have both access to public sector information laws and policy instruments concerning commercial exploitation of public sector information, two broad approaches may be distinguished, reflecting two different philosophies.

The first consists of treating access to and dissemination of public sector information (including commercial dissemination) as conceptually different activities, the former constituting a human right to be exercised at the lowest possible price and the latter constituting an activity based mainly on the principles of competition and intellectual property law reflected in the price of such dissemination. This philosophy seems to exist in some European countries.

The second approach has been followed mainly by the USA and makes no distinction between access to and dissemination or exploitation of public sector information. The general access law, the Freedom of Information Act, does not exclude commercial reuse, there is no copyright on federal agencies information, while in a number of additional instruments there are provisions encouraging such reuse.

An EU overview

Most Member States have general access laws differing in terms of scope, access conditions, attitude towards commercialisation and a number of issues that it would take too long to refer to separately (e.g. exemptions to the access right, copyright questions, etc.). Even in those Member States, that have addressed the issues of commercial exploitation, a number of questions, including tariffication and competition rules, seem to be treated differently by different government departments. In most Member States, markets are too small and do not provide incentives for successful public/private synergy policies exclusively based on the national markets. The case for discussing and developing a European policy seemed already clear several years ago, even before the Internet acquired a primary role in the information access and dissemination process. A number of issues needed to be examined and for this purpose the European Commission published a Green Paper in January 1999. These issues concern the respective roles of the private and the public sector in the dissemination of information content and may be listed as follows:

- 1) Definitions;
- 2) Pricing;
- 3) Competition and copyright;
- 4) Right to information versus right to privacy;
- 5) Exemptions to the right of access.

Definitions

Defining the term “public sector” for the purposes of this discussion is not a simple task. There seem to be at least three possible approaches:

- a) The functional approach, in which the public sector is defined by general public administration legal doctrine, thus including the bodies, of which the state authority or public service tasks and functioning are explicitly determined by law;
- b) The institutional approach, which explicitly lists the bodies included in the scope of a specific law;
- c) The financial approach, whereby the public sector includes all bodies mainly financed by public funds (i.e. not operating under the normal rules of the market).

Some divergence also exists with regard to the object to be accessed. Although some legal instruments explicitly include, and no existing legal instrument explicitly excludes electronic documents or information from the access right, the term “*documents*” used in some of the early laws seems to be more restrictive than that of “*information*” or “*data*”.

1. Balancing different interests

Studies and discussions have shown that the dual purpose of an EU access to public sector information policy, citizens access and commercial exploitation by the private sector, calls for a tariffication policy that should take into account a number of interests:

- affordable access for all citizens (to all kinds of information, where appropriate?);
- a profit margin for the private sector that would justify investment in commercial, value-added reuse;
- some cost recovery (where deemed appropriate) for the benefit of the public sector body disseminating the information, and ensuring the continuity of its public service tasks.

These interests to some extent conflict with each other and call for striking a careful balance. Moreover a distinction should be made with regard to tariffication in the context of access laws and in the context of public sector copyright. The legal aspects of the latter are discussed in the following section. Tariffication aspects will be discussed in this section, to allow comparisons between different tariffication policies.

2. Changing public sector policies

As already indicated, there is a wide variety of national policies with regard to pricing. Where access laws exist, the general tendency is to give access free of charge or at distribution cost, regardless of who the requester is (it should be remembered that in some laws commercial reuse is not permitted).

Commission studies have shown that recent years have seen a tendency, especially in Member States with relatively large information markets, for public sector bodies to recover part of their budgetary deficits by selling their own information at full market price. An intermediate policy has been to charge different prices according to the intended use of the public sector information (higher prices if the information is intended for commercial reuse). Existing instruments give some examples of pricing policy options.

Here, it would be interesting to examine the tariffication policies practised in the U.S.A., which has the longest and most successful tradition of public and private sector synergy in the information market on the basis of a general access law (the FOIA). The U.S. tariffication philosophy is that the public sector should see the adding of value only as a tool for its own efficiency purposes, and not as an incentive for profit making. On the other hand, if the private sector is to make a commercially viable product or service, it should be able to add value beyond that added by the public sector and sell it at a profit making price.

Competition and copyright issues

1. Competition rules

We have seen that competition questions may appear in relation to marginal cost tariffication of public sector information, in particular if there are similar information services operating in the market.

Competition questions may also arise when the public sector commercialises its own information directly in ways not allowing “level playing field” opportunities to competitors; and when public concessions or exclusive contracts are given to private sector bodies in ways incompatible with competition rules.

An interesting difference may be noted between U.S. and European philosophies with regard to the public sector. In the U.S. there is a relative lack of confidence towards the public sector and a perceived need for a diversity of public and private sources for government information. In Europe, such lack of confidence exists with regard to information sources such as the press and the media, where the issue of pluralism and media ownership has been at the centre of texts and discussions both at national and EU level. There have been no European laws on access to public sector information, however.

2. Copyright

Of particular importance in the discussion about public sector information is the role of government copyright. The Berne Convention (art. 2 (4)) gives national legislations the discretion to determine the protection to be awarded to official texts of a legislative, administrative or judicial nature.

In principle, public sector information is produced at public expense. The question may be asked whether, in a democratic society, public bodies may exercise copyright to prevent the public from using works produced at their expense, or to impose conditions and charge royalties in respect of publicly funded creations and for which the public has arguably already paid. On the other hand, it may be also argued that it is usually a small section of the public who wish to use a particular public sector information product and that the users should not be subsidised by the general public and that they should therefore make some contribution towards the costs of production. It should be noted that there is no copyright on U.S. federal agencies information products.

*Right to information versus right to privacy:
how should a balance be struck?*

Much of the information held by the public sector is of a personal nature, in that it refers to or allows for the identification of individuals. This is the case of population, company, vehicle or credit registers as well as of medical, employment or social welfare data, for example. Access to such information may be

requested for marketing, research or other purposes. In such cases, the citizens' and businesses' right to information appears to be in conflict with the individuals' right to privacy. All national access laws seem to have been aware of this potential conflict and have attempted to solve it one way or another.

On 24 October 1995 the European Parliament and Council Directive (95/46/EC) was adopted "on the protection of individuals with regard to the processing of personal data and on the free movement of such data" applicable to the public and the private sector. It is clear that this Directive will have to be fully observed in cases of personal data held by the public sector.

Balancing the access interests, for openness, commercial or other purposes against the privacy interests will be, firstly, the responsibility of the public bodies which process the personal data concerned (national supervisory authorities also having an important role and courts expected to decide in cases of dispute).

Exemptions to the right of access

All national laws and the Environment Directive provide for exemptions to the right of access. For the purpose of simplicity, such exemptions may be divided into four categories:

- a) Exemptions in the interests of the state (national security, public order, economic interests, international relations, legislative procedures, etc);
- b) Exemptions in the interests of third parties (privacy, intellectual property, commercial secrets, judicial procedures, etc);
- c) Exemptions to protect the decision making process (preliminary or "internal use" information etc);
- d) Exemptions to avoid unreasonable workload in the administrations concerned (information already published, excessive requests).

Different legal instruments introduce such exemptions in different degrees of detail. It may be noted that, while a number of exemption justifications are very similar in all the above examples, there are also many cases that differ because of particular legal traditions, historical political or other reasons. It would, of course, be desirable if exemptions could be both homogeneous and exhaustive so that users could have a simple, clear and uniform picture for all Member States.

All these and some other issues were addressed in the Green Paper published in January 1999 which invited a public debate. More than 200 replies and comments have been received and the Commission is in the process of producing a Communication with conclusions and action proposals.

Options for action

On the basis of the Green Paper consultation process, the following action areas have been identified:

1. Legislative action;
2. Projects to encourage public and private sector synergy;
3. Practical mechanisms to facilitate access to public sector information and pan-European co-ordination;
4. Awareness and training initiatives.

Proposals for legislative action

The present rules for access to and exploitation of public sector information in Europe is a legal patchwork. Against this background, the e-Europe Action Plan, endorsed by the Feira European Council, in June 2000 states that a co-ordinated approach should be developed for public sector information before the end of 2000. It may be argued that some legislative initiative(s) may be required that will help create homogeneous access conditions and policies, for the benefit of all concerned.

The most effective means of ensuring easier and to a large extent uniform access rights and exploitation conditions across the European Union is through a Directive. There is also a very strong economic argument for some harmonisation that will achieve at least three objectives:

- improve access for companies wishing to establish themselves in different Member States and needing relevant public sector information;
- provide companies throughout the E.U. with important information relevant to their activities;
- establish a “level playing field” for companies in the information market wanting to offer value-added services based on public sector information and a legal basis for public/private sector synergy.

Since it would be legally binding and create legal obligations, such a Directive would also have an important, indirect, positive effect on information management in the public sector. At this stage, however, in the context of the Green Paper consultation process, there has been no strong support for such a Directive except from parts of the information industry. There seems to be a need for further discussion of both the desirability and the content of such a legislative measure and the Commission intends to set up a High Level Group comprising public sector, private sector and citizens’ representatives to discuss this matter.

Technological projects

The Information Society Programme within the 5th Framework Programme for R&D has many elements and finances a number of projects that are important for the way governments deal with their information resources. There are action lines for “Systems and Services for the Citizens”, “Human Language Technologies” and programmes like INFO 2000 and its expected successor *e-Content* which cover part of this area. The *e-government* action in the *e-Europe* initiative proposed by the Commission and endorsed by the European Council will give additional impetus to a European public sector information strategy.

Proposals for practical mechanisms to facilitate access to public sector information and pan european co-operation

An appropriate E.U. legal framework and support to public/private synergy initiatives will have a limited effect, if there is no human infrastructure for their implementation:

- on the one hand, despite the electronic access possibilities offered by the ICTs, the human factor will always have the leading role in deciding and managing the collection, processing, dissemination and exploitation of public sector information at national level;
- on the other hand, an important co-ordination and information exchange exercise will be required at European level. A discussion on the ways in which to fully grasp the potential of the tools of the Information Society in the administrations is currently taking place in all EU Member States. New solutions are being tested in different environments. An exchange of information throughout the Union would ensure that access is possible under compatible legal, technical and organisational conditions. The High Level Group to be proposed by the Commission could be very useful in this respect.

Proposals for awareness and training initiatives

Despite the existence of access to public sector information laws in many Member States, there is a general feeling that in most Member States there is a lack of an appropriate public sector openness and information dissemination mentality, let alone a mentality geared towards active co-operation with the private sector in electronic information processing and dissemination. This has also been emphasised in recent Information Society Forum discussions. Important awareness and training efforts will be required in this respect.

Access to community documentation

The institutions of the European Union are currently working out a policy for public access to documents of the Commission, the Council and the European Parliament. The debate arising from these proposals illustrates the great difficulty of laying down general rules that can balance the need for administrations to carry out their work efficiently and the right of the citizens to be informed of the details of that work, while at the same time protecting the rights of other citizens and enterprises to confidentiality.

Conclusions

Information and communications technologies are transforming the landscape in the public sector as well as elsewhere and progress is being made daily in making information available to the citizen. However, as briefly sketched out in this paper, many obstacles remain. Three factors are expected to play a role in tackling these obstacles: firstly many of the problems facing administrations are common to all and it is encouraging to see international co-operation in solving them; secondly, the administrations themselves need data from other countries as commerce, workers and interests become increasingly global; thirdly, new economic opportunities arise from the new transnational markets for information. Given a positive outlook on the part of all those involved, there is now emerging an encouraging future for new initiatives in public-private collaboration in information dissemination. This is a necessary step to enable the citizens throughout the world to take a full part in the global Information Society.

SESSION
SESIÓN

2

FACILITATING
ACCESS TO NETWORKS
AND SERVICES

FACILITER
L'ACCÈS AUX RÉSEAUX
ET SERVICES

FACILITAR EL ACCESO
A LAS REDES
Y A SUS SERVICIOS

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Access to telecommunications in the Internet age

Ensuring and expanding affordable access to telecommunications services has long been a fundamental goal of national and global policy in communications. However, with the rise of the Internet, access to telecommunications has become even more urgent, since phone networks supply much of the conduit for Internet connectivity. This Paper will briefly review the historic concept of universal access and service in telecommunications, including the development at the ITU of analytical tools to measure national networks. The Paper will then examine a number of ways in which the rapid growth of the Internet impacts on the longstanding policy debate on universal access. The Paper will conclude with an assessment of the phenomenon of the Internet in the context of the Right to Communicate and a description of some recent developments at the ITU that are relevant to establishing a framework to promote expanded access to the Internet.

L'accès aux télécommunications à l'ère de l'Internet

Assurer et élargir un accès aux services de télécommunication qui soit abordable est depuis longtemps un des objectifs fondamentaux en matière de politiques nationales et internationales des télécommunications. À présent, avec l'avènement d'Internet, l'accès aux télécommunications devient encore plus urgent, étant donné que les réseaux de téléphonie assurent une grande partie de l'acheminement des données circulant sur Internet. Cet article examine brièvement la notion d'accès universel et de service en matière de télécommunications au cours de l'histoire et aborde notamment la mise au point d'instruments analytiques de mesure des réseaux nationaux à l'UIT. Il se penche ensuite sur un certain nombre d'incidences de la rapide croissance d'Internet sur le débat entamé de longue date autour des politiques en matière d'accès universel. Enfin, il présente une évaluation du phénomène qu'est l'Internet dans le contexte du droit de communiquer et décrit comment l'UIT a récemment pris des mesures pour mettre en place un cadre propre à favoriser un plus large accès à Internet.

El acceso a las telecomunicaciones en la era de Internet

Durante mucho tiempo, uno de los principales objetivos de la política nacional y mundial en materia de comunicaciones ha sido garantizar y ampliar el acceso a los servicios de telecomunicaciones a un costo asequible. Sin embargo, el acceso a las telecomunicaciones se ha convertido en una necesidad aún más apremiante debido al auge de Internet, ya que la conexión a la Malla Mundial se basa en gran medida en los conductos de la red telefónica. En el presente informe se hará una breve reseña sobre el concepto histórico de acceso y servicio universal en el campo de las telecomunicaciones, comprendida la elaboración en la UIT de instrumentos analíticos destinados a evaluar las redes nacionales. A continuación, se examinarán algunas de las incidencias del rápido desarrollo de Internet en el ya viejo debate sobre políticas de acceso universal. El informe finalizará con un estudio del fenómeno de Internet en el contexto del derecho a comunicar y una presentación de algunas actividades recientes de la UIT que son de interés para el establecimiento de un marco para facilitar el acceso a Internet.

Introduction

Promoting access to networks and services has been a longstanding goal of telecommunications policy. This concern reflects the historical status of telecommunications as a service provided by a government monopoly. The traditional paradigm was based on the view that telecommunications is a natural monopoly and a fundamental part of national infrastructure that cannot be subjected to market forces, but instead must be developed in a manner that meets a broad range of societal and economic concerns. These concerns ranged from national defence, to job creation and even included the need to bolster national finances.

There were a number of tradeoffs underlying this historical model. The monopoly operator was required, as a common carrier, to offer service without discrimination but granted protection from liability. Prices were regulated by the government, and long-distance revenues were often used as a subsidy to keep down the price of local calls. The roles of policymaker, regulator and operator were combined in a monolithic ministry. The goal of expanding the telecommunications network, referred to as universal service or universal access, was an obligation imposed on the monopoly operator as part of the tradeoff.

The historical model has come under sharp and largely successful attack in the past decade as the result of two key forces.

First, the trend toward deregulation and competitive markets that began in the 1980s, gained rapid momentum in the 1990s in most developed countries. The development of new technologies, such as microwave transmission and wireless telephony, laid to rest the argument that telecommunications was a natural or technical monopoly. In response, and to encourage downward pressure on the cost of communications, many governments opened this sector to competition by licensing new services and entrants, privatizing and creating independent regulatory bodies. National reforms were further stimulated in 1997 by the adoption of the WTO Agreement on Basic Telecommunications, which created a set of binding obligations to open more than 90% of the world telecommunications markets (on the basis of revenue) to domestic and foreign competition.

The other trend, of course, is the rapid growth of the Internet, which has diverse and far-reaching implications. The Internet challenges the technical underpinning of the telecommunications network. Through the use of packet-switched technology to replace the old copper circuit-switched phone network, the price of transmission has been sharply reduced. Today, phone companies have an entirely new technological basis for communications infrastructure, ushering in the age of Internet Provider (IP) networks. The popularity of the Internet also places pressure on governments to take steps to reduce the cost of local phone calls, which is an integral component of the price of Internet access.

But perhaps the Internet's key impact lies in the way that it has transformed the traditional concept of the network. We speak of IP platforms and the Internet as data networks. But what is data, in the digital age, other than the entire sum of human knowledge and learning. What was formerly a network used largely for voice telephony became the Information Superhighway. This transformation heightens the importance of telecommunications networks at the same time as it poses new issues as to how those networks should be deployed.

There are, unfortunately, two worlds to consider in this communications revolution. On the one hand, developed countries, having already opened their markets to competition, are rushing to promote the development of new broadband applications and technologies. The issue is different in the developing world, where many countries have not yet liberalized their markets. For many developing countries, basic phone services are still not available to most citizens.

This paper will discuss a few key issues concerning access to networks and starts with a review of the notion of universal phone service and the way in which this policy goal has been addressed. It then examines universal service in the digital age, including the manner in which access to phone networks has been applied to access to other transmission platforms, such as cable TV (CATV). It concludes with a description of the evolving role of networks in the Information Society.

The traditional concept of universal service

By some accounts, the term "universal service" was first used by Theodore Vail, the President of AT&T. In the 1910 Annual Report of the company, he described "universal service" by writing "the telephone system should be universal, interdependent and intercommunicating, affording opportunity for any subscriber to any exchange to communicate with any other subscriber of any other exchange".

In the more modern sense, universal service refers to having a phone and affordable phone service in every home. To be more legalistic, universal service means providing telecommunication service with access to a defined minimum

range of services of specified quality to all users everywhere at an affordable price. The precise parameters for universal service are usually set by national law or regulation, or may be contained in the licence of the dominant operator. The definition of universal service may include fax, phone booths, subscriber directories, emergency services or services for the handicapped. This obligation is usually imposed only on the dominant provider of basic telecommunications services.

Universal access is a broader notion that is of more relevance to developing countries. It generally means providing a telephone within a reasonable distance for all citizens. The ITU uses 5 kilometers as the test of reasonable distance for universal access.

Another measure used to estimate universal access, which was developed at the ITU, is teledensity, or the number of main phone lines per 100 inhabitants. While average teledensity for OECD countries is approximately 60, more than 72% of the world's population lives in economies with a teledensity of less than ten.

At the global level, the legal requirements for universal access are modest. The Constitution of the ITU provides that one of the purposes of the Union is to “promote the extension of the benefits of the new telecommunication technologies to all the world's inhabitants” (CS/6). Article 33 of the same Constitution establishes a normative principle that Member States recognize the right of the public to correspond by means of the international telecommunication service and this principle finds further elaboration in the International Telecommunications Regulations (Melbourne, 1988).

Universal access in the digital age

Redefinition

Despite the market reforms that are taking place in telecommunications, universal access remains one of the few areas where many believe that sector-specific regulation may be required indefinitely. It is also widely considered that the need for basic telecommunications will not be met by purely commercial means or the operation of market forces.

The term universal access, together with the variant universal service, has been defined and used in many different ways. Variations depend on legal, cultural and philosophical traditions, and perhaps even more, on a country's stage of network development. In the digital age, the concept of universal access is taking on new dimensions and there is a debate as to whether the concept should apply to Internet access. Modern communications are widely perceived as vital to international competitiveness in the information era. For this reason, it is a prime concern of many developed nations to spread broadband access

as rapidly as possible. This is also the reason underlying the effort of many developing countries to make basic Internet services accessible to an increased number of communities across the nation.

Nonetheless, different trends may be observed in countries at different levels of development. Several countries with advanced networks, for example the United States, Australia and the United Kingdom, are considering whether Internet access has become so widespread or even essential that it should be part of the definition of universal service. Broadly, the conclusions seem to be: a) home Internet access has not yet reached this status – its development should be left to market forces; b) public Internet access, especially in schools, is an important public good deserving political and financial support, if not the status of a universal service.

Several countries with less-developed networks are incorporating new and innovative services in their national telecommunications and universal plans. In India, for example, the 1999 Telecommunications Policy aims at providing Internet access to all district headquarters by the year 2000, and high speed data and multimedia capability, including Integrated Services Digital Network (ISDN), to all towns with a population greater than 200,000 by the year 2002 .

Specifying or regulating the quality of basic service is another key topic. It is important that service standards are not allowed to fall below a certain minimum. However, where differentiated service levels are available, some customers gladly choose a lower quality of service that allows worthwhile savings. This may be the case for the use of cell phones or even for Internet telephony.

Some aspects of service quality which have come to the forefront in recent years may reasonably be considered privacy rights. These include, for example, the right to choose the form of one's directory listing (including a refusal to receive telemarketing calls), and the right to have itemized bills.

Itemized billing also plays an important role in user rights in competitive markets, as it is often the best way for the caller to know the costs of calls, a necessary aspect in making an informed choice among competing service providers. Other relevant aspects include number portability (the right to change service provider without changing number) and dialing parity (right to choose long-distance operator without dialing more digits). As discussed above, these are increasingly strong candidates for inclusion in the definition of basic service in a competitive environment.

The role of the regulator

The following section takes a look at the tools that may be used by regulators to promote universal access. These include price controls, licensing and policies to increase access points.

1. Competition and price controls

The introduction of network competition is itself perceived in most countries to be the single most powerful tool for spreading access, by bringing down prices and injecting new energy into the sector. More generally, reforms that produce a new competitive environment offer regulators considerable opportunities for striking bargains with regulated companies, which may include access requirements.

The review of proposed acquisitions and mergers provides regulators with another means to shape markets, by imposing certain conditions for granting approval. The United States Federal Communications Commission imposed some 28 conditions for approval of the proposed SBC-Ameritech merger, including a requirement to offer high-speed data service to low-income areas. In Brussels, approval of the MCI-WorldCom merger by the European Commission was conditioned on divestiture by the companies of some of the Internet backbone capacity of the combined entity.

Furthermore, as a recent ITU Regulatory Survey shows, the majority of reporting countries which impose universal service obligations on incumbents, also impose them on the new operators that have been allowed into the market due to liberalization. Malaysia's recent Communications and Multimedia Act, for example, requires all fixed-line operators to contribute to the provision of payphones in rural areas, while this had previously been required only of the dominant operator, Telekom Malaysia.

The aim of most universal access regulation is to allow effective competition without detriment to universal access. This usually means promoting price and tariff rebalancing in order to reflect costs and thereby facilitate competitive entry. At the same time, there is a desire to protect vulnerable groups from excessive price increases. In developed countries, this is relatively easy to achieve – a huge blanket cross-subsidy to all telephone line rentals may be gradually replaced by a targeted cross-subsidy to some users only.

In most markets, the pairing of competition with select price controls is becoming an attractive mix to achieve the diffusion of new services to the population at large or basic services to selected groups in society. Monitoring the various prices charged for Internet services and developing adequate regulation to promote the service when needed is, for example, an increasingly popular approach among regulators worldwide. Some of them are:

- Monitoring end-user prices charged for Internet access. Often practiced and appropriate where there is little or no competition in Internet service provision to ensure affordability – as is done in the Gambia;
- Developing new charging schemes for local calls used to access Internet services. Special dialing numbers and reduced prices are being implemented in some countries to promote Internet access and usage;
- Monitoring the interconnection prices charged by telecommunications network operators to Internet service providers. In particular, to ensure they are no higher than those charges to the network operator's own Internet service provision branch;
- Exploring ways to bring down the price of leased lines (which are a main network resource used by ISPs to provide Internet services). High leased-line prices lead to high consumer prices, and, subsequently to a limited diffusion of Internet services;
- Requiring value-added operators, including Internet service providers, to contribute, either in cash or in kind to the achievement of universal service goals.

2. Licencing

Licencing has always been one of the preferred mechanisms of policy makers and regulators to achieve universal access goals. In the days of PTTs, performance agreements between the company and the relevant Ministry would set network expansion targets, and, in some cases, special service arrangements – such as subsidized prices – aimed at improving access to communications services for disadvantaged groups in society.

With the opening up of markets and the entry of new operators, licences are being used to achieve certain universal service/access goals. Licences now usually contain incentives and/or obligations relating to network expansion. That is the case in a number of Asia-Pacific countries, such as Indonesia and the Philippines where both new wire line and wireless operators have been required to comply with certain network expansion targets. That has also been the case in Sri Lanka.

3. Community Telecentres and access points

Many national approaches, particularly in developing countries, put the emphasis on the importance of public access points for broadening access to whatever communications technology has been installed. The hope is that guaranteed public access will diminish the worst inequities between the richer and poorer parts of a society and at the same time, stimulate demand for private (commercial) access to these technologies.

A number of countries in the developing world are putting special emphasis on multiplying the points at which the public can have an easy and reliable

access to communications services. Some have decided to supply, for the time being, traditional basic services. Others are aiming instead at more complex schemes, which might include some or all of the features of a multimedia telecentre.

The growing movement towards providing community telecentres is based in part on the desire to make the Internet more widely accessible. This policy has become a central plank of some universal access strategies, most notably in South Africa. The community telecentre is the result of a marriage between the public telephone and commercial cybercafés. It may range from a single phone in a hut (possibly with an enhanced data or fax capability) to a purpose-built, air-conditioned centre equipped with a dozen phone lines, computers, photocopiers, and a team of trainers and modern “scribes” (who help the uninitiated to find their way around the Internet).

Telecentres are being tested in a range of developing countries across Africa, Asia and Latin America. Most of them are very new and the conditions for their success are not clear, but it seems that they will require:

- Support by the regulator for the low-cost resale of telecommunications;
- Careful planning towards self-sufficiency as an integral part of the local economy, including the progressive filling of relevant jobs by local people;
- Involvement of the local community in the planning and management of the centre, as well as in its running.

4. Special needs

In redefining modes of access to telecommunications services, policy makers and regulatory agencies are increasingly taking into account the fact that not all citizens have the same physical and mental capabilities. This recognition is leading to an increasing public awareness of the need for positive action to secure equitable treatment of citizens with disabilities.

The nature of a disability may call for physical adaptation of the network, or more usually of terminal equipment, to achieve functional equivalence for people with that disability. For example, profoundly deaf people have no use for voice services. To communicate amongst themselves, they may use text or other visual services (for example, videophones which transmit sign language). To communicate with the hearing world, they must have a telecommunications relay service which translates between voice and these other services. Wheelchair users may be unable to reach public phones because of the height at which they are placed or the size of a kiosk. People with reduced vision or dexterity may find phones with big buttons a great help.

The impact of new technologies

Technological innovations and new services are widening the range of ways in which universal access goals can be achieved. In most countries, however, the chosen route is simply to open the market, without any special regulations to promote universal access. Yet, regulatory decisions related to the type of technologies that can be used under a particular licence have the ability to either promote or undermine the rapid diffusion of new information and communications technologies.

There is a risk however. If a particular technological configuration or standard is linked to a licence to provide a certain type of service, those holding the licence would find little incentive and considerable barriers to move up the technological ladder. In other words, licences that are not technology-neutral can often impede technological innovation.

The following section takes a brief look at some current technology trends which have important implications for universal access.

1. Internet service provision

A major phenomenon has been an enormous growth in use of the Internet, fuelled in developed countries by increasingly attractive tariff packages. These are often advertised as free, although users do normally pay something, either through a flat-rate subscription or through call charges. Service providers may also supplement their revenues from other sources, including advertising and commissions for on-line sales.

2. Mobile

The last few years have seen a huge growth in the sale and use of cellular mobile phones worldwide. In developed countries such as Sweden, Finland and Japan, there are, or soon will be, more mobile phones than fixed line subscribers. In several developing countries too, mobile phones are making a major contribution to the total number of lines, often substituting for fixed lines. Where fixed lines are especially scarce, as in Cambodia, again mobile lines may actually exceed fixed lines. Similar trends can be seen in countries like China, where it is expected that by 2010 mobile services will constitute as much as 40 per cent of all telecommunications services.

In the next few years, the deployment of third-generation (3G) (also referred to as UMTS) cell phones will begin, mostly in developed countries. These new devices will offer the possibility of portable broadband access to the Internet. Although the end costs for this service have yet to be determined, 3G technology does provide the possibility for leapfrogging in developing countries, as it avoids the need to build a wire line network. While it is too early to tell if 3G will succeed, it is entirely possible that the mobile phone may replace the personal computer (PC) as the preferred Internet access tool and this service is likely to be quite popular with those who cannot afford a computer.

Paying for universal access

Universal access, as a national policy, rests on the premise that this goal cannot be achieved by the market acting on a purely commercial basis. A key issue is the means by which to fund universal access, especially as new services and competitors enter the market. Not surprisingly, funding and the costing of universal service have caused considerable debate and controversy in industrial circles. Of course, the key to any shared funding mechanism is the determination of the net cost that is to be shared and there are several different approaches to this issue.

In many countries, the huge success of mobile services together with fixed/mobile service convergence, suggests that mobile operators are now sufficiently mature to be asked to contribute to these social goals. Contributions may be in cash or in kind: in South Africa, cellular operators have to provide cellular payphones within their coverage areas, and Grameen Phone in Bangladesh is providing villages with cellular payphones.

Convergence

There are many notions of convergence, but for this paper the working concept is that of the use of other media platforms to provide Internet access. In some countries, cable television systems can now provide broadband Internet access and telephony. This phenomenon complicates the debate, as it raises the issue of whether these companies should be considered as part of the access debate.

Digital broadcasting

Digital broadcasting greatly multiplies the number of channels available. To access this wealth of material, an individual must not only live within coverage of the new services, but also invest in terminal equipment: a new television, possibly a satellite dish, and a “set-top box” which makes access possible to those facilities that have been paid for. In spite of the cost of all this equipment, the technology offers tremendous opportunities. Digital television sets could rapidly out number personal computers, and provide a measure of data and Internet access which would satisfy a high proportion of demand. This could be the route towards true democratization of the Internet in developed countries, and an economical way to provide both broadcast and two-way communications to isolated communities anywhere in the world. Again, this is an emerging market whose future can only be guessed.

Thus, the issue must be raised as to whether broadcasting can be used to achieve universal access goals and at what cost.

Cable

New entrants in telecommunications usually need to make use of the wire line infrastructure of the dominant operator to offer their services to the public. This policy issue is referred to as interconnection. To take one example, mobile operators must have access to the Public Switched Telephone Network (PSTN) in order to terminate calls at customer premises. The terms and conditions of that access, i.e. interconnection, are critical in determining whether the new entrant will succeed. Not surprisingly, interconnection is perhaps the most difficult and contentious of issues dealt with by telecommunication regulators.

The debate on interconnection has broadened as telecommunications and the Internet expands to other delivery platforms. Recently, the issue has been raised as to whether cable companies should be obligated to offer “interconnection”, so that consumers who access the Internet over the cable system have a choice among different Internet Service Providers (ISPs). This question has been most vigorously contested in the United States, following recent acquisitions of cable companies by telecommunications operators.

In the United States, cable television is regulated at both the local and federal level. Several years ago, AT&T, a long distance provider, embarked on a campaign to acquire cable systems, in the belief that this would enable it to quickly get its own wire into customer’s homes. AT&T also formed an alliance with Excite@Home to be the sole provider of Internet access on the AT&T cable system.

The issue of cable access arose in the transfer of licences from the acquired companies to AT&T. In a decision in June 1999, a Federal judge in Oregon ruled that a local government could force AT&T to share its cable line with competing ISPs. AT&T then appealed the decision to the Court of Appeals for the 9th Circuit. Other localities took contrasting decisions and bills were introduced in 5 States to mandate open and competitive cable access for the Internet. Before the Appellate Court could rule, AT&T announced in December 1999 that it would voluntarily open its cable systems to ISPs competitor, but not before mid-2002.

In June 2000, a three judge panel of the Ninth Circuit ruled that the city of Portland, Oregon could not require AT&T to give unaffiliated Internet service providers nondiscriminatory access – often called “open access” – to its high-speed broadband cable plant. But the Court also found that cable broadband was a “telecommunications service” under the national Telecommunications Act, meaning that the Federal Communications Commission (FCC) will need to address this issue. At the time of this writing, the FCC has not issued a ruling on the matter.

Elsewhere, the Canadian Regulatory Commission (CRTC) has stated its intention to require open-access to cable systems, while the European Commission, in its 1999 Telecommunications Review, indicated that it is premature to require cable companies to offer open access to ISPs.

Network access in the information society

Increasingly, we think not of phone networks, but of information networks. And the networks that were formerly used to provide voice telephony can now bring the sum of human knowledge into the businesses and homes of each citizen who is connected.

This phenomenon has radically altered the significance of these networks. In this new century, access to the information network resource will become almost as important as access to natural resources such as air and water. Discussions about telecommunications must now take into account the fundamental impact that voice and data networks have on every aspect of human society.

The Japanese futurist Taichi Sakaiya has written: “Survival dictates that human beings... develop an ethics and aesthetics that favour exploiting fully those resources that exist in abundance, and economizing on items that are in short supply”.

In the age of information networks, the radio frequency spectrum used for wireless communications and the possibilities that it offers of broadband transmission of knowledge and data, is fast becoming the key resource of abundance. As custodians of that resource, government officials responsible for telecommunications will need to increasingly consider the other societal concerns that are now involved in the management of spectrum and broadband to create improved networks for communications.

The changed world of telecommunications also means that the scope of universal access must be reconsidered and greater recognition given to the importance of networks as the one of the keys to the future success of citizens and societies.

To explore that and related questions, the ITU is planning to hold a World Summit on the Information Society in the year 2003. This project has been endorsed by the Secretary-General of the United Nations and by the Heads of other UN agencies. The ITU will play a lead role in organizing the Summit in cooperation with other interested UN agencies, together with government, the private sector and civil society.

The purpose of the Summit will be to develop a set of shared global principles, based on an examination of the impact of the Information Society, including the fundamental role of telecommunications networks. It is also hoped that the Summit will produce a concrete and specific plan of action for implementation by UN agencies and all other partners concerned.

Conclusion

The achievement of universal access is one area where market forces are not likely to produce the desired societal result. The provision of universal access to some communities or regions in a country entails at least some investment on the part of a network operator which it has little or no chance of ever recouping. If the goal of universal access is to be attained, it will require commitment by governments, acting through laws and/or by targeted regulatory efforts.

In the digital age, the definition of universal access is becoming more complicated. Simple telephony no longer seems adequate as a goal, since access to the Internet is increasingly viewed as fundamental to economic and societal development. While nations have been slow to expand the concept of universal access to encompass the Internet, decisions in such areas as licencing, mergers, access points, and cost schemes will influence how accessible and affordable the Internet is to the average citizen. New technologies bring some promise of accelerating access to the information highway, providing these services can be offered at reasonable prices. As convergence takes hold, access issues will be applied to new media and platforms.

Perhaps most fundamentally, the changed role of the phone network in becoming the global information pipeline will require that a new set of policy concerns be brought to bear on decisions taken with respect to access to the network infrastructure of the future.

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Accessibility in rural and remote areas

Thanks to the remarkable progress of digital technology, radio communication technology such as satellite communications and fixed/mobile terrestrial wireless communication technologies, costs for provision of infrastructure for rural and remote communications services have come down close to the realistic level for the affordable and sustainable services. Combined with the development of Information Technology (IT), Voice over Internet Provider (VoIP) and other multimedia applications are expected to contribute to the provision of global connectivity for the rural and remote communities. Sophisticated IT technology products now being installed will allow service providers to better meet the needs of rural and remote communities by enabling a variety of pictorial, audio, text and multi-lingual interfaces and by providing the tools for communities to create and share their own local content. Promotion of the concept of Multi-purpose Community Tele-center(MCT) for shared use of equipments, the introduction of financing schemes and/or special funding mechanisms for the start-up of the rural and remote area services may be useful for the accelerated improvement of accessibility. There still remains barriers for improvements of accessibility such as radio frequency use or licence fee and the issue of cost sharing of international access lines for Internet which affect the end user prices.

Accessibilité aux régions rurales et reculées

Grâce aux remarquables progrès de la technologie numérique, des radiocommunications, notamment par satellite, et des télécommunications terrestres sans fils au moyen d'appareils, fixes ou mobiles, les coûts des infrastructures destinées aux services de télécommunications dans les régions rurales et reculées ont baissé au point d'être près d'atteindre le niveau réaliste où ces services seront financièrement accessibles et viables ; combinées au développement des Technologies de l'information (TI), la transmission des messages vocaux sur l'Internet (VoIP) et d'autres applications multimédia utilisables sur ces infrastructures desservant les régions rurales et reculées devraient contribuer à universaliser la connectivité au bénéfice des communautés qui y vivent. Des produits évolués issus des TI en cours d'installation dans ces régions permettront aux fournisseurs de services de mieux répondre aux besoins des populations en mettant en place tout un éventail d'interfaces multilingues et facilitant la communication des images, des messages sonores et des textes et en leur offrant les outils grâce auxquels elles pourront créer et diffuser elles-mêmes leurs propres contenus. Afin de rendre ces régions plus rapidement accessibles, il peut être utile d'y promouvoir la notion de télécentre communautaire polyvalent (TCM) en vue de la mise en commun des équipements et d'instituer des dispositifs et/ou mécanismes de financement spéciaux aux fins du lancement des services qui leur seraient destinés. Des obstacles à l'amélioration de l'accessibilité à ces régions subsistent néanmoins, qui concernent notamment l'utilisation des fréquences radio, les redevances de licence et le partage des coûts des lignes internationales d'accès à l'Internet, toutes questions qui influent sur les prix pour l'utilisateur final.

Accesibilidad a las zonas rurales y remotas

Gracias a los progresos notables de la tecnología numérica, la tecnología de las radiocomunicaciones como los satélites de telecomunicaciones y las tecnologías de comunicación inalámbrica terrestre fija o móvil, los costos del suministro de infraestructura para los servicios de comunicación en las zonas rurales y remotas han bajado a un nivel realista que posibilita la prestación asequible y sostenible de servicios. Se espera que el desarrollo de las tecnologías de la información, la telefonía por Internet y otras aplicaciones multimedia contribuya a conectar a las comunidades rurales y remotas con el resto del mundo. Los productos perfeccionados de la tecnología de la información que se están instalando en las zonas rurales y remotas permitirán a los proveedores de servicios satisfacer mejor las necesidades de las comunidades rurales y remotas, posibilitando diversos interfaces gráficos, sonoros, textuales y plurilingües y aportando a dichas comunidades los instrumentos necesarios para crear y compartir sus respectivos contenidos locales. La promoción del concepto de telecentro comunitario polivalente para el uso compartido de equipos, la introducción de un plan de financiación o de un mecanismo especial de financiación para iniciar la prestación de tales servicios en las zonas rurales y remotas pueden ser útiles para mejorar rápidamente la accesibilidad a las zonas rurales y remotas. Persisten algunos obstáculos para el mejoramiento de dicha accesibilidad, como el uso de las frecuencias de radio o el pago de derechos de explotación, así como el problema del costo de las líneas internacionales de acceso a Internet, que incidirán en los precios que pague el usuario final.

Introduction

More than 2.5 billion people – over 40% of the planet’s population – live in rural and remote areas of developing countries. Of the small fraction that have any access to telecommunications, radio broadcast and voice telephony have traditionally been the main services provided. Today, a wide variety of new services such as e-mail, e-commerce, tele-education, tele-health/tele-medicine, among others, has made access to interactive multimedia services as important for rural and remote communities as voice connectivity alone. Since each district or community requires a different mix of voice text, image, video and audio communications to best meet its needs, today’s telecommunications network operators must be able to support a range of services and bandwidth levels at a reasonable cost.

Rural and remote areas (or just “rural”) areas exhibit one or more of the following characteristics:

- scarcity or absence of public facilities such as reliable electricity supply, water, access roads and regular transport;
- scarcity of technical personnel;
- difficult topographical conditions, e.g. lakes, rivers, hills, mountains or deserts which render the construction of telecommunications networks very costly;
- severe climatic conditions that make critical demands on the equipment;
- low level of economic activity mainly based on agriculture, fishing, handicrafts, etc.;
- low per capita income;
- underdeveloped social infrastructure(health, education, etc);
- low population density;
- very high calling rates per exchange line, reflecting the scarcity of telephone services and the fact that large numbers of people rely on a single exchange line.

These characteristics make it difficult to provide public telecommunications services of acceptable quality by traditional means at affordable prices, while also achieving commercial viability for the service provider.

After extensive research through its web site, ITU's Focus Group on new technologies for rural applications, recently issued a report on the wide and ever increasing array of low cost information and communications technologies and solutions capable of supporting sustainable and socially beneficial services for rural areas.

Activities on ITU

Fifteen years before the concept of the digital divide was acknowledged, The Independent Commission for World Wide Telecommunication Development, chaired by Sir Donald Maitland set a goal in its report known as "The Missing Link" to bring telephone services within easy reach of all human kind. Basic recommendations of the Maitland Commission are still worth recalling when the subjects of bridging the gaps or rural access are addressed.

The Valleta Action Plan (VAP), formulated at the second World Telecommunication Development Conference in Malta, March 1998 sought to promote universal access to basic telecommunication, broadcasting and Internet as tools for development in rural areas. Focus Group on topic 7 "new technologies for rural application" was established one year later in Study Group of ITU-D and started its activities in June, 1999. A round table on rural access was organized on the initiative of Focus Group 7 during the ITU's AMERICAS TELECOM2000 in Rio de Janeiro in which participated rural telecommunication operators and regulators of the region. The round table discussion provided valuable information regarding the profitability of rural and remote telecommunications in Latin American countries. The activities such as case reports and the online discussion were conducted mainly on the web site and the final report was based on the analysis of the collected case reports which are now available in three languages.

Collection of case reports for rural applications

The internet web site; <www7.itu.int/itudfg7>, was established to gather and exchange information on the development of telecommunication technologies that truly meet the needs of rural areas of developing and developed countries. The web site invites contributions not only from the ITU membership but also from other organizations and individuals concerned with developing rural areas through telecommunication. The virtual conference room and the contact information allowed for direct contact with contributors. Three types of information were targeted.

1. ongoing projects using technologies specially designed for rural areas of developing countries including Multipurpose Community Tele-center, Telemedicine and Tele-education;

2. planned projects that make new combinations linked with wireless (WLL) networks;
3. examples of how equipment has been adapted for use in particular, harsh climatic or other conditions of remote and rural areas, such as solar powered telephones

Based on the data gathered through the web site, Focus Group 7 aimed, to:

- a) select those types of projects or systems that have social or economic importance but limited commercial profitability, so that the ITU can focus special support for projects helping to develop technology for rural applications;
- b) list new measures to be taken by ITU-D to encourage manufacturers and relevant organizations to create technology tailored to developing countries;
- c) recommend priorities that ITU-D should follow to help achieve the development of technology for rural applications.

57 of the reports collected in the library of the web site in time for the final report of the Focus Group 7 were deemed extremely useful for the quality and quantity of the information they contained.

Findings on application

Rural areas are generally characterized by low population density and long distances between settlement areas. Due to unfavorable geographic and climatic conditions, access from urban centres to rural areas, and vice versa, is often difficult. Further disadvantages of rural areas are:

1. Low educational level, high illiteracy rate;
2. Hardly any job opportunities;
3. Low income per capita and per family;
4. Increasing migration of the young to urban centres;
5. Unreliable and badly functioning public transport;
6. Irregular, if any, power supply;
7. Poor health care and medical services;
8. Lack of other government services;
9. Little participation in national affairs.

The basic objectives to which telecommunications services have to contribute are to trigger and sustain structural and economic development, to eliminate the above mentioned disadvantages and to generally improve the quality of life in rural and remote areas. Annual public expenditure on health and education in the world's low income countries is estimated at more than US\$100 billion. Where the cost and/or outcomes of these expenditures can be improved

through the use of telecommunications, access to appropriate infrastructure becomes not only a human right, but a financial necessity. New industries and other commercial operations are attracted only to places where telecommunications are at hand. Rural areas where these are lacking will, therefore, develop only slowly, if at all, thus contributing to the acceleration of unwanted rural to urban migration. One of several preconditions to reverse this trend is the availability of telecommunications services. Other benefits of telecommunications concern security, the elimination of feeling of isolation and insecurity in rural villages as well as the improvement of government administration. Public administration becomes more effective with telecommunications, because it relies heavily on co-ordination between central headquarters, regional and local offices as well as individual government officers in outlying districts.

It has turned out, though, that the full impact of improved telecommunications is only felt if road conditions are also improved. Many of the most critical factors that enable rural areas to benefit from technology lie beyond the network and its elements. Sustainable business models, political will, skills training and education are just as critical – if not more so – than selecting the most appropriate technology from among a range of reasonable alternatives.

Focus Group 7 found out that the Internet is the most widely used platform adopted to deliver multimedia applications in rural areas of developing countries. While much negative attention in developing countries has been focused on the use of the Internet as an illegal bypass mechanism in the international traffic arena, the long term importance of the Internet for developing countries lies in its potential to improve the domestic flow of economic and educational resources between isolated rural communities and urban centres. Areas of application for the Internet and other communications based services include telemedicine and public health education, co-ordinating regional food security efforts, making government sponsored agricultural extension services more effective and accessible to rural farmers, and enabling more rural children, adolescents and post-secondary students to receive education.

