

Right to access to contents versus intellectual property rights in the Global Information Infrastructure

by

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Abstract

Informative Infrastructure is a term of wide significance, extended a lot beyond the physical tools used for the transmission, elaboration or treatment of information.

This issue puts into light the significance and the assumption of the communicative architecture between the informative infrastructures inside which libraries are moving. In particular the focus is on the significance of "access to contents" in the frame of the Global Informative Infrastructure, GII and on the boundaries that prevent the fruition of the information in the net. Sometimes the obstacles to the extension of the benefits of the access to the contents on global scale (hidden inside the regulations established by the governments) are thrown off balance towards the reinforcement of the restrictions of the intellectual property on the contents. Most of all, politics and definite standards are necessary in the digital libraries, in order to build strategies that can ensure a balance between the intellectual right of property and the law of access to the contents in the point of view of copy-right, seen as the right of copy and of fair use, seen as a fair payment and universal access.

GII Global Information Infrastructure e NII National Information Infrastructure

At the basis of the promised revolution in the field of information there is the *Global Information Infrastructure*, or GII, whose perspective is to be vehicle for the spread of contents on global scale.

The leading purpose of GII is to make accessible, through the *National Information Infrastructure*, NII¹ or through other national infrastructures, every information on any format through adequately arranged codes. However, the standard of the net and the transmission codes that facilitate the interconnection and the interoperability between the nets, have to keep account of some fundamental values that must be necessarily protected. Above all the freedom of expression and in particular the right to access to contents, a right that is often countered to the right of intellectual property. When access is replaced by possession, the legal foundation of the normative system for the protection of the intellectual property collapses. Without an adequate legal protection –say the rights holders- there are chances neither for economical nor for cultural growth.

Protect the intellectual right of property is one of the key points of the NII targets, but it is considered also an obstacle to the achievement of the NII applications to libraries. Three are the significant conditions for the new challenges related to the protection of works on the Web. The first is linked to the digital reproduction, easily achievable at low cost, something that carries to the production of an indefinite number of perfect copies indiscernible from the originals.

The second depends on the possibility to convert the information, contained in different media, in a single stream, easily rigging, that gives rise to different activities.

The third condition pertains the distribution of the digital information, that can be immediately unloaded and sent off through the net to thousands of users.

¹In 1993, the president of the United States Clinton and the Vice President Gore began to support the NII initiative (National Information Infrastructure or National Informative Infrastructure) within the global infrastructure of the information.

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The global Digital Library and the librarian Infrastructure

The environments in which the NII applications meet pertain the areas of the industrial production, the electronic commerce, domestic networks, transportation, the informative infrastructures of the health area and of the monitoring of the environment, as well as the areas of the education, remote teaching and long life learning. Moreover, an essential application in this arena is the informative infrastructure of the governmental services –something that every country should necessarily build, like the essential public buildings in the city- in order to grant the access to the public documentation, but most of all for the informative spread of research and public data.

Increasingly, the role of the libraries in the technological future will be to help the public to find information in a fair way. Libraries will continue to coordinate and to facilitate the preservation of the records in the catalogues (of both new and old conception) and to maintain copies of the documents in traditional formats, but above all digital. The expressions of the intellectual productions of every country should be attainable and accessible by the informative infrastructure of the librarians services of each country inside the GII platform.

The central subject of the LXVI General IFLA² touched the themes of the international cooperation in the exchange and use of the information. The IFLA lecture has put into light how the information professionals, librarians in head, will have a main role in the GII in order to face up the increasing request of contents coming from the different specialized fields, provided that they are able to reach a double organizing dimension, bound to the local or national needs- in direct application to a bigger target related to the international Community.

The metadata, or "*data about data*", are essential components of the informative infrastructure, as they include intrinsic data of the document describing the expressed data, like its story, the rights of property, the conditions of preservation, the hardware and the necessary software.

There are some metadata that are automatically generated, some other that are manually created by professionals of the field. There are metadata generated at the moment of their creation or digitalization, while others increase during the migratory stream in the transportation of the document itself.

The Informative Infrastructures

The communication infrastructure offers the unit toward that and³ from that all the other infrastructural components are issued, where the semantic infrastructure, the infrastructure for the protection of the information, the infrastructure dedicated to the preservation, the user infrastructure and the collaborative infrastructure, all are inserted.