Communication based applications are being designed and implemented in rural areas of developing countries by a wide variety of actors in addition to public telecommunication operators (PTO's). A significant portion of the expertise required to develop sustainable, connectivity-enabled applications for rural areas is located within the professional, academic, business and agricultural sectors.

Not only do schools, universities, government departments, international organizations and NGOs routinely design and implement customized applications, they also independently purchase and set up information technology equipment. As a result, public telecommunications operators are increasingly required to support a heterogeneous mixture of networks, protocols and bandwidth requirements away from urban centres.

The need for basic literacy, computer skills and training in the use of ICT applications remains a significant challenge for rural areas. Language barriers

and the complexity of personal computer operation have been shown to hinder Internet diffusion. Many innovative schemes have been devised in rural areas to overcome these barriers. Although not widely utilized, techniques such as voice mail, translation of content, and icon based telephones indicate that foreign languages and illiteracy are not necessarily barriers to the use of communications services, if the end user's needs are comprehended and addressed. Relevant content is extremely critical to the success of any rural application.

Community and business development

A great deal of progress is being made in rural community and business development through the introduction of telephony, e-mail, telecentres, and radio broadcasts. For example, an infoDev-sponsored organization named PeopLink has established an e-commerce programme allowing local artisans in developing countries to market their products directly to first world consumers. Two of the key requirements for the success of community and business development applications were found to be local language support and availability of relevant content.

Telemedicine

The motivation and commitment to telemedicine in developing countries is very strong. This motivation is often backed by a willingness to pay for systems which are expected to improve health outcomes and lower medical costs in the long run. Telemedicine services may be perceived as more of a necessity in developing countries than they are in the industrialized countries, resulting in a greater willingness among the former to change established methods of doctor-patient interaction and health care administration. Telemedicine and healthcare applications are not limited exclusively to expensive, high bandwidth services. As long as the local medical community remains motivated and committed to implementing telemedicine and telehealth programmes, there are a wide range of health benefits that can be achieved through remote patient monitoring and diagnosis, multimedia communication links between urban and remote facilities, and broadcast of health information over radio and television.

Distance education

Unsurprisingly, the focus group found that university-level distance education programmes lend themselves to cross-border implementation. Using distribution by satellite or Internet, the administrative costs of running distance education courses can be spread over a very wide potential student base. A number of existing programmes, such as the African Virtual University (AVU) and the distance education network of the University of the South Pacific (USPNet), are already based on the concept of cross-border educational access.

Findings on technologies

Problems with installation and maintenance of copper cable plant have prompted the widespread use of wireless systems in rural areas. Ten types of wireless access systems were identified through the case studies and ITU activities, illustrating existing and emerging access options for reaching rural communities. Given the trend toward shared facilities such as telecentres, university extension centres, post office kiosks, etc., as well as the variety of revenue models associated with social services in the health, educational and e-commerce fields, the Focus Group considered technologies which expanded the number of supportable applications as well as those which demonstrated lower per-line costs.

Access infrastructure

Access options on the horizon for rural areas include a number of technologies that are new to the rural marketplace or still under development.

GSM cellular base stations using the 400 MHz band are scheduled for commercial introduction in 2001. The use of the lower frequency band will enable each GSM 400 base station to cover approximately double the area achieved by existing GSM 900 base stations.

Third generation cellular systems, known as IMT-2000, are designed to deliver a wide range of traffic types more efficiently and inexpensively than the current generation of wired and cellular telephony networks. The World Administrative Radio Conference-2000 (WARC-2000) designated bands under 1 GHz in order to allow for longer-range IMT-2000 cell sites, particularly for rural areas of developing countries. However, there are no firm indications from manufacturers about when commercial IMT-2000 systems under 1 GHz will appear on the market.

Gateways based on ITU-T Recommendation H.323 support real-time, two-way communications between local area networks (LANs) and the Public Switched Telephone Network, (PSTN). Such gateways offer developing countries the option of constructing local and wide area networks to deliver telephony and other services in rural areas, without undermining existing investments in the PSTN.

Internet Protocol (IP) based networking

Demand for Internet-based services in rural areas, particularly email, has resulted in new applications of old technologies, such as VHF radio systems and meteor burst communications, for non-real time services. In addition, new combinations of existing technologies are extending the reach and flexibility of wireless access systems, as well as reducing total costs through the integration of shared systems and components. In particular, many rural operators are deploying Very Small Aperture Terminals (VSATs) and point-to-multipoint

radio systems integrated with wireless local loop systems based on regional standards such as the Personal Handyphone System (PHS) and Digitally Entranced Cordless Telecommunication (DECT).

Wireless router networks, integrated with IP telephony software, have the potential to provide significant cost savings and social benefits such as multi-service platforms for telecentres, government offices, schools and other organizations in rural areas. Since these technologies are largely untested in rural areas, Focus Group 7 recommends that the Telecommunications Development Bureau (TDB) conduct pilot projects aimed at confirming the technologies' robustness in rural environments and effectiveness in dealing with multimedia applications such as telemedicine, distance learning and so forth.

User terminals

It is of the utmost importance that ITU-D strive to raise awareness of the rural information and communication needs of developing countries within the computing and information technology industry. Unlike the telecommunications industry, which has been doing business in underdeveloped rural areas for several decades, companies in the IT sector are generally unfamiliar with the environmental and social requirements of rural areas of developing countries. Multimedia systems profiled by Focus Group 7, some of which were only launched during the period in which the report was written between June and August 2000, demonstrate many features with potential lifetime cost savings for rural areas. For example, information appliances supporting email, World Wide Web (WWW) browsing and e-commerce applications provide simplified user interfaces in packages with fewer maintenance requirements than traditional PCs. Internet client network solutions can offer Internet service providers (ISPs) the ability to upgrade their rural customers' browser and applications software remotely, reducing the skills requirements for telecentre operators and rural schools. Finally, technical institutes and R&D organizations in developing countries such as India and Indonesia are developing their own custom, low cost IT terminals and devices.

Renewable power supply

The lack of mains energy supply in many rural and remote areas is a major obstacle to deploying telecommunication infrastructure. Many governments, agencies, and NGOs are currently working to support broader or massive use of telecommunications and IT systems in unelectrified rural areas. As a result, Focus Group 7 recommends that governments, administrations and recognized operating agencies consider establishing close links between renewable energy specialists and rural telecommunication and ICT initiatives.

In the past two decades, the most important use of renewable energy and hybrid systems in telecommunications has been for off-grid telecom repeaters. Due to the high cost of the repeater equipment, the critical role the repeaters

play in the larger telecom networks and their unattended nature, these power systems have been very carefully sized and designed by highly capable and experienced engineers. In contrast, the power requirements for user-side installations – such as wireless local loop terminals, PCs and cellular handsets – are relatively small. For such user-side equipment it will generally not be possible to rely upon the same approach to power system design as has been used for telecom repeater systems. Therefore, Focus Group 7 recommends that ITU-D support the efforts of the international renewable energy community by disseminating practical and useful information on small power systems for rural telecommunication installations to ITU-D members, project partners and other organizations.

Guidelines for rural solutions

The important elements for designing ICTs for rural areas in developing countries are as follows:

1. Use of wireless technologies for local loop network connecting the customers to the nearest local exchange or network node;
2. Use of low frequency bands for the wireless systems in sparsely populated rural areas (typically under 1GHz);
3. Modularity and scalability to meet the demand for services in rural areas where the network may be extended as needed and at the lowest incremental cost;
4. Remote network management for minimizing the operation and maintenance costs of rural installations;
5. Simplified user terminal configuration and operation for rural communities where the technical skills needed to install, configure and upgrade software on a typical personal computer may be lacking;
6. Flexible user interface design with interfaces based on input and output mechanisms such as icons, voice-oriented instructions, and choice of language and text;
7. Long life cycles for equipment which will take at least three years to recover investment, and in some cases much longer than that;
8. Multi-user terminals for the shared use at multi-purpose community telecentres with a metering function, software for multiple users and other specialized payment and billing systems;
9. Standard compliance of the equipment with the standards of ITU and other recognized standard bodies;
10. Low power requirements.

Obstacles

There remain some obstacles.

1. Frequencies under 1GHz are the suitable bands for the use of mobile services, and WLL in rural areas. However, there are services assigned to these bands in each country. Frequency use for rural services should be carefully examined in close collaboration with the regional and national radio frequency authorities;
2. Frequency licence fees are the remarkably high in some countries where frequency auctions are held. This can lead to increases of end user fees in the long run. The other option is the so called “beauty contest” methodology which does not have the same implications. Whatever system the developing countries choose to follow will have consequential implications;
3. Regarding the Internet services, the cost sharing of international Internet access lines is under debate in regional and international meetings such as The Asia-Pacific Economic Community (APEC), ITU-T, and the World Telecommunication Standard Assembly (WTSA). The position of the United States and that of the rest of the world are in major contrast. The present status is that the former is carrying the international access capacity to the latter. APEC conducted extensive research on the historical background, internet traffic analysis, and network cost structures etc. This gave rise to a compromise wording at Cancun, Mexico in May, 2000, that this matter should left to the private sector and commercially negotiated, but that the arrangements should reflect ideas of fairness(proportionality of traffic). The ITU-T and WTSA recommendation of the cost sharing concept was adopted with reservation by the US. Cost implications for an Internet user in an APEC country is thought to be U\$40/year/user. Debate and the research on these matters are still under way in APEC and ITU.

Conclusion

A new goal was set by the Secretary General of the ITU during the opening of TELECOM99 in the presence of Mr. Kofi Annan, the Secretary General of the United Nation. It is “to bring internet services to all humankind within a decade in the new millennium, and apply all the new technologies and impulses so that the gaps in connectivity to the Internet can be reduced”. To meet this goal, the following are the possible solutions for providing services to rural areas:

1. Systems such as Fixed Wireless Access (FWA) VSAT are effective means for establishing infrastructure in rural areas, since they are less costly and easier to install on the wired systems; IP based networks are more economic and flexible than circuit switched networks;

2. Packet based wireless access technologies such as IMT-2000 and wireless routers, are being designed to deliver a wide range of traffic types more efficiently than traditional wired and cellular telephony network;
3. Linking suppliers and users on the web by providing a comprehensive catalogue of contact information is a useful and less costly means for equipment procurement;
4. The shared use concept is useful for making ICT terminals and facilities at Multipurpose Community Telecentres available at affordable cost to rural users;
5. A financing scheme and/or special funding mechanism for the start-up of the rural and remote area services will accelerate improvement of accessibility in rural and remote areas;
6. Collaboration for the promotion of rural projects among multi-actors such as Governments, UN Agencies, PTOs and NGOs etc. should be encouraged;
7. The participation of women and young people in the promotion of information access for rural communities should also be encouraged.

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Networks and information services: government policy

Since 1997, through the launch of the Government's information society policy, Prime Minister Lionel Jospin has wanted online networks and services to be tools that serve democracy, justice and solidarity. Education is naturally given top priority. Great efforts are being made to connect all schools and to train teachers and pupils to use the Internet. Access facilities open to all are being established to combat the emergence of a digital gap within our society. The Government has taken steps to encourage the development of high-speed networks, an essential condition for the development of the new services. Lastly, Government departments are trying to set an example by providing users with electronic administrative services and by developing free access to essential public information.

Réseaux et services de l'information : la politique gouvernementale

Dès 1997, à travers le lancement de la politique gouvernementale pour la société de l'information, le Premier Ministre Lionel Jospin a voulu que les réseaux et les services en ligne soient des outils qui servent la démocratie, la justice et la solidarité. L'éducation est donc naturellement la première des priorités. Des efforts importants sont menés pour connecter tous les établissements scolaires et pour former professeurs et élèves à l'Internet. Des lieux d'accès ouverts à tous sont mis en place afin de lutter contre l'apparition d'un fossé numérique au sein même de notre société. Le Gouvernement a pris des mesures pour favoriser le développement des réseaux haut débit, condition nécessaire au développement des nouveaux services. Enfin, les services de l'État font un effort d'exemplarité en offrant aux usagers des services d'administration électronique et en développant l'accès gratuit aux données publiques essentielles.

Redes y servicios de información: la política gubernamental

En 1997, con el inicio de la política gubernamental para la sociedad de la información, el Primer Ministro Lionel Jospin quiso que las redes y los servicios en línea fuesen instrumentos al servicio de la democracia, la justicia y la solidaridad. Por consiguiente, la educación es naturalmente la primera prioridad. Se están haciendo esfuerzos importantes para conectar a todos los establecimientos escolares y para impartir a profesores y alumnos formación sobre Internet. Se están instalando lugares de acceso abiertos a todos para luchar contra la aparición de una brecha numérica dentro de nuestra sociedad. El Gobierno ha tomado medidas para propiciar el desarrollo de redes de alta velocidad, condición necesaria para el desarrollo de nuevos servicios. Por último, los servicios del Estado hacen un esfuerzo ejemplar ofreciendo a los usuarios servicios de administración electrónica y generalizando el acceso gratuito a los datos públicos fundamentales.

Mesdames, Messieurs,

Je me réjouis d'avoir à nouveau l'occasion de participer aux travaux de l'UNESCO relatifs à la société de l'information. Il y a un an, la conférence organisée conjointement par l'UNESCO et par le Conseil supérieur de l'audiovisuel français avait déjà été l'occasion d'échanges intéressants qui s'étaient achevés par une allocution du Premier Ministre M. Lionel Jospin sur les enjeux de la régulation de l'internet.

Je vais décrire la manière dont le programme d'action gouvernemental français pour la société de l'information, lancé par M. Lionel Jospin en janvier 1998, s'est déployé en matière d'accès aux réseaux, aux services et aux contenus, en particulier à l'information publique.

Quelques semaines seulement après la formation du gouvernement, le Premier ministre définissait dans son discours fondateur du 25 août 1997 l'objectif central de sa politique en matière de société de l'information comme devant favoriser l'émergence d'une société de l'information solidaire appuyée sur l'accès de tous aux outils et aux contenus.

Le programme d'action gouvernemental pour la société de l'information a défini six priorités pour le gouvernement : généraliser l'usage des technologies de l'information dans le système éducatif, établir une politique culturelle numérique, utiliser les TIC au service de la modernisation du service public, encourager le développement du commerce électronique, soutenir l'innovation et l'effort de R&D, adapter notre cadre législatif.

Sur le sujet qui nous réunit aujourd'hui, l'État joue en France un rôle essentiel pour assurer une possibilité d'accès dans les meilleures conditions possibles au plus grand nombre, et pour favoriser la formation des citoyens aux technologies de l'information. Ces deux actions sont essentielles à la lutte contre l'apparition au sein même de notre société d'un fossé numérique. Par ailleurs, les services publics ont un rôle d'exemplarité dans le développement de services d'administration électronique répondant aux besoins des usagers ainsi que dans la mise à disposition gratuite des données publiques essentielles.

Agir pour une meilleure accessibilité des réseaux d'information.

En ce qui concerne les infrastructures de communication, le rôle de l'État régulateur est déterminant : en définissant les règles du jeu pour la concurrence dans les télécommunications, et particulièrement les obligations de service universel et de couverture du territoire pour les réseaux sans fils, il encadre les conditions d'accès et veille à un aménagement équilibré du territoire.

En trois ans, le paysage des réseaux de communication a considérablement évolué : l'accès à l'internet à haut débit par le câble croît rapidement puisqu'il concerne déjà plus de 100 000 foyers en France ; l'accès à haut débit sur le réseau téléphonique traditionnel, par les technologies xDSL, devrait connaître une très forte accélération en 2001 ; les réseaux sans fils se multiplient, avec le GSM dont le débit s'accroît déjà par la technologie GPRS, puis, après 2001, avec l'UMTS ; les boucles locales radios offrent de nouvelles conditions d'accès à haut débit, notamment pour les entreprises ; les réseaux métropolitains, développés par les collectivités locales, prennent de l'ampleur ; les accès satellitaires se démocratisent.

En matière de tarifs, on constate des progrès importants : début 1997, la France avait les tarifs parmi les plus élevés d'Europe ; une récente étude de l'Autorité de régulation des télécommunications place la France parmi les trois pays les moins chers d'Europe pour l'accès à l'internet par la ligne téléphonique. L'enjeu se situe désormais au niveau du haut débit qui est une condition nécessaire au développement de nouveaux services.

S'agissant des infrastructures de communication, le gouvernement a pris une série de mesures pour favoriser leur développement comme, par exemple :

- un décret permettant à partir du 1^{er} janvier prochain le dégroupage de la boucle locale, essentiel pour dynamiser l'offre xDSL ;
- une modification du code général des collectivités territoriales permettant à ces dernières de prendre en charge l'installation de réseaux à haut débit. Le Gouvernement proposera au Parlement d'assouplir encore ces conditions d'intervention, essentielle en matière d'aménagement du territoire, à travers la future loi sur la société de l'information qui sera transmise au Parlement au début de 2001.

D'autres dispositions ciblées ont été prises. Ainsi, pour tenir compte du handicap constitué par l'insularité, le Secrétaire d'État à l'Outre-mer, M. Christian Paul, a fait introduire dans la loi de finance en cours de discussion au Parlement une disposition qui vise à favoriser fiscalement les activités des secteurs des technologies de l'information dans les départements et territoires d'Outre-mer.

Par ailleurs, le Secrétaire d'État à l'Industrie, M. Christian Pierret a attribué en août dernier des licences nationales et régionales de boucle locale radio à des opérateurs de télécommunications. Les conditions d'attribution des licences UMTS (mobile de 3^e génération) arrêtées par le Gouvernement ont été

fixées de manière à favoriser un déploiement rapide des infrastructures et une offre tarifaire attractive pour les consommateurs.

L'accès au haut débit pour la population sur l'ensemble du territoire est ainsi l'un des objectifs proposés par le Gouvernement aux collectivités locales, dans le schéma de services d'information et de communication du Schéma national d'aménagement et de développement du territoire. Un objectif de 2 Mbps pour tous en 2005 est ainsi fixé. Comme l'avait prévu le rapport du Commissariat général du Plan d'octobre 1996 sur les réseaux de la société de l'information, c'est bien sur une diversité croissante de types d'infrastructures qu'il faut s'appuyer, selon les types de territoires et d'utilisateurs concernés, pour aboutir à cet objectif.

Favoriser l'accès pour tous à la formation, en encourageant l'usage

Cette action pour les infrastructures s'accompagne d'un chantier pour la formation de tous les citoyens. Cette volonté de faciliter l'appropriation par tous constitue la première des priorités fixées par Lionel Jospin à l'action gouvernementale pour la société de l'information.

Elle s'articule autour d'une double action :

- généraliser la formation à la micro-informatique, à l'internet et au multimédia, dans l'ensemble des filières de formation initiale et continue;
- étendre le réseau d'espaces publics permettant la découverte des outils et des contenus de la société de l'information par tous, à toutes les générations.

Après la première étape du PAGSI, au cours de laquelle près de 6 milliards de francs ont été mobilisés, avec une priorité aux actions de formation, le troisième comité interministériel pour la société de l'information, qui s'est tenu le 10 juillet dernier, a décidé d'allouer 3 milliards de francs supplémentaires aux actions en faveur de la démocratisation de la société de l'information.

- a) Dans le PAGSI, l'essor du multimédia pédagogique est la première des priorités. Les pouvoirs publics ont conduit un effort très important au cours de ces trois dernières années en faveur de la connexion des établissements scolaires. Aujourd'hui, la presque totalité des lycées et des collèges disposent de connexions à l'internet, le ratio ordinateur utilisé à un usage pédagogique/élèves s'est considérablement amélioré en quatre ans (en 1997, les lycées généraux comptaient en moyenne un ordinateur pour 12 élèves, le chiffre est aujourd'hui de 1 pour 7, dans les lycées professionnels le taux est passé de 1/8 à 1/5 et dans les collèges de 1/26 à 1/15). Les écoles primaires, moins largement connectées, sont désormais la priorité du Ministère de l'éducation nationale et devraient être

toutes reliées au réseau avant la fin de l'année scolaire 2001-2002. C'est l'une des décisions du troisième comité interministériel pour la société de l'information qui s'est tenu le 10 juillet dernier. C'est d'ailleurs un objectif que l'on retrouve dans le plan d'action E-Europe adopté par les 15 chefs d'États et de gouvernement de l'Union européenne et dont la mise en œuvre a commencé sous Présidence française.

Le Ministre de l'éducation nationale, M. Jack Lang a ainsi annoncé que tous les élèves de troisième pourront se présenter au «brevet informatique et internet», qui sera généralisé à la sortie de l'école primaire à partir de 2003.

Dans le cadre de la formation professionnelle initiale, les 75 000 jeunes des centres de formation des apprentis (CFA) des chambres des métiers bénéficieront dès 2001 d'un module de formation à la micro-informatique, au multimédia et à l'internet.

Dans une société où plus de la moitié des personnes qui travaillent utilisent régulièrement l'ordinateur, il fallait intégrer dans la formation professionnelle des adultes une formation à l'outil et aux services. C'est pourquoi le gouvernement a décidé qu'un module de formation à la micro-informatique, à l'internet et au multimédia serait systématiquement intégré dans les stages de formation professionnelle suivis par les demandeurs d'emploi; module dont devraient bénéficier 1,2 million de personnes d'ici à la fin de 2002;

- b) Cette action de formation se complète d'un chantier très important en faveur du développement de lieux d'accès pour le public, qui visent tous les publics, y compris les personnes âgées qui sont souvent à la fois curieuses de découvrir ces outils mais aussi hésitantes face à un usage personnel, à domicile.

L'objectif que s'est fixé le Gouvernement est la mise en place d'ici à 2003 de plus de 7 000 lieux publics d'accès à l'internet. Ces réseaux ont commencé à se déployer dans les bureaux de poste, les gares du métro, les bibliothèques publiques et certaines administrations, mais aussi par des salles communales équipées. Parmi ces lieux publics, il a également été décidé que 2500 espaces baptisés «espaces publics numériques» offriraient, grâce à la mobilisation de plus de 4000 emplois-jeunes de formateur au multimédias, une initiation gratuite au multimédia ouverte à tous.

Des mesures ont également été décidées pour faciliter le don de matériels informatiques par les entreprises à leurs salariés. Une disposition qui figure dans la loi de finances en débat au Parlement permettra ainsi que les salariés ne paient aucune charge sur les matériels qui leur seront donnés.

Des dispositions ont également été prises pour encourager le don de matériel par les entreprises et les administrations au secteur associatif.

Le lancement du chantier de l'administration électronique et la diffusion massive d'informations publiques sur l'Internet

Outre l'accès aux réseaux et aux services, les acteurs publics, qui sont les premiers producteurs d'informations et de procédures indispensables à la vie quotidienne des citoyens et des entreprises, ont un rôle essentiel à jouer pour favoriser l'accès à l'information. Fort de cette conviction, le Gouvernement a fait depuis trois ans de la plus large diffusion d'informations publiques l'un des axes clefs du chantier de «l'administration électronique».

Ce chantier avance très rapidement. Un rapport du Plan publié en janvier 2000 constate un rattrapage en deux ans du taux d'équipement informatique de l'administration par rapport au privé. L'essor de l'administration française sur l'internet, spectaculaire si l'on songe à la situation de blocage qui existait en 1997, est remarqué. Une étude comparative du cabinet Andersen Consulting, publiée en mai 2000, a ainsi placé l'administration française en n°1 en Europe pour son usage de l'internet.

Il existe aujourd'hui 2 600 sites internet publics ouverts aux usagers. Afin d'optimiser l'accès à toutes les informations disponibles, un portail du service public baptisé «service-public.fr» organisé autour de thèmes pratiques et qui facilite l'accès à l'ensemble des administrations en ligne vient d'être inauguré par le Ministre de la fonction publique et de la réforme de l'État, M. Michel Sapin.

La décision de diffuser gratuitement l'ensemble des informations publiques essentielles, annoncées par le Premier ministre en août 1997, a été rapidement mise en œuvre. Elle concerne déjà, par exemple, le *Journal officiel*, les annonces de marchés publics et les rapports publics. Pour les données juridiques, elle sera étendue dès la fin de cette année à toutes les lois et à tous les décrets en vigueur, sous forme consolidée, au *Journal officiel lois et décrets* depuis janvier 1990, au lieu de janvier 1998 actuellement, et aux conventions collectives ayant fait l'objet d'un arrêté d'extension au plan national. En 2002, un service public unique de l'accès au droit à la fois gratuit et exhaustif rassemblant l'ensemble des bases de données juridiques publiques, y compris la jurisprudence, sera créé.

En ce qui concerne les services pratiques aux usagers, l'administration a déjà procédé à la numérisation et à la mise en ligne de 600 formulaires parmi lesquels les 100 formulaires les plus courants. Quelques téléprocédures existent déjà, notamment la possibilité de remplir sa déclaration d'impôt sur le revenu sur l'internet. Cette mesure s'accompagne de la possibilité de poser des questions aux services fiscaux auxquelles il sera répondu dans les 48 heures. En 1999, il a ainsi été répondu à 25 000 questions pendant la campagne fiscale.

La généralisation des téléprocédures est une des priorités du gouvernement. Dès 2001, plus de vingt téléprocédures seront mises en œuvre qui concerneront les démarches les plus courantes pour les citoyens (demande de

bourses d'enseignement supérieur ou de logement, mensualisation de l'impôt sur le revenu, par exemple) comme pour les entreprises (paiement de la TVA, déclarations sociales, dossier de crédit d'impôt recherche) et les associations (subventions de la politique de la ville et de l'économie solidaire).

La réforme du code des marchés publics préparée par le Ministère de l'économie et des finances ouvrira la possibilité de dématérialisation de la commande publique par voie électronique et rendra possible les enchères en ligne. Le bulletin officiel des annonces des marchés publics étant pour sa part déjà accessible gratuitement en ligne. Le dernier comité interministériel pour la réforme de l'État a décidé de généraliser progressivement l'utilisation de l'internet pour les consultations préalables aux grands travaux publics. Tout comme la diffusion croissante des informations publiques, ces décisions traduisent concrètement l'apport de l'internet en terme de transparence administrative.

Enfin, le Premier Ministre a annoncé le 12 octobre dernier, lors des secondes Rencontres parlementaires de l'internet, que le Gouvernement entendait inscrire dans la loi ces nouveaux principes relatifs à l'accès et à la diffusion de l'information publique sous forme numérique, qui figureront dans la future loi pour la société de l'information.

Mesdames, Messieurs

Parler d'une société de l'information, c'est constater d'abord que l'informatisation croissante de notre société entraîne une dépendance croissante à l'égard de l'information sous toutes ses formes.

La démocratisation du pouvoir de publier, qui est la première rupture introduite par l'internet, produit déjà des effets profonds : en France, les « pages personnelles » – entendez par là les sites qui ne sont ni les sites des entreprises ni ceux des administrations, sont passés de 545 000 en janvier 2000 à 1 499 000 en septembre dernier, soit une croissance de plus de 175 % ! En comparaison, le nombre de publications périodiques de la presse écrite, qui n'a cessé de croître depuis trente ans, est d'environ 9 000 aujourd'hui.

Mais pour que l'accès à l'information, aux réseaux et aux services bénéficie à tous, l'action des pouvoirs publics est déterminante. C'est cette conviction qui anime le Premier Ministre et le Gouvernement, engagé depuis plus de trois ans dans une politique ambitieuse visant à favoriser l'accès de tous à la société de l'information.

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The role of public authorities in ensuring access to information (reflections from Latin America)

This paper asserts that the access of society as a whole to globally available information is now a human right recognized in the countries of Latin America. Nevertheless, to enable all of the population to exercise that right States in the region must continue to assume the responsibility for creating the necessary infrastructure and services. Policies concerned with the creation of such infrastructure and services must first of all envisage the strengthening, broadening, development and conversion for telematic purposes of traditional information infrastructures and services such as libraries (university, public and school) and archives. Consideration should also be given to the creation of a network integrating four areas (academia, the education sector, civil society and government) into a local (national) cyberspace with free public access points which, combined with the telematic services offered by the private sector, would enable all sections of the population to access the information produced and available within the country and in the area of science and technology, the social and human sciences what is available globally. The paper pinpoints the infrastructure existing in the region and the facilities which must be created to achieve this objective.

Le rôle des pouvoirs publics dans l'accès à l'information (vu depuis l'Amérique latine)

Cet exposé part du principe que l'accès de l'ensemble de la société à l'information mondialement disponible est aujourd'hui un droit de la personne humaine reconnu dans les pays d'Amérique latine. Cependant, pour que toute la population ait la possibilité d'exercer ce droit, il faut que les États de la région continuent d'assumer la responsabilité de la création des infrastructures et services nécessaires. Les politiques ayant pour but de créer ces infrastructures et services doivent viser en premier lieu à renforcer, étendre, développer et doter de moyens télématiques les infrastructures et services d'information traditionnels tels que les bibliothèques (universitaires, publiques et scolaires) et les archives. Elles doivent viser en outre à créer un réseau qui, en regroupant quatre secteurs (universitaire, scolaire, public ou associatif et gouvernemental), donne corps à un cyberspace local (national) comportant des points d'accès public gratuits, qui, joint à l'offre privée de services télématiques, permette à toutes les couches de la population d'accéder à l'information scientifique, technique et relative aux sciences humaines produite et disponible dans le pays ou accessible à l'échelle mondiale. Cet exposé recense les infrastructures classiques existant dans la région et celles qu'il faudrait créer pour atteindre cet objectif.

Funcion de los poderes público en el acceso a la informació (una reflexión desde la América Latina)

En la ponencia se plantea que el acceso, por parte de toda la sociedad, a la información globalmente disponible, es en la actualidad un derecho humano reconocido en los países de la América Latina. Pero la posibilidad de que ese derecho sea ejercido por toda la población, depende de que los Estados, en la región, continúen asumiendo la responsabilidad de crear las infraestructuras y servicios que lo permitan. Las políticas destinadas a crear tales infraestructuras y servicios deben contemplar, en primer lugar, el afianzamiento, ampliación, desarrollo y teleinformatización de infraestructuras y servicios tradicionales de información como las bibliotecas (universitarias, públicas y escolares) y los archivos. Debe contemplar, además, la creación una red que, integrando cuatro áreas (académica, escolar, pública o cívica y gubernamental) configure un ciberespacio local (nacional), con puntos de acceso público y gratuito, que sumados a la oferta privada de servicios teleinformáticos, permita a todo los sectores de la población acceder a la información científica, técnica y humanística producida y disponible en el país y globalmente accesible. En la ponencia se identifican las infraestructuras tradicionales existentes en la región y las que deberían ser creadas para cumplir que ese objetivo.

Introducción

A partir de la segunda guerra mundial, y como resultado de la acción institucional de organismos internacionales y de organizaciones transnacionales de diverso tipo, los distintos Estados que interactúan en el ámbito institucional de las “*Naciones Unidas*”, tienden a aceptar como universales principios de ética social como la igualdad entre los seres humanos sin importar diferencias de sexo, religión o etnia; la igualdad entre las naciones y las culturas sin importar sus historias particulares o su “*grado de desarrollo*”; la democracia como sistema político; el acceso a servicios de salud, educación, recreación e información como derechos naturales.

UNESCO recibió desde su creación el mandato de promover la participación universal en los procesos culturales; el mandato de promover, en consecuencia, el acceso a la información científica, técnica y humanística como garantía de una educación y un desarrollo económico, social y cultural en todas las naciones del mundo. En ejercicio de ese mandato, durante décadas, UNESCO ha apoyado procesos de alfabetización, de mejoramiento de los sistemas educativos, de creación de infraestructuras y servicios de bibliotecas, de promoción del libro, la lectura y del uso de la información científico-técnica en medios profesionales. Hoy, cuando las naciones del mundo viven el impacto de tecnologías que combinan en la informática y las telecomunicaciones las anteriores formas de comunicación (tecnologías que, en su conjunto, son llamadas “*de la Información y la Comunicación*” o *TIC*), la UNESCO se ve frente al reto de reconcebir el sentido de esos programas, y para responder a tal reto, organizó en París el tercer congreso destinado a discutir y buscar soluciones a “*(...) los desafíos éticos jurídicos y sociales del ciberespacio*”¹.

Pero la discusión de una temática tan especial, adquiere dimensiones particulares en diferentes regiones del mundo. Adquiere dimensiones particulares, en aquellos países todavía en lo que se llama “*vías de desarrollo*” en relación a aquellos otros considerados ya desarrollados y que hoy por hoy se autodenominan “*Sociedades de la Información*”. Por este motivo, UNESCO promovió, en Río de Janeiro, una reunión regional para la América Latina y el Caribe, la cual se llevó a cabo en octubre del 2000 y en la cual se fijaría una posición particular frente a la problemática que se trataría luego en París.

Durante la reunión de Río de Janeiro, expertos y representantes gubernamentales discutieron la temática en cuestión y destacaron lo que se refieren al papel del Estado en el proceso de conducción de las sociedades latinoamericanas y caribeñas hacia la *Sociedad de la Información*, y la importancia que en ese proceso juegan las *infraestructuras tradicionales de información* (bibliotecas, archivos), como institucionalidad sobre la cual y desde la cual debe montarse el acceso al *ciberespacio*. En la ponencia que presento a continuación, se exponen las ideas que, sobre esta temática, fueron propuestas en Río de Janeiro para iniciar la discusión.

Acceso a las redes y a sus servicios

La relación entre estructuras sociales que determinan un acceso diferente a la información nacional y globalmente disponible, genera una mayor desigualdad entre los pueblos del mundo y en cada sociedad entre los diferentes sectores sociales. A las diferencias ya marcadas entre “ricos” y “pobres” se agregan ahora las que se establecen entre “inforicos”² (sectores sociales con acceso a información) e “infopobres” (sectores sociales sin acceso a información). Disminuir tales diferencias, paralelamente a las que plantea la condición étnica y socioeconómica, entre los ciudadanos del mundo, es un problema ético fundamental si se aspira a una sociedad justa y participativamente democrática. Dos grandes tareas deben asumirse para cumplir con este objetivo: ofrecer contenidos que faciliten la vida en sociedad y garantizar, con infraestructuras adecuadas, el acceso a esos contenidos.

La provisión de *contenidos*, es sin duda, lo más importante. Los contenidos son la *información* y el *conocimiento* que dan un significado históricamente distinto a lo que se ha llamado *Sociedad de la Información*. Pero los intangibles contenidos necesitan de infraestructuras tangibles. Necesitan de sistemas que permitan el almacenamiento de la información, la transmisión de la misma de un sistema a otro en el país y fuera de él y de sistemas que permitan a los usuarios de diverso tipo acceder a la información almacenada. El conjunto de infraestructuras físicas y tecnológicas que garantiza la realización de los procesos mencionados, se ha dado en llamar *infraestructuras de información*. La creación de tales infraestructuras en cada país, una condición básica para que pueda hablarse de una nación como *Sociedad de la Información*.

Pero al hablar de infraestructuras de información debemos distinguir las que corresponden al ámbito de los Estados-Nación, de las que conforman el espacio globalmente compartido; de las que conforman el “*ciberespacio*”³. Me referiré a estos asuntos en los apartes que continúan, pero antes me permitiré una reflexión sobre el papel que el Estado ha jugado y debe jugar en América Latina y el Caribe, en relación a la creación y mantenimiento de esas infraestructuras.

El estado y la creación de infraestructuras de información nacionales⁴

En América Latina y el Caribe, las primeras infraestructuras informáticas destinadas a almacenar información para ponerla a disposición del público, fueron construidas durante los años setenta por servicios bibliotecarios nacionales, públicos y universitarios, sostenidos por el Estado⁵. A principios de la década siguiente, agencias nacionales destinadas a la promoción de la ciencia y la tecnología en la región, en alianza con las universidades, instalaron las primeras redes públicas de transmisión de datos y ofrecieron, a través de ellas, los primeros servicios teleinformáticos⁶.

De esa manera, la consulta en línea de catálogos de bibliotecas públicas, nacionales o universitarias y el uso de correo electrónico por parte de la comunidad académica, fueron las primeras manifestaciones sociales, en la región, del uso de TIC por parte de algún sector de la población. Como consecuencia, puedo afirmar que al inicio del proceso que permite que sectores de nuestras sociedades participen en la actualidad de la *Sociedad de la Información*, estuvo la activa y casi exclusiva participación del Estado. Fue después, bien entrada la década de los ochenta y con cada vez mayor intensidad a partir del primer tercio de la década de los noventa, que el sector privado se incorpora a la construcción de infraestructuras teleinformáticas (redes de cable para voz y video y redes comerciales de transmisión de datos) y a la oferta de servicios (televisión por cable, correo electrónico, transmisión de archivos, consulta en línea de bases de datos, y hoy en día, todos los servicios que ofrece la WWW). La Sociedad Civil, por su parte, en América Latina y el Caribe, ha tenido poca participación en este proceso de construcción de infraestructuras⁷; ha jugado y cada vez juega un mayor papel como usuaria de los servicios que se ofrecen a través de las infraestructuras, pero no como promotora de las mismas.

Pienso, como consecuencia de lo anterior, que el Estado debe seguir cumpliendo ese papel promotor e, independientemente de lo que construya y ofrezca la empresa privada, continuar con la construcción de una *infraestructura de información* que garantice, a través de la oferta de servicios públicos, una paulatina y efectiva incorporación al uso de servicios de información, de los sectores de población actualmente excluidos en las sociedades de la región. Para que esto sea posible, opino que es necesario que el Estado conciba, diseñe y aplique políticas que permitan la preservación y desarrollo de *infraestructuras de información* tradicionales, la ampliación y repotenciación de las infraestructuras teleinformáticas públicas y la multiplicación como servicios, de puntos públicos de acceso a información.

Infraestructuras de información tradicionales en América Latina y el Caribe

En América Latina y el Caribe, la historia de los servicios de información difiere notablemente de la vivida en los *países del norte*. Nuestras sociedades fueron hasta ya avanzado el siglo XX, sociedades mayoritariamente analfabetas. A partir de la segunda Guerra Mundial, cuando el uso de la computación iniciaba el cambio radical en los servicios de información de Europa y EE.UU., los organismos internacionales, especialmente UNESCO, iniciaban campañas entre nuestros gobiernos para promover la alfabetización y la creación de servicios bibliotecarios públicos, escolares y especializados que fueran más allá de los muy limitados que ofrecían, desde el siglo anterior, las bibliotecas nacionales y universitarias.

Serán las proposiciones de los proyectos UNISIST y NATIS⁸, realizadas en la década de los setenta y acogidas por un número significativo de gobiernos de América Latina, las que darán origen a sistemas de bibliotecas públicas⁹ y *redes sectoriales de información*¹⁰ en distintos países de la región, creando en ellos, la infraestructura básica original de acceso a información científica, técnica, humanística y cívica, infraestructura que se amplía y complementa con la instalación, durante la segunda mitad de la década de los ochenta, por parte de Estados y Universidades, de las redes públicas de transmisión de datos y los servicios teleinformáticos a los que hice referencia antes. Y, por supuesto, extendiéndose continuamente, a partir de los años noventa, con la aparición de los servicios telemáticos de información comerciales que hoy crecen aceleradamente en el medio empresarial y entre la población de clase media¹¹, y que, simultáneamente, dejan fuera del proceso a los amplísimos sectores populares, relacionados con el sector informal de la economía.

Más recientemente, ya a finales de los noventa, algunos Estados latinoamericanos han empezado, desde instancias gubernamentales, a definirse como *promotores de la sociedad de información* en el país y han legislado o se proponen legislar en consecuencia.¹²

Como resultado de estos procesos, en buena parte de los países de América Latina y el Caribe existen infraestructuras de información nacionales que cuentan con los siguientes componentes:

- a) Bibliotecas Nacionales, desde las cuales se lleva registro de la memoria impresa y cultural del país y se promueven acciones de control bibliográfico como la conformación de *Bibliografías Nacionales*, la promoción de la creación y aprobación de leyes de depósito legal y la asignación de los códigos ISBN e ISNN a la producción editorial nacional;
- b) Conjuntos significativos de bibliotecas universitarias de diversa especialidad. Estos servicios son los primeros que han acogido las TIC para hacerse más eficientes y conformar sistemas y redes dentro de sus campos y conformar *redes académicas* en algunos países, utilizando las infraestructuras públicas de transmisión de datos creadas por el Estado para tal

- efecto. Representan, en el sector público, el área mas “*informatizada*” de la región;
- c) Conjuntos variablemente significativos de bibliotecas públicas que, en algunos países, han llegado a ser organizados, desde el Estado – y en algunos casos con el apoyo de la empresa privada – en sistemas nacionales¹³. En algunos países, no existen todavía tales sistemas o redes, pero en su defecto, han sido creadas instancias político administrativas entre cuyas funciones y misión se encuentra la de diseñar y establecer ese tipo de estructura. Las bibliotecas públicas cumplen, en su mayoría, funciones de apoyo al sistema escolar, supliendo la carencia de sistemas especialmente concebidos para atenderlo. Cumplen, también, por lo menos en la definición de sus objetivos, funciones de *Centros de Información Cívica*¹⁴;
 - d) Conjuntos significativos de bibliotecas o centros de información especializados, algunos de los cuales interactúan integrando asociaciones nacionales de mutua cooperación para el intercambio de información por área, o forman parte de redes más extensas que contemplan otras bibliotecas o centros de información de la región, conformando las ya mencionadas *redes sectoriales de información*;
 - e) Archivos históricos, nacionales, estatales¹⁵ y municipales, por lo general dispersos en su actividad y poco comunicados entre sí, a pesar de que en algunos países¹⁶, se diseñan e implantan en la actualidad, sistemas integrados de este tipo de servicios;
 - f) Bibliotecas y archivos en entidades gubernamentales y, en algunos países, el proyecto de crear *sistemas gubernamentales de información* por medio de la interrelación e intercomunicación de esas unidades de servicio;
 - g) Redes públicas de transmisión de datos, originalmente construidas para apoyar la investigación científica, tecnológica y humanística de la Academia y otras instituciones de investigación;
 - h) En algunos países, se cuenta también con redes de transmisión de datos especialmente construidas para apoyar la información que necesitan los entes gubernamentales para operar¹⁷;
 - i) Cada vez mayor número de eficientes redes comerciales de transmisión de datos y de servicios teleinformáticos que atienden, como he dicho, fundamentalmente al sector empresarial y al sector de clase media inserto en la economía formal de los países de la región.

Como se infiere de la descripción que vengo de hacer, las infraestructuras de información en la región no son del todo inexistentes, pero tampoco son suficientes para garantizar el derecho universal de acceso a la información socialmente disponible. Mantener y potenciar lo que se tiene y crear lo que hace falta, son las dos metas que habrá que cumplir para lograr ese objetivo.

Proposiciones para el desarrollo de las infraestructuras de información nacionales en América Latina y el Caribe

Para lograr una situación socialmente equitativa de participación democrática en los procesos sociales, desde el punto de vista de las infraestructuras de información, en los países de América Latina y el Caribe, los Estados deberían diseñar y aplicar políticas que permitieran:¹⁸

- a) Que sistemas integrados de bibliotecas académicas y bibliotecas especializadas, ofrecieran a los profesionales en formación, a los investigadores y los profesionales en ejercicio y con necesidad de permanente actualización, acceso a la producción intelectual nacional, regional y mundial. Y que, simultáneamente, permitieran ofrecer, en esos mismos ámbitos, la información y el conocimiento nacionalmente producido;
- b) Que sistemas integrados de archivos históricos, permitieran a historiadores y ciudadanos en general, la “*documentación*” positiva de los procesos y hechos históricos, y se transformaran en guardianes de la veracidad política y administrativa del Estado Nacional;
- c) Que sistemas integrados de información gubernamental, en el ámbito nacional, regional y municipal, ofrecieran a los funcionarios públicos la posibilidad de acceder a la información que regula su actividad y la posibilidad de coordinar programas, proyectos y acciones entre organismos, ámbitos y niveles jerárquicos; y que permitieran, además, a los ciudadanos conocer, cumplir o disfrutar, obligaciones, servicios, requisitos y trámites;
- d) Que sistemas de bibliotecas publico-escolares, garantizaran a todos los sectores sociales, incluso a los populares hoy excluidos de los procesos económicos, sociales, políticos y culturales formales de la sociedad, el acceso a la información general y cívica que necesitarían para incorporarse participativamente a esos procesos¹⁹.

Las políticas que se diseñaran deberían contemplar la asignación de recursos para que cada uno de los conjuntos de servicios que vengo de describir pudiera ponerse en condiciones de cumplir con sus funciones e incorporar plenamente las TIC como tecnologías organizativas y operativas. Esto último implica tres conjuntos de acciones:

- a) Las que tienen que ver con el rescate, repotenciación e incluso, de acuerdo a el caso y los países, la creación de los servicios que hemos llamado tradicionales. Implica, en consecuencia, concepción y diseño de servicios y sistemas de servicios; creación o remodelación de locales; compra de mobiliarios y equipos adecuados; compra de dotaciones documentales y de suscripciones a publicaciones impresas y digitales y reclutamiento y formación de personal para los distintos tipos de servicios y para los diferentes niveles gerenciales y operativos;
- b) Las que tienen que ver con la “*automatización*” de los procesos y servicios documentales de los sistemas mencionados. Implica compra y

adecuación de *software* para la elaboración de los catálogos en línea²⁰, control de usuarios y préstamo y control administrativo de las adquisiciones. Implica también, el diseño de “*Sitios*” y la adecuación de los catálogos para su acceso a través de ellos en Internet;

- c) Las que tienen que ver con la infraestructura *teleinformática* que permita incorporar a todos los servicios a la gran red y, a través de ellos, a la población de cada país.

Las infraestructuras de información tradicionales, potenciadas con la incorporación de las TIC a sus procesos técnicos y de servicio, deben servir como iniciadoras de los sectores excluidos de la población en el uso de información para la resolución de problemas que la sociedad plantee. Deben, en consecuencia, ser capaces de ofrecer información desde oral y audiovisual, para aquellos sectores analfabetas o analfabetas funcionales, hasta multi e hipermediática por vía telemática. Se generarían dos polos para la informatización pública de la sociedad: uno que avanzaría desde los servicios tradicionales, orales, audiovisuales e impresos, hacia la información digital en línea, dirigido y conducido por bibliotecarios, educadores y promotores sociales y culturales, y otro que partiría de los servicios teleinformáticos, digitalizados y en línea, hacia la incorporación de tales posibilidades tecnológicas en el seno de los servicios tradicionales.

Expresión del desarrollo del primer polo sería la *generalización* de los *servicios de información cívica a la comunidad* desde las bibliotecas públicas, prestados directamente por referencistas que tendrían entre sus fuentes las proporcionadas por Internet, al público no iniciado en el uso de las TIC; servicios de intermediación entre la población y el acceso nacional, regional y global a información por medio de las TIC.

Expresión del desarrollo del segundo polo, sería la instalación de centros de acceso a Internet en los locales escolares y en las bibliotecas públicas²¹; y también, paralelamente, en lugares de servicio público como las oficinas de correo, de teléfono o en sitios especialmente concebidos para ello; sitios equivalentes a los ya tan mundialmente populares *cibercafés* pero con intención no comercial sino de servicios; de servicio de información para la comunidad. Expresión del desarrollo de este polo sería la incorporación cada vez mayor de sectores de clase media a los servicios comerciales y la popularización de los mismos por medio de alianzas del Estado con las empresas de servicios teleinformáticos²².

Infraestructuras teleinformática

En definitiva, el planteamiento anterior se sustenta en el hecho de que el Estado asuma la creación de una infraestructura teleinformática capaz de garantizar, paralelamente al desarrollo de los servicios teleinformáticos privados y comerciales, que las distintas capas de la población puedan acceder a servicios de

información cívicos, escolares, académicos, científicos, técnicos y gubernamentales, ofrecidos, en principio, por la infraestructura tradicional de servicios de información teleinformatizada. Y que, alumnos, profesores, investigadores, gerentes políticos y funcionarios públicos en general, en sus lugares de estudio, investigación, tramitación o trabajo, tengan acceso a esa infraestructura teleinformatizada para usar, intercambiar y ofrecer información a través de Internet.

Pienso que para que lo anterior sea posible, desde el Estado, debe promoverse la creación de un *ciberespacio* local que abarque cuatro grandes áreas:

- a) *Académica*, para servir al sector universitario y de investigación. Incorporaría a las *redes* que, como he hecho mención, ya existen desde la década de los ochenta en unos cuantos países de América Latina y el Caribe. Las bibliotecas universitarias y las bibliotecas especializadas relacionadas con los centros de investigación científica, técnica y humanística, serían los grandes proveedores y organizadores de servicios digitales a través de ella;
- b) *Escolar* para servir a la escuela primaria y a la educación básica, fundamentalmente. A través de ella se llevarían acabo programas hipermediáticos de apoyo a la formación de niños y adolescentes, y programas de apoyo al trabajo de maestros y profesores de secundaria;
- c) *Gubernamental*, que incorporaría a las que, como he hecho mención, ya existen en algunos países para servir al sector oficial, facilitando las interacciones entre las distintas instancias del Estado y entre éste y el público en general;
- d) *Pública o cívica*, para servir a la población en general. Las bibliotecas públicas y los puntos públicos de acceso a Internet ubicados en lugares de servicios diversos, serían los grandes usuarios institucionales de esa área del *ciberespacio local*. A través de ella la población en general para tendría acceso desde cualquier parte, a información cívica, gubernamental, educativa, científico-técnica y humanística.

En definitiva, al *ciberespacio local* creado por el Estado, se sumarían los aportes de la industria de la información, creando paulatinamente, desde los tres sectores de la sociedad (Estado, empresa privada y sociedad civil), la sinergia suficiente para que nuestros países amplíen paulatinamente el acceso nacional a la información globalmente disponible; y por esta vía, nuestros países se incorporen cada vez más ampliamente a la *Sociedad de la Información*.

Referencias:

1. UNESCO. INFOética 2000: *El derecho a un acceso universal a la información en el siglo XXI: Programa Provisinal*. Tercer Congreso Internacional de la UNESCO sobre los desafíos éticos, jurídicos y sociales del ciberespacio, París 23-15 de noviembre de 2000 (UNESCO: París, 6 de julio de 2000) p. 1
2. Para una definición más amplia de estos conceptos ver, entre otros, Isidro Fernández Aballi. “La sociedad de la información en América Latina y el Caribe: contribución a una perspectiva 2020”. En: Carlos Tünnerman B. y Francisco López Segre (coordinadores). *La Educación en el horizonte del siglo XX*. (Caracas: IESAL-UNESCO, 2000) pp. 252-263.
3. “(...) espacio social creado por las nuevas tecnologías de la información, en el que el puesto de mando o la posición estratégica está ocupada por INTERNET, metáfora, germen y espina dorsal de la sociedad informática” Luis Goyanes. *Cibersociedad: los retos sociales ante un nuevo mundo digital*. (Madrid: McGraw-Hill, 1997) p. xvii. Usaré esta definición en los marcos del presente trabajo.
4. En el programa provisional, elaborado por UNESCO para la reunión de INFOética 2000 en París, se hace una afirmación que, opino, no aplica para América Latina. En el documento se dice: “Si bien corresponde principalmente al sector empresarial y comercial el proporcionar la infraestructura para el acceso a los recursos informativos (...)”. UNESCO, *Ibid.* p. 2. Los hechos que reseño en esta ponencia, espero que apoyen mi opinión.
5. El uso, a finales de los setenta, del programa “Notis” para crear el catálogo de la Biblioteca Nacional de Venezuela y el de las bibliotecas públicas del sistema que depende de ellas y la construcción del catálogo público de la Biblioteca Central de la Universidad Nacional Autónoma de México (UNAM) usando un programa creado en la misma universidad, son ejemplos de esta afirmación. La utilización, ya en los años ochenta, de “Notis” por parte de la Biblioteca Nacional de Chile y por la biblioteca “Luis Angel Arango” de Bogotá, y la creación y uso de “SIABUC” para elaborar el catálogo de las bibliotecas de la Universidad de Colima en México, son ejemplos adicionales.
6. Me refiero, por ejemplo, a los servicios ofrecidos por el CONACYT de México, especialmente los que se conocieron como programa SECOBI; a los ofrecidos por el CONICIT de Venezuela, especialmente a SAICYT, sus bases de datos y sistema de correo electrónico; y a los ofrecidos por el IBICT de Brasil, el CONICYT de Chile y COLCIENCIAS en Colombia.
7. Se conocen algunas experiencias de redes para el intercambio de información implantadas por organizaciones no gubernamentales en Centro América y Brasil, pero su impacto como oferta de servicios públicos, ha sido muy limitado.
8. NATIS: “National Information Systems”... proyecto presentado por UNESCO en una reunión intergubernamental realizada en París en 1974, destinado a promover “Sistemas Nacionales de Información” que integraran archivos, bibliotecas de diverso tipo y estadísticas nacionales en estructuras de servicios integradas; UNISIST: “Universal Science Information System” Proyecto también presentado por UNESCO unos años antes, 1971, destinado a promover la creación de un “Sistema Mundial de Información Científica”. Para comentarios e historia del NATIS y sus efectos en América Latina, ver, entre otros, Iraset Páez Urdaneta “Limitaciones de la metodología internacional para la formulación y la implantación de políticas nacionales de información y alternativas para la acción”. En: *Información para el progreso de América Latina*. (Caracas: Universidad Simón Bolívar – Congreso de la República, 1990) pp 105-114. Para comentarios similares sobre UNISIT y NATIS, ver Alvaro Agudo Guevara. *El proyecto de control bibliográfico universal como medio y espacio de globalización* (Caracas: UCV, Facultad de Humanidades y Educación, 2000) pp. 18-24.

9. Me refiero especialmente a los Sistemas “Nacionales de Bibliotecas Públicas” desarrollados en Venezuela, Colombia, México y Chile durante las décadas de los setenta y ochenta, inspirados en las proposiciones de NATIS. Para información sobre estos sistemas, ver Alvaro Agudo Guevara “Sistemas de bibliotecas públicas en América Latina”. En: *Lectura biblioteca y comunidad: tres estudios*. Santafé de Bogotá: CERLALC-Uruguay, Instituto Nacional del Libro, 1993).
10. Me refiero a los proyectos cooperativos establecidos por conjuntos de bibliotecas y centros de documentación especializados en la región para establecer redes de intercambio de información y documentos. Ejemplos importantes de estos proyectos son la “Biblioteca Regional de Medicina” BIREME, cuyo centro tiene su sede en Sao Paulo, Brasil y la “Red [latinoamericana] de Educación” (REDUC), con sede en Santiago de Chile. Para consultas sobre el origen e historias de estas redes, ver IDRC. *Taller sobre experiencias de las redes regionales de información de América Latina*. La Habana, Cuba, 20-22 de octubre de 1989. Informe Final (La Habana: autor, 1990).
11. Por supuesto, la situación no es homogénea en todos los países de la región. Por razones de limitaciones expositivas, elaboro una descripción de carácter general, tomando en consideración factores presentes, en mayor o menor medida en gran parte de nuestros países.
12. Como ejemplo, véanse las acciones recientemente tomadas por los gobiernos de Venezuela y Brasil.
13. Me refiero a los sistemas nacionales de bibliotecas públicas ya mencionados de Venezuela, México, Chile y Colombia. En este último caso, la empresa privada, a través de las llamadas “*Cajas de Compensación Familiar*”, ha contribuido a la creación de un sistema particular de biblioteca públicas en el país.
14. Ejemplo especial de esta función, es el proyecto desarrollado desde la década de los setenta, primero por el Banco del Libro y luego por la Biblioteca Nacional de Venezuela.
15. Me refiero con este adjetivo, a los que abarcan el ámbito de “Estados”, como entidades regionales, también denominadas “Provincias” o “Departamentos”, según el país de que se trate.
16. Por ejemplo en Colombia, donde desde el Archivo General de la Nación se adelanta la creación de un Sistema Nacional de Archivos.
17. Es el caso del proyecto *Platinum* en Venezuela.
18. En los trabajos citados de Páez Urdaneta (p. 145) y Fernández Aballí (pp. 263-270) se ofrecen descripciones de infraestructura que, consideradas desde América Latina, incluyen las que he llamado “*tradicionales*” ; también Sung Gwan Park. “*Disarticulations*” in *the information society: barriers to the universal acces to information haighways in developing countries*. First International Congress on Ethical, Legal and Societal Aspects of Digital Information (Monte Carlo: UNESCO,1997) p.3, desde Corea Kay Rasseroka. *Challanges of an interactive environnement in the context of developing countries in sub-saharian Africa*. Bostwana, University of Bostwana.). First International Congress on Ethical, Legal and Societal Aspects of Digital Information (Monte Carlo: UNESCO, 1997) p. 2, desde Bostwana, abogan en sus ponencias por que se incluyan, como parte de las *infraestructuras de información* por diseñarse, los servicios tradicionales de información.
19. Con “*Procesos formales*” quiero decir procesos legalmente aceptados y reconocidos por la sociedad; procesos que se producen dentro de un marco institucional legalmente regulado, a través del cual los actores sociales participan en la toma de decisiones cívicas y políticas, en la creación de bienes económicos y culturales, en la redistribución de la riqueza socialmente producida.

20. Recomiendo el uso de programas desarrollados en el país o por lo menos en la región, por razones de mantenimiento y asistencia técnica a los sistemas. Es bien conocida la amplísima utilización hecha por las bibliotecas y centros de documentación de la América Latina del programa de UNESCO CDS *Micro.Isis*. alrededor del cual se han creado organizaciones de usuarios en capacidad de resolver múltiples problemas técnicos. Recientemente ha aparecido una versión de este programa (IsisWeb) que permite poner los OPAC's creados con MicroIsis en la red. En Venezuela se conocen otros tres programas, elaborados en el país, con las mismas capacidades:
"Documentum" que utiliza bases de datos de MicroIsis como plataforma;
"Alejandría", desarrollado por una empresa de origen universitario "Hacer-ULA" y "Sidula" desarrollado para el sistema de bibliotecas de la Universidad de los Andes. En México también existen varios, por ejemplo "Biblos" desarrollado por una empresa privada y "Siabuc" creado por la Universidad de Colima.
21. Un ejemplo de esta estrategia de informatización de la sociedad, es el proyecto de crear "Kioskos" de acceso a Internet en las bibliotecas públicas del sistema dirigido por la Biblioteca Nacional de Venezuela, convenio que involucra a las bibliotecas públicas, por supuesto, al CONICIT de Venezuela, como financista y a *Reaccium*, la red académica de transmisión de datos, como canal.
22. Dos ejemplos de esta modalidad de servicio son: la "Biblioteca Virtual de la Victoria", instalada por la gobernación del Estado Carabobo en la Victoria, Venezuela y "Los Puertos de Alejandría" en la ciudad de Caracas, instalados y administrados por "Hacer Sistemas", empresa privada venezolana de origen universitario, a la que ya hemos hecho mención cuando nos referimos a los "software" latinoamericanos para el manejo de información bibliográfica.



THE FAIR USE CONCEPT
IN THE INFORMATION SOCIETY

LA NOTION D'USAGE LOYAL
DANS LA SOCIÉTÉ
DE L'INFORMATION

EL CONCEPTO DE USO LEGÍTIMO
EN LA SOCIEDAD
DE LA INFORMACIÓN

THE FAIR USE CONCEPT
IN EDUCATION,
SCIENCE, CULTURE
AND COMMUNICATION

LE CONCEPT D'USAGE LOYAL
DANS L'ÉDUCATION,
LA SCIENCE, LA CULTURE
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EL CONCEPTO DE USO LEGÍTIMO
EN LA EDUCACIÓN,
LA CIENCIA, LA CULTURA
Y LA COMUNICACIÓN

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Rethinking fair use in the digital era

This paper examines the relevance of the traditional concept of fair use in light of the current and ongoing revolutions in the global information society resulting from technical advances in communication and info/infra-structure. The emergence of digitalization, information processing, growth in network bandwidth and a common architecture have radically transfigured the format for delivering information and content making these processes virtually seamless and platform independent. The emergence and proliferation of databases and computer programmes which do not conform to traditional conceptual copyright models, the decentralized nature of the web which offers virtually unfettered freedom to individuals to publish, broadcast and replicate works present special challenges. Despite the presence of international conventions, fundamental differences in national and regional regulations and concepts of copyright exist. The impact of increasing access to information, the reduction of the digital divide and convergence in knowledge from other information technology fields and some challenges and opportunities that these pose are highlighted.

Repenser l'usage loyal à l'ère numérique

La pertinence de la notion traditionnelle d'usage loyal est examinée dans cette intervention compte tenu des révolutions qui bouleversent actuellement et vont continuer de bouleverser la société mondiale de l'information par suite des progrès techniques des télécommunications et des info/infrastructures. La numérisation, l'informatique, l'expansion des bandes passantes des réseaux et l'adoption d'une architecture commune ont transformé radicalement les moyens de diffuser l'information et les contenus, rendant ce processus pratiquement sans solution de continuité et indépendant des plates-formes utilisées. L'apparition et la prolifération des bases de données et programmes informatiques, qui s'écartent des modèles conceptuels traditionnels des oeuvres protégées par le droit d'auteur, le caractère décentralisé du Web, qui offre aux individus une liberté quasi absolue de publier, diffuser et reproduire des oeuvres posent des défis particuliers. En dépit de l'existence de conventions internationales, il subsiste des différences fondamentales entre les réglementations et notions relatives au droit d'auteur adoptées à l'échelle nationale et régionale. Un éclairage est apporté sur les effets de l'élargissement de l'accès à l'information, la réduction de la fracture numérique et la convergence des connaissances avec celle d'autres secteurs des technologies de l'information, ainsi que sur certains des défis et promesses qui en découlent.

Replantearse el uso leal en la era informática

En este documento se examina la pertinencia del concepto tradicional del uso leal, teniendo en cuenta las actuales mutaciones en curso en la sociedad mundial de la información de resultados de los adelantos técnicos en las comunicaciones y las infraestructuras de la información. La numerización, el procesamiento de la información, el aumento de la anchura de banda de las redes informáticas y la arquitectura común han transformado radicalmente el formato de transmisión y el contenido de la información, haciendo que todos estos procesos sean prácticamente continuos e independientes respecto de las plataformas. Se ha planteado una problemática especial con el nacimiento y proliferación de bancos de datos y programas informáticos que no se ajustan a los esquemas conceptuales tradicionales del derecho de autor, y también con el carácter descentralizado de la Red que ofrece a los particulares una libertad prácticamente ilimitada para publicar, transmitir y reproducir obras. A pesar de la existencia de convenciones internacionales, siguen existiendo diferencias esenciales en las reglamentaciones nacionales y regionales, así como en los conceptos del derecho de autor. En este documento se destacan las repercusiones del acceso cada vez más amplio a la información, la reducción de las diferencias en materia de recursos informáticos y la convergencia de los conocimientos procedentes de otros ámbitos de la tecnología de la información, así como algunos de los retos que plantean y de las posibilidades que ofrecen estos fenómenos.

I guess in this city of kings we'll start by saying "Fair use is dead. Long live fair use!!"

We have here a global phenomenon with potential significant local impacts. I'm talking about global information and communication infrastructure. It has at least 4 remarkable characteristics which should be borne in mind as we think about the notions of fair use. Briefly, these characteristics are: **Digitalization** or the ability to take all sorts of human interaction and communication – and non-human ones as well – and reduce them to a common series of zeros and ones. So we now have the ability to digitalize all sorts of content. Historically if we wanted to convey music or convey a word or convey a visual image we were confined to the media that we could use to do that; but now we are able to put all these into a common sort of platform. The second remarkable feature of the information communication's revolution is **Information Processing** and the ability to process and manipulate ever greater amounts of information in really stunning size and amounts. The third aspect is the **Growth in Network Bandwidth**. It's very exciting to process ever greater amounts of information and if I had more time I could really surprise you with some of the figures that we expect to see over the next two, five, ten years and beyond. This is already extremely interesting in itself but then it gets tremendously interesting when you start taking all of that processed information and begin moving it around among various people and entities and that's the Network Bandwidth. Already, we can foresee tremendously large growth in network bandwidth tripling every nine months for the next twenty-five years. It is estimated that in less than ten years time, there will be a disk that will be able to hold everything you ever saw or heard. It is also estimated, and these are very good estimates, that in less than ten years time we will have between 1000 and 10,000 times the communication capacity that we have today. And being of the human species, I would wager that we will fill all of that communication capacity with our interactions with one another. A fourth remarkable characteristic is the **Common Architecture, this TCP-IP Protocol**, which is the common TCP-IP architecture, that is the basis for internet communication today. So again keep in mind these four characteristics that determine the context in which we begin to think about fair use.

Fair use comes to us principally from the copyright regime, or copyright, as applied to computer programmes. Two of the principles that copyright does

for us in a global environment is to control or to speak directly to the reproduction right. Copyright also builds into or plugs immediately into a series of international regimes including the Universal Copyright Convention which this organization oversees, the Berne Convention and now the Trade Related Aspects of Intellectual Property (TRIPS) Agreements and also subsequent the work that will be done under the E-Commerce Round in the WTO and the E-Commerce Work Programme. So copyright met directly two principal concerns or needs, a desire to control reproduction and ability to do that on an international basis. And those are some of the driving reasons to maintain copyright and for the United States in a very strong diplomatic effort, spanning over a decade, to convince other countries through various means, some friendly, some not so friendly to adopt copyright protection for computer programmes.

But we've seen over time, that computer programmes don't fit very well into copyright and that there are various points of friction. Similarly, databases are also problematic as we try to decide how they should be protected as they evolve again and again in the context of these four remarkable characteristics of information and communication technologies that I listed earlier. So the fair use exemptions are limitations to a series of rights enjoyed by copyright owners.

Fair use itself is a factual concept based on factual analysis, since it depends on the particular jurisdiction or nation. For example, the USA's set of fair use possibilities is different from what is considered to be fair uses of copyrighted material in Germany. So we have a different mix from jurisdiction to jurisdiction of what constitutes fair use. It is a very fact based analysis and also in the United States especially it is a very litigation based analysis and that is not a very good model to carry to other countries in jurisdictions where litigation is not so frequent. In the United States, there are many cases relating to fair use, but the possibility of using those cases as precedents for other US fair use issues is very limited because of the extremely fact based nature of fair use as it is viewed under US copyright law.

So in my opinion, this cannot be the model for a global information society. It's nice to use the phrase "fair use" for it sounds good but I don't think this is the proper model. So what should fair use be? This is what we are going to attempt to define.

How do you make rules for information not only copyright information but personal information, objectionable contents and so forth. How do you create information rules in a global information society? There are four aspects in the life of information: creation; initial access; wider distribution; and use.

Most of the rules about information not only intellectual property but other information as well relate to the second and third aspects – access and distribution. There are relatively few rules about the creation of information – child pornography being one of the notable exceptions – and relatively few rules about the use of information. This is logical in a way, because it's easier for governments or other authorities to keep track of access, distribution and information channels than it is to monitor creation and use which may happen

in more in private circumstances. But going back to those 4 remarkable characteristics we have a situation in which everyone has the potential to be a publisher or a broadcaster. Everyone can use information and potentially have access to it in many more ways. Under these circumstances, do copyright rules map sufficiently well the kind of technological situation that we have today.

I will refer to a few other issues. First of all the open source movement is very robust, alive and well in the United States. This presents a real challenge to the fair use concept and also a way to move towards another sort of model of fair use. I think we will see more and more movement toward commodity software and plug-in parts. Essentially, open source offers robustness potentials that proprietary software often does not. Also with the growth world-wide of computer programming expertise we will see a far livelier community emerge.

One of the principal questions here has to be: "What is the economic incentive or business model, which is both appropriate and fair to both the consumer and the user. Should there be restricted rights to some works or a certain set of rights for some works and different limitations or exemptions for others? That's the knot of the problem.

Recently, we have been hearing about the Napster-Bertelsmans deal, or embryonic deal, by which Bertelsmans is going to give \$ 50M to Napster to help them develop their technology further so that it can be used to control the use of proprietary or copyrighted musical works and other works. The challenges are said to be technological although I would think that they are probably the lesser challenge. The larger challenge for them is what is the business model, how is any one going to make any money and I think our discussion should take up this point. Many lawyers are involved in and reflected an intellectual property law, but how can this law be so implemented in such a way as to facilitate both consumer use and artistic creation. If the creators are no longer owners what is the value proposition what are the incentives?

The wider question here, beyond that of fair use, is access to information. This is a rather inflammatory expression. Although these are three very innocent sounding words, they became at one time a very combustible combination. And we see that same expression coming up again in the debate on the digital divide. The digital divide is all about access, access to infrastructure, for some people in some countries, it's about access to information, it's about access to education and critical thinking skills so as to be able to absorb the information that is available to you and adapt it to your life. The model for information distribution is not the PC or this developed country model which is a very old model.

We work very hard in the United States to discourage our policy-makers from thinking about the Information Society in that way, because they have all been very focused on getting the PC's or boxes out to people. For most of the population of the planet and that is billions of people, their first experience of the Internet will be through a cheap handheld device manufactured in developing countries. The technology may well not be owned by anyone in

those developing countries; it may be owned by people in the developed countries; but the devices will be manufactured there. I think, that we will see a lot of very interesting local adaptations of those technologies, whether lawfully or perhaps slightly unlawfully. And there will be plenty of information. So the devices will be there and be cheap, the information will be there but how do people absorb it and adapt it to their own lives?

I should like to mention a final point. There is a lot of discussion about convergence and there are several types of convergence. One is the convergence of information and communication technologies with bio-technology and nano-technology and other advanced technology areas. There has been relatively little work done on that area and relatively little work done on the ethics involved. Let us look at the ethical landscape of several different advanced technologies today; for information technology it's relatively undeveloped, there is a reasonable amount of discussion about privacy but I would argue that it's not enough, I would like to see more. In the bio-technology area there is a lot of ethical discussion and public awareness of the ethical issues. In the field of material science and nano-technology, there is very little public awareness that there may be important ethical issues. So, as these technologies converge, how do we take advantage of the rather uneducated but high levels of public awareness and interest in the ethical issues around biotechnology and extend them to information technology and material science and nano-technology to create a more coherent ethical vision?

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Fair use and access to information in the digital era

Various proposals have been made to restrict the fair use exception in a digital context. Digitization provides tools to detect private digital copying of a protected work and to limit it. This may allow title-holders to prevent practices that have been important for educational and scholarly purposes. Given the power conferred by the technology, fair use exceptions established by the law may become inapplicable and substantially affect access to information, particularly in developing countries. The protection of databases, as established or proposed in some jurisdictions, may aggravate this problem. The development of new principles for the application in this context of fair use needs to be considered, including possible approaches to deal, under special rules, with the case of developing countries.

Usage loyal et accès à l'information à l'ère numérique

Différentes propositions ont été faites pour restreindre, dans l'environnement numérique, les exceptions au droit d'auteur au titre de l'usage loyal. La numérisation fournit des moyens de déceler et de limiter les copies numériques privées d'une œuvre protégée. Cela peut permettre aux titulaires de droits d'auteur d'empêcher certaines pratiques qui ont jusqu'à présent été importantes pour l'éducation et la recherche. Étant donné ce pouvoir que confère la technologie, les exceptions légales au droit d'auteur au titre de l'usage loyal des œuvres risquent de devenir inapplicables, ce qui aura des effets néfastes sensibles sur l'accès à l'information, en particulier dans les pays en développement. La protection des bases de données, telle qu'instituée ou proposée sur certains territoires, risque d'aggraver ce problème. Il faut envisager d'élaborer de nouveaux principes concernant l'application de la notion d'usage loyal dans ce contexte, en étudiant notamment les moyens de résoudre par des règles spéciales le cas des pays en développement.

Uso legítimo y acceso a la información en la era numérica

Se han formulado distintas propuestas para restringir la excepción de uso legítimo en un contexto numérico. La numerización ofrece medios de detectar la copia numérica privada de una obra protegida y de limitarla. Esto puede permitir que los titulares de los derechos impidan prácticas que se han ejercido con fines educativos y académicos. Habida cuenta del poder que confiere la tecnología, las excepciones de uso legítimo establecidas por la ley pueden ser inaplicables y afectar de modo considerable el acceso a la información, en particular en los países en desarrollo. La protección de bases de datos, como se ha hecho o propuesto en algunas jurisdicciones, puede agravar este problema. Se debe estudiar la posibilidad de formular nuevos principios para la aplicación del uso legítimo en este contexto, incluidos los posibles criterios para tratar, según determinadas reglas, el caso de los países en desarrollo.

Introduction

The digitization of information and the development of computer networks, such as the Internet, are posing new and far reaching challenges to copyright. The way in which they are finally resolved may have important implications for the access to and the use of information worldwide.

The main technological changes behind this “new revolution” (G-7 Ministerial Conference, 1995), are improvements in data storage, manipulation and transmission of data. With digitization, all kinds of data and copyright works may be recorded and compressed in the same, binary, format. While this allows copies to be reproduced without any degradation (every copy is perfect), developments in software make it possible to manipulate data, images, voice, make “sampling” and otherwise alter works by interactive techniques (Pearson, 1996).

The power of digital technology has transformed the way creators work and how authors and publishers deliver copyright works. It has blurred the lines between copying and reading, sale and reuse, performance and viewing a work (Hill et al, 1998, p. 1). The digitization of works -which are broken down to 0s and 1s- affects the very notion of what constitutes a “copyright work”, as well as other key legal concepts such as “author”, “originality” and “infringement” (Dreier, 1995, p.37). Underlying these developments is the capacity of the new technologies to create unauthorized, perfect and costless copies.

In addition, as a result of the explosive growth of the Internet, any work may be distributed worldwide, essentially instantaneously and at an insignificant cost.. Data transmission is no longer limited to a one-to-one basis, but one-to-many or even one-to-all basis. Internet, thus becomes a “broadcasting” system. The growth of the system and the improvement of transmission techniques challenges the market position of several industries and services, including those related to voice transmission (Rowley, 1995), radio broadcasting, phonograms (Dreier, 1993), publishing of literary works¹ and computer programmes (Heker, 1995).

These developments have polarized opinions on the ways in which copyright law should react, in order to protect the producers and suppliers of different kinds of works while preserving the interest of the public, particularly in research and education..

Some authors and industrial groups have argued that copyright requires only minor changes in order to adapt to the new technological changes (Holleyman and Steinhardt, 1995, p. 56), particularly with respect to the scope of exploitation rights and the extent of the fair use exception, (Dreier, 1993, p. 489; Dessemontet, 1996, p. 287). This was, for example, the position held by the U.S government in its “White Paper on Intellectual Property and the National Information Infrastructure”.

This paper argued that “no more than minor clarification and limited amendment” of the Copyright Act were necessary, in order to strengthen the rights of the copyright owner, particularly by clarifying and “dematerializing” the concepts of “fixation”, “distribution”, “transmission” and “publication” (IITF, 1995, p. 17). The only major change deemed to be necessary was the introduction of a *sui generis* right to supplement copyright protection for data databases (Lehman, 1995, p. 80).

For other scholars, however, copyright, which was a response to the problems posed by printing, and was later adapted to audiovisual works, needs to be reconceptualized in the digital era. “The copyright subject-matter has evolved over time from symbolic representations of sensual matter to the sensual matter itself, and from works passively received by the audience to works which interactively engage the audience” (Christie, 1995, p. 523).

According to some views, the “right to prevent copying” (as conferred under copyright) should be replaced by a “right to prevent access” to a work (Olswang, 1995)². Other have argued that the exclusive rights granted by copyright, which are becoming “outdated and irrelevant”, could be replaced by mere rights to obtain a remuneration (Rickeston, 1995, p. 898).

Since on-line access to subject-matter may be allowed only to those who agree to pay for it and comply with various restrictions regarding use, the need for property rights at all in a digital environment has also been questioned. Payment for access may be guaranteed by way of automatic, on-line, debiting of a credit card account or a bank deposit account. Developments in the technology should make it possible to ‘lock’ the digital data constituting the subject-matter to which access is allowed. In addition, it should be possible to detect and trace any subsequent unauthorized uses of the accessed subject-matter, and to automatically debit an account by way of a contractually agreed right to compensation for the unauthorized use (Christie, 1995, p. 526).

The debate on the protection of copyright for digital works has taken place in a context of expansion and strengthening of authors’ protection. As in the area of patents, in the field of copyright there has been a fundamental shift from a system originally based on non-commercial considerations – the benefits that the society may derive from creative authorship and the dissemination of ideas – to a “law of misappropriation” the ultimate objective of which would be to protect the commercial value of creative outputs. The encouragement of investment and the availability to the public of their results would be sufficient to justify the awarding of monopoly positions³. Whatever copyright may have

rested upon in the past, “the primary goals of copyright are now economic considerations” (Swanson, 1988, p.224)⁴.

Under the new, dominant conception that has emerged in response to changes in technology and market trends, the primary concern is rewarding investors, rather than the encouragement of individual creation and the public dissemination of knowledge.

“Even if the rhetoric of argument occasionally appeals to notions of justice and equity, modern economic analysis, and its characteristic preoccupation with questions of efficiency, now set the terms for policy discussions about the protection of intellectual property” (David, 1993, p. 20).

Limitations to exclusive rights

Despite the trend referred to above, there has been consensus so far that the purpose of copyright is not to ensure the holder a maximum economic return, but to find a balance between authors rights to obtain a fair return and society’s interest in access to and use of information. More than 100 years ago Numa Droz, one of the founders of the Berne Convention, already stated that “limits to absolute protection are rightly set by the public interest” (Ricketson, 1999, p.540).

In order to reach such a balance, copyright laws have normally incorporated a variety of limitations to the authors’ exclusive rights, in particular reproduction.

The exclusive reproduction right, defined in Article 9 of the Berne Convention. Paragraph 1, provided that authors of literary and artistic works have the exclusive right of authorizing the reproduction of their works “in any manner or form”⁵. These broad terms were interpreted to cover all methods of reproduction (e.g. drawing, lithography, offset and other printing processes, photocopying, recording), including those that were unknown at the time of adoption of the Convention.

Paragraph 2 of the Convention balanced such exclusive rights by stipulating that

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.

Almost every copyright law based on the “authors rights” conception contains exceptions for copying for personal use (scientific, educational or other private use), archival copying, library use, education, freedom of news reporting and reporting of current events.

These limitations are generally formulated as specific exceptions for particular uses or situations defined in advance. Thus, though the right to prevent unauthorized *reproduction* of a protected work has been one of the pillars of copyright protection, exceptions were included in most national laws for private or personal use. These exceptions, however, have not generally allowed for reproduction which might seriously affect the author's primary market. The exceptions have, therefore, been limited in different ways.

In Europe, for instance, these limitations normally include the following conditions:

- Copies should only be made of parts of the work. Complete works may be copied only where originals are not available on the market;
- Copies may be produced by reprographic processes only, because those copies are of lesser quality;
- Only single copies may be reproduced. Copies may not be used for other than private purposes and not be given to third parties;
- The private use must be intended by the copier or the copier must act in a non-commercial way;
- If there are exemptions for the benefit of libraries and archives, those institutions must be accessible to the public and act in a non-commercial way;
- The legitimate interest of the right-holder must be taken into account' (Hoeren and Decker, 1998, p.261).

Under Anglo-American copyright law, exceptions are generally formulated on a case-by-case basis, and are grounded on the application of broad general principles. The exceptions refer to acts of fair dealing or fair use, such as copying for purposes of research, teaching, journalism, criticism, parody and library activities.

A good example is the U.S. doctrine of fair use which only provides general legislative guidelines and largely leaves to courts the task of elaborating what is permissible in specific instances. Fair use is defined as an equitable rule of reason that permits copyrighted materials to be used under certain conditions without the consent of the copyright owner⁶. Such conditions, according to section 107 of the U.S Copyright law as developed by case law, include:

- The purpose and character of the use, including whether the use is commercial or for non profit educational purpose, transformative and productive or duplicative⁷;
- Whether the original work is published or unpublished (taking material from an unpublished work weighs against a finding of fair use);
- The nature of the copyrighted work (the scope of fair use is broader for factual works than it is for works of fantasy);
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole (the greater the taking of copyrighted material, the weaker the claim of fair use); and,

- The effect of the use on the potential market for or value of the copyrighted work⁸.

Fair use in the digital era

The application of the general guidelines provided by the US law and the lack of a complete and precise list of exempted acts, has made it difficult to articulate the fair use doctrine in particular cases⁹, but has provided a flexible framework to adapt solutions, as new technologies have emerged.

In Europe, despite the progress made in the harmonization of different aspects of intellectual property laws, the issue of fair use gave rise to many divergent regulations. EU member countries have shown little willingness to abandon their own conceptions about the extent of limitations to the reproduction right. This has led to sometimes contrasting solutions in different countries. For instance, in the case of reprography and private copying in particular, solutions range from a straightforward ban on private copying to legalization without compensation of rightholders (Commission of the European Communities, 1995, p.51).

The analysis of the law of other countries, including developing countries, also show considerable divergences and, in some cases, uncertainty about the exact scope of the exception to the reproduction right¹⁰.

The status and scope of the fair use exception came under scrutiny and controversy as a result of the development and diffusion of digital technology. As mentioned, this technology has substantially modified the way creators work and how authors and publishers deliver copyright works. It has, on the one hand, increased the power of copyright owners to control copying, the sale of copies and public transmissions of works, and it has also extended such power to reading, reusing copies and viewing protected material (Hill et al, 1998, p. 8). On the other hand, digital technology makes it possible to create unauthorized, perfect and costless copies, and allows the almost instantaneous and worldwide distribution of protected works through computer networks.

These developments have created new pressures to review the availability and scope of a fair use exception and to internationalize the copyright system. The fair use doctrine, it is argued, is justified when the transaction costs are too high and prevent copyright owners and users from entering into a copyright licence as in the case of library photocopying or home videotaping. But technologies exist today that enable copyright owners and users to negotiate individual licences for electronically stored works at a low cost. This may be done, for instance, through a "Copyright Clearance Center" that collect and administer royalties for each individual use (Goldstein, 1994, p. 217; 223; 240).

In addition, given the international reach of computer networks and the diverging legal solutions existing at the national level, reproduction acts that may be subject to the rightholder's consent in one country may well be covered by a fair use exception in other countries. This has been viewed by copyright

industries, some legislators and policy makers as a serious threat to the economic basis of copyright exploitation (Dreier, 1995, p.38).

The concerns about the status of fair use in a digital context led in some countries to the establishment of national *ad hoc* commissions, the preparation of reports, the enactment of new legislation and the negotiation and adoption of two new international treaties. In a number of judicial decisions the impact of digital technology on fair use was also specifically considered.

In the United States the issue of the future of fair use was addressed by the “National Information Infrastructure Task Force’s Working Group on Intellectual Property Rights”, chaired by Bruce A. Lehman, the U.S. commissioner of patents and trademarks . A “Conference of Fair Use” (“CONFU”) was established, but it collapsed as a result of disagreement on the extent of the “safe harbor” for fair use¹¹. Libraries and other groups expressing the users’ views defended the need for lawful uses of copyrighted works by individuals, libraries, and educational institutions in the digital environment (Okerson, 1996, p. 66). US Congress passed in October 1998 the “Digital Millennium Copyright Act” (DMCA)¹² and has under consideration two bills (the “Collection of Information Antipiracy” and the “Consumer and Investor Access to Information Act”) for the protection of data bases developed under quite diverging philosophies on the desirable extent of protection.

In Canada, a “Copyright Subcommittee” examined whether the fair dealing provisions should apply to the use of works on the Information Highway and whether criteria should be introduced to provide guidance. The subcommittee observed a high level of dissonance among submissions representing both users and creators regarding the current state of the fair dealing provisions in the Canadian Copyright Act. Submissions from creator’s groups generally argued that, given the ease of reproducing works on the Information Highway, fair dealing should be excluded as a possible defence in order to restore some balance of control for copyright owners. Submissions from users requested greater clarity in the application of the fair dealing provision and argued that there should be criteria such as are currently found in the U.S. law (Copyright Subcommittee, 1995, p. 27-31).

The European Commission prepared a “Green paper” where it argued that the change brought about by digital technology.

“...must be taken into account when we consider the right of reproduction in a digital environment. Where the technology does not allow copying to be prevented, a valid response may continue to be that levies should be charged on the equipment and recording medium, and private copying be declared permissible. But where there is the technical means to limit or prevent private copying, there is no further justification for what amounts to a system of statutory licensing and equitable remuneration...”

“Without a harmonized response to these questions there may be difficulties with the Internal Market if a right-holder from another Member

State with more protective legislation refuses to allow digital works or other protected matter to be brought into his territory where they originate in other Member States where digitization does not require the consent of the right-holder.

“The scope of the reproduction right is a separate question, because so many exceptions have been made by Member States under Article 9(2) of the Berne Convention. Careful consideration will be needed in order to determine which of these exceptions can continue. An example of the sort of difficulty which arises is the question of matter disseminated in digital form. There will also have to be a review of the legality of private digital copying, given that the technology allows this kind of copying to be monitored, prevented or limited.

“A situation in which private copying is legal in some Member States and not in others will create serious difficulty. The fact that private copying is authorized in certain Member States means that some operators will be afraid to allow access to their services there. The technical arrangements needed to control private copying cannot be made compulsory in Member States which authorize private copying, but will be required in other Member States. These differences will place barriers in the way of trade in the relevant equipment”. (Commission of the European Communities, 1995, p. 50 and 52).

In 1991, the European Union took an important step in the direction of reducing the scope of limitations to exclusive reproduction rights in the area of software. Given that copies of digital works can be identical to the original, the EC Computer Programmes Directive narrowly tailored exceptions to such rights. Similarly, the EC Directive on Data Bases, limited reproduction for private purposes only to non-electronic databases (article 6.2.a).

Moreover, in order to address the problems of copyright in digital works, the adoption of a new European Directive on the “Harmonization of certain aspects of copyright and related rights in the Information Society” is under consideration. The draft Directive permits Member States to exempt copies for non-commercial archiving or conservation purposes by libraries and universities, and in respect of ephemeral fixations made by broadcasting organizations by means of their own facilities and for their own broadcasts from the reproduction rights.

The Member States are also permitted under the draft to provide for limitations to the reproduction rights, where the use is for the sole purpose of illustration for teaching or scientific research, and this is subject to both acknowledgment of the source and the provision of fair compensation of rights-holders. The use of excerpts in connection with the reporting of current events, as long as the source and, if possible, the author’s name is indicated, and to the extent justified by the informatory purpose and the objective of illustrating the event concerned may also be excluded.

Other exemptions in the draft Directive include quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source and, if possible, the author's name is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose (Doherty and Griffiths, 2000, p. 18-19).

National courts have also taken into account the effects of digital technology on the extent of permissible fair use in deciding particular cases relating to various categories of digital works¹³. For instance, in Germany the Federal Supreme Court acknowledged that the interests of authors are increasingly affected as a result of the development of technology. The Court addressed, in particular, the problems raised when articles are entered into public archives on the day of their publication and on-line users may order these articles also on the same day. Though this leads to a situation where archives may compete with the original publication itself, the Court argued that the availability of information is essential in a modern society, and considered a mandatory royalty sufficient to take care of the interests of authors in such cases (Mann, 2000, p. 95).

The perceived need to adapt and strengthen copyright law in the digital environment was also the driving force for the negotiation and adoption of two World Intellectual Property Organization treaties in 1996. The preamble to the WIPO Copyright Treaty (1996) proclaimed

*“the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”*¹⁴.

Article 10 of the WIPO Convention included a specific provision on limitations to exclusive rights, modeled on, but at first sight more restrictive than article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement. According to the WIPO Convention,

- 1) *Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;*
- 2) *Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*

In the Berne Convention there is no limitation that the States shall “confine” the exceptions to those meeting the three-step test introduced by article 9(2).

New challenges to the fair use doctrine

Though the developments described have eroded the status and scope of the fair use doctrine, it has survived and obtained specific recognition in the WIPO Copyright Treaty, as mentioned. However, new challenges to the application of the doctrine emerged from new fronts:

- the development of protection technologies (generally known as “rights management systems” or “rights management technologies”) and the express regulation of “circumventing” devices or services that may be used to defeat technical means of protection (such as “password codes” for computer programmes, encryption or scrambling for cable programming, videocassettes, CD-ROMs and DVDs);
- the extended use of contract law to control access to and the use of digital copyright works; and
- the development of a *sui generis* form of protection, for databases.

Anti-circumvention measures

Available technologies permit rights-holders to control access by third parties to works in digital form. Once accessed, it is also possible to monitor and regulate their use. This in-built protection can be more effective than any intellectual property rights protection, and may deprive the fair use doctrine of any concrete value. With the effective use of such protective technologies, titleholders may enjoy “virtually absolute control over their works, unencumbered by the limitations embodied in copyright law” (Denicola, 2000, p. 194).

Technologies designed to prevent third parties from unauthorized access to and use of digital works may permit right-holders to control, monitor and meter every possible use of a work. If strengthened by the legal prohibition to defeat them, such systems create new and powerful means to prevent reproduction, including that for fair use, and other acts.

Recent legal developments have moved precisely in that direction. The WIPO Treaty referred to incorporated, under the influence of the US government and US motion picture industry, a new international norm to regulate technologies likely to circumvent technological protection to digital works. Article 13 states that

“Contracting Parties shall provide legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restricts acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”.

In the USA, the already mentioned DMCA enacted, among other things, to implement the WIPO Copyright Treaty obligation to provide legal remedies

against circumvention of technological protection, went a step further. The DMCA prohibits the manufacture, sale, or importation of technologies that can be used to circumvent technological protection for copyrighted works. The Act (article 1201) proscribes devices or services that

- are primarily designed or produced to circumvent;
- have only limited commercially significant purpose or use other than to circumvent; or
- are marketed for use in circumventing.

The DMCA includes a number of acts that will be exempted from the reproduction right. However, the Act transforms the fair use doctrine from a flexible common law “safe harbour” to a system of narrow, specific exceptions to exclusive rights¹⁵, modeled on the European approach to fair use. The DMCA also narrows down the fair use doctrine since it reverses the traditional presumption of fairness that attaches to non-commercial uses (Cohen, 1999, p. 236).

Under the DMCA, the Congress gave the Library of Congress – a congressional agency – rulemaking authority to promulgate by October 2000 exceptions to the anticircumvention prohibition if users of a certain class of works are or are likely to be adversely affected by the prohibition. Those exceptions must be revised every three years thereafter.

Since the copying of a work may be a fair use under certain circumstances, the DMCA does not prohibit the act of circumventing a technological measure that prevents copying¹⁶. However, as indicated, devices primarily designed to circumvent controls protecting the title-holder are banned (section 1201). The act of circumventing a technological protection measure to gain *access* is prohibited. Fair use is not, under the DMCA, cannot be used as a defence for the act of gaining unauthorized access to a work, since this is a violation in its own right.

Preventing access can *de facto* impede copying. What cannot be copied cannot be accessed. Even after legitimate access, users may be technologically unable to make copies, given the ban on devices primarily designed to circumvent. Title-holders may also extend the ban on access to acts of copying by requiring users to re-access a work for every use.

Commentators¹⁷ seem to agree that the DMCA entails a significant departure from the US legal tradition in relation to fair use, which was based on a case-by-case fundamentally equitable balancing of private and public interests. Moreover, many fear that:

“Because the anti-circumvention rules makes circumvention of access controls an independent wrong, it has the potential to convert copyright into an absolute form of protection that it was never intended to be. To the extent protected technological measures are actually effective in controlling access to copyrighted works, they will, as a practical matter, preclude all uses of copyrighted works not authorized by copyright owners, including fair use and other excepted uses

that the law in legal theory permits. By reinforcing technological protective measures with legal sanctions for their circumvention, the anti-circumvention rule may, in practice, wipe away many of the exceptions and exemptions to copyright protection that Congress has provided for balance” (Dratler Jr., 2000, p. 2-21/2-22).

Contract law vs. copyright law

Using electronic fences, title-holders are in a position to prohibit use or to seek payment for any use of technologically protected works. They can, in fact, supersede any rules allowing for fair use.

Since digital distribution systems permit right-holders to interact directly with users and to determine the conditions for access to and use of works, the massive use of contracts on terms and conditions dictated by suppliers¹⁸ is another ingredient of the threat to fair use and, more fundamentally, to copyright law as such (Denicola, 2000, p. 194). The enforcement of “shrink wrap” licenses for software and of pre-determined conditions attached to the commercialization of other digital works¹⁹ illustrate this threat.

It has been observed that fees charged for electronic information licences (which give libraries or schools permission to use materials) are generally higher than prices for the equivalent books or periodicals. The costs of information, particularly scientific books and journals, has been reported to increase by 10 percent or more annually (Okerson, 1996, p. 67).

Though the enforcement of unconscionable contractual terms may be denied by courts, or subject to antitrust or misuse doctrines²⁰, the asymmetry in the contractual relationship may lead to overriding fair use and other statutory limitations to copyright. An electronic agreement that governs access and use for every user looks like an exclusive right rather than a bilateral licence (Denicola, 2000, p. 198). As noted by Cohen,

“if society values the fair use limits on copyright protection, it would be entirely logical to forbid or limit the ability to contract around them -particularly where the terms are non-negotiated and bind large numbers of consumers” (1999, p. 240).

A sui generis regime for databases

Finally, the fair use doctrine (and corresponding exemptions under continental law) can be restricted as a result of the development of a *sui generis* regime for databases.

Databases are protectable, under copyright, as compilations. In principle, however, only those databases that meet the copyright originality test are protectable. In other words, the simple compilations of data are in the public domain.

The European Council Directive 96/9/EC, developed a new, *sui generis*, form of protection for any database if it is shown that qualitatively and/or quantitatively a “substantial investment in either obtaining, verification or presentation of the contents” has been made (article 7).

The EC Directive provides for an “extraction right”, i.e. the right to prevent “the extraction or reutilization of the whole or substantial part, evaluated quantitatively or qualitatively, of the contents of the database” (art. 7).

This Directive provides a conspicuous example of the emerging paradigm of Intellectual Property Rights (IPRs) protection, whereunder the main goal is not to protect creativity and ingenuity, but investments. Databases are, in effect, protected under the *sui generis* right without requiring originality in the selection or arrangement of their contents. In accordance to the European Commission, the main feature of the Directive is

“to create a new economic right to protect the substantial investment of by a database maker. Considering the considerable investment of human, technical and financial resources necessary to create a database, and given that those databases can be copied at a much lower cost than that of their development, such legal change is important. Unauthorised access to a database and the extraction of its contents are thus acts which can give grave technical and economic consequences” (EC Commission, 1995, p. 32).

The Directive’s sections on the *sui generis* right define two categories of restricted acts: extraction and re-utilization. The right applies to the whole or a substantial part of a database, which means that an insubstantial part is not protected. Protection lasts for 15 years, and that period may be renewed if there has been substantial new investment. The Directive defines exceptions to the right which are similar to those existing in the chapter on copyright, but, in view of the volume of information in such databases, the exceptions are generally limited to the right of extraction. The *sui generis* right is conferred in addition to the other existing rights.

The Directive does not prescribe, but only authorizes, Member States to provide exceptions for the cases of extraction for “private purposes”, “teaching or scientific research”, “public security or an administration or judicial procedure” (article 9). Moreover, Member States may limit the exception relating to teaching and research to “certain categories of teaching and scientific research institution” (Preamble, No. 52).

In the USA, the Supreme Court decided in *Feist Publication Inc. vs. Rural Telephone Services* (499 US 340, 1991) that information consisting solely of facts arranged in a straightforward manner (an alphabetical arrangement of telephone subscribers’ names and numbers) were not “original works of authorship” within the meaning of the Copyright Act.

This decision was viewed by some authors as endangering the vitality of the U.S information industries:

“To a nation that counts information as an important asset and a principal export, the outcome is (or should be) extremely worrisome” (Dreyfuss, 1993, p. 197).

After *Feist*, a bill (the “Collection of Information Antipiracy Bill”) was introduced into US Congress in order to expand protection for databases, based on the model of unfair competition rather than property (Perkins, 2000, p. 368) ²¹. With the purpose of offering a less restrictive, alternative regulation, a second bill (the “Consumer and Investor Access to Information Act”) was also introduced.

The adoption of new regulations on databases may limit the scope of fair use, particularly for scientists, libraries and educational institutions (Reichman and Uhler, 1999, p. 79). For instance, under the U.S “Antipiracy” Bill, making available or extracting information for non-profit educational, scientific or research purposes would constitute a fair use only if those acts do not materially harm the primary market of the database maker²².

Conclusions

The development and diffusion of digital technology has an ambivalent impact on copyright protection. On the one hand, this technology allows perfect and costless copies of copyrighted works, to be made thus expanding the scope for unauthorized reproduction. On the other, it permits rights-holders to detect and limit such reproduction. Standardized contractual schemes can reinforce or supplement the technological protection.

The fair use doctrine and similar limits on the scope of copyright protection incorporated in most copyright laws and relevant international treaties, have played an important role in promoting the dissemination of knowledge and the creative arts.

Access to information is the foundation of a democratic society. Copyright must ensure a sound balance between the interests of authors and those of society. There is no reason to think that giving copyright owners greater control over the reproduction and use of their works in the digital environment will result in greater benefit for the public.

While the potentially negative effects of free-riding on authors and the copyright industry need to be taken into account, the combination of electronic fences via the use of “rights management systems”, the use of contract law and the development of a *sui generis* protection for databases, may effectively reduce or eliminate the ability of researchers, authors, critics, scholars, teachers, students and consumers to find, to quote for publication or otherwise make fair use of information.

Current technical and legal developments may result in growing barriers to the access to all types of information, which will be increasingly channelled through digital networks. Such barriers are likely to affect not only technology,

but also general factual information, as well as scientific knowledge, including information in the public domain.

The adoption of anti-circumvention measures, such as under the DMCA, and the displacement of copyright by contract can make any fair use exceptions contained in copyright law illusory. If the legislative model developed in the USA on anti-circumvention measures²³ and the European approach on data bases become internationalized, the access to and fair use of works may be restricted on a global scale. This may widen the large technological gap that today separates developed and developing countries. For the latter, it is essential to ensure that an appropriate fair use zone is preserved in the digital environment at both national regional and international levels.

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1. Individual authors have in fact the unprecedented opportunity of becoming their own publishers and to distribute their works in digital form through computer networks (Dixon and Self, 1994, p. 466).
2. This would confer the power to prevent information's use, in contradiction to the basic copyright idea/expression dichotomy.
3. For instance, a U.S. Supreme Court decision (Mazur v. Stein), stated that "the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.." (247 U.S. at 219).
4. See also Dreyfuss, 1987.

5. Paragraph 3 also states that “Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention”.
6. In the most recent Supreme Court decision dealing with fair use (*Campbell v. Acuff-Rose*, also known as the “Pretty Woman” case), the Court held that there are no straight lines, few presumptions, and that fair use involves a sensitive balancing of interests.
7. The commercial nature of use weighs against, but does not preclude, a finding of fair use. Though many educational uses will often be regarded as fair use, colleges, universities, not-for-profit libraries, and other noncommercial users can be held liable for copyright infringement notwithstanding the fair use defense.
8. See Shipley, 1996, p.10.
9. According to judge L.Hand, the fair use doctrine has been the “most troublesome in the whole law of copyright” (*Dellar v. Samuel Goldwin Inc.*, 104 F. 2d 661, 2s. Cir. 1939).
10. See Lipszyc, 1993, p. 222.
11. See the “Final Report to the Commissioner on the Conclusion of the Conference on Fair Use”m Nov. 1998.
12. See below a discussion of the implications of this law on fair use.
13. Case law has been particularly rich in the United States. See, e.g., Chused (ed.), 1998.
14. This statement has been deemed a “major development in international copyright policy”, since “*If copyright policy on an international scale had seemed to be veering away from traditional purposes such as the promotion of knowledge in the public interest and toward a solely trade-oriented set of purposes, this treaty can be seen as a timely correction in the course of international copyright policy*” (Samuelson, 1997, p. 926).
15. The exceptions are for nonprofit library, archive and educational institutions; reverse engineering; protection of minors, personal privacy, and security testing.
16. “Nothing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title” (section 1201, c.1).
17. See, e.g. Cohen, 1999; Hill et al, 1998. See also H.R. Rep. No. 551 (Part 2), 105th Cong., 2d. Sess. 26 (July 22, 1998), quoting letter of June 4, 1998, to Committee on Commerce from Consumers’ Union):
“It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information” (quoted in Dratler Jr., 2000, p. 2-21)
18. For instance, the DMCA gives owners the chance to regulate access and use through contracts.
19. In *ProCD Inc. v. Zeidenberg*, for instance a US court held that “a notice on the outside (of the package), terms on the inside and a right to return” were sufficient to establish a contract. The case related to a CD-ROM telephone directory that included unprotected contents (quoted in Denicola, 2000, p. 196).
20. The U.S Uniform Computer Information Transactions Act (1999) authorizes a court to refuse enforcement to contractual terms that violate a “fundamental public policy”.
21. WIPO also convened a Diplomatic Conference to develop a treaty on databases in December 1996. One of the basic proposals considered by the Conference was the protection of non-original databases the production of which entailed a “substantial investment”. See document WIPO CRNR/DC/6, 30.8.96.
22. According to the “Access” Bill, however, the transformative use of database content, for instance for research, would not entail liability (Perkins, 2000, p. 369).
23. Nicola has noted that “the lavish excesses of the DMCA are part of an attempt to boost international standards of protection” (Nicola, 2000, p. 205).

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Copyright and its limitations in the digital environment

The rationale of many existing limitations may not justify simply converting them to the digital environment. Instead, we must differentiate, according to the different rationales of the exemptions. Limitations that are aimed at protecting fundamental rights and freedoms must be preserved, if possible in media neutral terms, in the digital environment. Limitations serving (other) public policy aims, should be re-evaluated, in the light of their potential impact on the market for copyrighted goods and services. Limitations based on market failure should not be applied in the digital environment.

Le droit d'auteur et ses limitations dans l'environnement numérique

Les arguments qui fondent un grand nombre des limitations du droit d'auteur en vigueur ne sauraient en justifier la transposition pure et simple à l'environnement numérique. Il faut en fait distinguer entre ces différents arguments. Les exceptions qui visent à protéger des droits et libertés fondamentaux doivent être préservées dans le monde numérique, si possible dans des conditions qui assurent que leurs effets soient indépendants des médias considérés. Celles qui servent d'autres finalités d'ordre public demandent à être réévaluées à la lumière de leur impact potentiel sur le marché des biens et services protégés par le droit d'auteur. Les limitations qui se justifient par la défaillance du marché ne doivent pas être appliquées au secteur numérique.

El derecho de autor y sus limitaciones en el universo numérico

La lógica en la que se fundan muchas de las limitaciones del derecho de autor actualmente existentes no permite a veces una simple transposición de éstas al universo numérico. Se deben diferenciar los distintos argumentos lógicos en los que se basan las excepciones. Las limitaciones que tienen por objetivo proteger derechos y libertades fundamentales se deben preservar en el universo numérico, a ser posible con independencia de los medios de comunicación utilizados. Las limitaciones para cubrir (otros) objetivos de las políticas públicas se deben reevaluar, teniendo en cuenta sus repercusiones potenciales en el mercado de bienes y servicios protegidos por el derecho de autor. Las limitaciones que se basan en las carencias del mercado no se deben transponer.

The crucial question that we are trying to answer, “should copyright limitations survive in the digital environment?” Or conversely, “should they be abolished?” What makes this discussion so interesting is that both sides of the debate, users on the one side, and rights holders on the other, both have good arguments. At first sight, users have the easiest argument. What they’re basically saying is: what we can do offline, we must be able to do online. Rights holders on the other hand have the somewhat more difficult proposition to defend, that the digital environment has changed all this, and that, in the not too distant future, individual licensing on a pay as you go basis will become feasible, thereby denying or obviating the need for any limitations on copyright in the future.

There is merit in both arguments. Consequently, it would be simply too facile to recommend a mere restatement of existing limitations and exemptions in digital (or media-neutral) terms. The rationale of many existing limitations may not justify simply converting them to the digital environment. Instead, we must differentiate, according to the different rationales of the exemptions. Limitations that are aimed at protecting fundamental rights and freedoms, such as freedom of expression and the right to privacy, must be preserved, if possible in media neutral terms, in the digital environment. This category comprises traditional limitations for the purposes of news reporting, criticism, academic and (other) scientific purposes, parody, etcetera. Exemptions allowing for (limited) copying for personal or other private uses also fit into this category.

The majority of exemptions, however, are not primarily aimed at protecting fundamental rights, but are motivated by various public interest considerations. In this category, we find exemptions for educational purposes, library privileges, archival exemptions, privileges for museums or other cultural institutions, et cetera. Should exemptions of this type be preserved in the digital environment? Perhaps. If public or university libraries deserve an alleviated copyright regime in the analogue world, why not in cyberspace?

The problem is: nobody knows what a ‘library’ really looks like in the digital environment. A traditional library has four walls, a front door, stacks of books and limited opening hours. The physical construct of a library serves as a natural limit to the library privilege. By contrast, a digital (or virtual) library is *ubiquitous*, and open day or night to a (potentially) unlimited global user group.

Clearly, in designing a library “privilege” for the future, an institutional definition of libraries exempted (e.g. publicly funded libraries) would lead to unacceptable results. What is called for, then, is a clear definition of library functions or user groups that merit special treatment under the copyright law. Ultimately, preserving library privileges in the digital environment will require a thorough rethinking of the public service role of libraries as such. The same is true, *mutatis mutandis*, for exemptions for educational purposes and museum privileges.

Finally, rights holders are correct in arguing that limitations based on market failure (i.e. the practical inability to transact), such as the reprography rules and home taping provision found in many countries, must not be mindlessly transplanted into the digital environment. Instead, the legislature should adopt a wait-and-see approach. If acquiring licences for certain uses in the digital environment should eventually prove to be unfeasible as well, legislative intervention might be appropriate. Until that day, the market should develop by itself.

I’d now like to discuss an extremely important decision that was handed down by the WTO Dispute Settlement Body in June 2000. The case involved a claim by the European Communities against the United States concerning alleged non-compliance with the Trade related aspects of intellectual property (TRIPS) Agreement. The TRIPS Agreement compels most countries of the world to abide by the most important Intellectual property (IP) conventions, including the Berne Convention. Article 13 of TRIPS contains language that is similar to article 9.2 of the Berne Convention: limitations are allowed if they meet the “three-step test”. The WTO Panel had to answer the question whether a provision in the U.S. Copyright Act, which allows owners of small restaurants and shops to play broadcast music on their premises, actually met the test. The WTO Panel concluded it did not. The exemption could not be considered a ‘special case’ (step 1), it conflicted with the ‘normal exploitation of the work’ (step 2), and it unreasonably prejudiced the right holders’ interests (step 3).

In concluding that the U.S. provision failed the three-step test, the WTO Panel demonstrated that there are limits to the national legislature’s autonomy to maintain or implement limitations. On the other hand, the decision also gives legislatures some more room to move, by declaring that it is not for the Panel to judge the validity of the public policy objective pursued by a national legislator in enacting a limitation. Whether or not there actually was a valid public interest involved in rescuing these restaurant and shop owners from the claws of the collecting societies, is irrelevant, according to the WTO Panel. In other words, states remain free to decide for themselves whether a particular public policy objective should be pursued or not by an exemption. But an exemption may never become the rule; it may not eat into the exclusive right to such an extent that nothing of the right remains.

There is much more to say about this decision but time is short, and I also want to briefly mention the forthcoming European Copyright Directive. It

is expected the Directive will finally be adopted in Spring 2001, after the European Parliament has finalized its discussions in a second reading. The *pièce de résistance* of the Directive is a very lengthy article 5 on copyright ‘exceptions’. Its original goal was to harmonize copyright limitations in the European Union, but that operation has failed spectacularly. The Commission’s aim of limiting the number of exemptions to a bare minimum, enumerated in an exhaustive manner, has backfired dramatically. In the course of the negotiations in the Council Working Group, the Member States have managed to maintain most, if not all, of the limitations currently existing in national law. Thus, article 5 now lists no fewer than 20 possible exemptions. What makes the Directive a total failure, in terms of harmonisation, is that the exemptions allowed under article 5 are optional, not mandatory (except for article 5.1 on ‘technical copying’). Member States are not obliged to implement the entire list, but may pick and choose at will. It is expected most Member States will prefer to keep their national laws intact as far as possible. At best, some countries will add one or two exemptions from the list, now bearing the EC’s seal of approval.

In my opinion, the whole idea of drawing up a finite set of limitations was ill-conceived in the first place. The last thing information producers, intermediaries and users need in these dynamic times are rigid rules that are cast in concrete for the years to come. How can a legislature in its right mind even contemplate an exhaustive list of limitations, many of which are drafted in inflexible, technology-specific language, when the Internet produces new business models and novel uses almost each day? Note that the ‘safety valve’ of article 5.3o (‘use in certain cases of minor importance’) is limited to existing exemptions and analogue uses. Now, thanks to the Directive, if some unforeseen use that we all agree should be exempted emerges, we’ll have to wait at least three years, if not much longer, for the Directive to be amended.

There’s also some interesting language in the Directive on anti-circumvention measures, and the dangers of ‘digital lock-up’ (article 6), but I don’t have time to discuss it. Let me conclude by saying that limitations are here to stay, but that not all limitations are likely to survive in the digital environment. Unlike humans, not all limitations are created equal.

LARRY ALLMAN

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Fair use, free use and mega-use of copyright works in the networked digital environment

Data, information and knowledge are not necessarily copyright works. Public domain is not protected by copyright. Fair use and free use are different. Free uses are legislative in origin, and embody a public benefit; fair use is judicial in origin, and involves a weighing process involving local standards, together with consideration of purpose, nature, substantiality and effect. The Action Plan from this meeting should contain the concepts of moderation, balance, flexibility and fairness in respect to fair use. On-line Internet infringements will be resolved in the next few years. Technological measures of protection are here by consensus. Copyright will survive the current technological and Internet challenges. WIPO Member States decide on its policies. There is an over-abundance of information available on-line.

Usage loyal, libre utilisation et utilisation massive d'œuvres protégées par le droit d'auteur dans l'environnement des réseaux numériques

Les données, l'information et les connaissances ne sont pas nécessairement des œuvres protégées par le droit d'auteur. La protection par le droit d'auteur ne s'étend pas au domaine public. L'usage loyal (Fair use) et la libre utilisation sont deux notions distinctes. Les formes de libre utilisation trouvent leur source dans la législation et servent l'intérêt public; l'usage loyal trouve sa source dans la jurisprudence et implique un processus de pondération en fonction de normes locales, ainsi que l'examen de considérations d'objet, de nature, d'importance et d'effet. Le plan d'action qui résultera de la réunion devrait prendre en compte, dans la section consacrée à l'usage loyal, les principes de modération, d'équilibre, de souplesse et de loyauté. Le problème des atteintes au droit d'auteur commises en ligne sur l'Internet sera résolu dans les prochaines années. Des mesures technologiques de protection sont prises par voie de consensus. Le droit d'auteur survivra aux défis que posent actuellement la technologie et l'Internet. Les États membres de l'OMPI sont en train de décider des orientations à adopter en la matière. L'information offerte en ligne est pléthorique.

Uso leal, uso libre y uso masivo de las obras protegidas por el derecho de autor en el contexto de las redes informatizadas

Los datos, la información y los conocimientos no son forzosamente obras protegidas por el derecho de autor. Las obras de dominio público carecen de la protección dispensada por ese derecho. El uso leal y el libre son muy distintos. El uso libre tiene un origen de índole legislativa y encarna una utilidad pública, mientras que el uso leal tiene un origen judicial y supone un proceso de equilibrio en el que intervienen las normas locales, además de la consideración, de su propósito, índole, importancia y repercusión. La parte dedicada al uso leal en el Plan de Acción que emane de esta reunión debe comprender conceptos como: moderación, equilibrio, flexibilidad e imparcialidad. En los próximos años podremos acabar con las infracciones perpetradas en línea en Internet. Las medidas tecnológicas de protección deben ser fruto de un consenso. El derecho de autor superará los problemas planteados actualmente por la tecnología e Internet. Los Estados Miembros de la OMPI adoptan sus propias políticas al respecto. La información disponible en línea es excesiva.

Presentation

Before I get into the substance of my paper, I would like to compliment UNESCO, an extremely interesting organization with a wonderful mandate. One thing that it does very well is to rise to the challenge of difficult topics and subjects and issues and to bring together interesting people to discuss them. I think UNESCO should be complimented for going forward courageously and boldly with difficult subjects.

In terms of the substance of my paper, I would like to add some contextualization and hopefully add some clarity. Yesterday, and today even, certain terms have been used with perhaps not the context that they need to have, or not the clarity or specificity.

Data is raw facts. When data is synthesized, and organized and thought about, it becomes *information*. When information is synthesized, and thought about, it may become *knowledge*. Those 3 items, are different from *copyright works*. Copyright works, because of the originality of the author in creating them, qualify for a regime of protection. Data, and information, and knowledge, may or may not be copyright works. Data most likely is not, and it may or may not qualify for international protection.

Public Domain is a concept that mostly comes out of copyright. The public domain consists of works that do not have copyright protection. Whether are original works that went through copyright and then came out into the public domain, or whether they were never subject to copyright protection is a discussion where there are two bodies of thought. But the main point is that public domain works are not protected by copyright.

It may be helpful to separate “*fair use*” from “*free use*”. Free use is a concept that basically originated out of copyright in the Berne Convention. Article 9(2) of the Berne Convention, refers to nations being allowed to permit reproduction in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. This is the origination of the 3-step test that has been pulled through the ages and has ended up in various international instruments.

Article 10 of the Berne Convention takes this a little further, where quotations are concerned and the phrase “compatible with fair practice is used”. This is the first time that this particular phrase occurs. And I suggest that “fair practice” has more to do with the business practices of the use of copyright works, and fair use is more a question of legalities and treaties and things of that nature. The TRIPS Agreement picks this up and adds some clarification, as it did to computer programmes and databases. Article 13 of TRIPS specifically institutionalizes limitations and exceptions.

Fair use vs. free use. I suggest that free use has a legislative origin, in that it is part of a legislative framework. I also suggest that in every free use, you can find a *public benefit* and this is what will distinguish it later from a fair use. The public benefits of free use are acknowledged as being valuable for society: education; scientific research; news; public discussion; freedom of speech. Governments, and people in general, feel that there is a justification in limiting copyright, since the benefits to society are so great.

Fair use on the other hand, at least in the common law system, has a judicial origin. Thus, judges interpret situations, or administrators work out what is a fair use, and therefore what sort of regulations should we impose on this Internet Service Provider (ISP) or that particular publisher, for example. It is generally not an exclusive right because it is very difficult to decide on an absolute fair use. For example, is fair in China the same thing as fair in Peru? Is the same thing as fair in the Philippines as it is in South Florida? I don't think so. I think that there are some local standards that have to enter into the definition of what is fair. And conversely, what is a use nowadays? Is a use the same thing in New York City as it is in Khartoum? Maybe yes, maybe no. What I am saying is that fair use is a weighing process, and it is very, very important that it be seen as a weighing process. The interface between users, rightsholders, big multi-nationals that fund and support and distribute works on the one hand, and society and the users and those who have a need for works on the other – fair use is the mechanism which oils the wheels.

Under the common law system, you can analyze fair use and get a fairly good idea of which way a decision on it might go by looking at four factors.

- a) What is the purpose and the character of the use? How is it used and for what purpose?;
- b) What is the nature of the work? Is taking a multimedia work in its entirety the same as taking a quotation from a book or the essence of a poem?;
- c) The amount and substantiality of what is taken. This is another factor that is important. To take 100% of a work and claim fair use, creates a more difficult situation than taking 10%. The 10% might be the whole essence of the poem, film or book, etc., but the situation is still different;
- d) Looking at the Berne Convention, what effect does it have? Does it kill or does it stimulate the market? It may be said that the worst nightmare of the Hollywood entertainment industries is that they sell one DVD.

And then it goes on the internet and their market is dead, because everyone downloads it and that's the end of their sales. It is their worst nightmare, and it is a legitimate concern for us.

Lastly I should like to make the following prediction: We are currently having some difficulties with digital technology and on-line dissemination of works, and how exactly the legal interface is going to work with the technological and what the effect of this will be on the public. I predict that the legal framework and the technology will work together quite well, and they will solve all of these problems. Within the next few years, the problems that we are seeing today will no longer exist, and I mean the Napster problem, the unauthorized distribution of works on a massive global scale, the killing of an author's market, etc. We are going to have different problems in the future, but the problems which I have just mentioned will be solved.

Secondly, where the technological measures are concerned, I have already indicated that these are way too broad and may not even have a place in copyright. 120 countries came together in the Diplomatic Conference that WIPO held in December 1996, and made the decision that technological measures would be enforced to protect the works of authors. They adopted the *WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty*. Technological measures are included in those treaties; 120 countries adopted them, and there were 50 signatories. Today, there are 19 ratifications to the Copyright Treaty and 16 to the Performances and Phonogram Treaty. After 30 ratifications or accessions, they will come into force.

The age-old question, "Can copyright survive this digital challenge or on-line challenge or Internet challenge?" has already been raised. To put this into perspective, copyright has survived every technological challenge that has ever challenged it, from movable type and the printing press, through radio and television to the VCR, etc. Copyright will survive Napster, it will survive the Internet and it will survive because it is one of the fundamental building blocks of countries in terms of culture, in terms of economic development and in terms of future investment.

The role and the policy of WIPO have been widely discussed. May I clarify a few points. We at WIPO are a Secretariat. If we were to dictate to our Member States what we wanted them to do, which treaty we wanted them to study or what a particular paragraph should look like, they would dismiss us in a second. WIPO does not have a policy – we support our Member States and we provide an environment and a venue whereby they come together, make decisions and we follow their dictates.

Lastly, there has been some discussion about limitations on information and limitations on knowledge and how these limitations are increasing. If you have been on the Internet lately, there is no limitation. There is such an abundance of information available that the problem is organizing it and understanding it, and trying to figure out exactly what's out there. There's plenty of information out

there and I don't see any sort of limitation that affects my rights or yours at this point, and I think that this is a trend that is going to continue *ad infinitum*. More and more and more information until everyone has too much information.

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The fair use concept in the information society

The notion of fair use in copyright was introduced as an important policy in the print environment to ensure public access to information, which was difficult to obtain. The fair use concept so far has provided a fair balance between the users' needs for access to information and the legitimate rights of the creator and the publisher (the rights holders). Today's digital environment has dramatically shifted the status quo as it allows not only easy and rapid access to information by multiple users at customized prices, but also a seamless reproduction and dissemination of this information by unauthorized users.

It is the publishers' role to organize information creatively and make it available to the public. (STM) Publishers are extensively investing in new forms of digital collections (databases) by selecting, producing, storing (archiving) and are developing new terms under which information with appropriate quality assurance can be disseminated. In this respect we notice a shift from traditional copyright protection to contract law, where access and use of information is made possible by means of special licensing arrangements.

In this context the traditional concept of fair use as developed in the print-on paper environment needs to be revisited for the digital world. For the same reasons information from these data collections cannot be regarded as a free commodity: The costs of a proposed right to (free) access to information should be compensated, and not be put on the shoulders of the authors and the publishing community. Since Society as a whole benefits, Society should make funds available to buy the works to make them publicly available!

La notion d'usage loyal dans la société de l'information

La notion d'usage loyal a été intégrée au droit d'auteur en tant que principe majeur destiné à assurer, dans le contexte de l'édition sur papier, l'accès du public à l'information, laquelle était difficile à obtenir. Cette notion a, jusqu'à présent, maintenu un juste équilibre entre la satisfaction des besoins d'accès à l'information des usagers et la défense des droits légitimes des créateurs et éditeurs des œuvres (les titulaires des droits). L'environnement numérique actuel a bouleversé le statu quo en ce qu'il permet non seulement à de multiples utilisateurs d'accéder aisément et rapidement à l'information, à des prix « sur mesure », mais aussi à des personnes non autorisées de reproduire de manière indétectable et diffuser cette information.

Les éditeurs ont pour rôle d'organiser l'information de manière créative et de la communiquer au public. Les sociétés d'éditions scientifiques, techniques et médicales investissent aujourd'hui massivement dans de nouvelles formes de collections numériques (bases de données), en déployant les activités de sélection, production et stockage (archivage) que cela suppose, et élaborent les nouvelles conditions de la diffusion d'informations avec une assurance qualité satisfaisante. A ce propos, on constate un abandon de la protection traditionnelle par le droit d'auteur au profit de dispositions contractuelles qui autorisent par la voie d'accords de licence spéciaux l'accès à l'information et son utilisation.

Dans ce contexte, la notion traditionnelle d'usage loyal telle qu'élaborée pour l'édition sur papier demande à être revue dans l'optique du monde numérique. Pour les mêmes raisons, l'information que l'on peut tirer des collections de données susmentionnées ne peut être considérée comme un bien gratuit : les coûts du droit au (libre) accès à l'information qu'il est proposé d'instituer

doivent être compensés et ne peuvent être mis à la charge des auteurs et éditeurs. Puisque c'est l'ensemble de la société qui doit en profiter, c'est la société qui doit fournir les fonds nécessaires à l'achat des œuvres et à leur communication au public

La noción de uso leal en la sociedad de la información

La noción de uso leal se incorporó al derecho de autor como un principio importante para garantizar, en el contexto de la edición impresa, el acceso del público a la información de difícil obtención. Hasta la fecha, esta noción de uso leal ha permitido mantener un equilibrio equitativo entre las necesidades de los usuarios en materia de acceso a la información y los derechos legítimos de autores y editores, es decir, de los titulares de los derechos. El contexto numérico actual ha provocado una mutación espectacular de la situación existente ya que no sólo permite a múltiples usuarios tener un acceso fácil y rápido a la información, con precios "adaptados al cliente", sino que también permite la perfecta reproducción y difusión de esa información por parte de usuarios que carecen de autorización.

La función de los editores consiste en organizar la información de manera creativa y ponerla a disposición del público. Las editoriales están invirtiendo masivamente en nuevas formas de colecciones informatizadas (bases de datos) mediante procedimientos de selección, producción y almacenamiento (creación de archivos), y están creando también nuevas condiciones para difundir información con garantía de calidad suficiente. A este respecto, se puede observar que la protección tradicional dispensada por el derecho de autor está evolucionando hacia disposiciones contractuales que, mediante cláusulas de licencia especiales, posibilitan el acceso a la información y su utilización.

En este contexto, la noción tradicional de uso leal concebida para la edición impresa necesita una revisión para su adaptación al universo numérico. Por estos mismos motivos, la información procedente de las colecciones de datos mencionadas no se puede considerar como un bien gratuito. En efecto, el costo del derecho al libre acceso a la información que se propone debe compensarse y no tiene que correr a expensas de los autores y de la comunidad de editores. Si se tiene en cuenta que es la sociedad en su conjunto la que se beneficia de esta situación, es a ella a quien corresponde suministrar los fondos necesarios para comprar las obras y ponerlas a disposición del público.

This paper focuses on the role of the publisher/rights holder, who plays a crucial role in the information chain. It will concentrate particularly on the views of scientific, technical and medical publishers and will make four explicit statements for further discussion.

Nearly everyone agrees that creation requires time, effort, skill and investment and that society stimulates and protects that creativity via copyright. Thirdly, everyone has the right to protection, and finally, protection helps to ensure the maintenance and development of creativity!

So, copyright protects and stimulates the creators and publishers add value to their creative work. It should however be born in mind that each author is (and should be) free to select his or her publisher. Once the publisher has been selected, it is the publishers' role to disseminate the works for which they have obtained the rights.

To presume – as some people do – that publishers will lock up information in the digital environment, contradicts the very nature of the publishing industry and is in fact the complete opposite of current practice. To go one step further: Publishers have a passion for books, literature, education and the advancing of science and knowledge in society; we care about authors and their works and we care about our readers. This is why publishers – through the International Publishers Association (IPA) – actively support freedom of expression and information world-wide.

Publishers nowadays are actively investing in new forms of digital collections (databases) and new forms of dissemination. They make huge investments, are engaged in many different experiments, find much satisfaction and, unfortunately, have sometimes to accept big losses. It is my personal opinion that when publishers secure the authors' rights, guarantee access, and take seriously into account the interests of users and society at large, everybody wins.

There is a current growth of e-licensing, because for a number of reasons, contracts and licences (based on the concept of copyright) provide, in most cases, a more appropriate mechanism for digital products than copyright laws alone. Firstly, they offer a great variety of access conditions at a range of prices, whereas in the past one product, such as a journal or a book had a fixed price for the total production. For example, in more and more databases of scientific articles, users can conduct searches in the database, view abstracts of content

and browse and are charged only if they download the full work(s). Secondly, flexible pricing is now widely offered, based on flexible licensing terms, which take into account the size of the online community, the number of users, sites and seats etc.

Flexible pricing is possible, because publishers are creating new, sophisticated data collections (such as Science Direct, Springer-Link, Wiley InterScience, CAS of the American Chemical Society, Westlaw, Lexis) which contain as well as the articles secondary data, chemical structures and reactions, images, and links to other databases, thus providing extensive, cross referencing and support. The result is wider and easier access (instead of more limited access!) as well as advanced search capabilities: text, visual and intuitive.

Publishers are now involved in archiving, often on the request of user communities who cannot afford to do so. We are also engaged in digital rights management systems so as to be able to handle transactions seamlessly, allow for the creation of new, sophisticated revenue models and stimulate navigation from one data collection to another. This means that publishers sell content in a variety of packages with very specific customer-targeted services and a range of access options and price models.

When users collect the information they need through these new means of delivery, they expect to receive a secure content package. Because it is very easy to manipulate texts, their integrity becomes more and more important. Similarly, it is also clear that we need to protect against circumvention and therefore require some level of encryption to ensure proper control, to ensure for example, that an author's work is properly cited.

Protection is also needed for other reasons: We may close our eye to it, but it is a fact that there is an increase in piracy world-wide. This is not only the case in the Far East, with historically different notions about 'the art of copying', but is also the case in the Western world, the Northern hemisphere! Education is needed. People too easily say: "a little bit of free browsing does not hurt" or "copying of a few articles for my students, to be used in a reader should be possible". But the problem is that this attitude reinforces the notion that all information can be obtained free of charge, and that is not the case, Somebody has to pay for it!

This brings me to the topic of copyright exceptions. Fair use, fair dealing, the library privilege, etc were originally based on the fact that information was difficult to obtain. It was necessary to find the physical copy of the book or to subscribe to an expensive international journal, which were not available everywhere. Therefore fair use is well established in the analogue world. Fair enough, but times have changed, information is a mouse click away and you can pay as you go. Why should it be free of charge?

Digital is different. To pretend that digital is not different; which huge groups of well-educated and well-informed people do seems at best provocative, at worst ignorant. Would anybody disagree that the 'cut and paste' clicks and the 'copy' button did not change the cumbersome process of obtaining a

piece of text at a library in the past? It is unbelievable that a respected organisation like the International Federation of Library Associations (IFLA) recently made a statement that digital is not different.

I would like to stress the point that publishers fully agree that access to information for students and the general public has to be guaranteed through libraries. But in the analogue world a work was not accessible if a library did not stock the work in the first place. Therefore, society had to provide the funds to buy the works to make them publicly available!

With the arrival of digitalisation publishers have made works more accessible than in the past, but still at a price. We do not think that fair use should be extended in the digital world.

Let me make two points here. Firstly, in the scientific community, any article can be obtained for free: write or e-mail to the author and he/she gladly sends it to you (in the past by means of a reprint). But to obtain instant access to a comprehensive set of articles on a certain subject using sophisticated search engines to dig into huge archives carries a cost. Secondly, exceptions are dangerous in a global economy. How can you protect your cultural heritage and local creativity if exceptions allow for free use? It may seem a paradox, but precisely because of copyright protection the huge wealth of information in the western world is still available to all around the world!

Exceptions and limitations to copyright should not imply a right to access. Information cannot be free of charge, because large groups of authors live from their creativity and publishers do not publish 'raw information'. Publishers select, add value, skill and expertise, invest and take risks and none of this is cost-free.

Should it be authors and publishers who 'pay' for controlled fair use? Authors and the publishing community should not be the only ones supporting the costs of education, scientific research and information in general. It is the society as a whole that must bear the costs.

Last but not least, it must be recognized that we should not underestimate the power of users world-wide. Internet users are becoming increasingly sophisticated and will find ways to obtain the information they seek (e.g. youth and music). Protection in some form is needed.

In summary, I hope I have showed you that publishing is organizing information and making it available. It is a skill that requires huge commitment and is done by people who love books, magazines, newspapers and want to make them available to everybody. Digital is different. The Internet has less restrictions, digital copies are easy to misuse and we have to create awareness among people that information has a value: somebody somewhere along the chain has to pay. Contractual licensing is a sensible solution to differentiate terms and conditions for different regions and different types of customers. New information technology allows easier access to information at an affordable price, whilst protecting the creativity of the authors and the value added by the publishers.

APPLICATION
OF LEGAL EXEMPTIONS
TO COPYRIGHT
FOR DEVELOPING COUNTRIES
(through international conventions)

APPLICATION
DES EXCEPTIONS LÉGALES
AUX DROITS D'AUTEUR
AUX PAYS EN DÉVELOPPEMENT
(à l'aide des conventions internationales)

LA APLICACIÓN
DE EXCEPCIONES LEGALES
A LOS DERECHOS DE AUTOR
EN LOS PAÍSES EN DESARROLLO
(a través de convenciones internacionales)

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How can the fair use doctrine be applied for the appropriate level of copyright protection in the global marketplace?

So far we have been held captive by an invincible dogma, that is, strong copyright protection is essential to prevent illegal infringements of copyright throughout the world. No one casts doubt on the rationale behind the argument. However, the question is the degree of protection. Appropriate level of copyright protection should be re-examined especially for the information poor, because excessive protection of copyright can hamper the cultural or economic development of the information poor. The fair use doctrine, as a major exception to the principles of copyright protection, should be reinterpreted to resolve the side-effects of excessive copyright protection especially in the digital age.

Comment faut-il interpréter la notion d'usage loyal en droit d'auteur sur le marché mondialisé d'aujourd'hui dans le cas des comptes rendus d'actualités, des films, des œuvres de création originales ? À qui cet usage doit-il être réservé et comment ?

Un dogme inexpugnable a régné jusqu'à présent presque sans partage, à savoir qu'il est indispensable de protéger strictement les droits des auteurs pour prévenir les atteintes illégales dans le monde entier. Si nul ne met en doute les fondements de cette thèse, la question qui importe ici est celle de l'ampleur de la protection à garantir. Il conviendrait de réexaminer le degré de protection des droits des auteurs qui est approprié en particulier à l'égard des pays pauvres en information, dont le développement culturel ou industriel risque d'être entravé par une protection excessive. La doctrine de l'usage loyal, exception majeure aux principes de la protection des droits des auteurs, demande à être réinterprétée en vue de l'élimination des effets pervers d'une protection excessive, en particulier à l'ère numérique.

Interpretación correcta del concepto de uso legítimo
en materia de derecho de autor
en el mercado mundial actual para la comunicación
de noticias, las películas cinematográficas,
le música, los libros y otros productos creativos:
¿para quién y de qué modo?

Hasta ahora ha prevalecido un dogma incuestionable: una fuerte protección del derecho de autor es indispensable para impedir las violaciones ilícitas del derecho de autor en todo el mundo. Nadie pone en duda la lógica de tal argumento. Sin embargo, de lo que se trata es del grado de protección. Se debe reexaminar el grado adecuado de protección del derecho de autor, en especial para los que carecen de información, ya que una protección excesiva del derecho de autor puede entorpecer el desarrollo cultural o industrial de los que carecen de información. La doctrina del uso legítimo, excepción importante a los principios de la protección del derecho de autor, debe reinterpretarse para subsanar los efectos secundarios de la protección excesiva del derecho de autor, en especial en la era numérica.

Introduction

No one denies that intellectual products are becoming an increasingly important component of national and international economies and of socio-political development. Information and information-based products are not only valuable economic essentials in and of themselves but their use also increasingly affects the performance of other economic, and socio-cultural factors. It is very clear that the information industry is becoming more and more important to the world economy and culture.

However, it is not unusual to observe that only highly developed countries have earned profits from the development of electronic information markets. This is mainly because developed countries are not only the producers but also the users of information in their economic and socio-cultural activities. They are usually the major owners and controllers of the information distribution industry. Being an information rich country no longer implies simply the right of access to information but also the opportunity to produce, distribute and sell information. In contrast, developing countries do not have sufficient trained personnel and information infrastructure for the efficient production and dissemination of information for their national development. In this context, developing countries, rather than trying to produce their own information, prefer to use the information developed in other advanced countries as far as possible.

However, while their dependence on imported information from the developed countries is increasing, people in developing countries have to pay more than before for access to the information they require. In other words, as copyright protection in the global marketplace becomes stronger, accessing information becomes costly to many developing countries. It is not surprising that people in developing countries are complaining of excessive copyright protection for the intellectual material in the global marketplace. Developing countries even argue that they are having difficulties in developing their own information from the copyrighted material of the advanced countries, due to severe restrictions and the undue expense required in order to access the information. As a result, they believe that the gap between the developed and developing ones is widening rapidly in terms of information-handling capacity, destroying the hope of balanced development world-wide.

Various measures have been suggested to resolve the situation. A need for New World Information Order in the information society has been raised. It is proposed that the international intellectual property system which seems to be mostly in favour of the copyright owners needs to be reexamined especially in terms of fair use doctrine. This doctrine sometimes *de facto* provides a useful defense mechanism against copyright infringement claims, leading to a viable dissemination of information in the global marketplace.

Based on the rationale mentioned above, this paper is designed to evaluate the validity of the fair use doctrine as a way to assess the appropriate level of protection for copyrighted material in the information society. To this end, a legal and economic aspect of the doctrine¹ has been introduced in order to see whether the current international intellectual property system works in favour of balanced economic and socio-cultural development among nations, especially between the developed and developing ones. An integrated legal and economic viewpoint is useful to assess the validity of legal provisions based on the analysis of their impact on the marketability of copyrighted material. Cooter & Ulen (1988), in their book *Law and Economics*, also support the usefulness of an integrated perspective of economics and law in clarifying the validity of legal codes. This paper will firstly investigate the nature and applicability of the fair use doctrine on the basis of the type of copyrighted material flowing across nations. Then, several policy directions for the revision of the international copyright system will be suggested especially in terms of the applicability of the fair use doctrine in the global marketplace.

Application of fair use doctrine in the global marketplace

Before discussing the fair use doctrine in the global marketplace, we need to realize that copyright is not an inalienable right that confers on authors the absolute ownership of their creations. Rather it is designed to stimulate activity and progress in the arts and science for the intellectual enrichment of society as a whole². Therefore, unlike patents, copyright law does not protect ideas themselves but rather the expression of them in a fixed form. The doctrine of fair use should be also understood in the sense of contributing to the nature of copyright as described above.

Until the mid 20th century, the question of whether certain kinds of conduct constituted a “fair use” was not clear at all because of a conceptual ambiguity. The concept of fair use still seems to be dubious and not well formulated at all. These days, the enormous power of the interactive technologies to copy, disseminate and manipulate electronic information makes it even more difficult to gauge the proper application of fair use in the marketplace. Leval (1990) argues that throughout the development of the fair use doctrine, courts have failed to fashion a set of governing principles or values. However, to a certain extent, it seems to be natural not to have a rigid formula for fair use, because it should basically be tailored to individual cases which may present an endless

variety of circumstances. Having a standardized formula for fair use doctrine is not easy and even undesirable in terms of its legal flexibility in interpretation. Nonetheless, since Judge Story listed four factors for fair use in *Folsom v. Marsh*, in 1841, the factors have been frequently cited in many cases. In approximate order of importance, the factors are³:

- 1) impact on the potential market;
- 2) the purpose of uses;
- 3) the nature of copyrighted material at the time of the copying; and
- 4) the number of copies.

In addition to these factors, customary practice without simple malice can be considered useful in determining whether copying of the copyrighted material without permission is fair use or not. The Court also identified four objectives that the doctrine of fair use ought to serve:

- 1) advancing social utility by increasing the supply of intellectual products and facilitating their distribution;
- 2) enforcing an author's natural right to a reasonable portion of the fruits of his labour;
- 3) protecting an author's interest in controlling the way in which his creations are presented to the world; and finally
- 4) aligning the law with custom and popular conceptions of decent behaviour⁴.

There have been several landmark court cases relating to the fair use doctrine. They are: *Folsom v. Marsh* (1841)⁵; *Basic Books, Inc. et al. v. Kinko's Graphics Corporation* (1991)⁶; *Princeton University Press v. Michigan document Services, Inc.* (1992)⁷; *Harper & Row, Publishers, Inc. v. Nation Enterprises* (1985)⁸; *Campbell v. Acuff-Rose Music, Inc.* (1994)⁹; *Frank Music Corporation v. CompuServe, Inc.* (1995)¹⁰.

Any decision as to whether copying of intellectual material is "fair use" should be based on the considerations mentioned above. In addition, various types and characteristics of copyrighted material in the global marketplace need to be analyzed in order to establish whether the current level of protection for the copyrighted material is appropriate. Basically the characteristics of intellectual material such as films and sound recordings moving across nations can be defined as follows:

- 1) Nature/type of information: The nature of the information is very important for deciding whether fair use may be applied. As mentioned earlier, one of the functions of the fair use doctrine is to serve "*advancing social utility*"¹¹ by increasing the supply of intellectual products. Accordingly if copying of information is intended to advance social utility, such as education or academic research, it is more likely to fall into the area of fair use than copying for commercial use.¹² The type of the information (entertainment/educational, commercial/non-commercial) is also useful in assessing the appropriateness of fair use. In general, copying of non-exclusive information is more likely to fall within fair use than that of information which

has a monopolistic influence in the market. It seems to be necessary to empower copyright owners to charge fees for the privilege of using information, and to acknowledge that mutually exclusive rights of copyright holders for a given period might cause a loss of monopoly, which vary among different types of copyrighted material;

- 2) Characteristics of information goods: Information is basically a public good. Therefore it has the characteristics of non-excludability (in consumption) and non-rivalry (in terms of utility). Accordingly copyright law forbidding users from unauthorized copying of intellectual products can be interpreted as a mechanism to eliminate a source of economic inefficiency by re-introducing excludability into the information marketplace. In a pay-per-use world, fair use rarely works, because pay-per-use can be carried to an extreme in which all electronic access and use requires permission and/or payment¹³. However, if information is sold to each individual, it becomes a private good though it still has a characteristic of non-rivalry. Information (whether it is educational or not) with a competitive edge tends to have a lot of sales outlets. As the number of users increases, the long range average cost (LRAC) of information declines. This indicates that copying of competitive information at an early stage could be an obstacle to its marketability and thus, lead to diminished possibilities of fair use, unless the information is in public domain.

A combination the type of information and the four factors for fair use mentioned earlier allows us to have a somewhat clearer and more predictable interpretation in deciding whether copying without permission falls into the fair use domain in the following way:

- 1) Information which is essential and useful for economic and socio-cultural development should have a broader area of fair use. Here again the problem lies in the conceptual ambiguity.
 - **News:** In general, foreign news is by its very nature volatile and not particularly marketable on a domestic news market, though it sometimes has significant socio-economic and political value. Therefore its transmission with the customary standards of “good faith” is likely to fall into the area of fair use. Indeed, in the sense that the scope of fair use is generally broader when the source of borrowed expression is a factual or historical work, news transmission deserves to enjoy broader fair use.
 - **Movie film/sound recordings:** Basically, unauthorized copying of copyrighted movie film/sound can not be defened at all. The scope of fair use is narrower with respect to unpublished works. Here, the productivity of copying should be carefully examined in the fair use assessment, because subordination of the idea of productivity is essential in facilitating the creation of derivative works.
Therefore, copying information of no value for economic or socio-cultural development is likely to be in the public domain.

- 2) Information with a competitive edge generally has a stronger potential for profit-making than information without a competitive edge. As described earlier, the LRAC of information decreases as the number of users increase. This indicates the importance of the timing of the copying when deciding on the proper scope of fair use. The nature of copyright is not to allow copyright owners to enjoy excessive economic benefits for their creativity, but to create favourable conditions for the wider dissemination of information, without seriously eroding the incentives for artistic and intellectual innovation. The unauthorized copying of unpublished intellectual materials is therefore likely to harm the property right of copyright owners because of its impact on the potential market of copyrighted material. On the other hand, copying of already sufficiently consumed copyrighted material is likely to fall within a broader scope of fair use, if it serves the public interest.
- **News:** Unauthorized copying of “hot” news has a broader domain of fair use, for copying of unpublished news is by its very nature inexistant. Due to its volatility, copying of already known (disseminated) news does not pose any threat on the potential news market. Therefore, news traditionally enjoys the broader scope of fair use.
 - **Movie film/sound recordings:** Copying of unpublished movie film or sound recordings without seeking permission is fatal to their potential market, leaving no room for fair use. For example, when the film ET (Extra Terrestrial by Spielberg) was first introduced into Seoul several years ago, its illegally copied version had been already made available in the country, leading to a disastrous failure in the market. Copying of intellectual material for personal use also deserves the broader area of fair use, in that it does not usually pose a serious threat to the potential market for the material¹⁴.

So far, we have discussed several factors should taken into account in assessing the proper scope of fair use. Both the characteristics of information and its role in society should be examined. The factors have in fact been thoroughly examined in the courts, whenever there has been conflict between copyright owners and copiers. The various rights granted to copyright owners are mostly resolved in the market.

The problem which remains unresolved here is that the various criteria for fair use, mentioned so far, are not particularly helpful in determining the optimal level of copyright protection. The key is to prevent copyright owners from collecting monopoly profits in greater than optimal amounts, and to allow judges to use the fair use doctrine to establish a balanced interest between the claimants. It is also necessary to develop various ways in which to reduce the gap between the monopolistic influence of copyright holders and the users right to access information. Standardized contracts, compulsory licensing systems, and blanket licenses can be examined at the domestic level, and the revision of international copyright systems at the international level.

Basic directions for the revision of international copyright systems

Based on the analysis of the criteria used to assess the scope of fair use, the following policy suggestions to determine the appropriate level of copyrighted material in the global marketplace are made:

- 1) The scope of fair use for advancing social utility (such as education, library copying, or creation of derivative works) should be enlarged, even in digital society. In other words, specific classroom exemptions should be respected, even in the information society. Until now, some of the fair use guidelines for educational copying limit such copying to a given number of pages¹⁵. These guidelines represent the minimum amount of copying which is considered legal for educational purposes. Educational uses of music, digital images, etc. is not an infringement of copyright if the minimum amount of copying is done by a non-profit educational institution. For the educational purposes of digitized material, international copyright systems should guarantee that non-profit educational institution may digitize newly, lawfully acquired analog visual images to support accepted educational uses¹⁶. However this exemption can be considered only in the situation where digitized products are not readily available in usable digital form for purchase or license at a fair price. Also so-called thumbnail images of lawfully acquired images for educational or librarian purposes¹⁷ should be allowed to encourage the maximum social utilization of intellectual material. In the case of derivative works, if they have minimum amount of originality, they can be acknowledged as legal. In other words, derivative works created in developing countries, based on originally copyrighted material, should be fall within the fair use doctrine, in the sense that they could stimulate the further development of creative works;
- 2) “Implied permission” needs to be widely reflected and implemented in international copyright systems. Implied permission has indeed played the role of an exception against copyright infringement claims. For example, if copyright owners publicly display their information on the web, they allow users to use their information without permission, i.e., implied permission;
- 3) Recently the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) include various provisions necessary for the adaptation of the international copyright norms. In particular, some legal issues about interactive transmission need to be carefully examined when revising the framework of international copyright systems in a digital society. As the number of interactive media increases, the need for the right of public transmission has been raised. This is mainly because the traditional definition of broadcasting or public performance has been diluted, although the definitions and rights of broadcasting and public performance in the international copyright systems have not changed for a long time. The appropriate level of copyright protection for material shown on interactive media needs to be reexamined;

- 4) Power dynamics among players in the market should be taken into consideration when deciding on the appropriate level of copyright protection in international copyright systems. For example, performers in the music industry, in general, do not enjoy economic benefits from the copyright law, because the law is designed to protect the right of information disseminators (such as TV or recording companies), not those of performers such as musicians. The background for this lies in the EEC Rental Directive which was designed to protect performers from being forced to agree to a buy-out of their rights. Nonetheless, excessive protection of the neighbouring rights of performers should be avoided in order to allow for a wide dissemination of information. Compulsory licenses and retransmission rules should be more actively utilized to facilitate the dissemination of information (which can be assumed as having been sufficiently consumed one in society) in developing countries. In sum, the application of the rules can have a positive effect especially when the information serves the public interest;
- 5) Various international copyright systems such as the Berne Convention have changed over time to adapt themselves to the new environment. As the information society develops, copyright law will become more international than other areas of law. In this sense, international harmonization among countries is essential to avoid conflict, and to fulfill the economic and socio-cultural aspirations in global marketplace. Fair use doctrine, if well defined and articulated, could serve to deter the excessive protection of authors' rights and contribute to achieving the somewhat contradictory goals of copyright: wide dissemination of useful information and incentives for creative works.

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1. Fisher (1988) argued that economic analysis proves capable of providing insights into the fair use doctrine that all but the staunchest critics of the methodology would find helpful.
2. See Leval (1990) Toward a Fair Use Standard, *Harvard Law Review*, pp. 1105-1161.
3. See, Fisher (1988), *Harvard Law Review*, Vol. 101, No. 8. pp. 1668-1669.
4. *Supra*, Fisher.
5. This is the first case of the fair use doctrine. After reviewing the nature and objects of the copying made, Justice Story decided in *Flosom* that the defendant had infringed the plaintiff's copyright.
6. Kinko's defence failed to prove fair use, though it emphasized that an unfavourable ruling against so-called "professor publishing" would cause serious damage to the nonprofit, educational institutions it served.
7. Even if professors made anthologies for colleges courses to students, often without seeking copyright permission, the copyright law does not give professors a blanket exemption.
8. The court ruled against fair use, declaring that the scope of fair use for unpublished materials is narrower than that of published documents.
9. The Supreme Court ruled that an imitation here presented creative parody.
10. CompuServe, which allows subscribers with home computers to use its MIDI/Music forum service to download audio copies of copyrighted song, without paying royalty fees, agreed to pay \$568,000 to the plaintiff.
11. Educational or library uses are a good example for advancing social utility.
12. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary due. *Supra*, Fisher, 1673.
13. Secor (1997) also argues that if all uses of information require permission and/or payment, no copyright infringement is possible and the defence of fair use would never arise.
14. See *Universal city Studios v. Sony Corp.*, 480 F. Supp. 429 (C.D. Cal. 1979)
15. For example, in case of poetry, copying of less than 250 words is acceptable, whileas unauthorized copying of prose should be less than 2500 words (from complete article) or 1000 words (from an excerpt).
16. See Hardy, T (1997). Limitations on and Exemptions to Copyright, WIPO National Seminar on Digital Technology and the New WIPO Treaties, p. 123.
17. Making copies of materials that are being damaged by time or by over-use, or making copies for purposes of sending materials to other libraries that do not have a copy themselves. *Supra*. Hardy. p. 124

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Preserving fair use in the digital age

The right to free speech is widely recognized as one of the most fundamental principles in a civil society. Over the past few years, various forces have pushed for measures to expand the rights of intellectual property holders at the expense of other speakers and listeners. Unfortunately, these ill-conceived measures have watered down time-honored standards that protected freedom of expression, including the doctrine of fair use. Fair use should not be unduly limited on the pretext of preventing illicit traffic of intellectual property. At the very least, fair use should be applied to the electronic world to the same extent as it is in other media (such as newspapers and books). No special intellectual property regimes or “conditions” should be imposed on information in electronic media.

La préservation de l’usage loyal à l’ère numérique

La liberté d’expression est généralement reconnue comme l’un des principes les plus fondamentaux des sociétés civiles. Au cours des dernières années, divers facteurs ont incité à prendre des mesures pour étendre les droits des titulaires de la propriété intellectuelle aux dépens d’autres personnes susceptibles de s’exprimer et du public. Malheureusement, ces mesures mal conçues ont affaibli les normes séculaires – la doctrine de l’usage loyal notamment – qui protégeaient la liberté d’expression. L’usage loyal ne doit pas être indûment limité sous prétexte d’empêcher le trafic illicite des droits de propriété intellectuelle. Tout au moins doit-il s’appliquer au même degré dans le monde électronique que dans d’autres médias (tels que les journaux et les livres). L’information véhiculée par les médias électroniques ne devrait être assujettie à aucun régime spécial de propriété intellectuelle ou « conditions » particulières.

Preservar el uso legítimo en la era numérica

El derecho a la libertad de palabra se reconoce ampliamente como uno de los principios más fundamentales en una sociedad civil. En los últimos años, varias fuerzas han presionado para que se adopten medidas encaminadas a ampliar los derechos de propiedad intelectual a expensas de los partidarios de la libertad de expresión. Por desgracia, estas medidas mal concebidas han debilitado normas de larga tradición que protegían la libertad de expresión, entre ellas la doctrina del uso legítimo. El uso legítimo no debe limitarse indebidamente con el pretexto de luchar contra el tráfico ilícito de obras protegidas. Como mínimo, el uso legítimo debe aplicarse al mundo electrónico en la misma medida que se aplica en otros medios de comunicación (como los periódicos y los libros). No se deben imponer regímenes o “condiciones” especiales de propiedad intelectual para la información en los medios de comunicación electrónicos.

Introduction

The right to free speech is widely recognized as one of the most fundamental principles in a civil society. Article 19 of the Universal Declaration of Human Rights states:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.¹

Similar language can be found in the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and many other human rights accords.² However, while this principle has survived countless attacks throughout history, and despite its theoretical acceptance in most parts of the world, a new threat to free speech has emerged – not directly from governments, but from newly empowered intellectual property holders. Over the past few years, various forces have pushed for measures to expand the rights of intellectual property holders at the expense of other speakers and listeners. Unfortunately, these ill-conceived measures have watered down time-honored standards that protected freedom of expression, including the doctrine of fair use. Despite considerable opposition, these proposals have been incorporated within multinational treaties and have formed the basis for new intellectual property legislation all over the world.

The expansion of Intellectual Property rights significantly threatens free expression. The fair use doctrine, for example, has fostered creativity, innovation and knowledge. It has allowed scientists to exchange ideas freely and to develop exciting new technologies. Fair use has enabled artists to enrich our cultures in a variety of media. It has immeasurably aided teachers in the education of our children.

This paper will examine the history of fair use, measure its value in the free marketplace of ideas, and propose steps to preserve the doctrine in the digital age.

Legal background

The fair use doctrine balances two competing interests: the protection of the right to free speech and the protection of creators' works from exploitation. Under this rule, individuals may legally make use of copyrighted materials, depending upon the extent of material used, the purpose of the use, and other similar factors.

The following version of the doctrine as incorporated into American law spells out most of the key principles behind fair use and provides a suitable starting point: “The **fair use** of a copyrighted work ... **for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.** In determining whether the use made of a work in any particular case is a fair use **the factors to be considered shall include:**

- 1) “the **purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;**
- 2) “the **nature of the copyrighted work;**
- 3) “the **amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and
- 4) “the effect of the use upon the potential market for or value of the copyrighted work”.³ (Emphasis added.)

This doctrine applies to a broad range of activities. Generally, expression may be protected if it is “sufficiently imbued with elements of communication”.⁴ Courts have also applied fair use to new technologies as they were developed. For example, based on the principles of fair use, videocassette recorders (VCRs) and similar appliances that could be utilized for piracy purposes are not illegal as long as they are also “capable of substantial noninfringing uses”.⁵

Recently, judges have begun to grapple with how to apply fair use and similar principles of free expression to new digital media and technologies. Many of these decisions have come from the United States, where a disproportionately large number of intellectual property holders (ranging from high-technology firms to entertainment conglomerates) are based and where a majority of computer users still reside.

American courts have applied free speech doctrines with equal force to discussions concerning the use of computers, including the Internet. Most significantly, in *Reno v. American Civil Liberties Union*, the U.S. Supreme Court struck down several serious restrictions on Internet speech. The High Court found that speech on the Internet was entitled to the highest Constitutional Protection – protection which was, at least, the equal of that provided to the printed word.⁶

The American decisions recognize that expression can take on a digitized form and that computer language is itself a form of speech. Most notably,

two U.S. Circuit Courts of Appeal have held that encryption software was protected by the free speech provisions of the Constitution and struck down restrictions on its export.⁷

While the courts have generally cast a sceptical eye on governmental restrictions on digital speech, several recent developments have cast doubt on the future of fair use. These developments threaten to create a regime of private restrictions on speech.

Over the past few years, intellectual property rights holders have attempted to strengthen their hands through the adoption of new treaties and international accords, the most important of which was created under the auspices of the World Intellectual Property Organization (WIPO) in Geneva.

WIPO treaty's treatment of the issue of "circumvention" is especially problematic. The treaty requires signatory nations to prevent people from breaking through anticircumvention devices (such as copy protection codes on software) with the intent make illegal use of a protected work (e.g. piracy). The pact covers many forms of modern media (which are encoded in some way or other), including computer software, compact discs (CDs), digital video discs (DVDs) and electronic books. A number of developing nations, particularly those in Africa, were successful in amending the treaty to allow its adherents to carve out exceptions (such as fair use) to the anticircumvention rule. Moreover, the rule itself was drawn in such a way as to theoretically allow circumvention, so long as the circumventer is making legal use of the protected work.⁸

The WIPO treaty, of course, needed to be implemented through legislation on the national level. Unfortunately, the new pact does not require signatory nations to apply any of the traditional copyright defenses to circumvention, such as fair use. Countries can fully comply with WIPO standards by completely banning circumvention, which would render fair use all but impossible for the average person.

The very first piece of legislation came from the United States in the form of the Digital Millennium Copyright Act (DMCA).⁹

The DMCA was portrayed as a logical outcome of the WIPO treaty. Its supporters saw it as a natural extension of globalization and as an important element of U.S. trade policy, which would benefit American entertainment conglomerates and other large intellectual property rights holders. In reality, the United States went far beyond what was required by the WIPO treaty. The DMCA broadly prohibits the provision of any device that is meant to circumvent a technological measure that controls access to a copy protected work. But where the WIPO agreement allowed signatory nations to include many exceptions (for free speech reasons and otherwise), the U.S. statute provided very few exemptions, such as the creation of new software to allow copyrighted material to be used on other machines. Moreover, because these exceptions are so narrowly worded, consumers effectively have far fewer rights to fair use than they did prior to the DMCA's passage.¹⁰

Essentially, this means that you can still buy a copyrighted work, but if that work is encoded in some way, such as in computer programmes, compact or Digital Video Discs (DVDs), your rights may be fundamentally limited. You may not make fair use of your favourite film or album (assuming it is in digital form), even for salutary purposes such as commentary or news reporting. You may not make copies of it (even for backup purposes). You may not play it on any platform you choose (such as on your home computer rather than using a stand-alone player). You may not look “under the hood,” i.e. examine the underlying code and operation, of the work that you bought (software package or otherwise) to see how it operates, even if there is a problem. You might have been able to do all of these things in the pre-digital era, but in the New World envisioned by the DMCA, all of these free speech rights must take a backseat to preventing even the theoretical possibility of piracy.

The DMCA affords copyright holders almost complete control over subsequent uses of the work, including fair use. Once the copyright holder employs an anti-circumvention tool like encryption – even weak encryption – than the user who foils it or merely discusses how to foil it is liable to have violated the law.

These provisions allow large intellectual property holders to restrict competition, innovation and the spread of knowledge – the very purposes for which the copyright laws were created.

Despite strong opposition from a diverse coalition of organizations, including the Electronic Frontier Foundation, the Computer Professionals for Social Responsibility, the Electronic Privacy Information Center, the Modern Language Association and the US Catholic Conference, the DMCA did become law. Since then, the DMCA has begun to produce the results which were feared by its opponents. One such case arose when a Norwegian teenager (who wished to play DVDs on his Linux computer) created a programme named DeCSS. This primitive programme interacted with the encoding scheme contained on DVDs and allowed users to view favourite films on computers using the Linux operating system, but was ill designed for copying entire DVDs. When *2600* magazine reported on DeCSS and included links to the programme on its website, the Motion Picture Association of America (MPAA) sued the magazine’s publisher under the DMCA and won at the trial level.¹¹ A similar suit has been filed against dozens of computer users in California, and more court action is likely.¹²

DeCSS is just one of several technologies that have fueled widespread debate over the diminution of fair use. A number of entertainment conglomerates have filed suits to prevent the use of other new computer programmes (such as Napster and MP3.com) that allow individuals to trade music files online. Many of the arguments raised by the plaintiffs are similar to the ones used against videocassette recorders – that these devices will foster piracy. While many of the lawsuits against MP3.com have been settled, one court recently levied fines against the company that amounted to over EUR 100 million.¹³ In the Napster case, the presiding judge issued a harsh decision that

essentially silenced ordinary computer users by forcing them to prove (at the outset) that their speech had not been copyrighted by someone else.¹⁴

The Napster case raises several troubling issues. At the outset, it is worth noting that Napster is used to trade both copyrighted and non-copyrighted material. Like the VCR, Napster can be used for both legal and arguably illegal purposes. I say arguably illegal because the transfer of even copyrighted material for non-commercial uses may be permissible.

As a service provider, Napster is being held liable for the “infringing” uses. Under this theory, Napster is responsible for monitoring all of the traffic on its site. Given the sheer impracticality of determining which of millions of users are violating copyright laws, Napster would have to shut down, even if the courts only order it to block infringing uses.

Indeed holding Internet Service Providers and other conduits liable for illegal content will lead to a general chill on free expression as the providers are forced to engage in whole sale monitoring and censorship of their users.

In the U.S., the DMCA has been already become a sword of Damocles held over the head of fair users to prevent the spread of knowledge and has created a form of private censorship.

In *Reno v. ACLU*, the U.S. Supreme Court noted that “the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it”.¹⁵

The DMCA has had precisely that effect of “interfering with the free exchange of ideas.”

Meanwhile, intellectual property holders are rushing to implement DMCA-type measures around the world. For example, several weeks ago, the Australian government introduced the Copyright Digital Amendment Bill 2000, which mirrors the DMCA’s harsh standards regarding anticircumvention and other limits on fair use. Not surprisingly, the bill is generating considerable controversy (as the DMCA is in the United States) because of its potentially harmful effects on free speech.¹⁶ These efforts are not confined to industrialized nations; the proponents of these bills are pushing for tougher intellectual property measures in developing countries, often with little regard for the value of free expression.¹⁷

Discussion: fair use in practice

Fair use should not be unduly limited on the pretext of preventing illicit traffic of intellectual property. At the very least, fair use should be applied to the electronic world to the same extent as it is in other media (such as newspapers and books). No special intellectual property regimes or “conditions” should be imposed on information on electronic media.

Fair use is not a “problem”, as many of its detractors suggest. Furthermore, it is misleading to claim that fair use doctrines allow the “destruction of intellectual and cultural property.” The fundamental goal of intellectual property laws is to prevent the unfair exploitation of creators; there are other sets of rules (both civil and criminal laws) regarding any potential “destruction of intellectual and cultural property.” Attention should instead be focused on overly broad intellectual property laws that endanger free speech. The doctrine of fair use represents a partial and time-honored solution to this dilemma. To understand why this is the case, it is important to revisit the reasons why fair use principles were created in the first place, and what effects these principles have had.

Fair use promotes free expression and cultural development

Fair use has allowed creators of all types to enrich our culture with their views of the world around us. Consider the work of painters like Andy Warhol, who composed numerous works with such images as Campbell’s Soup cans and photographs of Marilyn Monroe – images that were protected under intellectual property laws.¹⁸ Consider, too, the work of Jean-Michel Basquiat, who paid homage to musicians like Miles Davis by including lyrics to their (copyrighted) songs in his paintings.¹⁹ Without fair use, these artists might have been branded as outlaws. Unfortunately, this spectre of legal liability (through new ill-conceived intellectual property laws) may jeopardize the work of artists today, many of whom now use the digital domain as a medium for their creative endeavours.

Furthermore, many artists are actually benefiting from the new technology. Musicians such as Prince, Limp Bizkit and the Offspring have embraced software (like Napster) that allows Internet users to trade music files online.²⁰ While some forces in the music industry have shunned these programmes, many other artists are thrilled by the emergence of Napster and its cohorts, because it has increased interest in their work. For new artists, fair use of the songs (via music-trading software) has led to considerable publicity, lucrative recording contracts, and massive sales (indeed, the album sales for one Internet savvy group have gone from zero to nearly half a million copies).²¹ These benefits have also been felt by more established groups. At a recent hearing in the United States Congress, Sixties rock veteran Roger McGuinn testified that the trading of music files on the information highway had apparently led to higher attendance at his concerts, greater awareness of his musical exploits, and more sales of his records.²² Indeed, a recent study (by Jupiter Communications) suggests that the use of Napster and other similar products has actually led to higher not lower sales for the music industry.²³ The recording industry has itself admitted that sales of CDs have been rising for years, even after the advent of MP3.com and its cohorts.²⁴

These examples also underline that there are many new ways for content creators to get paid for their recordings that do not require stringent intellectual property regimes. Dean Varian from the University of California-Berkeley pointed out in a recent article that “the current business model for music distribution is unlikely to survive. But this doesn’t mean there will be no music; it just means the business will have to change.” For example:

“[Best selling novelist] Stephen King is trying a ‘ransom’ model. He has released two chapters of a book and will release the rest if fans send in enough money. [Heavy metal band] Metallica ... could experiment with variations on the same theme: release 10 seconds of a new song, pledging to deliver the rest only if listeners send in the required ransom. For extra motivation, fans who contribute could receive special treatment – autographs, coupons for T-shirts, a lottery ticket to meet the performers, or some other benefit that would encourage them to contribute rather than get a free ride”.²⁵

Moreover, since computer programmes themselves are a form of expression, it should come as no surprise that computer scientists, journalists and other individuals have attacked the DMCA and its global counterparts as an attack on their right to free expression.

Fair use fosters learning

The fair use doctrine promotes education. It generally provides that “the purpose and character of the use, including whether such use is a commercial nature **or is for nonprofit educational purposes**” (emphasis added) should be taken into consideration.²⁶ If the fair use doctrine did not exist, it is likely that many teaching materials (such as textbooks, instructional films and so forth) would either be unavailable, too expensive, or not produced at all, due to the potential legal liability. Fair use has allowed teachers to do their work and help new generations appreciate aspects of world cultures without undue fear of lawsuits.

For these reasons, it is not surprising that many educational groups oppose attempts to curb fair use. Several of these organizations have stated: “As technology and society’s use of it continues to evolve, the need in the library, scholarly and educational communities for an appreciation of both information proprietors’ rights and user privileges like fair use is expected to intensify.

- “We will work to extend the application of fair use into digital networked environments in libraries and educational institutions by relying on it responsibly to lawfully make creative use of information;
- “We will resist relying on any proposed code of conduct which may substantially or artificially constrain the full and appropriate application of fair use; and
- “We will encourage our members to reject any licensing agreement clause that implicitly or explicitly limits or abrogates fair use or any other legally conveyed user privilege”.²⁷

Fair use promotes free communication

Fair use promotes global communication and the spread of knowledge throughout the world. The disappearance of fair use will curb technical discussions of important public and scientific issue. The attacks on *2600* magazine for its reporting of DVD-related software may be a troubling portent of things to come.

These effects will be felt most strongly on the Internet. If the fair use doctrine did not exist, Internet users might be prevented from discussing matters of communal interest. In addition, many Internet service providers may begin censoring content of their subscribers' websites, e-mail messages, or chat room discussions, for fear of liability. This result would run counter to past precedents that protect analogous activities in the non-Internet context.

Fair use promotes scientific advancement

The fair use doctrines were also created to promote science. Fair use helps ensure that new technologies can be developed and used without undue fear of an intellectual property lawsuit. Past legal precedents clearly indicate that such devices as videocassette recorders may be distributed legally so long as they have some legitimate uses under intellectual property laws. Without fair use in place, many such technological advances will never get beyond the drawing board, for fear of potential legal liability.

Indeed, we have already begun to see these problems appearing in the DVD arena, where intellectual property holders have launched lawsuit after lawsuit over a single, primitive programme, which was designed to help consumers watch their lawfully obtained films on their own computers. A number of distinguished scholars in their testimony have expressed fears that new intellectual property laws will prevent them from speaking freely about a whole host of scientific discoveries. Indeed, during his testimony in the DeCSS trial, Professor David Touretzky of Carnegie Mellon University worried aloud that a ruling against *2600* would preempt his ability to discuss his works, saying, "I've been programming computers since I was 12 years old, and I'm very concerned when events take place that threaten my ability to express myself".²⁸

These expert views contrast sharply with the arguments from opponents of fair use, who often suggest that stronger intellectual property laws will encourage innovation (through the profit motive). On the contrary, the elimination of fair use is far more likely to threaten academic discourse and stifle the development of new technologies.

Erosion of fair use will hurt developing nations

The elimination of fair use and the new intellectual property rights that have been accorded to holders in the developed world will have particularly detrimental effect on developing nations. In the new economy, no resource is more valuable than information. But the new laws which protect information that previously would have been available for use will quickly put a price on information and the products developed that will put them out of the reach of the developing world.

These problems have already cropped up in the realm of patent law. Pharmaceutical firms have sought stringent patent protections that allow them to charge consumers several times more than the free market price.²⁹ In particular, these patent laws have had a cruel and tragic effect on developing nations by pricing drugs to combat AIDS out of the reach of millions of the people who have AIDS or are HIV positive.³⁰

As a result, many people are unable to afford the drugs they need, and are often forced into illegal acts in order to get the treatment they so desperately require. Ironically, while patent laws are supposed to prevent piracy, the harsh economic consequences of these intellectual property regimes have created new incentives to engage in such illicit activity.³¹

Similar problems have already arisen in other areas of intellectual property law. Observers have noted how copyright and trademark protections have provided entertainment companies with economic windfalls worth billions of Euros every year. Part of the reason for this windfall is that the intellectual property-based fees can vastly inflate the costs to consumers for items like CDs, videotapes, DVDs, computer programmes, and so on. Moreover, the profits gained from these monopolies help finance entertainment company lawsuits against potential competitors and innovators, which, in turn, can keep the prices for many products at a high level.³² This system for entertainment distribution has led to problems even in relatively prosperous countries, where several government officials have sued these corporations for price-gouging.³³

The hardships visited on prosperous countries by the erosion of fair use pale in comparison to the problems faced by developing nations. Given the limited economic resources that these countries possess, the developed world is asking for far too much when requiring these nations to strengthen intellectual property rights enforcement measures beyond what already exists. Indeed, the liberalization and relaxation of unnecessarily harsh intellectual property laws might greatly benefit these countries by lowering the cost barriers to the technology they need to grow.

Scholars and advocates have cited intellectual property laws as one of the biggest barriers to the exchange of informational and technological resources. In an open letter to the WIPO, nearly a dozen organizations (including Departamento de Informatica-UFPE, Computer Professionals for Social Responsibility, Consumer Project on Technology and many others) warned that the new WIPO pact would create “an enormous chilling effect on the development of new

information technologies”.³⁴ It should come as no surprise that some 30 African nations had proposed alternative language to counteract these effects.³⁵ Similarly, as noted economist Dean Baker points out,

“[The United States] has worked hard to extend U.S.-style copyright and patent laws throughout the developing world. These are extremely costly forms of protectionism. Copyright protection can raise the price of items like compact disks or videocassettes, which sell for a dollar or two in a free market, as high as thirty dollars. Similar, patent protection can raise the price of pharmaceuticals, which may sell for one or two dollars per prescription in a free market, to hundreds or even thousands of dollars per prescription. It is inaccurate to describe a trade policy that tolerates or promotes this sort of protectionism as ‘free trade.’”³⁶

For example, consider the plight of mainland China, which is still struggling to enter the information age. The Chinese people can ill afford to pay the prices charged by Western corporations for such items as computer software, CDs, and DVDs – prices that are fostered by strong intellectual property schemes. It should come as no surprise that the Chinese government is pushing users to develop and adopt indigenous open source products (such as Red Flag Linux) in part to avoid having to purchase similar goods from the West (such as Microsoft Windows) that are considerably more expensive, largely due to copyright, trademark and patent restrictions.³⁷ Many Chinese citizens aren’t willing to wait for these efforts to bear fruit, and have resorted to piracy in order to fulfill their needs.³⁸ These problems are not limited to mainland China alone; they have arisen in many parts of Africa, Asia and other parts of the world.³⁹

Yet proponents of new intellectual property conventions make the disingenuous claim that their measures are necessary to protect the “cultural, artistic and scientific heritage of developing countries, including traditional and indigenous information”, and that new intellectual property rights are needed to make this “heritage” more available.

Outright theft of information can be and is protected by preexisting laws. There may be a need for more vigorous enforcement, but the laws are adequate.

The plain fact is that most of the supporters of this “heritage” theory are actually not from developing countries, but represent large intellectual property holders in industrialized nations. Thus, these “heritage” based suggestions should be viewed with a degree of scepticism.

Some have suggested allocating a “symbolic percentage of fees received on private copies (unrecorded supports and reading devices) to subsidize developing countries access to international index works” protected by intellectual property laws. These proposals need to be very carefully examined and raise a host of troubling questions.

- In developing nations, who will foot the bill? Average citizens? Non-commercial entities? Corporations? The government? Some other entity?;
- Will these fees have the effect that intellectual property holders expect? The China example suggests that this set of proposals may be counter-productive because they will encourage piracy and spur governments in emerging nations toward quasi-protectionism;
- Will these fees also be imposed on already-developed nations? To what extent?

One more example: proposals to protect facts

A disturbing new threat to fair use and free expression has arisen in the form of proposals to extend intellectual property protections for the first time to mere facts or data. Specifically, legislation has been introduced in the US (e.g. H.R. 354, The Collections of Information Antipiracy Act), and treaties have been proposed that would apply quasi-copyright protection to public facts that have been collected in some way.⁴⁰

The advent of sophisticated computer technology has made it possible to aggregate public facts into databases that can easily be searched and correlated with other databases. The parties who create these databases are surely entitled to some protection for their compiled works. If, for example, an organization were to compile the intellectual property decisions of World Trade Organization into a unique form on a CD-ROM, others could legitimately be prevented from simply duplicating the CD and offering it for sale.

But these new database protection schemes would go much further. They would give the parties, who create these databases of public facts, an ownership interest in the fact themselves. The data base owners would have proprietary control over the decisions themselves. Fair use of these facts would not be permitted. These proposals would remove public information from the public domain. They would seriously impede scientific research, the discussion of public issues and educational exchanges. Data ranging from stock prices, to sports scores, to decisions of public bodies, to governmental satellite images that are used to protect the environment and promote sustainable development could be removed from the public domain. They would have a particularly onerous impact on journalists, who would be limited in their ability to report on public facts, which may have been compiled into a proprietary database. According a property interest to facts would also inevitably drive up the cost of obtaining those facts with a devastating effect on developing nations.

Finally, onerous database protection laws that fail to protect fair use will also significantly harm the Internet. A central characteristic of the current Internet is the easy and inexpensive availability of information. The Internet can be a democratizing medium that puts information in the hands of the rich and poor.

The database protection schemes will concentrate information in the hands of those who can afford to pay inflated prices for knowledge.

Conclusion: preserve fair use for the information society

The preservation and expansion of the doctrine of fair use is essential to the preservation of free expression in the 21st Century. It is the key to the future economic development in many nations. Governments should respect the need for broad access to information and knowledge. Policymakers must resist the temptation to curb the well-established principle of fair use.

The World's lawmakers should be wary of calls to harmonize levels of protection and access worldwide along the line of the DMCA and should recognize the possibly devastating effect those efforts may have on developing countries.

The WIPO Treaty, itself, needs to be amended to require that the signatory nations specifically include fair use and other freedom of expression doctrines in any of their intellectual property legislation. Any new treaties should contain similar provisions.

A global alliance needs to be created to advocate these principles. This conference presents a unique opportunity to begin forging an alliance between the non-governmental organizations in the developed world, who have been fighting to protect fair use and access to information and technology and governmental and non-governmental bodies in the developing world. We need to begin to co-ordinate our interests and to work toward the common goal of protecting fair use and access to information.

The American Civil Liberties Union stands ready to be part of such an alliance.

Acknowledgements

Barry Steinhardt is Associate Director of the American Civil Liberties Union. He chairs the ACLU Cyber-liberties Task Force, which coordinates the ACLU's extensive programme on information technology issues. He was a co-founder of the Global Internet Liberty Campaign (GILC), the world's first international coalition of Non-Governmental Organizations concerned with the rights of Internet users and one of the originators of the Internet Free Expression Alliance (IFEA), which was formed to monitor issues related to Internet content rating and filtering. Mr. Steinhardt has spoken and written widely on information technology issues and has done extensive consulting for Human rights organizations in Central and Eastern Europe.

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Copyright and the freedom of accessing information in cyberspace

The author describes the latest Hungarian copyright legislation regarding on-line uses of authors' works. Giving the International background of the Hungarian Copyright Act (WIPO Copyright Treaty as an "umbrella solution" for on-line communication to the public) he describes the right of communication to the public in the new Hungarian Copyright Act (on-line uses from legal aspect, author's right and collective management) and the exemptions (free uses) in this Act regarding on-line uses (private copying, etc.). He also provides information on licensing in practice: collective management (joint licensing) in Hungary (licensing different types of uses of different types of works in cyberspace) and concludes that the trend is towards a balanced legislation.

Droit d'auteur et libre accès à l'information dans le cyberspace

L'auteur décrit la toute dernière législation hongroise sur le droit d'auteur en ce qui concerne les utilisations en ligne des oeuvres protégées. Après avoir indiqué la source internationale de la loi hongroise sur le droit d'auteur (le Traité de l'OMPI sur le droit d'auteur, « texte cadre » visant la communication en ligne au public), il explique comment cette nouvelle loi hongroise traite le droit de communication au public (aspects juridiques des utilisations en ligne, droits d'auteur et gestion collective), ainsi que les exceptions qu'elle prévoit (libre exploitation) pour les usages en ligne (copie privée, etc.). Il renseigne également sur les pratiques en matière de licences telles que la gestion collective (concession de licences communes) en Hongrie (concession de licences pour différentes catégories d'utilisations de différents types d'œuvre dans le cyberspace) et conclut que la législation tend vers un équilibre.

El derecho de autor y la libertad de acceder a la información en el ciberespacio

El autor presenta la última legislación húngara sobre derecho de autor con respecto a los usos en línea de las obras de autores. Tras exponer los antecedentes internacionales de la ley húngara de derecho de autor (el Tratado de la OMPI sobre Derecho de Autor como "solución marco" para la comunicación pública en línea), analiza el derecho a la comunicación pública según la nueva ley húngara de derecho de autor (los usos en línea desde el punto de vista jurídico, el derecho de autor y la gestión colectiva) y las exoneraciones (usos libres) contempladas en esta ley en relación con los usos en línea (copia privada, etc.). El autor explica también la práctica de la concesión de licencias: la gestión colectiva (licencias conjuntas) en Hungría (licencias para diferentes tipos de usos de distintos tipos de obras en el ciberespacio) y llega a la conclusión de que se tiende hacia una legislación equilibrada.

Preface

Members of the information society are considered to be users of information. From the users' aspect copyright may seem to be an obstacle to accessing and/or offering information. But from the aspect of authors copyright is the only legal "instrument" which enables them to get equitable remuneration in return for the uses of their works. In this paper the needs and interests of both authors and users of their works are explored, The structure and motives of the present international and Hungarian legislation, are described and the fact that a balanced regulation can only be created and enforced only if compromises are accepted by the different interested parties.

International background of the hungarian copyright act

The WIPO "Internet Treaties"

In 1996, when the need to create an international basis for harmonized national legislation concerning copyright issues in the digital age became urgent, the World Intellectual Property Organization's Diplomatic Conference adopted two international treaties (currently signed by more than 50 countries of the world), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The provisions of these treaties describe the uses of authors' works that takes place on and via the Internet as a series of temporary and permanent reproductions and communications made directly or indirectly by the public.

Reproduction rights

Before communicating (making available) a work to the public, a reproduction has to be made of it. The WCT itself does not create a new notion of reproduction rights. Rather, reference is made to the relevant provisions of the Berne Convention¹, which are sufficiently broad to cover reproductions that take place in the digital environment.

The WPPT also states that: “The reproduction rights... fully apply in the digital environment. It is understood that the storage of a protected performance or phonograph in digital form in an electronic medium constitutes a reproduction within the meaning of these articles.”

Communication to the public: the “Umbrella Solution”

WCT expands the Berne Convention’s definition of “communication to the public” of works protected by copyright to include provisions for both perceptible and downloadable “transmissions” of works. According to the treaty: “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”.²

This definition – hopefully – covers all types of uses in the digital age (that’s why it is often called the “umbrella solution”).

Limitations

The general consensus at the expert committee meetings and the diplomatic conference (leading to the adoption of WCT and WPPT in 1996) was that the limitations and exceptions provided by the existing and newly-created exclusive rights should apply in the digital environment. The limitations and exceptions addressed by both treaties approach the subject from different directions. The delegates agreed that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of WCT or the Berne Convention”.³ As a result, the “mere conduit” may not constitute an act of communication (making available) to the public.

Both WCT and WPPT grant the contracting parties the freedom to provide new limitations or exceptions in their national legislation, and to extend existing ones to match the rights granted to authors of literary and artistic works under WCT⁴. This freedom applies in cases where:

- There is no conflict with a normal exploitation of the work, and;
- The legitimate interests of the author are not unreasonably prejudiced.

A similar authorization under WPPT (using the same language in respect to the boundaries of the creation and extension of limitations and exceptions) applies with regard to the protection of performers and producers of phonograms⁵.

The right of communication to the public in the new hungarian copyright act

The new Hungarian copyright act, Act LXXVI of 1999, (CA) entered into force 1 September, 1999. It stipulates that on-line uses of authors' works must be considered as a two-step procedure, the first step being that of loading the work onto a server connected to the Internet. Based on the provisions of the WCT, the act qualifies this activity as communication of the work to the public⁶, which must be licensed by the author (in Hungary this happens through extended collective management of rights).⁷

The second step of the procedure is accessing (displaying, downloading) the work on the Internet by users. This phase is regarded – under certain conditions – as copying the work for private purposes, which – according to the regulations of the act – is considered to be a free use of the work, which may happen without the permission of the author or paying royalty.

Cases of free use in the hungarian act regarding on-line uses

Exceptions are limitations of the rightholder's exclusive rights. The role of these exceptions – so called free uses in the Hungarian law – is to maintain a balance between the respectable private interests in accessing information and the authors' interests in getting fair and equitable remuneration in return for the use of his works. Among the cases of free uses described in the CA, the legislator – in harmony with the recent relevant EU-provisions⁸ – included special cases regarding the latest technological possibilities of the information society (temporary reproduction of the work).

Private copies

1. Home copies

According to the Hungarian copyright act “a copy of the work may be made by anyone for private purpose if it is not designed for earning or increasing income even in an indirect way. This provision shall not apply to (...) software and databases operated by a computing device”.⁹ But the CA contains restrictions regarding literary works: “A complete book as well as the whole of a periodical or daily may be copied even for a private purpose only by handwriting or typing”.¹⁰

2. Internal copies by institutions

The CA gives the opportunity to institutions (such as scientific institutions, libraries) to make internal copies of authors' works as follows: "in a manner and to the extent complying with the intended purpose as well as for internal use in an institution, if it is outside the scope of commercial activity a copy may be made for such purposes if it is not designed for earning or increasing income even in an indirect way and

- a) it is required for scientific research,
- b) it is made from a copy for the files to be used for scientific purpose or for the supply of a public library, or
- c) it is made of a limited part of a published work or of an article in a newspaper or a periodical".¹¹

3. Copies in educational institutions

"Specific parts of a work published as a book as well as newspaper and periodical articles may be reproduced for educational purposes in a number corresponding to the number of pupils in a class or for purposes of examinations in public and higher education in a number necessary for the said purpose".¹²

Temporary reproduction

"The temporary reproduction of a work done with the exclusive purpose to allow for the use of the work authorized by the author or permitted pursuant to the provisions of this Act shall be taken to fall within the scope of free use, on the condition that the temporary reproduction is an integral part of the technological process aiming to achieve the said use and lacking any economic significance of its own".¹³

These provisions enable users to access works by browsing, or with the help of search engines, and automatic caching. Mirror caching for example, since it is not an integral part of the technological process destined to provide free use, and may have independent economic significance, is not permitted without the licence of the rightholders.

Licensing in practice: collective administration of authors' rights in Hungary

According to the CA, licensing of different type of on-line uses of authors' works (such as streaming, webcasting or on-demand uses) in Hungary is done by the collective managing society (Artisjus) appointed by the Ministry of National Cultural Heritage.

The royalty-tariff chart (attached to this paper as Annex I.) regarding on-line uses (determined each year by Artisjus and approved by by the Ministry

of National Cultural Heritage) has extremely detailed provisions concerning the new types of uses of works in the digital environment.

The tariff has many special regulations making differences between several types of communication to the public such as broadcasting-type (streaming and simulcasting) and on-demand uses (download, real audio).

Conclusion: towards a balanced legislation

Newly developed technological methods offer more and more possibilities for accessing information. Only a well developed, internationally harmonized legal system can provide the balance required between the interests of users (accessing more and more information free of charge, without any legal obstacles) and of authors (getting equitable remuneration).

In this paper, it has been stressed that the Hungarian copyright legislation – under the umbrella of the newest international standards – is capable of handling the new issues raised by the “digital age” through the application of the aforementioned legal exceptions.

Annex I: Tariffs

Excerpt from The Tariff Announcement of ARTISJUS for the year 2000
(Official Gazette 2000/5)

(C.A. = Copyright Act of Hungary, Act LXXVI of 1999)

- 2.1. In compliance with Section 27 of the C.A. radio and television broadcasters shall pay a cumulative royalty of 1 per cent of their budgetary support, and 2 per cent of their receipts from subscribers' fees as well as 4 per cent of their advertising and sponsoring revenues, with regards to the reproduction for the purpose of repeated broadcasts [§ 26 para (6) C.A.] and to the broadcast [§ 26 para (1) second sentence C.A.] of literary and musical works already made available to the public (hereinafter: small right works);
- 2.2. Pursuant to § 26 para (7), para (8) first sentence and § 27 C.A. the entities specified in item 2.1. communicating works to the public shall pay a royalty in accordance with item 2.1., if they make available the programme to the members of the public not by broadcasting [§ 26 para (1) – (6)], but via cable, or by any other similar means or method, including the use of a computer network.

The tariff provision under the preceding paragraph does not apply to cases, where works are made on demand available to the public [Sub-Chapter C];

- 2.3. Pursuant to § 26 para (8) first sentence and § 28 C.A. radio and TV broadcasters as well as the entities specified in item 2.2. shall pay a royalty of 5% of and beyond the royalty under item 2.1. for the communication to the public of works specified in item 2.1. taking place also by the use of a computer network simultaneously with the broadcasting [“streaming”];
- 2.4. The entities under items 2.1. and 2.2. – unless a shorter term is agreed upon by the parties – shall provide data quarterly, until the 15. day of the month following the last calendar month of the respective quarter of the year on the items of programmes and the literary and musical works used therein that were actually broadcast or otherwise communicated to the public, either by filling in the form introduced by ARTISJUS or in any other manner or format as specified in the licensing agreement to broadcast entered into by the parties [§ 92 para (5) C.A.].
Royalties to be paid for making available of works to the public on demand.

3. Making available of works to the public on demand is a sort of communication of works to the public by cable or any other device or in any other manner which does not fall within the scope of Article 26 (1) to (7) of the Copyright Act (CA) and whereby members of the public may have access to works (or sections of works) so that they can choose both the works (sections of work) and the time and place of the access at discretion (on demand). A case of access on demand takes place irrespective of whether the members of the public are or are not in a position to download the works (sections of works) made available on demand to a computer or to any other carrier.

The provider [as defined in IV. C) 3.12] providing the possibility to the public to have on-demand access by the computer network to the so-called small-right musical and literary works [IV. E) Paragraph 7] or sections thereof which have already been made public shall, pursuant to CA Art. 26, second sentence of Paragraph (8), and Art 27, be obliged to pay royalty as follows:

C) 1. Regarding musical works

- 3.1. For the so-called “real audio” type use just permitting audio perception but excluding download:
- 3.1.1. if related to the use the provider comes by income, he shall pay a royalty made up of sums corresponding to 1 per cent of the budget subsidy, 2.5 per cent of the subscription fee paid by the member of the public, and 6 per cent of the publicity and sponsoring incomes,
 - 3.1.2. if related to the use referred to in 3.1. no income is obtained by the provider, and
 - 3.1.2.1. a maximum of ten sections of work are made available for access on demand, not exceeding one minute per work, the provider shall not be obliged to pay royalty;
 - 3.1.2.2. however, he shall pay a royalty of HUF 25 000 per month irrespective of the number of accesses on demand if the sections of work that are made available for access on demand, lasting no longer than one minute per work, number more than 10 but less than 1000;
 - 3.1.2.3. he shall pay a royalty of HUF 90 000 per month irrespective of the number of accesses on demand if the sections of work or complete works that are made available for access on demand number no more than 1000, exceeding a duration of one minute per work;
 - 3.1.2.4. should over 1000 works or sections of work be made available for access on demand, the additional royalty to be paid over and above the royalties referred to in 3.1.2.2. and 3.1.2.3. shall amount, regarding the works or sections of work going beyond the limit of 1000 but irrespective of the number of accesses, to HUF 2 per section of work for accesses not exceeding one minute and to HUF 18 per section of work or complete work for accesses exceeding one minute.

- 3.2. For uses of the download type (also permitting the making of permanent copies) the provider shall be obliged to pay a royalty corresponding to 12 per cent of the subscription fee paid by a member of the public for an access on demand or, if no such fee is paid (when the access for download is allowed free of charge), to 6 per cent of the publicity and sponsoring incomes, but in all cases at least HUF 25 per musical work accessed on demand and HUF 6 per minute (whether full or partial) of the use of a musical audio visual work;
- 3.3. The royalty paid on the uses referred to in 3.1. and 3.2. shall be taken to include the (mechanical) royalty due on the fixation of works in a computer or in an electronic database fixed on any digital carrier under the provider's control permitting repeated accesses on demand.

C) 2. Regarding literary works

- 3.4. For uses permitting perception but excluding download,
- 3.4.1. if related to the use the provider comes by income, he shall pay a royalty made up of sums corresponding to 1 per cent of the budget subsidy, 2 per cent of the fee paid by the member of the public, and 4 per cent of the publicity and sponsoring incomes,
 - 3.4.2. if related to the use referred to in 3.1. no income is obtained by the provider, and
 - 3.4.2.1. a maximum of ten parts of work are made available for access on demand, the provider shall not be obliged to pay royalty;
 - 3.4.2.2. however, he shall pay a royalty of HUF 25 000 per month irrespective of the number of accesses on demand if the sections of work that are made available for access on demand number more than 10 but less than 1000;
 - 3.4.2.3. he shall pay a royalty of HUF 90 000 per month irrespective of the number of accesses on demand if parts of works, to be considered as exceeding the size of a section of work (Item 3.6.), or complete works are made available for access on demand, with the number of such works and parts of work not exceeding 1000;
 - 3.4.2.4. should over 1000 works, parts of work or sections of work be made available for access on demand, the additional royalty to be paid over and above the royalties referred to in 3.4.2.2. and 3.4.2.3. shall amount, regarding the works, parts of work or sections of work going beyond the limit of 1000 but irrespective of the number of accesses, to HUF 2 per section of work and to HUF 18 per part of work going beyond the size of a section of work or per complete work.
- 3.5. For uses of the download type (also permitting the making of permanent copies) the service provider shall be obliged to pay a royalty corresponding to 10 per cent of the subscription fee paid by a member of the public for an access on demand or, if no such fee is paid (when the access for download is allowed free of charge), to 6 per cent of the publicity and sponsoring incomes, but in all cases at least HUF 10 per section of work accessed on demand, and – if a complete work or a part of work of a size larger than a section of work is involved – HUF 20 per poem, HUF 40 per short story, and HUF 100 per epic work of a size larger than the usual size of a short story;
- 3.6. For purposes of the provisions in 3.4. and 3.5. a section of work shall be defined as one stanza at most of a poem consisting of several stanzas or as a part not larger than 10 per cent of a complete work in the case of other literary works. The section however may not exceed the size of the image visible with unaided eyes, which is perceptible by the ordinary computer user on a 14" monitor without making the image run by any device or in any manner, in particular by operating the menu or making the cursor move and using the keyboard;
- 3.7. Should the Tariffs or the general terms and conditions of the blanket licensing agreement of the appropriate copyright society operating in the foreign country in which the access on demand takes place – concerned with the collective administration of authors' rights, representing the affected right holders and works with regard to the right of communication to the public, and maintaining contractual relations with ARTISJUS on mutual or unilateral

representation, specify higher royalties than those set in the Tariff Chart current in Hungary for access on demand inclusive of download, the user shall pay the differential amount too in the case of a use according to Items 3.2. and 3.5;

- 3.8. Simultaneously with settling its accounts [Chapter IV, Subchapter E), Paragraph 9] the provider shall communicate to ARTISJUS, in the manner (format) specified in the licensing agreement, the titles and composers, and songwriters of the works made available for access on demand and actually accessed in the period of accounting, as well as the number of accesses on demand per work and per country where the accesses occurred in the period of accounting [CA, Art. 92 (5)]. The obligation to supply particulars shall apply, in the case of uses according to Items 3.1. and 3.4., only to the titles and the composers and songwriters of the works made available for access on demand;
- 3.9. The provider shall be obliged, upon agreement with ARTISJUS, to make perceptible on the work or attached to the work the electronic rights management data suitable for identifying the work made available for access on demand [CA Art. 96 (2)]. This obligation shall apply only from the date on which the application of the particulars referred to will have been accepted in the international practice or declared to be a standard;
- 3.10. The licensing agreements that can be entered into according to Item 3 may have a duration of 6 months at most or may include a right of unilateral termination, under which ARTISJUS has the right to terminate the agreement at 3 months' notice should the technical circumstances of the use or the legal prerequisites of the use change so that this could essentially affect the scope of license granted, the manner of the use or the determination of the royalty, or the amount or calculation of the stipulated royalty;
- 3.11. Making audiovisual works, sound recordings or fixed performances available for access on demand shall be subject to, over and above the licensing according to Chapter IV, Subchapter C), authorization by the affected rightholders as well;
- 3.12. For purposes of Item 3., a provider shall be taken to mean an entity offering a musical or literary work to be available for access on demand (content provider), further an organisation other than the content provider concerned with the fixation of works on server, except for an organisation concerned with caching only, i.e. fixing the works in a store permitting an accelerated access on demand.

References:

1. The Berne Convention on the protection of literary and artistic works is a international convention signed by more than 140 countries, originates from 1886., last revised in 1971. It prescribes minimum standards to the copyright legislation of the members of the Berne Union, and also includes the rule of national treatment.
2. Article 8. WCT.
3. See the agreed statement to Article 8 WCT, which is reinforced in respect of the performers and phonograph producers in the agreed statements attached to WPPT.
4. See Article 10 (1) WCT and the agreed statement to Article 10.
5. See Article 16 (1) WPPT.
6. “The author shall further have the exclusive right to communicate his work to the public in a manner other than broadcasting (...) and to authorize another person therefor. This right shall in particular cover the case when the work is made available to the public by cable or any other means or in any other manner so that the members of the public can choose the place and time of the availability individually.” Art. 26. (8) CA.
7. “As regards the authorization of the broadcasting of any disclosed works and of their uses as provided for in Article 26 – except for the use of literary works designed for the stage and of musico-dramatical works or scenes and overviews thereof – as well as the determination of the royalties to be paid for the said uses, the organization performing the collective administration of the rights related to literary and musical works acting on behalf of the literary authors, composers and lyricists shall conclude licensing agreements with users.” Art. 27. CA.
8. EU-Directive on electronic commerce (Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
9. Article 35 (1) CA.
10. Article 35 (2) CA.
11. Article 35 (4) CA.
12. Article 35 (5) CA.
13. Article 35 (6) CA.

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Legal exception to copyright and the development of the African and development countries' information sector

This paper focuses on Africa and takes a cursory look at the book and information sector today. It proceeds to argue that the problems are low literacy levels, poverty, limited availability of relevant and appropriate content and high levels of copyright violation. The paper further argues that in addition to economic development, literacy and education, we need better copyright protection to encourage local creativity and publishing in order to develop the local book and information sector. The special exception provision will stifle creativity and publishing on the continent while favourable laws all over the developed world will encourage the development of their information sectors. This will perpetuate and even worsen the neo-colonial situation in which Africa consumes more than 12% of the total world book output but contributes less than 3% to the content that is read in the world. The paper concludes that the special exception concept focuses shortsightedly on the access to information and fails to look at the need to create and package the information as part and parcel of a total strategy to enhance access to relevant and appropriate information in the developing world.

Exceptions légales au droit d'auteur et développement du secteur de l'information dans les pays africains et les pays en développement en général

Cette intervention, centrée sur l'Afrique, examine succinctement l'état du secteur du livre et de l'information. Elle démontre ensuite que les problèmes de ce secteur tiennent aux faibles niveaux d'alphabétisation, à la pauvreté, à la faiblesse de l'offre de contenus pertinents et appropriés et aux nombreuses violations du droit d'auteur. Elle fait valoir également qu'outre le développement économique, l'alphabétisation et l'éducation, il faut améliorer la protection du droit d'auteur afin d'encourager la créativité et l'édition locales et de développer par là même le secteur du livre et de l'information en Afrique. L'institution d'exceptions spéciales étouffera la créativité et l'édition sur le continent, alors que, dans le même temps, les législations favorables existant dans tous les pays développés encourageront l'expansion de leurs secteurs de l'information. Cela perpétuera et même aggravera la situation de néo-colonialisme actuelle, qui fait que l'Afrique consomme plus de 12% de la production mondiale de livres mais contribue pour moins de 3% à la production des contenus lus dans le monde. La conclusion est que la notion d'exception spéciale relève d'une concentration trop étroite sur l'accès à l'information et méconnaît la nécessité d'assurer la création et le conditionnement de celle-ci dans le cadre d'une stratégie globale visant à améliorer l'accès du monde en développement à des informations pertinentes et appropriées.

La excepción legal al derecho de autor y el desarrollo del sector de la información en los países de África y en los países en desarrollo

Esta comunicación se centra en África y examina someramente la situación actual del sector del libro y de la información. En ella se aduce que los problemas de este sector están relacionados con los bajos niveles de alfabetización, la pobreza, la escasa disponibilidad de contenidos pertinentes y apropiados, y la alta proporción de violaciones del derecho de autor. Asimismo expone que, además del desarrollo económico, la alfabetización y la educación, es necesaria una mejor protección del derecho de autor para fomentar la creatividad y la edición en el plano local, a fin de desarrollar el sector del libro y de la información en ese mismo plano. La disposición sobre la excepción especial puede asfixiar la creatividad y la actividad editorial en el continente africano, mientras que legislaciones favorables en todos los países desarrollados van a propiciar el desarrollo de sus respectivos sectores de la información. Se puede perpetuar y agravar así la situación neocolonial de África, que consume más del 12% de la producción mundial total de libros y sólo contribuye con menos de un 3% a la producción de contenidos leídos en el mundo. Esta comunicación concluye diciendo que la noción de “excepción especial” supone una visión miope del acceso a la información e ignora la necesidad de crear y configurar la información como parte de una estrategia general encaminada a mejorar el acceso de los países en desarrollo a una información pertinente y apropiada.

There is dire need for information in the developing world, particularly in crucial areas such as the educational, medical, legal and human rights sector. The need for a special approach to this problem is not a subject for debate, but the nature of the solution is. This paper will look critically at the application of legal exceptions as a solution to a certain number of problems. To do so, the presentation will briefly place the solutions in the information context of the developing world and proceed to ask the question whether the application of legal exceptions is a plausible solution before suggesting the way forward.

The African publishing and information sector is an underdeveloped and struggling sector due to a number of factors. Some of the problems include:

- very low reading habits among the populations,
- an underdeveloped information distribution system,
- poverty and a myriad of economic problems that make books and information unaffordable and inaccessible.

The fact that information cannot be afforded is partly caused by poverty, the high prices of books and information gadgets and the cost of access. These high prices are in turn caused by very low economies of scale. The low economies of scale are caused by low reading habits and the high levels of piracy and illegal copying.

The little reading that takes place is mainly of books produced in the North. According to recent research by Association for the development of education in Africa (ADEA) and the African Publishers' Network, Africa consumes about 12% of all books produced in the world but contributes less than 3% to books read in the world (Makhotsi, 1999). It is for this reason that any campaign that seeks to develop access to information, without qualifying the nature of the information and without emphasizing the need to make sure that the developing world is an active participant in information creation and dissemination, is inadequate. Among the plausible principles of this conference is the promotion of multiculturalism. The wealth of information in a global context is in its diversity and this diversity can only be achieved through more equitable participation.

The digital era once again promises a revolution in terms of access to information, but unless the strategies that we adopt today take account of the problems faced by the developing countries in terms of hardware and networking, the world will take another technological leap without the inhabitants of the South, as it did in the case of the print media. According to a survey carried out by Microsoft, the USA and Europe enjoy between 40 and 80% connectivity among their populations and Africa is below 7%, far below the 25% that is required for sustainable electronic information dissemination. (Brass D, 2000)

From this brief run through the information environment in the developing world, it is our conviction that the problems of the African information and book sector are related to poverty, an underdeveloped and uncompetitive information sector, lack of relevant and appropriate information and reading material and piracy and illegal photocopying. Contrary to belief, the gravest threat to electronic information dissemination is lack of connectivity and hardware. This sector is much less viable than the analogue information sector, because of very low economies of scale, which could be still further reduced by inappropriate policies.

In an environment such as I have sketched above, what then should be the strategy for access to information? Is it the application of legal exceptions to copyright? This solution seems to me to be an intervention that does not take account of the information chain and how it functions in the developing world, and for that matter in the rest of the world. Strategies that look at information dissemination without thinking seriously about the creation of information and the means of dissemination are very unlikely to work in the developing world. Rights owners need a fairly regulated environment where the investment in creativity, packaging and dissemination of information meets minimum required returns to authors, publishers and distributors. The African book and information sector does not meet these minimum returns. Disseminators of information need relevant and appropriate information to disseminate. A strategy for access to information in the developing world should therefore seek to create conditions, which stimulate creativity and not those which kill it.

Applying legal exceptions to the developing world will further erode the competitiveness of the local book and information sector and perpetuate a neo-colonial order in which our understanding of the world and ourselves continues to be fired from the same colonial, intellectual cannon. This is so, because only those information creators and developers who have operations in more viable parts of the world will be able to disseminate information in the developing world. This is precisely what has happened to the scholarly information sector. The rest of the world is making significant progress in debating the regulation of the electronic information sector, thereby creating a suitable environment, in which all the parts of the information sector can operate in a manner that will ultimately enhance access to information for all. We begin to wonder why such thinking is not applied when the information sector of the developing world is under discussion.

The developing world does not only need access to information. It also needs relevant and appropriate information. It also needs to be an equal participant in the global information system and to be able to do this, it needs to be both a consumer of world information and also a producer of global content. To disregard the question of the type and of the identity of the producer users, will perpetuate the hegemony of information dissemination that exists today. To be able to cut through this hegemony, the rights holders in the developing world also need effective copyright protection.

There is growing, genuine interest in African content and culture in the rest of the world, beyond the infamous “African gaze” fascinated by circumcision, genital mutilation and witchcraft. It is only appropriate that African authors and publishers exploit this content for the benefit of the African information sector. It is very likely that the application of legal exceptions in the African information sector will leave the local sector unable to exploit this content. We believe that the only way to protect indigenous knowledge for our benefit is to exploit it ourselves or at least to be able to compete fairly for its exploitation with the rest of the world. If this is not possible, the fears of African authors, scholars, and publishers that our compromised ability to exploit this content will lead to its misappropriation, will be real. Chido Ngandu of USAfrica on line warned, “if not watched carefully, the digital information era can be a more brutal force of imperialism than colonialism.” (Southern African Libraries Conference. Johannesburg, November 2000)

The application of legal exceptions needs to be questioned even in areas of critical and crucial need such as education. The impact of such exceptions in an environment like Africa where up to 95% of all publishing is in curriculum based education materials, compared to up to 35% in the developed world, (Makhotsi R, 1999) needs to be carefully considered. This sector subsidises other areas of publishing. Even in this sector the economic needs are so dire that the best hope of any publisher is to produce a book that is so cheap that to photocopy it is more expensive and hope to recoup the investment from a higher rate of turnover. In every African country today, there is ongoing co-operation between the Departments of Education and the publishers on finding ways of making learning support materials accessible to learners. This is the only way for everyone. Is the application of legal exceptions the best way to increase access to information in such an environment?

One contradiction inherent in the application of legal exceptions is the talk about one amorphous information platform in the digital world and the assumption that this world can still be divided and managed with the developing world having legal exceptions and the developed world having a different set of rules. This assumption begs the question, of how these exceptions will be implemented and managed.

Discussions and negotiations between rights owners and rights users in which we seek to enhance access to information are taking place in Africa. This is the only way we can survive in the developing world as rights holders and disseminators of information. The fact that the copyright symposium of the

International Publishers Association (IPA) is taking place in Ghana in 2002 is proof that copyright is as important in the developing world as it is in the developed world. As has already been emphasised in some earlier papers on the technological needs of the developing world and possible solutions, to problems of capacity in the developing world should be based capacity building, training and the implementation of laws that effectively govern the development of the information sector and enhance access to information. Proposed solutions should not target one aspect of the information sector, to the detriment of its holistic development and global competitiveness.

In conclusion I would like to thank UNESCO for opening a dialogue on solutions for the developing world where access to information is concerned. I would like to hasten to point out that such solutions must be informed by the real circumstances of the developing world. Such solutions also need to be informed by a broader desire and objective to encourage the holistic development of the whole information sector. It is also important to look at the impact of any solution on local participation and on an inclusive contribution to knowledge at a global level. Finally resources and sustainability have been cited as major problems. We need to think about ways to subsidize access to information, which at the moment is in the hands of the rights holders. Certainly the local private sector, particularly the indigenous sector does not have the means to do so.

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THEME
THÈME
TEMA



PROTECTING HUMAN
DIGNITY
IN THE DIGITAL AGE

PROTECTION
DE LA DIGNITÉ HUMAINE
À L'ÈRE NUMÉRIQUE

PROTECCIÓN
DE LA DIGNIDAD HUMANA
EN LA ERA NUMÉRICA

SESSION
SESIÓN

5

PROTECTION
OF PRIVACY
ON
GLOBAL NETWORKS

PROTECTION
DE LA VIE PRIVÉE
SUR LES
RÉSEAUX MONDIAUX

LA PROTECCIÓN
DE LA PRIVACIDAD
EN LA
REDES MUNDIALES

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Ten commandments to protect privacy in the Internet world

The existing international rules concerning data protection of (computerized) personal data files (e.g. U.N. Guidelines of 14 December 1990, OECD Recommendation of 23 September 1980) do not pay attention to the special conditions of the use of the Internet and other telecommunication networks, though these technologies create serious threats to the right to privacy. There are proposals to amend these rules introducing additional requirements for the Internet World. Following a recommendation made in the last year's International Conference of Data Protection Commissioners in Hong Kong the International Working Group on Data Protection in Telecommunications formulated Ten Commandments to protect Privacy in the Internet World which will be presented to the UNESCO Congress.

Dix commandements pour protéger la vie privée sur l'Internet

Les règlements internationaux existants concernant la protection du contenu des fichiers (informatisés) de données à caractère personnel par exemple les principes directeurs du 14 décembre 1990 de l'ONU, et la Recommandation du 23 septembre 1980 de l'OCDE) ne tiennent pas compte des conditions particulières de l'utilisation de l'Internet et des autres réseaux de télécommunication bien que ces technologies fassent peser de sérieuses menaces sur le droit au respect de la vie privée. Des propositions ont été faites pour modifier ces dispositions par l'ajout de stipulations visant le monde de l'Internet. Donnant suite à une recommandation faite l'an dernier à Hong Kong lors de la Conférence internationale des commissaires à la protection des données, le Groupe de travail international sur la protection des données dans les télécommunications a formulé Dix commandements pour protéger la vie privée dans le monde de l'Internet qui seront présentés au Congrès de l'UNESCO.

Los diez mandamientos para la protección de la vida privada en el mundo de Internet

Las actuales normas internacionales relativas a la protección de ficheros (informatizados) de datos personales (véanse las Directrices de las Naciones Unidas del 14 de diciembre de 1990 y la Recomendación de la OCDE del 23 de septiembre de 1980) no contemplan las condiciones especiales del uso de Internet y otras redes de telecomunicaciones, aunque estas tecnologías plantean serias amenazas contra el derecho a la vida privada. Se han formulado propuestas para reformar estas normas introduciendo requisitos suplementarios para el mundo de Internet. A raíz de una recomendación formulada en la Conferencia Internacional de encargados de protección de datos celebrada el año pasado en Hong Kong, el Grupo de Trabajo internacional sobre la protección de datos en las telecomunicaciones formuló Diez Mandamientos para la protección de la vida privada en Internet que se presentarán en este Congreso de la UNESCO.

- ***Informational Separation of Powers:***
Network and Service Providers must not intercept or interfere with any contents except where explicit law requires it. Insofar as Network or Service Providers provide content themselves, responsibilities for their respective functions have to be separated.
- ***Telecommunications Secrecy:***
Network and Service Providers must not disclose any information on content or data traffic except for the purposes of telecommunications or where explicit law requires it.
- ***Data Austerity:***
Telecommunications infrastructure has to be designed in such a way to ensure that the least amount of personal data as technically possible is used to run the networks and services.
- ***Right to Anonymity:***
Network and Service Providers have to offer to any user the option to use the network or to access the services anonymously or using a pseudonym. Pseudonyms, which are used for this reason, must not be revealed except where explicit law requires it.
- ***Virtual Right to be Alone:***
Nobody must be forced to let his or her personal data be published in directories or other indices. Every user has to be given the right to object to his or her data being collected by a search engine or other agents. All users must be given the right and the technical means to prevent the intrusion of external software into their own devices.
- ***Right to Security:***
All users have to be given the right and the technical means to communicate their content confidentially by using suitable methods such as encryption.

- ***Restriction on Secondary Use:***
Traffic data must not be used for purposes other than those which are necessary to run the networks or services without the explicit consent of the user.
- ***Transparency:***
Network and Service Providers have to publish in a clear form all explanations necessary for users be able to understand the structure of the network or service, the respective responsibilities involved, the amount of personal data being processed, and the planned disclosure.
- ***Access to personal data:***
Every user has to be given the individual right to be informed on all personal data which are processed about him or her in order to run the network or service on-line.
- ***International Complaints Resolution:***
Given the international aspects of all network and service activities every user must be given the right to complain to an authority with transborder powers of investigation and enforcement, if national legislation is not sufficient to guarantee his or her rights.

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The legal protection of the right of privacy on the Internet

The right to privacy in modern legal systems is safeguarded by constitutional texts, Legislation and/or Case Law in each country. The right to privacy is mainly the right to be let alone, the right to be free from unwarranted publicity and the right to live without unwarranted interference by the public. The right to privacy is inherent to the individual and perhaps also to juridical entities such as corporations, cooperatives, sovereign states and international organizations. The impact of modern information systems on human liberties has been drastic on both sides of the spectrum. The regulation of modern technological innovations in communications and IT is an elusive task due to the ever-changing technical complexity of the issues and to the acceleration effect. How are the major legal systems coping with the perpetual technological change in protecting the notion of privacy? Is law enforcement effective in safeguarding the right of privacy? What is the position of the Egyptian legal system in this context as an example of a developing country?

La protection juridique du droit au respect de la vie privée sur les réseaux

Dans les systèmes juridiques modernes, le droit au respect de la vie privée est garanti par les dispositions constitutionnelles, la législation et/ou la jurisprudence de chaque pays. Il se définit essentiellement comme le droit à la tranquillité, le droit de ne pas être l'objet d'une publicité abusive et le droit de mener sa vie sans ingérence publique induite. C'est un droit fondamental des personnes physiques et peut-être aussi de personnes morales telles que les sociétés, les coopératives, les États souverains et les organisations internationales. Les systèmes d'information modernes ont eu un impact radical sur les libertés des individus comme de ces entités. Les innovations technologiques en matière de télécommunications et d'information éludent les tentatives de réglementation en raison de la complexité technique sans cesse renouvelée des problèmes inhérents à cette tâche et de l'effet d'accélération du changement. Comment les grands systèmes juridiques font-ils face à l'évolution technologique incessante s'agissant de protéger la notion de vie privée? L'application de la loi suffit-elle à sauvegarder le droit au respect de la vie privée? Quel est, dans ce contexte, la situation du système juridique de l'Égypte en tant qu'exemple de pays en développement.

La protección jurídica del derecho a la vida privada en las redes

En los sistemas jurídicos modernos, la vida privada es un derecho protegido por textos constitucionales, la legislación o la jurisprudencia de cada país. El derecho a la vida privada es básicamente el derecho a que lo dejen a uno en paz, el derecho a no recibir publicidad indeseada y el derecho a vivir sin interferencia pública injustificada. El derecho a la vida privada es inherente al individuo y tal vez también a entidades jurídicas como las empresas, las cooperativas, los Estados soberanos y las organizaciones internacionales. Los efectos de los sistemas modernos de información en las libertades humanas han sido drásticos en ambos lados del espectro. La reglamentación de las innovaciones tecnológicas modernas en la esfera de las comunicaciones y la tecnología de la información es una tarea difícil de lograr debido a la complejidad técnica de los problemas y al efecto de aceleración. Frente a este cambio tecnológico incesante, ¿qué hacen los principales sistemas jurídicos para proteger la noción de vida privada? ¿La aplicación de la ley puede salvaguardar eficazmente el derecho a la vida privada? ¿Cuál es la posición del sistema jurídico egipcio en este contexto como ejemplo de un país en desarrollo?

Introduction

It has been said that: “Privacy is at the heart of freedom in the modern state”, but, what is the meaning of the term privacy? According to Webster’s Dictionary the linguistic meanings are:

1. a) the quality or state of being apart from company or observation:
seclusion
b) freedom from unauthorized intrusion (one’s right to).
2. archaic: a place for seclusion.
3. secrecy.¹

In the classical legal terminology according to Black’s Law Dictionary, the right of privacy is:

“The right to be let alone; the right of a person to be free from unwarranted publicity; and right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned”.

The term right of privacy is a generic one encompassing various rights recognized to be inherent in the concept of ordered liberty. Such rights prevent governmental interference in intimate personal relationships or activities protect the freedoms of individuals to make fundamental choices involving themselves, their families, and their relationships with others and the rights of individuals (or corporations) to withhold themselves and their property from public scrutiny, if they so choose. The right of privacy exists only in so far as it is consistent with law and public policy, and in a rightful case equity will prevail, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain or malice”². According to the same source, the invasion of privacy encompasses acts such as “the unwarranted appropriation or exploitation of one’s personality, publicizing one’s private affairs with which the public has no legitimate concern, or wrongful intrusion into one’s private activities, in such a manner to cause mental suffering, shame or humiliation to person of ordinary sensibilities. The violation of the right which one has to be left alone and unnoticed if one so chooses. Such invasion by an individual or the government may constitute an actionable tort³. The invasion of privacy is perpetrated by acts such as “eavesdropping⁴ or using a pen register”⁵.

According to modern legal concepts the following aspects of an individual's right of privacy in the context of rights in electronic information, as stated by Thomas J. Smedingoff⁶ are: **“Privacy of a Person's persona:** Certain privacy rights attached to a person's persona – that is, a person's name, identity, photograph, voice and so forth. Any misuse of that persona can constitute an invasion of that right of privacy. **Privacy of Data About a Person:** Privacy rights can also attach to information about a person that is collected and used by others. This might include, for example, information about a person's spending habits, medical history, religious or political affiliations, tax records, employment records, insurance records, criminal records, and the like. Misuse of this information by collecting organizations or their customers has often been a source of controversy. **Privacy of a Person's Communications:** There is also, in certain situations, a right of privacy with respect to online communications sent to or from an individual. Thus, in certain circumstances, monitoring or disclosing the contents of an electronic communication by anyone other than the sender or the intended recipient can constitute an invasion of privacy. **Anonymity:** Finally, there is the ultimate form of privacy “anonymity.” Anonymity often plays an important role in online electronic communication. The extent to which anonymity is a right, and ought to be respected, is also the subject of much controversy”⁶.

According to modern jurisprudence the privacy of a person's online communications may be violated by the unlawful interception of electronic communications, the unlawful accessing of stored electronic information and communications⁷ and the unlawful divulgence of the anonymity of a person.

On the *De Jure* side, the right of privacy is regulated both internationally and nationally by many legal tools such as: International treaties and conventions, directives, national constitutions, national acts, legislations, regulations, etc. describing rights and prescribing penalties for the offenders (if caught). Contractual undertakings could be a protective element between contracting parties. Self-regulation measures are also available to control the behaviour of the members of groups with special interests, but with a lesser effect. The protection of privacy on the networks is provided on the *De Facto* side by technological devices and procedures in the realm of communication security comprising: physical security, encryption, TX security, emission security⁸. Information and communication security is the first and most effective line of defence to protect privacy on the networks, to safeguard communications from the six Es: error, embezzlement, extortion, enmity, espionage and ego⁸. Such security needs to be followed in order of effectiveness by legal deterrents and ethics consecutively.

The invasion of privacy on the networks

Before embarking on this short trip through the legal framework of the ways and means for protecting the Right of Privacy on the networks, we should start by viewing some socio-economic factors, which are at the roots of this issue and which culminate in a behavioural problem. The impacts of globalization, relativism, the new world order, materialism, egocentrism, hyper consumerism, invasive technologies, the uncontrollable flood of information, the advent of genetic manipulation and perhaps genetic control, the corrosion of the notion of the sacred in modern post-industrial societies and many other factors have shaken value systems in each and every society. The insatiable greed for more instant pleasure, which is not in itself a sin, has added a spinning – or even a cataclysmic – potential to the tempo of change. This uncontrollable hyper acceleration in all areas of life including cyber crime, leads some to believe that a rational, utilitarian scale of values could be found to govern human behaviour. But let us remember that Auguste Comte (Catéchisme Positive) did not solve the problem. Because of the gap between theory and practice, ideologies also failed. The human being cannot be ethically perfect; philosophers do not rule the world and the pure rational human being does not exist. The paradox between stability and change remains and perhaps the tools of global behavioural control will prevail in the future, eliminating in their own way what is known as free will.

We return to the privacy issue by examining some practices which are sometimes illegal and sometimes legal and which have an impact on privacy on the networks:

Sautter reports that “To prevent the loss of hundreds of thousands of dollars in wasted man-hours and bandwidth more and more employers are using special software to monitor their employees’ Web browsing and e-mail traffic”⁹.

Marketers can spy on you by using cookies. A cookie is a unique text file that is placed on your hard drive the first time you access certain websites. It is like a personal serial number used to identify your computer on your next visit to the site but the cookie also enables the marketers to gather information about your browsing preferences. According to the Washington based privacy research group EPIC, 86 out of 100 tested online companies work with cookies. “The gathered information about the customers could be sold to other persons or entities”¹⁰.

Hackers can spy on you by using Trojan horses coming in the guise of backdoor computer programmes which once infiltrated into your computer allow hackers to access it and take control¹¹. Hackers can even spy on your E-mail as it passes through the several web servers. “At any of these relay points, your message is vulnerable to snooping. Skillful hackers can also hijack a router and then read or mess around with the text messages stored in it. Sniffer programmes may scan traffic for specified terms, cyber snoops can capture Internet account login identities and passwords and use them to surf the web at the owner’s expense and web based E-mail services are particularly open to intruders”¹².

Some sovereign states run electronic surveillance systems around the world and scan the web for signs of criminal activity, monitoring E-mail communications eavesdropping on chat room conversations and generally tracking the traffic on the net. Echelon, a massive cold war-era surveillance network run by the intelligence services of the U.S., U.K., Canada New Zealand and Australia, is the world's most extensive spy system for nonmilitary targets and the one most likely to be watching as you roam the Web. Some 90% of Net traffic is said to be scanned by Echelon. Several countries also run their own national Web surveillance systems¹³. According to Duncan Campbell "the Echelon system can access and process all of the world's satellite communications automatically"¹⁴. A large part of Echelon is devoted to the intelSat network of Geo stationary communications satellites. Cable tapping is harder, however, as with cryptography itself Echelon is fighting a losing battle. As more and more phones become low power digital devices, the range over which they can be monitored and the effort needed to decode them increases, a brand new wireless technology called pulse wireless – already used by the security services – promises to make many transmission virtually undetectable"¹⁵. By autumn of this year, the Echelon interception system will be subject to a legal battle that threatens to blow the gaffe on this covert surveillance network when the issue reaches the courts. David Nataf of the Jean Pierre Millet law firm in Paris is leading the assault on America's National Security Agency (NSA). The plaintiffs, several French corporations and individuals who cannot be identified, allege that the NSA has spied on them illegally". He says his team has enough evidence against the NSA to pursue damages for lost business and for illegal covert activity. At the centre of the allegations is evidence implicating the NSA's involvement in spying on European nations' commercial dealings. Nataf's team will try to convince the American courts that stolen information was passed onto US companies, giving them an unfair advantage over their French competitors. In March 2000, a former CIA director, James Woolsey, confirmed that the US monitors European communications to keep an eye on any economic bribery activities. "We have spied on that (bribery) in the past," said Woolsey responding to the (Interception Capabilities 2000) report presented to the parliament's Citizens Rights Committee. "I hope that the United States government continues to spy on bribery"¹⁶. The controversial impact of Echelon was also apparent on a broader platform when, in July 2000 the European Parliament voted to set up a Temporary Committee of inquiry on the Echelon interception system¹⁷.

"Governments may not be the only ones spying on citizens' secrets." It is suggested that **multinational companies** may have taken their cue from Echelon and are carrying out their own surveillance work. Some have suggested they may even cooperate with secret government snooping. Industrial espionage is not a new phenomenon, but as information becomes ever more vital to companies and integral to their practices it is easy to see that the incentives are greater than ever. A Scientific and Technical Options Assessment (STOA) report called *Development of Surveillance Technology and Risk of Abuse of Economic Information* presented to the European Union December 1999 concludes that:

“Although it is very difficult to quantify the losses caused by industrial espionage, the losses incurred by European firms can reasonably be put at several billion Euros per year”¹⁸.

These are some of the issues affecting the right of privacy on the networks. The matrix of interceptors includes individuals, corporations, multinational companies and even sovereign states. Efforts are being made to inquire into these interception activities and even to condemn their acts as infringing the right of privacy on the networks and in global communication.

Fact or fiction. As with any issue involving communities at large, these are a multitude of interception techniques. Some even sound extremely credible and others are generally discarded as unimaginable at the current state of technology. Duncan Campbell’s study (**Interception Capabilities 2000**) attempts to portray the current technological capabilities available. A summary of the key findings concerning the state of the art in Communications intelligence (Comint) are: “Comprehensive systems exist to access, intercept, and process every important modern form of communications, with few exceptions; Contrary to reports in the press, effective (word spotting) search systems that have the capability to automatically select telephone calls of intelligence interest are not yet available, despite 30 years of research. However, speaker recognition systems – in effect, (voiceprints) – have been developed and are deployed to recognize the speech of targeted individuals making international telephone calls; Recent diplomatic initiatives by the United States government seeking European agreement to the (key escrow) system of cryptography masked intelligence collection requirements have formed part of a long-term program which has undermined and continues to undermine the communications privacy of non-US nationals, including European governments, companies and citizens; there is wide-ranging evidence indicating that major governments are routinely utilizing communications intelligence to provide commercial advantage to companies and trade”¹⁹.

The legal protection of the right of privacy on the networks in the modern world

In this part the legal aspects of the protection of privacy on the networks will be studied on the basis of the legal tools providing so-called protection. The law has a functional role to play by deterring any potential perpetrator from committing a criminal act and it also has a curative effect in deciding on compensation for damages if an illicit act is committed. As previously mentioned the legal texts covering this area are very varied and they constitute the two sides of one coin. One side is information protection laws and the other is telecommunications protection laws. Their symbiotic effect produces legal deterrents and protection.

In order to be criminalized and therefore penalized by the law, the acts of violation of the right of privacy should constitute crimes in conformity with the old Latin rule (*Nullum Crimen, Nulla Poena Sine Lege*). We should bear in mind that criminal law texts are interpreted very strictly (*stricto sensu*). In the modern world, on the international level, there are international agreements and conventions such as: I-The Universal Declaration of Human Rights in which Article 12 states that: “No one shall be subjected to arbitrary interference with his privacy,...or correspondence,...Everyone has the right to the protection of the law against such interference”. A key word in this Article is (arbitrary). Lawful interference is not excluded. II- The International Covenant on Civil and Political Rights. This UN Covenant builds on the Universal Declaration and is legally binding. By Art. 2.1, the Contracting Parties are obliged to respect and ensure all of the rights recognized by the Covenant, and by Art. 2.2 they are required to take steps to meet their obligations within their own legal systems. Art. 4 allows Contracting Parties to derogate from some of the specific Articles (i.e. Rights) in a Public Emergency. Article 17 states that: “No one shall be subjected to arbitrary or unlawful interference with his privacy” and that: “Everyone has a right to the protection of the law against such interference”. This appears to address only natural, not legal persons and reinforces the idea that lawful interference is permitted”²⁰.

The second layer of legal sources comprises national legislations either enacted by parliament in the form of laws and acts or in some countries by means of presidential decrees and in this context, we examine the situation of the legislation in some developed countries. In the U.S.A., privacy on the networks is protected by “the Federal Electronic Communications Act (ECPA), which protects all forms of electronic communications – telephone voice communications as well as computer digital communication. ECPA applies to the government as well as to private persons and entities. It prohibits any person from intentionally, intercepting an electronic communication, or from disclosing the contents of any intercepted electronic communication unlawfully. It applies not only to hackers but also to those who own and operate such systems such as an internet access provider, a private network operator, the systems operator of a computer bulletin board and the like. ECPA also prohibits any person or entity who provides an electronic communication service to the public from divulging the contents of any communication. The anonymity of communications emanates according to the U.S. Supreme Court from the right to speak anonymously and is protected by the first amendment to the US constitution⁶. ECPA in the USA sets in place a procedure to authorize lawful interception. Network operators and service providers are required by the Communication Assistance for Law Enforcement Act (CALEA) to have the necessary technical facility and to render assistance to law enforcement agencies²⁰. The Foreign Intelligence Surveillance Act of 1978 (FISA) authorized electronic surveillance of foreign powers and agents of foreign powers to protect US national security. The communications targeted need not relate to any crime. FISA surveillance actions are implemented operationally by FBI and the surveillance is classi-

fied²⁰. In addition to these legal tools the Privacy Act of 1974 imposes limits on the collection and use of personal information by federal government agencies⁶. The Privacy Protection Act of 1980 establishes safeguards relating to materials held by a person reasonably believed to have the intention of publishing a newspaper, book, making a broadcast, or similar public communication. The Fair Credit Reporting Act of 1970 regulates information maintained by creditors. The Right to Financial Privacy Act restricts government access to the financial report of any financial institutional customer. The Telephone Consumer Protection Act of 1991 protects the consumer from advertising via e-mail²¹. In addition to this there is a plethora of state laws and regulations.

The situation in the European Union can be clearly seen in the comprehensive study prepared by Dr. Chris Elliot for the scientific and technological option assessment programme of the European Parliament²⁰. According to the executive summary “the EU countries are committed by international treaties, EU decisions and directives and each national country by its national laws. Most countries have legal recognition of the right of privacy of personal data and many require telecommunications network operators to protect the privacy of their users. All EU countries permit the use of encryption for data transmitted via public telecommunications networks (except France where this will shortly be permitted). Electronic commerce requires secure and trusted communications and may not be able to benefit from privacy law designed only to protect natural persons. The legal regimes reflect a balance between three interests: privacy; law enforcement; electronic commerce. Legal processes are emerging to satisfy the second and third interests by granting more power to governments to authorize interception (under legal controls) and allowing strong encryption with secret keys. There do not appear to be adequate legal processes to protect privacy against unlawful interception, either by foreign governments or by non-governmental bodies. A course of action open to the EU is to require telecommunications operators to take greater precautions to protect their users against unlawful interception. This would appear to be possible without compromising law enforcement or electronic commerce”²⁰ ...

The right of privacy on the networks in a developing country (Egypt as a case study)

The right of privacy is governed in Egypt as in many other countries by consecutive layers of legal texts, on both the supranational and the national levels. On the international level, Article 12 of The Universal Declaration Of Human Rights together with The International Covenants On The Civil And Political Rights are enforced according to Article 151 Para 1 of the Egyptian Constitution which stipulates the following: “The President of the republic shall conclude treaties and communicate them to the People’s Assembly, accompanied with a suitable clarification. They shall have the force of law after their conclusion, ratification, and publication according to the established procedure”²².

On the constitutional level, article 45 of the Egyptian Constitution stipulates the following: “The law shall protect the inviolability of the private life of citizens. Correspondence, wires, telephone calls and other means of communication shall have their own sanctity and secrecy and may not be confiscated, divulged or monitored, except by a causal judicial warrant and for a definite period according to the provisions of the law”²². And in the same context Article 57 of the Constitution stipulates: “Any assault on individual freedom or on the inviolability of the private life of citizens and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant fair compensation to the victim of such an assault”²². We would like to state also that before the prevailing Constitution of 1971 the previous Constitutions including the Constitution of 1923 safeguarded the right of privacy by stipulating in Article 11 “It is prohibited to divulge the secrets contained in letters, telegrams, phone communication except in the cases provided for in the law”.

On the legislative level, secrecy and privacy are maintained in several legislations such as Tax Laws, Banking Secrecy Law, Laws pertaining to Correspondence and mail, Laws pertaining to the Civil Status, Laws governing Statistics and Census, the Code of Criminal Procedures, the Penal Code and the Civil Code. (See **addendum 1 to this study**)

From the analysis of the texts of the constitution and legislation mentioned previously, we can conclude the following:

- a) The right of privacy pertaining to personal data and information is protected by both constitutional and legislative texts;^{23,24,25,26,27,28,29}.
- b) Eavesdropping, hacking, and unlawful surveillance by using phone lines as a medium of communication are penalized by the texts of the penal code, in the opinion of the majority of the Egyptian judiciary;
- c) In my opinion, privacy on the networks is in general protected by the texts of the prevailing laws;
- d) To ensure maximum protection, amendments should be made to the text of Article 309 of the Egyptian Penal Code in order to penalize eavesdropping, unlawful intrusion, or penetration or unlawful surveillance of telecommunications since the prevailing law protects phone conversations and the penal law is interpreted in the strict sense (*stricto sensu*);
- e) A new law governing telecommunications is being discussed by the new parliament. This law covers telecommunications. In the draft there is an article governing the secrecy of telecommunications. We shall see the final product after its enactment by the competent constitutional authorities;
- f) Contractual undertakings to safeguard privacy may be added to any contracts.

Further elaboration leads me to assert that the current Egyptian Civil Law clearly provides for the right to demand compensation independently of the right of the state to impose penalties. In Article 50, Egyptian Civil Law stipulates the following: “A person whose rights inherent in his personality have been unlawfully infringed, shall have the right to demand the cessation of the infringement and compensation for any damage sustained thereby”³⁰. And it stipulates in Article 163 the following: “Every fault which causes injury to another, imposes an obligation upon the person by whom it is committed to make reparation”³¹. The sanctity of the right of privacy is thus protected by civil law. If the right of privacy has been unlawfully infringed, the victim of the infringement has the right to demand before a court of law the cessation of the infringement and compensation for any damage sustained thereby²³. The right to receive compensation for damages according to the civil law is a right which is independent of the right of the state to impose penalties on the perpetrator of a crime committed in violation to the Right of Privacy. The perpetrator is penalized if proven guilty by imprisonment and/or fine.

The impact of the conflict of laws and the conflict of jurisdictions on law enforcement

Our modern world is composed of independent sovereign states. Each sovereign state has its own constitution, laws, and competent courts. The result of this is that, each law in each sovereign state determines the material acts that constitute a crime. As state laws differ in general from country to country, we are sometimes faced with the quandary of conflicting laws. Some examples are as follows:

Network intrusion could be considered as a criminal act in one state and not so in another.

One state may have a law penalizing the hacking and interception of messages on the networks and another state may not have any such text.

In the same context, one state may penalize the breaking of its laws by an individual who commits a criminal act on the networks in a country in which the act is not considered criminal. The state may proceed to prosecute the individual in absentia. The trial might result in a guilty verdict and the individual condemned to prison. In that case, how could said state impose the sentence on the perpetrator, who is the citizen of another sovereign state whose laws do not penalize what he or she has done.

An individual who communicates quite innocently on the networks with a person in another sovereign state may have no knowledge of the laws of the country being accessed through the networks. It is possible that the country in question may have a criminal text penalizing this type of behaviour and a legal text stating that ignorance of the law is no defense. Furthermore, some procedural laws in several sovereign states provide for the right to prosecute specific crimes, such as attempts to disrupt national security even if the act is perpetrated

beyond their borders. Accordingly, the conflict of laws is crucial to the governance of legal conduct on the networks.

The conflict of jurisdictions is another issue. Sovereign states may differ in their opinions as to which courts and in which countries are competent courts to try a given case. The law of one country may indicate that a criminal court is competent to try an eavesdropping crime on the networks committed by a citizen of a second country against an individual or an entity in the first country. The second country conversely may consider its courts to be competent since the crime was committed on its territory. A third country might consider competence to lie with a state security court rather than the criminal courts, since the act is considered by the country to be a state security crime (i.e. espionage). In federal states, there may be both conflict of laws and conflict of jurisdictions between state and federal laws, and between state and federal courts.

International treaties and conventions are the tools used in international law to homogenize the legal principles in the different sovereign states and to harmonize the stipulations of the different national laws and to solve conflicts. Due to the international aspect of most of the crimes perpetrated on the Internet or other networks, the reasonable solution, according to some lawyers, would be the governance of the international networks by an international treaty containing positive clauses governing the behaviour of the individuals and entities on the networks and penalizing any infringement such clauses through international prosecution, courts and law enforcement agencies. Such an idealistic approach should give rise to an international judiciary able and capable to issue orders and verdicts enforceable against the perpetrators of any criminal act on the net in any jurisdictions. This is a farfetched solution.

A compromise could be reached by having an international treaty which established the minimum requirements necessary in national laws to safeguard the right of privacy and other rights on the Internet. In many countries including Egypt international treaties and conventions which are signed, approved, promulgated, and enacted by the parliament have the force of the national law. The European model in this context is a successful one, using as it does regional conventions, European Directives etc. The model of the United States of America is that of the balance between laws in the different states of the union and the supremacy of the federal laws. One possible solution would be for jurists and professionals to draw up a model law to be used as an example by sovereign states in national legislation.

Enforcement of the law is however, a crucial area with numerous problems. In order to illustrate the inherent difficulties of law enforcement, some of the more problematic aspects of this issue are given below:

- the anonymity of the perpetrator;
- the quasi-immateriality of the criminal act that has to be proved before a court of law on the basis of laws which are not always designed to tackle cyber crime issues, especially the immateriality of the conduct on the networks and the immateriality of the evidence;
- the technical incapability of most police forces to track and apprehend perpetrators on line;
- the geographical and territorial barriers (where communication is concerned, the world is a global village but where law enforcement is concerned it is composed of geographically distinct continents and countries); and
- the preoccupation of the police force with other types of conventional crimes which are called natural crimes or with other life threatening crimes or national security issues and not with cyber crimes against natural persons.

This enumeration is not complete but highlights some of the more relevant aspects that should be taken into consideration in law enforcement.

Conclusion, remarks and suggestions

At the end of this paper, I would like to state the following remarks and suggested solutions bearing in mind the aforementioned facts:

Remarks:

1. The struggle between individuals or entities seeking to protect their right of privacy and intruders on that right will continue;
2. The technological race between privacy protection techniques and surveillance techniques will continue at least for the foreseeable future;
3. Technical protection remains the most effective line of defence for privacy on the networks;
4. The different modes and degrees of legal protection in different countries, together with the international character of the acts, the conflict of laws and the conflict of jurisdictions constitute an obstacle to the criminalization and penalization of acts constituting violations of privacy on the network;
5. The anonymity of the perpetrator remains an obstacle and the quasi-immateriality of the cyber crime creates a problem for the presentation of acceptable evidence to a court of law;
6. The preoccupation of law enforcement agencies with other crimes which are in their opinion more important than the crimes against the right of privacy is another negative aspect;
7. The unavailability of funds to provide for the technical backing of the law enforcement agencies in their war against intruders is a detrimental factor;

8. The technical aspect of cyber crimes poses a problem to the law enforcement agencies due to the technical sophistication of the acts and the inability of most legal practitioners to define and qualify acts of violation of the right of privacy as illicit acts;
9. Because of possible consequences for national political, economic and social security, some sovereign states have reservations about the right of privacy on the networks. The issue of national security is a relative matter which differs from one state to the other. The declared position of a country may be contradictory to its undeclared position;
10. Hyper materialism and conventional ethics are incompatible.

Suggestions:

1. A multi-disciplinary approach to the protection of the right of privacy is the one available up till now. It combines the propagation of applicable and practical ethical values for conduct on the networks with applicable, legal deterrents penalizing perpetrators for any violation of the right of privacy. This is in addition to the first line of defense, which is the use of technically available devices and procedures to protect privacy on the networks;
2. The perpetual updating and upgrading of techniques for the protection of privacy on the networks to counter innovations in surveillance and intrusion techniques;
3. To remedy the effect of the immateriality and internationalization of acts infringing the right of privacy, their criminalization and penalization should be defined in an international model law or treaty describing each and every criminal act against the right of privacy and setting minimum requirements to be implemented in national legislation;
4. The adoption of a model law for the protection of the right of privacy to be used by sovereign states in their internal legislations in the quest for harmony among the laws of different countries;
5. The conflict of laws and the conflict of jurisdictions should be settled by adopting enforceable international treaties;
6. Extradition treaties should be entered into between sovereign states to facilitate the task of law enforcement and if they already exist, they should be amended to cover cyber crimes;
7. Invasion of privacy should be severely punished: harsh penalties, fines, confiscation of the financial proceeds deriving from the act, the dissolution of the entity involved, in addition to administrative penalties. In addition, the victim should have the right to receive full compensation for damages;
8. To include and define in national legislations the crimes and sentences penalizing the crimes against the Right of Privacy;
9. The continuing education of the legal practitioners involved in cyber crime including legislators, the police prosecutors, judges, and lawyers to give them the minimum knowledge required to understand the basic, technical aspects of cyber crime;

10. To provide law enforcement agencies with the technical capabilities to handle deal with cyber crime at all levels of procedure: investigation, enquiry, accusation, trial, and sentencing;
11. The modification of criminal law to adapt to the facts of cyber crime, especially as far as the legal inspection of the networks and the apprehension and accusation of the perpetrator are concerned;
12. The continuous amendment of the laws protecting privacy on the networks to include any new material or immaterial developments in the field of invasion of privacy;
13. To finance law enforcement on the networks by levying a minimal tax on E. commerce and by using confiscated financial proceeds deriving from cyber crimes;
14. The propagation of utilitarian values increasing awareness of the importance of fair conduct and fair competition in the search for material benefits for and the welfare of all the players.

Last but not least, the practice of real democracy and transparency.

Addendum I

The English Translation of Some Egyptian Constitutional and Legislative Texts Governing the protection of Privacy in Data and Telecommunication

The constitutional legislator stipulated in the 1971 Constitution the following:

- Article 45:
“The law shall protect the inviolability of the private life of citizens. Correspondence, wires, telephone calls and other means of communication shall have their own sanctity and secrecy and may not be confiscated divulged or monitored except by a causal judicial warrant and for a definite period according to the provisions of the law.”
- Article 57:
“Any assault on individual freedom or on the inviolability of private life of citizens and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant a fair compensation to the victim of such an assault.”
- Article 66:
“Penalty shall be personal. There shall be no crime or penalty except by virtue of the law. No penalty shall be inflicted except by a judicial sentence. Penalty shall be inflicted only for acts committed subsequent to the promulgation of the law prescribing them.”

- Article 67:
“Any defendant is innocent until he is proved guilty before a legal court, in which he is granted the right to defend himself. Every person accused of a crime must be provided with counsel for his defense.”
- Article 70:
“No penal lawsuit shall be sued except by an order from a judicature organ and in cases defined by the law.”
- Article 71:
“Any person arrested or detained should be informed, forthwith the reasons for his arrest or detention. He has the right to communicate, inform, and ask the help of anyone as prescribed in the law. He must be faced, as soon as possible, with the charges directed against him. Any person may lodge a complaint to the courts against any measure taken to restrict his individual freedom. The law regulates the right of complaint in a manner ensuring a ruling regarding it within a definite period, or else release is imperative”.
- Article 151 Para 1:
“The President of the republic shall conclude treaties and communicate them to the People’s Assembly, accompanied with a suitable clarification. They shall have the force of law after their conclusion, ratification, and publication according to the established procedure”.
- According to Article 13 of the Civil Status Law 143 for the year 1994:
“All the data and information pertaining to the civil status of citizens included in registers, books, computers or the attached storage media are secret and it is prohibited to examine them or to take possession of them except in the cases stipulated in the law. Data, information, compound statistics enclosed in the registers, books, computers or computed storage media are national secret. It is prohibited to examine them or to publish them except for a national or scientific interest or by written approval issued by the director of the Civil Status Authority or his deputy according to the conditions and procedures specified by the law or by the executive regulations”.
- And according to Article 56:
“The Civil Status Authority should take all measures to safeguard personal data compiled and stocked by way of computers or related way of storages against any hacking, disruption, examination, divulgation, destruction or tempering by any mean or way except in the cases stipulated in the law”.
- Article 74 of the same law stipulated that
“anyone who examines or perpetrates to examine or took possession or attempted to take possession of the data or information contained in the registers or computers or the storage media and next to the computers or altered them by addition, omission nullification, destruction or any way of tempering or made them public or divulgated them contrary to the stipulations and procedures of said laws. We shall be punishable by imprisonment and shall be fined”.

The Egyptian legislator protected the right of privacy in the Egyptian penal code in Articles 166 Bis, 309, 309 Bis (A), 310, 361 by stipulating the following:

- Article 166 bis stipulates:
“Whoever deliberately causes disturbance to others by abusing the telecommunications equipment, shall be punished with detention for a period not exceeding one year and a fine not exceeding one hundred pounds, or either penalty”.
- Article 309 stipulates:
“A penalty of detention for a period not exceeding one year shall be inflicted on whoever encroaches upon the inviolability of citizen’s private life, by committing one of the following acts in other than the cases legally authorized, or without the consent of the victim.
 - a) Eavesdropping, recording, or transmitting via any instrument whatever its kind, talks having taken place in a special place, or on the telephone;
 - b) Shooting and taking or transmitting by one of the instruments, whatever its kind, a picture of a person in a private place.

If the deed referred to in the previous two clauses take place during a meeting, before the eyes and ears of the meeting attendees, their consent shall be presumable.

A public official/civil servant who commits any of the deeds defined in this article, based on the authority of his position, shall be punished with detention.

In all cases the court shall rule confiscating the instruments and other equipment that might have been used in the crime, and also deleting or destroying the recordings obtained therewith.”

- Article 309 Bis-A stipulates:
“Whoever discloses, facilitates the disclosure of, or uses, even non-publicly, a recording or documents obtained by one of the methods prescribed in the previous article, or if it is made without the consent of the concerned party shall be punished with detention. Whoever threatens to divulge any of the matters obtained by one of the aforementioned methods to force a person to carry out or refrain from carrying out some work shall be punished with imprisonment for a period not exceeding five years. A public official, who commits any of the deeds indicated in this article, depending on the authority of his position, shall be punished with imprisonment. In all cases, the court shall rule confiscating the instruments and other equipment that might have been used in the crime, or by which the recordings or documents have been obtained. Also the ruling shall enforce the deletion or destruction of the recordings obtained through the crime”.

- Article 310:
“Whoever among the physicians, surgeons, pharmacists, midwives, or others with whom a secret is deposited by dint of his profession or position, or to whom it is confided, then he discloses it in other than the cases wherein the law obligates him to report it, shall be punished with detention for a period not exceeding six months or a fine not exceeding five hundred pounds. The provisions of this article shall not apply except in the cases where it is not legally authorized to disclose and divulge specific matters as prescribed in articles 202, 203, 204, and 205 of the Procedure Code, in civil and commercial matters”.
- Article 361 stipulates:
“Whoever deliberately destroys or damages fixed or movable property he does not own, or makes them unsuitable for use, or makes them inoperable in any way, shall be punished with detention for a period not exceeding six months and a fine not exceeding three hundred pounds, or either penalty. If the act results in a financial harm amounting to fifty pounds or more worth, the inflicted penalty shall be that of detention for a period not exceeding two years and payment of a fine not exceeding five hundred pounds or either penalty. The penalty shall be that of imprisonment for a period not exceeding five years and payment of a fine of not less than one hundred pounds and not exceeding one thousand pounds if the deed results in hindering or suspending the works of a public utility department, or in risking the health and security of the people. The ceiling of the penalties shall be doubled if the crime is committed in execution of a terrorist end”.

The legislator stipulated in the Civil Code the following:

- In Article 50:
“A person whose rights inherent in his personality have been unlawfully infringed, shall have the right to demand the cessation of the infringement and compensation for any damage sustained thereby”.
- In Article 163:
“Every fault, which causes injury to another, imposes an obligation to make reparation upon the person by whom it is committed”.

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Protecting human dignity in the digital age: freedom of expression through choice mechanisms

Any desire to create an ethical framework for the Internet based on user-enabled choice must be predicated on the enormous challenges posed by such an action. Numerous international consultations are showing that clear policy guidelines are needed in the increasingly open, interactive and global information context. Such guidelines should cover all aspects of the global information networks – technological and economic, but also educational, scientific, cultural and social. This paper investigates a set of mechanisms for user-enabled choice and normative claims on the Internet.

A tradition of decentralized participation in the creation of socio-technical systems encourages individual users to add new content and tools to the system as a whole – the unified operating authority is replaced by a contradictory, and even chaotic form of control. Structural and systemic elements, such as web filtering systems, are examined for they represent ‘acknowledged conditions’ to uphold freedom of expression through ‘choice mechanisms’. If the Internet is to remain an innovative means of collaboration, discovery, and social interaction, it will need to build upon its adaptability and its participatory design.

Protéger la dignité humaine à l’ère numérique : assurer la liberté d’expression grâce à des mécanismes de sélection

Toute volonté de créer pour l’Internet un cadre éthique fondé sur l’offre de moyens de sélection aux utilisateurs doit tenir compte des énormes défis de cette entreprise. De nombreuses consultations internationales font ressortir la nécessité de directives politiques claires face au caractère de plus en plus ouvert, interactif et mondialisé du domaine de l’information. Ces directives devraient couvrir tous les aspects – technologiques et économiques, mais aussi éducatifs, scientifiques, culturels et sociaux – des réseaux d’information planétaires. Dans cet exposé, on analyse un ensemble de mécanismes permettant aux utilisateurs d’effectuer des choix et de faire valoir certaines normes sur l’Internet.

La tradition qui veut que la création des systèmes socio-techniques s’effectue de manière décentralisée encourage les utilisateurs individuels à ajouter de nouveaux contenus et de nouveaux outils à l’ensemble du système, substituant à une autorité de gestion unifiée une forme de régulation contradictoire, voire chaotique. Les éléments structuraux et systémiques tels que les dispositifs de filtrage du Web sont examinés, en ce qu’ils constituent les « conditions reconnues » de la sauvegarde de la liberté d’expression grâce à des « mécanismes de sélection ». L’Internet va devoir faire appel à toute son adaptabilité et à sa capacité de conception participative afin de demeurer un moyen novateur de collaboration, de découverte et d’interaction sociale.

Proteger la dignidad humana en la era electrónica: amparar la libertad de expresión mediante mecanismos de elección

Todo afán de crear un marco ético para Internet basado en la posibilidad de que los usuarios dispongan de medios de elección debe tener en cuenta los grandes retos que plantea semejante empresa. Numerosas consultas internacionales están demostrando que se necesitan orientaciones políticas claras en un contexto en el que la información se caracteriza por ser cada vez más abierta, interactiva y universal. Estas orientaciones deberían abarcar todos los aspectos de las redes de información mundiales, es decir, tanto los tecnológicos y económicos como los educativos, científicos, culturales y sociales. En esta comunicación se analiza un conjunto de mecanismos que permiten a los usuarios elegir y hacer valer determinadas reglas en Internet. La corriente defensora de la participación descentralizada en la creación de sistemas sociotécnicos alienta a los usuarios individuales a añadir nuevos contenidos e instrumentos al conjunto del sistema, reemplazándose así una administración unificada por una forma de control contradictoria, e incluso caótica. En esta comunicación se examinan los elementos estructurales y sistémicos de Internet, por ejemplo los sistemas de criba de la red, habida cuenta de que constituyen las “condiciones admitidas” para mantener la libertad de expresión gracias a “mecanismos de elección”. Para que Internet siga siendo un medio innovador de cooperación, descubrimiento e interacción social, será menester que desarrolle plenamente su capacidad de adaptación y su concepción participativa.

Introduction

Any desire to create an ethical framework for the Internet based on user-enabled choice must be predicated on the enormous challenges posed by such an action. Numerous international consultations are showing that clear policy guidelines are needed in the increasingly open, interactive and global information context. Such guidelines should cover all aspects of the global information networks – technological and economic, but also educational, scientific, cultural and social. To quote from UNESCO, “The goal of the UNESCO INFOethics programme is to stimulate reflection and debate on the ethical, legal and societal aspects of the Information Society.”¹ This paper investigates a set of mechanisms for user enabled choice and normative claims on the Internet. If there is a constant in the short history of the Internet, it is the technological symbol of the “post-modern” culture of the late twentieth century, in which unified authorities give way to multiple stakeholders with complex and contradictory agendas. A tradition of decentralized participation in the creation of socio-technical systems encourages individual users to add new content and tools to the system as a whole – the unified operating authority is replaced by a contradictory, and even chaotic form of control. Structural and systemic elements, such as web filtering systems, will be examined for they represent ‘acknowledged conditions’ to uphold freedom of expression through ‘choice mechanisms’. If the Internet is to continue as an innovative means of collaboration, discovery, and social interaction, it will need to build upon its adaptability and participatory design.

It is perhaps worthwhile to quote from a recent European Union communication: In social terms, the Internet represents significant potential benefits. It offers unprecedented opportunities for empowering citizens, and for connecting them to ever richer sources of digital information. The Internet has been used to great effect in a number of Member States to connect administrations and citizens. Lowering the barriers of entry to the dissemination of information on the local, as well as on the global scale, the Internet allows individuals or associations to publish information about their activities to a wide audience at modest cost. In the field of culture, the Internet already contributes significantly to the creation and dissemination of European digital multimedia content, fostering linguistic diversity, and the *rayonnement* of European cultures in the world. As

exemplified by a number of innovative projects linking libraries, schools and universities in Europe, the Internet is similarly the key to a new “electronic literacy”, and, as such, the cornerstone of the new and far-reaching European Union initiative, the Action Plan “Learning in the Information Society”.²

Having stated this, like any other communication technology, the Internet carries an amount of potentially harmful or illegal content and it can be misused as a vehicle for criminal activities. Although there is not widespread ‘misuse’ of the Internet, there is an impact in a variety of distinct areas. These are covered by different legal regimes and instruments at the national and international level, e.g., national security (instructions on bomb-making, illegal drug production, terrorist activities); protection of minors (abusive forms of marketing, violence, pornography); protection of human dignity (incitement to racial hatred or racial discrimination); economic security (fraud, instructions on pirating credit cards); information security (malicious hacking); protection of privacy (unauthorised communication of personal data, electronic harassment); protection of reputation (libel, unlawful comparative advertising); intellectual property (unauthorised distribution of copyrighted works, e.g. software or music).³

While the benefits of the Internet far outweigh its negative aspects, there are issues of public, political, commercial and legal interest which must be addressed. Reflecting these concerns, recent political discussions in the European Union have stressed the need for urgent action and concrete solutions.

While ethical discussions certainly cannot provide answers to all the technical opportunities presented by the nature of the Internet, they do offer a normative orientation and facilitate the dialogue with a concerned public. There are many specific technical mechanisms deserving attention. One such mechanism activates Internet Service Providers (ISPs) in a new form, giving them the *option* to provide users⁴ with the *choice* to control the content delivered over the Internet. Rather than retrieving items from the Web, filtering systems are used to selectively restrict access to materials on the Web. Such systems may be used to ‘filter out’ Web sites or Web pages that contain material that is objectionable to a community of users. Such systems could be used to restrict access by users to sites containing pornographic material or hate material.

The user – enabled measures outlined in this paper have their own shortcomings; taken literally, we suggest a relative examination of control – the deployment of content control as a reflection of individual, community and social policies and preferences. We suggest measures that promote the following principles:

Communication Principle

- *The right of communications as a fundamental human right*

Free Expression Principle

- *States should promote the right to free expression and the right to receive information regardless of frontiers.*

If users have the *choice* to control the content delivered to them, a social code of conduct has been created. The momentum of large-scale socio-technical systems, such as codes of conduct, offer a hierarchical framework for the interpretation of conduct. Alfred D. Chandler in *The Visible Hand* a monumental study of modern enterprise, presents documentation to defend the hypothesis that the construction and day-to-day operation of many technical systems in the nineteenth and twentieth centuries require the development of a particular social form – a large-scale hierarchical organization administered by powerful agents.⁵ Chandler points to ways in which technologies ‘demand’ or ‘require’ this form of human association. The only conceivable arrangements of power and authority made possible by the nature of the Internet are those of decentralized, democratic user self-management. It is not possible to settle the issues raised by Chandler in the management of the Internet within this paper alone. The interesting question, however, has to do with whether or not this pattern is in any sense a requirement of such systems, especially a system such as the Internet.

The matter ultimately rests on judgments about and interpretation of the steps which are necessary to protect human dignity in the digital age. Was Plato right in saying that a ship at sea needs steering by a decisive hand and that this could only be accomplished by a single captain and an obedient crew? The captain exists through user empowerment. In the content area, this translates into providing users with the means to control content in their own homes.

If the political language for evaluating and accommodating information technology includes categories only of tools and uses, if it does not include attention to the meaning of the mechanisms of filters, then we will be blinded to much that is ethically crucial. Monitoring of codes of conduct prove to be most intractable because they demonstrate the significance of the entrenched interests that have guided technological and social choices and development made early on in the innovation of the Internet. Information technology has not only been investment through structure, but it has also been investment by users of conduct and skills. To integrate codes of conduct would not only shoot down the expected social investment on the Internet but also threaten the interests and integrity of the users. A symbolic demonstration of user enabled choices must be demonstrated in order to promote answers to imperative questions: Whose strategy? Whose choice? During this time of innovation, codes of conduct, the realities, significance and consequences of barriers to access, whether publicly or privately created, must be explored.

Social choice arguments provide a partial depiction of the process through which technological choices are made and implemented. John Child in *Organization Structure, Environment and Performance: The Role of Strategic Choice*⁶ portrays strategic choice, and strategy formation in general, as an interpretive process by organizational leaders. What distinguishes those leaders, however, is the power they possess to enact their interpretations as plans and directives that structure the organization. In this sense, Child makes an important and very relevant point: the behaviour of organizational leaders is as likely

to be affected by broadly normative, ideological, and political considerations as is that of any other organizational or group member. In this formulation, he builds into the concept of strategic choice a conception of politics that goes well beyond simple self-interest to include distinctive perspectives or beliefs about how people and organizations ‘should’ work.⁷ Given this conceptual base, rooted in a strategic choice initiative is the mediating role of organizational process and politics in relation to technological choice. The value of social choice perspective resides in its insistence on the inclusion of social and organizational contexts as mainstays in the analysis of technological change.

We draw attention to the active role that peer-to-peer socio-technical relations will play in influencing, if not directly determining strategic choice initiatives. Essentially, peer-to-peer communications takes away the Internet service provider (ISP) as the middleman. This means that you and I can communicate directly as long as we both have Internet protocol (IP) addresses and we know each other’s address. Therefore, the only filtering technologies that would apply would be black and white lists in the browser, label processing in the browser and restricted access at the server.

This is important because it would mean that the government could not impose filtering at the ISP level. However, it also means that we could not stop people accessing sites that teach them how to build bombs. Technology is always a two-edged sword.

As explained by Oram: “In various ways [peer-to-peer communications] return content, choice, and control to ordinary users. Tiny end points on the Internet, sometimes without even knowing each other, exchange information and form communities. There are no more clients and servers – or at least, the servers retract themselves discreetly. Instead, the significant communication takes place between cooperating peers. And thus, starting around early July 2000, the new Internet model was dubbed peer-to-peer.”⁸

Technology partnered with normative claims uncovers and extends fields where ethical problems have not previously been raised. An attempt to clarify both the legal framework and the current practices of the industry continues.

Filtering methods

We feel that the question is not how to use technology to enforce legal statutes (countries have laws for defining what is legal and what is not) but rather as a way to ensure, as far as possible, that *unintentional access* to possibly legal, but nonetheless objectionable material, is minimized, particularly for children.⁹ There is an array of technological approaches available that can be deployed both at the Internet Service Provider (ISP) level and at the home or school level. The control mechanisms that ISPs have the *option* to provide and the control mechanisms that users can *choose* to utilize, were the subject of a report by two of the current authors.¹⁰ There are a variety of types of control mechanisms available and they are described below. We are not entering into the

debate on whether or not there should be censorship on the Internet. That is a debate which is taking place elsewhere.

ISP control mechanisms have significant promise for providing content management, especially if they place some control in the hands of users. These mechanisms provide a more technologically robust system upon which parents can place greater reliance than on desktop filters. Although desktop filtering technologies may be more prone to tampering, they empower users to control the content at a finer level than would be expected from an ISP. These technologies, however, are not 100% effective in that they can be circumvented by computer-adept people. They cannot be relied upon to filter effectively all undesirable content and they may filter out some desirable content unintentionally. Nevertheless, these technologies provide an important part of the user's content-control tool kit. Whether the control is managed remotely at the ISP or locally on the desktop, transparency and knowledge of the mechanisms deployed is important. Users need to understand what is being filtered, when it is being filtered, and why it is being filtered.

The premise behind such filtering is that it is better, particularly for young children, to miss some material than to get offensive material. However, filtering mechanisms are difficult to maintain in an environment in which new material is constantly being added and new Web technologies continue to be developed. To operate effectively, filtering systems must acquire and maintain, *over the long term*, accurate knowledge not only about the users but also about the Web sites and Web pages.

Overview of core technologies and application classification

There are a number of ways that access to content on the Internet can be controlled, and these rely on one or more underlying core technologies. Applications typically combine core technologies and can be situated at the level of the ISP, that of the client, or both. To date, there is no clear recommendation as to the best method or even where it is best applied. There is no "silver bullet" here. Nonetheless, users must be informed of their options and risks and, where feasible, involved in the process.

The core technologies include the following:

- *Site labels.*
Labeling refers to schemes to assign content related labels to URLs and/or specific Web pages. Individual rating protocols exist, in general, separate from products or applications using these ratings. Once a label schema has been chosen by a service or a community, then a language, such as Platform for Internet Content Selection (PICS)¹¹ is required to implement that schema for individual Web pages. In general, these labels can be

stored as part of the Web page or separately from the Web page in a database. Labels may be the result of self-rating, third-party authority rating, or community rating by interested users.

- *Lists of appropriate or inappropriate sites (“white” and “black lists”).*
The most frequently used content control mechanism is the use of lists of acceptable and/or unacceptable URLs. “White” lists are used to define a domain of “safe” Web sites within which users can browse. These typically require people to search and select sites that are approved by the provider of the list. “Black” lists are lists compiled of URLs from which requests will not be serviced. In almost all cases the lists are compiled by people either working alone or as communities of raters.
- *Automated text analysis.*
Another way to analyze a Web site is to use software that scans the text of a site to determine the relevance or suitability of pages. Users or groups of users have profiles of interests (positive and/or negative), consisting of keywords and phrases, that are used in this determination. Almost all content based filtering uses some variation of keyword matching, where keywords from a profile of interest are compared against the keywords occurring in the content of the specific Web page. Text analysis is also used to screen search terms from search queries.
- *Authorization.*
Encryption, password protection, and credit card validation techniques are used to authenticate that a user has the authorization to access given services or data. These techniques are described further below.
- *Activity tracing.*
Internet usage can be traced by using the server log files and other data logs. These files store details of all Web accesses and can be used to analyze web-related activities.

The types of content control applications that are built on these underlying technologies include the following:

- *Special purpose browsers for children.*
Browser applications, such as SurfMonkey,¹² are targeted to child users. Such applications can provide easier search strategies and friendlier graphics, remove advertisements, and provide filtering and search-safe domains in a way that makes it transparent to the user.
- *Child-friendly search engines and portals.*
The idea behind both special purpose child-friendly search engines and portals is to use a third party gateway to Web content. Child-friendly portals, such as Yahoo!igans¹³ are Web access sites that try to provide a

domain of safe sites for the user to explore. As long as the user comes in through the portal, they view a pre-selected domain of the Web.

- *Proxy applications.*
Application software can be added to server proxy modules that permit the execution of text analysis and URL list comparisons on every Internet browser request and response.
- *Activity monitors.*
Rather than restrict or control access to Web sites proactively, these applications monitor and log Internet activity for parental review. Software¹⁴ is also available to ensure the protection of the identity of children as users of the Internet.
- *Restricted access applications.*
Applications residing on the host site that restrict access to services or data on that site to authorized users can be written. Data may be encrypted so that only authorized users can decrypt and view the data. Login names and passwords may be assigned to authorized users of sites with restricted data. A host site may require a user to provide a valid credit card number¹⁵ or some other proof of age before allowing access to the site. New biometric algorithms and hardware devices are being developed to uniquely identify users using, for example, finger scanning, retina scanning, and voice print, and user's individual typing rhythm¹⁶.
- *Non-HTTP applications.*
Applications can be written using these core technologies to control content of email and to control access to File Transfer (FTP) sites, telnet hosts, discussion and chat groups, and newsgroups. Email filtering applications focus on email spam (flood of copies of messages) and email content filtering. Spam filtering uses rules to scan the headers of incoming messages to eliminate likely spam messages. Content filtering is a finer grained inspection of the message contents, typically using a profile of keywords. For more control, email applications, such as *Email for Kids*¹⁷ give the parent control over both incoming and outgoing messages. News server filtering, such as for UseNet, is largely accomplished using two core technologies: lists of acceptable/not-acceptable newsgroups to block at the newsgroup level, and keyword based filtering. *FTP* can be controlled by preventing any ftp access, controlling the sites, or the use of user identity and password. Since telnet is remote access of a user to his or her own account on a remote computer, the main control mechanism available is disallowing telnet access at a firewall. Controlling access to discussion groups, chat rooms, and instant-messaging applications is generally achieved by using access lists. Often these control features are bundled with other control features in broader applications such as NetNanny or SurfMonkey.

Potential of the core technologies

All of these core technologies have a role to play in control mechanisms for the Web. *None of these core technologies provides a long-term solution on its own.* Systems will need to combine the technologies in innovative ways to provide effective solutions within well-defined contexts. In particular, we note that:

- *Site labeling* systems are the most flexible and perhaps hold the most promise for the future. Labels may be generated by the content provider, third party rating services, communities of users, or individual users. Software at the ISP and/or client level then uses the labels that have been assigned. Questions arise as to the completeness of label coverage in a billion-page Web domain and the quality of labels, i.e., who generates them and who guarantees them.
- *URL lists* are the most effective in controlling domains of access. This method is particularly good for creating child-friendly sites. However, the use of lists does not provide the flexibility of labels and the Web is growing so quickly it is very hard to keep lists up-to-date and accurate.
- *Content Filtering* by automated analysis of the content of Web sites is problematic at best, due to the vagaries of natural language, the difficulties of cross-language filtering, and the difficulties of determining the content of graphics and images. Although using this technology to assist in the labeling of sites based on text categorization techniques does hold some promise.
- *Access authorization* can be effective as a reverse filter, restricting who can have access to a given site, yet many problems, both technical and non-technical remain. Encryption schemes, such as Public Key Infrastructure (PKI) or Private Key Algorithms (PKA) require the client to be in possession of a valid key in order for the decryption to occur. Users wishing to access data or transfer data sites with user identities and passwords must first obtain these and then keep them. The use of credit cards or proof of age cards over the Internet is problematic at best. Clearly many people over 18 do not have credit cards and there then exists the need to ensure that the user is the actual owner of the credit or proof of age card. Australia¹⁸, for example, has proposed the use of credit card validation to verify that a person requesting access to adult material is 18 years of age or older. There is a real concern over privacy with the application of this technique within Australia.¹⁹
- *Activity tracing* monitors what has been done, rather than actually filter out any material. Issues of privacy must be addressed here as well.
- *Non-HTTP applications* rely generally on lists of blocked or accepted sites, keyword filters, and user identities and passwords. As noted above, none of these techniques works particularly well. The access control for discussion groups, chat groups, and I Seek You's (ICQ's) centre on the appropriateness of the community of users of particular group in question.

It must be emphasized that none of the above technologies is 100% effective and that the content of the Web is, by its very nature, volatile. In order to be (more) effective, these technologies have to be used in combination and in layers, both by the ISP and the client. For instance, a combination of labels and URL lists can be used at the ISP level in conjunction with a final filter using local lists and/or automated analysis techniques at the client level.

Summary

In general, content control mechanisms can be applied proactively or reactively. These mechanisms are not distinct with respect to whether applied in a proactive or reactive manner, but the application philosophy differs. ISPs and third party authorities are more likely to be able to provide *proactive* services while ISPs and clients are more likely use the reactive mechanisms. Proactive or pre-search control mechanisms refer to pre-search result activities that collect information that may be used to prevent the retrieval of inappropriate Web pages or to define domains of appropriate Web sites for communities of users. Proactive control mechanisms include: the creation, storage, and use of labels, and the creation of lists of good and bad URLs. Both labels and URL lists require significant investment in resource identification and the discovery of both suitable and unsuitable sites. *Reactive* or post-search control refers to the analysis of URL domain names, metadata, or content after a Web search has been executed. Post search control mechanisms may also use URL lists and assessment of label information associated with a given page. In addition, post search may use a content based filtering technique to analyze the actual content of pages returned by the search and on that basis allow or restrict access to pages.

While virtually all of these techniques can be implemented by an ISP, it is important that use of filtering be transparent to the user community. The user should understand what is being filtered, when it is being filtered, and why it is being filtered. The potential for shared and informed Web content filtering has not yet been realized and a co-operative approach of policy and technology will be needed to meet that goal.

In spite of the above-mentioned filtering mechanisms, the following issues remain to be addressed.

Freedom of expression

The first and most important principle for our discussion is the freedom of expression. Various legal consequences appear to be:

- Most ISPs are responsible for the content that they produce and place online in their name;
- As Internet users may freely express themselves on the Internet, they are responsible for their own behaviour;

- ISPs, who are not responsible for the content placed online by their users, expect them to respect their General Terms;
- In practice, personal pages, which may be changed at any time by the author, cannot reasonably be the object of the systematic and exhaustive control by ISPs over their content, their rights, and their links to other sites. Through reports provided by users, ISPs have the capability of detecting litigious contents, and remove them according to their General Terms;
- ISPs are not the authors or editors of content produced and placed online by third parties;
- Within newsgroups (which are unmoderated spaces for public discussion) ISPs do not have the means to prevent the creation of discussion groups, which they do not initiate. Therefore, their secondary involvement can only be after the appearance of illegal discussion groups. ISPs may block the spread of discussion groups that do not conform to their General Terms of Use or upon judicial injunction. However, the filtered groups may remain accessible from other access providers abroad.

Protection of minors

The concern for protection of minors is widely shared

Some countries address the protection of minors from harmful content in their codes of conduct, promoting best practices such as ensuring that content which is unlawful or impermissible is not accessible. Other countries address this concern mainly through co-operation with public authorities or private organisations that run hotlines.

Codes of conduct have in common the same coercive mean, which is the expulsion of a member. However, the filtering systems identified above indicate the following:

From a technical perspective, content can only be removed by:

- the author or
- the hosting ISP.

From a legal perspective, removal of content can be obtained from:

- the author,
 - on his or her own initiative or
 - following advice of a non judiciary organisation,
- the hosting ISP, according to
 - its General Terms, or
 - the judiciary authority assessing the law, or
 - the law enforcement authority as is the case on child pornography in Belgium and the United-Kingdom)

In fact, expulsion is the only legitimate way for a non-judiciary organisation to persuade its members to respect a code of conduct.

Filtering harmful activity or content on the Internet can be technically designed only after normative standards are adopted. Increasingly, it is recognized that the existence of offensive online content – albeit a very small portion of the available online content – may be a significant barrier to the growth and development of universal access to the Internet. In this paper, normative claims and filtering mechanisms have been presented to facilitate approaches of governments, business and civil society in ensuring security, privacy protection and freedom of expression on global information networks. The Internet demands responsibility as much as it offers freedom.

Although codes of conduct are rooted in national contexts, multi-national Internet industry associations share common principles, such as freedom of expression, protection of minors, data protection. They also share common procedures such as expulsion of a member who does not conform with their code of conduct. Understanding the efficiency and the limits of the current codes will allow us to build on the common principles already defined. Although it does not answer all questions the European Union ‘green paper’ on the protection of minors and human dignity is worthy of further examination and development.²⁰

International instruments related to human rights recognize the necessity of concerted and balanced effort for drafting of strategies for the development, evaluation, and maintenance of mechanisms.²¹ It is important to note that in recent years a change of emphasis has taken place in the field of international human rights. The initial focus was on setting standards as well as identifying and denouncing violations of human rights. Now there is an increasing interest in ensuring the effective implementation of human rights instruments. Mechanisms for monitoring the obligations accepted by States and for implementing standard setting are many and varied. Therefore, instruments protecting equality, justice and morality within cyberspace increasingly contribute to a recipe for public administrative and operational services readily accessible by all.

The real test for monitoring the Internet is whether technology-ridden legislation can be implemented and made to work effectively. Codes of conduct should grow and be stimulated nationally first, with consumers, governments and legislature involved. Bottom-up practices based on national concrete practices, i.e. national codes of conduct, must be favoured to a top-down approach. Are global networks, governments or international organisations prepared to take filtering mechanisms to the test? When using ethical frameworks and testing technical methodologies we question the structure – the Internet. The immediate and real challenges facing us have not been fully appreciated, the ethical responsibilities of technology towards society and present and future generations calls for a powerful statement from our generation to the next.²²

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SESSION
SESIÓN

6

FREEDOM OF EXPRESSION
IN ELECTRONIC MEDIA

LIBERTÉ D'EXPRESSION
ET SUPPORTS
ÉLECTRONIQUES

LA LIBERTAD DE EXPRESIÓN
EN LOS MEDIOS
DE COMUNICACIÓN
ELECTRÓNICOS

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David and Goliath revisited: the new corporate threat to freedom of expression

Large companies have traditionally viewed any new media as a threat. Unconventional forms of publishing and speech challenge conventional ways of conducting business. Historically, only an exceptionally small and forward-looking group of companies take advantage of new media. Others resist their implementation, and attempt to use legal mechanisms to frustrate access to such technologies and techniques.

The recent moves by large industry groups and companies to inhibit free expression on the Internet is predictable. Attempts by the film and music industries to paralyse the development of new technologies of consumer content distribution is entirely consistent with their initial responses to photocopier and video technology.

This paper assesses the attempts being made by these industries to curtail content and distribution on the Internet, and discusses the likely result of such moves.

David et Goliath revisités : les grosses entreprises font peser de nouvelles menaces sur la liberté d'expression

Les grosses entreprises considèrent traditionnellement tout nouveau moyen d'information comme une menace. Les modes novateurs de publication et d'expression remettent en cause les moyens classiques de faire des affaires. L'histoire montre que seule une infime poignée d'entreprises clairvoyantes tire parti des nouveaux médias. Les autres s'opposent à la mise en œuvre et recourent aux moyens de droit pour tenter d'empêcher l'accès à ces technologies et techniques.

Les récentes démarches faites par les gros groupes et entreprises industriels pour entraver la liberté d'expression sur l'Internet étaient donc prévisibles. Les tentatives des industries du film et de la musique visant à paralyser le développement des nouvelles technologies de diffusion de contenus aux consommateurs sont tout à fait dans la ligne de leurs réactions initiales à l'apparition de la photocopie et de la technologie vidéo.

Cet exposé soumet à une analyse critique les efforts déployés par ces industries pour restreindre les contenus et la diffusion sur l'Internet et en examine les résultats probables.

Una vez más David frente a Goliat: las grandes empresas ponen de nuevo en peligro la libertad de expresión

Las grandes empresas han considerado tradicionalmente que todo nuevo medio de comunicación representaba un peligro. Las modalidades no convencionales de edición y expresión representan un reto para los métodos tradicionales de dirección empresarial. Se ha demostrado históricamente que solamente un grupo excepcionalmente reducido y clarividente de empresas saca provecho de los nuevos medios de comunicación. Las demás se resisten a implantarlos e intentan utilizar mecanismos jurídicos para impedir el acceso a las nuevas tecnologías y técnicas.

Las recientes tentativas de grandes grupos y empresas industriales para reprimir la libertad de expresión en Internet eran previsibles. Las tentativas de la industria filmica y musical para paralizar el desarrollo de las nuevas tecnologías de difusión de contenidos a los consumidores son completamente coherentes con sus anteriores reacciones hostiles a la fotocopia y la videotecnología.

En esta comunicación se analizan las tentativas de esas industrias para restringir los contenidos y su distribución en Internet, y también se examinan los resultados probables de este modo de proceder.

Introduction

Large companies have traditionally viewed any new media as a threat. Unconventional forms of publishing and speech challenge conventional ways of conducting business. Historically, only an exceptionally small and forward-looking group of companies take advantage of new media. Others resist their implementation, and attempt to use legal mechanisms to frustrate access to such technologies and techniques.

The recent moves by large industry groups and companies to inhibit free expression on the Internet is predictable. Attempts by the film and music industries to paralyse the development of new technologies of consumer content distribution is entirely consistent with their initial responses to photocopier and video technology.

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The new battleground of free speech

Attempts by Western governments to curtail free speech on the internet have largely failed. Internet censorship provisions in the US Communications Decency Act 1995 and the Child Online Protection Act 1998 have been struck down by the Supreme and Federal courts (*Reno v. ACLU* 1996; *ACLU v. Reno* 2000). While some other Western countries are still attempting to censor the net, it is likely that they will achieve little more than to drive the content of some websites on First Amendment-protected US Web servers, where it is only a few milliseconds further away from their citizens.

Some governments, such as those of China and Singapore, have attempted to block certain content (most notably pornography and political commentary) from entering their countries by using firewalls and restricted connectivity. These efforts have not taken account of recent developments in Internet technology, and are likely to fail in the long term because of services that anonymise Internet activity. Any Internet user can connect to services such as anonymizer.com, which will make the task of monitoring and blocking virtually impossible. The growing use of encryption will compound the task of

ensorship. As Internet usage increases in those countries, the reliability requirements of e-business will also force better connectivity.

Future government attempts at censorship may centre around making Web hosts liable for the content they serve, similar in some respects to conventional publishing law. Britain has a “notice and take down” system as a result of a successful defamation prosecution by UK academic Lawrence Godfrey against the Demon Internet Service Provider (ISP) (Lawrence Godfrey v Demon Internet Limited 1999). The US has a similar provision under the Digital Millenium Copyright Act 1998 with regard to copyrighted material. This latter effort is being driven by a new threat to free speech: big business.

The industry challenge

Notice-and-take-down laws have been largely driven by the music industry, which is demanding that ISPs do not allow copyrighted MP3 music files (a compressed data format) to be distributed from their sites. Even MP3.com, who designed technology especially to allow users with legal copies of music to access it over the Internet, has been pursued through the courts by the big labels. The company has agreed to pay royalties to four of these companies, but may have to pay up to \$250m to settle a lawsuit with Universal Music Group

New technology such as Napster has provoked an even more extreme response. The company, which provides an on-line community for the sharing of music, has faced a life-or-death court attack from the Recording Industry Association of America, currently awaiting a decision from the federal Court of Appeal in California.

The film industry has also aggressively pursued those it claims are violating its copyright online. DeCSS, a program written to allow Digital Video Disks (DVD) to be played on Linux computers (an operating system that competes with Microsoft Windows), has been targeted on Web servers all over the world by the Motion Picture Association of America. The MPAA has attempted to obtain injunctions in New York and California courts to prevent the publication of or even linking to DeCSS. These efforts to threaten ISPs extend even outside the jurisdiction of the US courts of law [Young1998]. One of the programme’s authors, 16-year old Jon Johanssen, was arrested at home in Norway and had his computer equipment seized.

The content industries have also expended substantial resources on lobbying legislatures, particularly the US Congress, to pass new laws reducing citizens’ fair use rights that allow limited non-commercial reproduction of copyright materials. The US Digital Millenium Copyright Act has been heavily criticised for banning devices that allow circumvention of copyright control mechanisms even for these limited fair use purposes [Samuelson, 99]. Industry is heavily lobbying the US state legislatures to pass the Uniform Commercial Information Transactions Act, an update to the US Uniform Commercial Code

that governs interstate commerce. This update gives powers to enforce information “licenses” that may exclude fair use rights [Samuelson, 98].

Various music groups have also been taking technical measures to try and stop the distribution of their music via services such as Napster. Metallica and Dr. Dre both monitored Napster’s servers to obtain lists of users making their songs available, and then demanded that Napster block those people’s access. They then have the option to take legal action against any of those individuals. A Xerox Parc study found that only a small percentage of file swappers made their own music files available to others [Adar, 00]: these people would be the obvious first legal targets.

Stopping whistleblowers

Various companies have used technical and legal attacks to uncover the identities behind pseudonymous critics and whistleblowers. In many cases, ISPs will comply with corporate requests for information on their users without any judicial authorisation.

Companies have a long history of using telephone records to identify whistleblowers and other sources of embarrassing information. They are now turning to Internet surveillance for the same purpose. Corporate mail servers may provide copies of e-mails sent and received. The addresses of Web pages visited by employees may also be logged. Many companies are eager to use these powers.

Governments are reluctant to provide protection against such measures. The United States has fought pressure both from its own citizens and from the European Union to pass privacy protection legislation. The United Kingdom has explicitly authorised employee monitoring for a wide range of purposes. It has also provided powers for a large group of government authorities to obtain “traffic data” on Internet users’ activities, and to require ISPs to store such data. This measure has the unintended effect that such information will be available to any organisation willing to bribe unethical individuals with access.

The US and UK law enforcement and intelligence communities have been prime movers in extending these powers to governments around the world via the Council of Europe’s draft Cybercrime treaty.

New technologies

Napster and Gnutella (another popular file-sharing program) have different, but similarly damaging, flaws. Napster uses central servers to index the files available on its users’ hard disks. These central points are easy targets for legal and technical attacks, as the record companies have been quick to realise. Gnutella identifies the source of any file downloaded, providing a target for prospective legal action.

The record industry has been attempting to prevent duplication of music through their Secure Digital Music Initiative (SDMI). Their vision is of a world of music devices – CD players, walkmans, radios – that will refuse to play copies of songs marked by their publishers as “not for copying”. However, attempts to create the building blocks of these technologies have so far failed. Just one group of researchers broke all four of the candidate marking algorithms SDMI had selected. Due to fundamental problems in securing mass-market devices, SDMI is unlikely to succeed.

New file-sharing technologies designed to avoid the weaknesses of Napster and Gnutella are now becoming available to distribute these de-protected songs. Freenet uses a distributed search and copy mechanism that masks the identities of users and caches files so they are available quickly to users around the world. Mojonation allows files to be split redundantly between several users: each split is hard to find, but even if removed can still be reconstituted from other splits if available. It also provides a micropayment mechanism that rewards users who make resources such as disk space available to the network, avoiding the problem of users willing to download but not share files, as identified by the Xerox study.

Conclusion

These new technologies are very likely to overcome the content industries’ censorship attempts. Unfortunately the companies’ determination to change the balance of copyright law in their favour may diminish many other conventional rights in the process. It would be tragic if the content industries adapted to new Internet business models, but left a legacy of restrictive laws before doing so. The business world moves far faster than the legal environment.

It is ironic that media companies have historically been some of the staunchest defenders of First Amendment rights. It would be unfortunate if this was now to change as their profits were threatened.

Copyright is a balance struck between society and authors, not an inalienable right of the copyright holder. The US Constitution allows Congress “To promote the progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” If society feels the benefits of copyright are flowing too heavily to intellectual property owners, it will slowly but surely start to move that balance back in its own direction. Legislators are influenced heavily by lobbyists, but even more by the prospect of large numbers of votes from citizens who may come to resent attacks on their freedom of expression.

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Human dignity in the cyberspace society

With the rise of the Internet and cyberspace, loopholes in national legislative frameworks make the protection of human dignity in the realm of the Web's new media problematical. While seeking to ensure that the principles of freedom of communication and expression are observed, it is important for the protection of humanity, over and above respect for simple moral rules and standards, to ensure that the dignity and privacy of each citizen all over the world are protected. This paper suggests guidelines for devising some practices by way of a code that could encourage governments and civil society to formulate policies and strategies to ensure protection of privacy and respect for the freedom of expression on world information networks. Particular consideration is given to the situation of Africa and the developing countries, which have to face three problems: the low density of the electronic network, unsound legislation and regulations, and the scale of the problem of illiteracy.

La dignité humaine dans la société du cyberespace

A l'heure d'Internet et à l'ère du cyberespace la porosité des cadres législatifs nationaux rend problématique la protection de la dignité humaine à travers les nouveaux médias de la Toile. Tout en cherchant à assurer l'observation des principes de liberté de communication et d'expression, il est important pour la sauvegarde de l'humanité et ce, au-delà du respect de simples normes et règles morales, de garantir la protection de la dignité et de l'intimité du citoyen à travers le monde. La présente communication suggère quelques pistes permettant d'élaborer quelques pratiques en guise d'éthique propre à inciter les gouvernements et la société civile à élaborer des politiques et stratégies visant à assurer la protection de la vie privée, ainsi que le respect de la liberté d'expression sur les réseaux mondiaux d'information. Un regard particulier est jeté sur la situation de l'Afrique et des pays en développement qui font face à trois problèmes : la faible densité du réseau électronique, la précarité de la législation et de la régulation, l'ampleur du phénomène de l'analphabétisme.

La dignidad humana en la sociedad del ciberespacio

A la hora de Internet y en la era del ciberespacio, la porosidad de los marcos legislativos nacionales torna problemática la protección de la dignidad humana a través de los nuevos medios de comunicación de la Red. Al mismo tiempo que se procura garantizar el respeto de los principios de libertad de comunicación y de expresión, es importante para la salvaguardia de la humanidad – y más allá del cumplimiento de simples normas y reglas morales – garantizar la protección de la dignidad y de la vida privada del ciudadano en todo el mundo. En esta intervención se indicarán algunas pistas para la adopción de algunas prácticas de carácter ético cuya finalidad es incitar a los gobiernos y la sociedad civil a formular políticas y estrategias encaminadas a garantizar la protección de la vida privada, así como el respeto de la libertad de expresión en las redes mundiales de información. Se prestará especial atención a la situación de África y de los países en desarrollo en los que se plantean tres problemas: la densidad insuficiente de la red electrónica, la precariedad de la legislación y de la reglamentación y la amplitud del fenómeno del analfabetismo.

Introduction

La dignité humaine dans la société de l'Information s'exprime à travers un ensemble de notions et de principes que l'on retrouve dans le droit à l'image et le droit à la vie privée.

Si cette dignité est considérée comme inhérente à la nature humaine et par conséquent élevée au rang d'un droit universel, sa prise en charge par les législations varie d'intensité dans l'espace et le temps. Plus particulièrement à l'heure d'Internet et du cyberspace, la porosité des cadres législatifs nationaux, due essentiellement à l'extension des nouveaux médias électroniques, rend problématique la protection de la dignité humaine. Cette problématique repose sur plusieurs aspects qu'il convient d'analyser avant de nous projeter en termes de solutions alternatives à un problème au demeurant si crucial, qu'il sera probablement un autre terrain d'expérimentation de la responsabilité collective de l'humanité.

La notion de dignité humaine et la problématique de sa protection sur les nouveaux médias de la Toile

La notion de dignité humaine est relative. Elle varie dans le temps et dans l'espace. Elle repose sur des valeurs qu'il faut rattacher à chaque système culturel. Si le fait de disséquer un cadavre constitue un acte médical vulgaire en Occident, il est une profanation de l'espèce humaine en Afrique. Encore qu'à ce niveau, il faut introduire des nuances en fonction des milieux et des groupes socioculturels considérés.

De même, l'exploitation du corps humain et des parties intimes est considérée en Afrique comme une atteinte grave à l'ordre moral et à la dignité humaine, alors qu'elle est moins choquante sous d'autres cieux, sous réserve de certaines limites. Et l'on peut multiplier à souhait les cas où, en fonction des zones culturelles, telle ou telle autre image sur le Net peut être admise ou considérée comme une abomination.

Tous ces exemples attestent de ce que la notion de dignité humaine varie selon les cultures et dans le temps.

Cependant, on peut dégager un ensemble d'éléments constants dans la définition de la dignité humaine en dehors des considérations ou des nuances spatio temporelles.

Il s'agit notamment :

- du droit à l'image ;
- du droit à la vie privée ;
- du droit à l'intimité ;
- du droit à l'honneur ;
- du droit à la considération ;
- etc.

Comme on peut le constater, la problématique de la protection de la dignité humaine réside d'une part, dans la relativité des éléments constitutifs de cette dignité, variables dans leur essence selon les systèmes culturels, et d'autre part, dans la difficulté à la concilier avec les principes de la liberté d'expression.

La liberté d'expression elle-même suppose théoriquement une absence d'entrave à la circulation du son et de l'image au niveau mondial. Mais comment concilier cette liberté avec la nécessité d'une protection de la vie privée du citoyen ?

C'est à partir de cette interrogation majeure que nous voulons suggérer des pistes permettant d'élaborer quelques règles d'éthique propres à orienter l'action des gouvernements et de la société civile, dans leurs stratégies visant à assurer la protection de la vie privée ainsi que le respect de la liberté d'expression sur les réseaux mondiaux d'information. Dans cet élan, un regard particulier sera jeté sur la situation de l'Afrique et des pays en développement en général.

La dualité entre la liberté d'expression et le droit du citoyen à sa dignité

La liberté d'expression telle qu'affirmée dans l'article 19 de la Déclaration Universelle des droits de l'homme est à mettre en corrélation étroite avec le droit du citoyen, dans son besoin d'exister et de s'affirmer dans la société où il vit.

Cependant l'observation stricte du principe de la liberté de communication sans réglementation conduit à des dérives attentatoires à la dignité humaine. Cette inquiétude est encore plus marquée avec Internet qui ne connaît aucune frontière. L'illustration en est donnée aujourd'hui avec des sites montés par des réseaux pornographiques et de pédophiles.

Il en découle la nécessité d'une démarche normative, avec des règles d'éthique et de déontologie dans la mise en application des principes de la liberté de communication pour protéger l'intimité du citoyen ainsi que sa dignité.

Mécanismes de protection de la vie privée sur le Net

L'autorégulation

Cette auto-régulation avec les limites par ailleurs réelles qu'il faut lui reconnaître, peut se pratiquer au niveau des offreurs ou hébergeur de sites. Ainsi, l'on s'engagerait en tant qu'hébergeurs de sites à «moraliser» l'accueil des demandeurs si les sites et les contenus à abriter présentaient quelques risques d'atteinte à la dignité humaine, en fonction des zones desservies.

La création d'une autorité de régulation supranationale

Cette autorité de régulation du Net assurerait un rôle de surveillance des sites, et d'alerte des autorités investies des pouvoirs légaux de répression (police, justice, etc.). Elle pourrait également être investie des missions suivantes :

- Une visite permanente et tous azimuts des sites;
- La barricade de l'accès aux sites litigieux en considération des règles d'éthique;
- Incitation des offreurs de sites nationaux et extérieurs à exclure des avantages de la Toile, les demandeurs notoirement connus en raison de leur moralité douteuse.

Le développement des législations nationales

Le développement de l'armature répressive au plan national doit viser à donner le maximum de suites judiciaires aux atteintes à la vie privée des citoyens et aux diverses formes d'attaques sur le Net, à travers une législation appropriée. Mais l'efficacité des législations nationales peut être bien limitée en fonction des situations et des difficultés à contrôler le phénomène du Net.

En principe, si l'auteur d'un contenu exerce sa part de liberté d'expression, cette liberté ne doit pas cependant contrarier les valeurs morales, les droits et la vie privée et les intérêts de ceux qui sont susceptibles d'en prendre connaissance.

Par ailleurs, si les seules parties à l'échange électronique sont l'expéditeur et le destinataire, il y a peu de risques de propagation du message. Mais si au contraire, le message est diffusé à plusieurs destinataires, les dommages peuvent être considérables. Et c'est sous cet angle qu'il faut percevoir les risques de dérives, sans que, pour l'instant, il ne soit possible d'entrevoir des parades technologiques à cette propagation tous azimuts du son et des images sur Internet. Il y a là la preuve d'une fragilité de l'action des législations nationales.

Conclusion

Au-delà des questions d'autorégulation ou du renforcement des législations nationales pour protéger la vie privée du citoyen sur les nouveaux médias de la Toile, il y a une mobilisation de la communauté internationale à susciter sur une question si importante qu'elle peut orienter le destin de l'homme.

La présente conférence procède sans doute de ce souci. Mais en particulier, il faut appeler de toutes nos forces l'émergence d'une autorité de régulation supranationale pour donner à chaque peuple du globe la chance d'opérer sur la Toile, les sélections qui conviennent à ce qu'il a comme conception du droit du citoyen et de la dignité humaine.

Il y a de toute évidence sur la question un autre terrain d'affermissement de la responsabilité collective de l'humanité, et c'est pour en avoir pris tous conscience que sous l'égide de l'UNESCO, nous sommes tous ici réunis, chacun apportant sa contribution à la préservation de notre édifice commun qu'est le monde dans sa riche et multiple diversité.

DUNCAN CAMPBELL

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United Kingdom

Interception capabilities 2000

Report to the Director-General for Research of the European parliament Scientific and Technical Options Assessment (STOA) programme office on the development of surveillance technology and risk of abuse of economic information. This study considers the state of the art in Communications intelligence (Comint) of automated processing for intelligence purposes of intercepted broadband multi-language leased or common carrier systems, and its applicability to Comint targeting and selection, including speech recognition. The study was presented as a working document for the STOA panel of the European Parliament (Luxemburg, October 1999).

Les moyens d'interception en l'an 2000

Rapport au Directeur général pour la recherche du Parlement européen (bureau chargé du programme Scientific and Technical Options Assessment) sur le développement des technologies de surveillance et le risque d'utilisation abusive de l'information économique. Cette étude fait le point de l'état des connaissances, dans le domaine du renseignement des transmissions (Comint), du traitement automatique à des fins de renseignement des interceptions de systèmes à large bande multilingues sur ligne louée ou réseau ouvert au public, ainsi que de son applicabilité au choix des cibles Comint, notamment en ce qui concerne la reconnaissance vocale. Cette étude a été soumise comme document de travail au groupe STOA du Parlement européen (Luxembourg, octobre 1999).

Posibilidades de intercepción 2000

Informe presentado al Director General de Investigación del Parlamento Europeo (oficina del programa de Evaluación de Opciones Científicas y Técnicas – STOA) sobre el desarrollo de la tecnología de la vigilancia y del riesgo de utilización ilícita de la información económica. En este estudio se examina la situación actual del “espionaje de comunicaciones” (“Comint”) mediante procesos automatizados de intercepción de transmisiones de banda ancha multilingües de sistemas portadores arrendados o compartidos, y su aplicabilidad a la determinación y selección de objetivos de esta vigilancia, comprendido el reconocimiento del lenguaje hablado. Este estudio se presentó como documento de trabajo al panel STOA del Parlamento Europeo (Luxemburgo, octubre de 1999).

Summary

1. Communications intelligence (Comint) involving the covert interception of foreign communications has been practised by almost every advanced nation, since international telecommunications became available. Comint is a large-scale industrial activity providing consumers with intelligence on diplomatic, economic and scientific developments. The capabilities of and constraints on Comint activity may usefully be considered in the framework of the “intelligence cycle” (section 1).
2. Globally, about 15-20 billion Euro is expended annually on Comint and related activities. The largest component of this expenditure is incurred by the major English-speaking nations of the UK/USA alliance. This report describes how Comint organisations have for more than 80 years made arrangements to obtain access to much of the world’s international communications. These include the unauthorised interception of commercial satellites, of long distance communications from space, of undersea cables using submarines, and of the Internet.
3. The highly automated UK/USA system for processing Comint, often known as ECHELON, has been widely discussed within Europe following a 1997 STOA report. That report summarised information from the only two primary sources then available on ECHELON. This report provides original new documentary and other evidence about the ECHELON system and its involvement in the interception of communication satellites (section 3). A technical annexe give a supplementary, detailed description of Comint processing methods.
4. Comint information derived from the interception of international communications has long been routinely used to obtain sensitive data concerning individuals, governments, trade and international organisations. This report sets out the organisational and reporting frameworks within which economically sensitive information is collected and disseminated, summarising examples where European commercial organisations have been the subject of surveillance (section 4).

5. This report identifies a previously unknown international organisation – “ILETS” – which has, without parliamentary or public discussion or awareness, put in place contentious plans to require manufacturers and operators of new communications systems to build in monitoring capacity for use by national security or law enforcement organisations (section 5).
6. Comint organisations now perceive that the technical difficulties of collecting communications are increasing, and that future production may be costlier and more limited than at present. The perception of such difficulties may provide a useful basis for policy options aimed at protective measures concerning economic information and effective encryption (section 6).
7. **Key findings** concerning the state of the art in Comint include:
 - Comprehensive systems exist to access, intercept and process every important modern form of communications, with few exceptions (section 2, technical annexe);
 - Contrary to reports in the press, effective “word spotting” search systems to select telephone calls of intelligence interest automatically are not yet available, despite 30 years of research. However, speaker recognition systems – in effect, “voiceprints” – have been developed and are deployed to recognise the speech of targeted individuals making international telephone calls;
 - Recent diplomatic initiatives by the United States government seeking European agreement to the “key escrow” system of cryptography masked intelligence collection requirements, and formed part of a long-term programme which has undermined and continues to undermine the communications privacy of non-US nationals, including European governments, companies and citizens;

There is wide-ranging evidence indicating that major governments are routinely utilising communications intelligence to provide commercial advantage to companies and trade.

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GLOSSARY AND DEFINITIONS

FOOTNOTES

The full text of the above can be found on the following website:
http://www.europarl.eu.int/stoa/publi/pdf/98-14-01-2e_en.pdf

CLOSING ADDRESSES

DISCOURS DE CLÔTURE

DISCURSOS DE CLAUSURA

Madame Chair,
Ladies and Gentlemen,

It is with great honour to represent the President of ECOSOC of the United Nations, Ambassador Makarim Wibisono, at the conclusion of this Third UNESCO International Congress on the Ethical, Legal and Societal Challenges of Cyberspace.

On behalf of the President of ECOSOC I am deeply pleased to formally convey to all participants congratulations for the success of this Congress, which unquestionably has been a valuable forum for debate on the ethical challenges and legal alternatives applicable to new technologies in the Information and Communication fields. The deliberations have been conducted skillfully under the leadership of the moderators and the content of the interventions during these three days addressing such important themes as the role of public authorities in access to information, the fair use concept in the Information Society, and the promotion of human dignity in the digital age has been most valuable.

In the last ten years, we have witnessed an unprecedented revolution in the field of telecommunications and the use of information. The accelerated development of computers, the Internet and wireless communications have had a profound impact on the economic and social relations of the whole world. The digital revolution has allowed unimaginable progresses in fields as diverse as health, education, agriculture, the sustainable management of the natural resources, transport and trade.

Information and knowledge are increasingly accessible, transforming themselves into the main factors of production. The wealth of nations is not longer measured by the size of their economy but by the knowledge and talent of their citizens. Today, we are witnessing the rise of a new society, a society centred on ideas and creative ability, a society which allows the fusion of the most diverse efforts and knowledge to produce qualitative changes in all areas of human activity.

Nevertheless, the digital revolution presents a series of challenges some of which have been analyzed by this Congress. In these three days we have discussed the potentially dangerous situation in which access to information could be restricted to a small economic elite, at the international level as well as within each of our countries, unless public authorities take decisive measures to prevent this situation.

On the other hand, we have considered the need to combat piracy of information and knowledge, while, at the same time, allowing all humanity to have access to the information essential for education and development. We have considered in parallel the need to respect human rights and the fundamental dignity of the users of new information technologies while ensuring that those technologies do not turn into the means for committing criminals acts.

The search for a solution to these challenges requires the formulation of new ethical norms to be applicable to a new information society. It is necessary to foster, under the auspices of UNESCO, universal moral principles and distill from them appropriate guidelines for clear and concrete actions for the future development of information technologies. However, this undertaking will require a determination of which values and which objectives should be given precedence.

In concrete terms, should we give priority to the right of privacy or to the responsibility of combating terrorism and organized crime? Should we give preference to the respect for copyrights or to the need of guarantee the wide access to information by the highest possible number of people, especially in the developing world? Should we give priority to the freedom of expression or to the need for restrictions on the promotion of ethnic hatred, racism or child pornography?

Thus, in the absence of a clear hierarchy of moral principles and legal guarantees, the creation of concrete policies will lead inevitably to value confrontations and conflicts. These ethical challenges require a delicate balance between many and frequently diverse values with a view to achieving a satisfactory solution, which would fully respect the fundamental rights as well as protect the essential values of society.

We cannot sacrifice individual human rights under the pretext of guaranteeing the interest of society, at large, or can we sacrifice the interests of society to such an extent that individual rights are constrained.

Madame Chair,

One of the central themes in this Congress, the issue of the protection of human dignity in the digital era, has served as a particular example of the ethical challenges raised by the new information technologies. In the last few days, emphasis has been given to the protection of privacy and the freedom of information. It is necessary to protect the privacy of communications and to prevent the gathering personal information that individual users do not wish to be made public. For this purpose, legal and ethical boundaries have to be established for the appropriate use of information. At the same time, the confidential nature of private communications transmitted through electronic mail should be guaranteed. This information should not be used by private groups with commercial objectives, nor should it be utilized by any state as a means of political

repression. Lastly, the information technologies should not be allowed to promote terrorism, organized crimes, ethnic hatred or child pornography.

If we were to establish an absolute protection of the right to privacy and freedom of expression, we would not be able to combat the abuses derived from it and we lose a valuable mechanism for fighting organized crime. On the other hand, the very existence of surveillance mechanisms, leads to the risk of police states and the absolute loss of freedom.

The only feasible alternative resides in the principles of human rights and in the liberal intellectual tradition. Individual freedoms should be protected fully and any restrictions should be based on all assurances of due process. Privacy in communications and personal information can only be breached when there is clear evidence of the existence of criminal activity and if the appropriate legal authorization is available, giving the opportunity for suitable defence. The respect for human dignity in cyberspace requires, in consequence, the respect for human dignity in all social structures.

Madame Chair,

The high level segment of the substantive session of ECOSOC of this year had as its central theme the role of information technology in the context of a knowledge-based global economy.

In that meeting, Ministers of Science, Technology and International Co-operation of the Member States of the Economic and Social Council called upon the international community to eliminate disparities in the access to digital technology and to ensure that information and communications technology serve all peoples of the world.

The Ministers recognized that the digital divide between developing and developed countries is widening and emphasized that the great majority of the population of the world is not enjoying the benefits of the information society.

The ECOSOC encouraged the pursuit of greater equity and justice in regards to the use of information technologies and called upon all governments to adopt development national programmes that take full advantage of them. This challenge can only be met through the decisive action of the public authorities.

In order to facilitate greater access to information resources and to make greater content available to the public, decisive political leadership is required to formulate and implement a comprehensive development strategy with the aim of democratizing information and communications technology. At the same time, the government action should be directed towards promoting the development of human capital.

The guidelines of ECOSOC indicate that all governments should adopt a comprehensive development strategy aimed at taking the greatest advantage possible of the development opportunities offered by information technology. My country, Costa Rica, is implementing a firm and committed policy in this direction.

We are pleased to indicate, as the annual report of the Secretary General of the United Nations stated, that this policy has yielded excellent results. Today, our exports of microchips constitute 38% of national exports. The economic growth of Costa Rica, which reached 8,3% in 1999, was driven predominantly by the high-technology sector. Several local software development companies have emerged already in Costa Rica and the Government is creating a unique software development institution.

At the same time, we are working to provide universal access to communications and the Internet. We believe that it is necessary to close the digital divide between the privileged with access to the new technology and those who, until now, have been excluded from its benefits. Thus, the government of President Rodríguez has offered all Costa Ricans free access to electronic mail through the use of computers installed in municipal offices, and, at this moment, this service is being offered through computers installed in post offices and schools.

My country seeks to democratize knowledge of the new technologies to the fullest extent. Thus, we have set the objective of connecting 50% of primary schools and all secondary schools to the Internet. We have created small mobile centres with multimedia capability that will allow the technology to reach rural areas and we have interconnected all hospitals and health centres. My government has introduced, the new technologies at the administrative level, thus increasing transparency and has offered a wide range of services to producers.

These examples, taken from the Costa Rican experience, shows some of the ways in which the information technologies can contribute to greater justice and equity and to economic and social development for our populations.

This Congress has served to compare and share different experiences and aspirations in search for an international consensus, to allow a more just use of the information technologies. Thus, I am convinced that this forum has directly contributed to the efforts being made at ECOSOC to foster international cooperation in the field of Information and Communications Technology to promote development.

Finally, Madame Chair, I would like to indicate the profound appreciation of ECOSOC to UNESCO and to its Director-General for their valuable contribution to the success of the high level segment of ECOSOC this year.

We trust that the rich debate we have had on the ethical and legal aspects of cyberspace here at UNESCO, as well as the conclusions of this Congress, will continue to make a valuable contribution to the United Nations' search for a more just world.

BERND NIEHAUS

Ambassador and Permanent Representative of Costa Rica
to the United Nations
Vice President of the Economic and Social Council 2000

Droit et éthique dans la société mondiale de l'information

Le troisième Congrès international de l'UNESCO sur les défis éthiques, juridiques et sociétaux du cyberspace a été un succès remarquable tant par le nombre des délégués et des pays représentés, que par l'excellence des présentations et la qualité des débats. Que tous les participants en soient chaleureusement remerciés ainsi que toute l'équipe de préparation, sans oublier bien sûr les participants des quatre congrès Infoéthique régionaux ayant précédé cette rencontre, à Addis-Abeba, Rio de Janeiro, Vienne et Beijing.

Un Rapport récapitulatif sur la teneur des débats est actuellement en cours d'établissement par les divers modérateurs des sessions, et sera disponible sur le site Internet du Congrès Infoéthique.

Mais quelles seront les prochaines étapes ?

Un Rapport préparé par le Secrétariat de l'UNESCO à la demande de la Conférence générale et portant sur l'établissement d'une Recommandation sur l'accès universel à l'information dans le cyberspace, va être envoyé incessamment à tous les États membres pour avis.

L'ensemble de ces avis ainsi que le rapport final et les documents préparatoires d'Infoéthique 2000 seront utilisés par un comité international d'experts, réuni par l'UNESCO en mars 2001, afin de rédiger un projet de Recommandation sur l'accès universel à l'information dans le cyberspace. Ce projet de Recommandation sera soumis pour approbation aux États membres, lors de la prochaine Conférence générale de l'UNESCO en octobre 2001. Parallèlement l'UNESCO s'engagera dans un processus de préparation du Sommet mondial sur la Société de l'Information qui doit se tenir en 2003 à l'initiative de l'UIT, sous l'égide des Nations Unies.

Comme on le voit, Infoéthique 2000 est donc une étape très importante dans un processus pouvant conduire à terme à l'adoption de normes de conduite internationales, fondant la notion d'accès universel à l'information.

Parce qu'elle est à l'évidence un phénomène de portée mondiale, la société de l'information pose de manière très concrète un problème nouveau, celui du « bien commun mondial » et de sa régulation. Par exemple, la notion d'accès universel à l'information et les questions de propriété intellectuelle, la régulation

à l'échelle mondiale des échanges électroniques dans le monde, la marchandisation du savoir sont autant de défis pour de nouvelles formes de gouvernance mondiale.

La régulation mondiale d'Internet doit être traitée par des institutions de compétence et d'envergure mondiales. Mais c'est aussi à l'opinion publique mondiale et à la société civile mondiale de se mobiliser pour encourager les gouvernements à accélérer ce processus nécessaire. Les sujets appelant à régulation ne manquent pas :

- Régulation de l'accès aux ressources naturellement ou artificiellement limitées (noms de domaine d'Internet, positions orbitales des satellites, fréquences radio-électriques) ;
- Régulation de la concurrence entre fournisseurs de services Internet (accords de «peering» et accès aux NAPs) ;
- Régulation de la «concurrence loyale» en particulier le domaine des télécommunications, des logiciels et du commerce électronique ;
- Définition des politiques tarifaires et des subventions croisées à l'échelle mondiale pour les télécommunications internationales ;
- Taxation de l'utilisation des «biens publics mondiaux» (comme le suggère le rapport 1999 du PNUD sur le développement humain), à des fins de redistribution mondiale ;
- Révision de la philosophie juridique fondant la propriété intellectuelle pour créer un système ne barrant pas l'accès des pays en développement au savoir et limitant les excès d'une marchandisation accélérée des savoirs.

Vers un droit mondial ?

Prenons ce dernier sujet, d'ailleurs abordé sous divers angles pendant Infoéthique 2000. Comment orienter ou guider l'évolution du «droit mondial» de la propriété intellectuelle ? Il s'agit là, moins d'une question juridique que profondément politique, et même éthique.

Par exemple, les puissances publiques peuvent décider de renforcer les droits de propriété intellectuelle (leur champ d'application, leur nature, leur durée) consentis aux inventeurs et aux créateurs pour encourager la production de connaissances. Les inventeurs disposent alors de revenus tirés de l'exploitation de leurs brevets, sur lesquels ils ont un monopole d'exploitation. Une plus grande activité inventive est encouragée, mais au dépens d'une restriction temporaire de l'utilisation par d'autres de ces inventions.

Les puissances publiques peuvent aussi décider de rééquilibrer cet avantage donné aux inventeurs en limitant la durée de la protection de l'invention (permettant alors un retour plus rapide dans le domaine public) ou de limiter l'étendue et la nature des inventions protégeables, et en exigeant une activité inventive réellement significative. L'existence d'un «domaine public» mondial de l'information et des connaissances est donc un fait juridique et aussi politique.

Mais qui décide de la légitimité – au plan mondial – du meilleur équilibre possible entre intérêt général et intérêt des inventeurs, entre domaine privé (incarné par la durée et la nature des protections) et domaine public ?

Le rôle des puissances publiques nationales additionnée des possibilités propres aux organisations internationales est à cet égard central, pour mettre au point un système mondial de protection de la propriété intellectuelle qui incarne « l'intérêt général mondial ».

Il est essentiel de comprendre que le choix d'un système spécifique de rétribution de l'activité créative et inventive peut avoir des conséquences extrêmement importantes sur le rythme des inventions. En les protégeant de manière trop large ou trop longue, on risque tout simplement d'appauvrir les opportunités pour des inventions ultérieures, les futurs inventeurs étant d'autant plus empêchés de capitaliser sur les savoirs précédents. En protégeant de manière trop étroite, on peut tomber dans l'excès inverse et diminuer l'incitation des inventeurs, désormais non assurés d'un retour lucratif.

Quoiqu'il en soit, il est clair qu'une protection trop forte¹ a pour conséquence d'élever le prix de l'accès aux connaissances, aux idées nouvelles, et donc accentue inévitablement le fossé entre les info-élus, ayants droit à l'information, et les info-exclus. L'existence de cette distorsion peut devenir tout à fait intolérable comme le démontre l'existence de lois anti-trust visant à rétablir (contre les conséquences du « libre » fonctionnement du marché) les conditions du fonctionnement équitable de ce même marché, à savoir la possibilité d'une concurrence « loyale », fondement de l'idéologie du libéralisme économique.

Le procès mené par le gouvernement fédéral américain contre Microsoft est exemplaire à cet égard. Mais il reste à savoir si le dysfonctionnement ainsi constaté vient du dérèglement du marché, que l'on se contenterait alors de réguler par les lois anti-trust, ou alors s'il vient de l'existence d'un droit de la propriété intellectuelle mal proportionné, donnant un avantage immérité, beaucoup trop « fort », aux détenteurs de brevets. Autre hypothèse encore : ce dysfonctionnement ne vient-il pas de la nature même de l'économie du virtuel, à base de normes et de réseaux, et donnant *ipso facto* un avantage incommensurable aux premiers arrivés, ou aux premiers émergents, ou aux premiers déposants de telles ou telles composantes d'un standard technique, devenu absolument indispensable à la collectivité mondiale, et transférant alors à leurs détenteurs une rente de situation sans proportion avec leur activité inventive réelle ?

L'intérêt général mondial exige-t-il plutôt de renforcer la notion de concurrence loyale, invitant ainsi à diminuer les effets de monopole, ou exige-t-il de renforcer la protection des inventions, conférant des monopoles juridiques ?

On voit que ces questions ne sont pas réellement de nature juridique. Le droit, en l'occurrence, n'est que le champ ouvert aux chocs d'une bataille plus large, de nature profondément politique, bataille elle-même alimentée par un débat philosophique sur le concept même d'intérêt général, de bien commun, à l'échelle mondiale. Les jugements prétendument juridiques posés sur le bien-fondé d'une extension ou d'un renforcement du droit de propriété intellectuelle

sont en réalité des jugements arbitrant, de manière implicite, en faveur de tel ou tel groupes de pression, ou en faveur de tel groupe de pays partageant les mêmes intérêts. Les conflits d'intérêts s'exacerbent particulièrement entre les pays en développement et les pays développés, les premiers craignant que le renforcement du droit international de la propriété intellectuelle se fasse à leurs dépens, au moment où précisément ils auraient le plus grand besoin d'élargir leur accès aux ressources mondiales de l'information pour rattraper leur retard cognitif, scientifique et informationnel. On en a vu une illustration concrète lors de la Conférence diplomatique de décembre 1996, organisée par l'OMPI, à propos du projet de Traité sur la protection des bases de données, finalement retiré sous l'influence des pays en développement, et aussi d'un mouvement de la société civile (scientifiques, enseignants, bibliothécaires).

Les abus induits par une trop forte protection de la propriété intellectuelle peuvent être corrigés dans une certaine mesure dans les pays développés, qui disposent de lois anti-trust. Mais de tels mécanismes n'existent pas au niveau international. Il n'y a pas de lois anti-trust mondiales permettant de limiter les monopoles d'entreprises qui auraient échappé à la sagacité des lois anti-trust purement nationales. Ce fait est un symptôme de la difficulté à incarner juridiquement le concept de « justice mondiale » en matière économique, autrement dit, c'est un symptôme de la prévalence des rapports de force en la matière.

La «tragédie du bien commun»² évoquée par les économistes est encore plus tragique au niveau mondial. En effet, les «égoïsmes nationaux» n'ont pas intérêt à voir apparaître des revendications, qui, pour légitimes qu'elles soient, réduiraient leur liberté de manœuvre, mineraient à la base leur «souveraineté nationale».

Afin de lutter contre cette tragédie, il faut compter sur l'émergence progressive d'un droit «mondial», à ne pas confondre avec le droit «international».

La paternité de l'expression «droit international» revient à Jeremy Bentham³. Avant Bentham, on utilisait l'expression de «droit des gens», le *Jus gentium* des Romains ou le *Jus inter Gentes* du juriste de Salamanque, Vitoria.

Le terme de «droit international» évoque l'idée d'un droit *entre* les nations. Le terme de «droit des gens» évoque un droit commun aux gens, aux personnes. Le droit des gens implique une «communauté internationale» considérée comme une société d'individus, non comme une société «interétatique».

La notion de «communauté internationale» est loin de faire l'unanimité, à la différence de celle de «société internationale» qui est la société des États. L'extrême hétérogénéité des États dispersés de par le monde fait du concept de «communauté universelle» une sorte de fiction. Les différences de civilisation, de culture, d'idéologie, de développement économique, séparent les peuples bien plus qu'elles ne les rassembleraient.

Mais à l'inverse les points de convergence ne manquent pas non plus: aspiration universelle à la paix, sentiment général de l'importance de l'idée de

justice, évidence de l'interdépendance économique, nécessité de lutter de manière conjointe contre le sous-développement.

Il ne s'agit pas seulement de choisir une théorie du droit international ou mondial, ou d'arbitrer entre Grotius et Vattel. Il s'agit de privilégier un mode de pensée qui puisse favoriser l'émergence d'une citoyenneté planétaire.

Du fait de la mondialisation, il y a une prise de conscience croissante d'intérêts communs entre États. On observe le développement de la «solidarité internationale», principe qui vient en contradiction de la notion de souveraineté en ce qu'il fonde un droit de regard de la communauté internationale sur ce qui se passe au sein des États.

Les organisations internationales ont beaucoup fait pour dépasser les limites propres à l'interétatisme, et pour renforcer le concept du multilatéralisme.

En théorie, les États membres assemblés au sein du système des Nations Unies peuvent prétendre à dégager la «volonté générale» des peuples du monde. Les résolutions des organes pléniers des organisations internationales apparaissent comme des prémisses, parfois contestées, d'une véritable législation mondiale. Certaines organisations se voit déjà confier le soin de gérer les richesses collectives mondiales, comme les ressources du fond des mers. On voit se concrétiser la notion de «responsabilités communes des États envers la communauté internationale», et s'exprimer des concepts comme celui de «patrimoine commun de l'humanité».

La notion de bien commun mondial⁴ commence à recevoir l'apport des théoriciens et des praticiens des relations internationales.

Mais il y a des questions ouvertes. Pourquoi les biens communs mondiaux sont-ils si difficiles à pourvoir en quantité suffisante ? Par exemple l'éducation, l'accès au savoir, et aux informations.

La nécessaire péréquation entre nations, générations, groupes sociaux, ne peut se faire que si tout le monde prend conscience de l'intérêt supérieur du bien commun et accepte de prendre en charge ses responsabilités.

Le bien commun, s'il n'est pas promu et défendu, ne peut que dépérir. Ce faisant, ce sont des «maux communs» (“Global Bads”) qui apparaissent alors. Ces maux communs circulent à la vitesse de la mondialisation. Ils augmentent les risques de dysfonctionnement systémique global. Certains acteurs transnationaux non gouvernementaux peuvent tirer un avantage spécifique des différences juridiques, économiques, sociétales existant entre les pays. Le dépeçage de l'équité mondiale favorise évidemment les plus rapides à exploiter les failles sociales, économiques et juridiques des systèmes nationaux les moins préparés.

Si les États ne se préoccupent pas de renforcer le bien commun mondial, c'est le mal commun mondial qui va s'étendre.

La société civile mondiale doit aussi jouer un rôle central, parce qu'elle est composée d'individus, qui sont les réels «sujets» du droit international, et les véritables pierres sur lesquelles construire la communauté mondiale.

Il y a en effet la question fondamentale de la représentation.

Qui représente l'intérêt général mondial? C'est à partir d'une formulation démocratique de cet intérêt général mondial que peut se fonder la légitimité d'un «droit mondial»⁴.

L'idée d'un droit mondial n'est pas nouvelle. Kant dans son *Projet de paix perpétuelle* envisageait déjà l'idée d'une société civile universelle et d'un «droit cosmopolitique». Il repoussait cependant l'idée d'un «État mondial» qui menacerait l'humanité d'un despotisme universel, sans recours.

Le «droit mondial» doit être fondé sur une prise de conscience des contradictions bien réelles et des rapports de force (qui ne sont pas, par définition, des rapports de justice) qui forment la matière des relations internationales.

La Cour pénale internationale, le droit d'ingérence humanitaire (condamnation des génocides, de l'esclavage, de la piraterie), le *jus cogens*⁵ sont autant d'embryons du droit mondial. Il reste à les faire croître et prospérer.

Le principe de la primauté du droit mondial doit être affirmé, et c'est l'individu, sujet mondial par excellence, qui doit en être le fondement et en assurer la défense et la promotion.

Quel est en effet le véritable fondement du droit?

Le fondement du droit est hors du droit: dans l'éthique, seule capable de fonder le «droit naturel» qui est le droit commun de l'humanité.

La réalité diverse et hétérogène des Nations et des États, fait fondamental du monde actuel, ne doit pas nous écarter de cette intuition fondatrice.

Car l'humanité, par-delà les différences, est fondamentalement «une».

La mondialisation du droit est simplement «en retard» sur la mondialisation technique et économique.

La société civile mondiale doit prendre conscience d'elle-même et de sa force politique. S'il y a un bien commun mondial, alors ce bien commun est forcément le même pour tous les habitants du monde. Car il repose essentiellement sur une éthique du «monde commun», et une éthique et une justice de la *res publica* mondiale, dont je suis sûr qu'Infoéthique 2000, grâce à vous tous – a contribué à mieux articuler.

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Références:

1. *Cf.* Jean Monnet, Aspects actuels de la contrefaçon, 1975 : «La protection du moyen général est quelque chose de nuisible à la recherche pour la raison suivante : si l'on reconnaît que la fonction en elle-même est protégée, on aboutit à la sclérose de la recherche car le breveté, ayant une protection d'étendue énorme, sera incapable d'exploiter tout le domaine qu'il aura et de nombreux concurrents seront peu enclins à aller dans ce domaine qu'ils peuvent penser être effectivement couvert par le brevet.»
2. Garrett Hardin, 1968, "The Tragedy of the Commons", *Science* 162, (décembre) : pp 1243-48
3. Jeremy Bentham, *An Introduction to the Principles of Moral and Legislation*, 1780
4. *Global Public Goods: International Cooperation in the 21st Century*, edited by Inge Kaul, Isabelle Grunberg, and Marc Stern, 1999, Oxford University Press
5. *Cf.* la Convention de Vienne sur le Droit des Traités du 23 Mai 1969, entrée en vigueur le 27 janvier 1980.
Article 53. – Traités en conflit avec une norme impérative du droit international général (jus cogens). Est nul tout traité qui, au moment de sa conclusion, est en conflit avec une norme impérative du droit international général. Aux fins de la présente Convention, une norme impérative du droit international général est une norme acceptée et reconnue par la Communauté internationale des États dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise et qui ne peut être modifiée que par une nouvelle norme du droit international général ayant le même caractère.
Cf. également l'article 103 de la Charte des Nations Unies.

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THEME B**THE FAIR USE CONCEPT
IN THE
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IN EDUCATION,
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COMMUNICATION**

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Session 4

**APPLICATION
OF LEGAL EXEMPTIONS
TO COPYRIGHT
FOR DEVELOPING COUNTRIES**
(through international conventions)

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THEME C

**PROTECTING
HUMAN DIGNITY
IN THE
DIGITAL AGE**

Session 5

**PROTECTION
OF PRIVACY ON GLOBAL
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