Internet, it was affirmed by Hafner and Lyon in 1996⁴, is the motive-power of the Society of the Information: foundation of this force is its informative infrastructure.

Internet, says Lawrence Lessig⁵, jurist of international renown and expert of cyberright at the Stanford Law School, it is in big part responsible for its innovative character. This feature is based on the "end-to-end" principle⁶, that's why at present the net is "stupid", because are the end users to choose the contents and not the owners of the cables or of the contents. The net in itself should remain willingly "stupid", which mean incapable to discriminate between different shapes of traffic in the net, while "intelligence" should be distributed to its end tips, delegated therefore to the end users computers.

² Lecture held in Jerusalem, in August 2000, "Information for Cooperation: Creating the Global Library of the Future"

³ Hafner, K e Lyon, M. "*Where Wizard Stay Up Late: The Origins of the Internet*". Simon & Schuster, 1996

⁴ Hafner, K e Lyon, M. "*Where Wizard Stay Up Late: The Origins of the Internet*". Simon & Schuster, 1996

⁵ Lawrence Lessig was one of the consultants of the United States Government in the case against Microsoft

⁶ Lessig, Lawrence, "*The Future of Ideas: The Fate of the Commons in a Connected World*".

Even though this architectural principle has been originally adopted for technical reasons, it has become immediately obvious that this feature of freedom of the net has allowed decisive social and economical consequences. For example, the "end-to-end" principle, for its implicit nature, promotes freedom of expression, since it limits the extension within the holders of rights of the net can censure the contents closing them within their enclosures. Whoever has a new idea can rely on the fact that the net will treat its applications in the same manner in which the applications introduced by the largest societies are considered⁷.

Ownership of intellectual properties

In a static economy, the law of property -most of all if it works on material assets- finds its greatest accomplishment. Crisis occurs when the economy becomes dynamic, intangible assets like intelligence are exposed to violations due to the spread of the new technologies, within everyone's reach.

Legal tools, like laws for the protection of the intellectual property, created in order to defend the creative job of the authors, if not timely calibrated, can become ways of controlling the contents, capable of influencing the market and the free circulation of the ideas they contain. The risk is that the holders of the new technical infrastructures become also the holders of the information with the power of restraining the access to the contents, creating situations of control carried out through a regime of monopoly. The tension between freedom of expression and intellectual property truly exists.

Nevertheless, one must keep in mind that often, although the efforts of the WIPO (World Intellectual Property Organization⁸), the legislative systems of many countries in the world about intellectual property do not have an organic and consistent legal structure, but they are made of different rules sewn together in normative bodies which are not harmonized in a global context. Using a metaphor⁹, today the normative international system resembles the railroad system at its beginning, when a train could not pass the limit of one concession, because the next had tracks of a different caliber. To these differences must be added that almost all the national normative systems that regulate the intellectual property are related to "on paper" contents. A publisher of the United States can have problems concerning the moral right in French territory in the use of photography, problems that he would have never meet in a context of copyright. A publisher in Germany can bump into what he considers a theft from its bank data distributed in the United States, when he learn in the meantime that under the Feist's doctrine what he has considered a "theft" is rather a right of all the American citizens¹⁰. These differences -not only formal- of the normative bodies, work above all in the sphere of the moral right, making clear that a strong coordination at international level is necessary.

In the meanwhile, in order to overcome the differences of the different systems related one to the other in terms of exchange of informative goods, in countries with different laws, where the intellectual property can be understood and perceived in many different shades, the only solution to the numerous normative incompatibilities is offered by the contractual relationship freely established between the parts: suppliers of contents, libraries, publishers and users.

It must be also underlined that the protection of the intellectual property or better the exploitation of the work or of the product of the intelligence, finds another limit in the

⁷ Lessig, Lawrence "Code and Other Laws of Cyberspace". Op. cit

⁸ The offices are in Geneva, Switzerland. The organization was created in 1967 (Stockholm Convention) with the aim of extending the protection of the intellectual property at international level. The origin of the organization dates back to 1883 (Paris Convention for the protection of the industrial property) and to 1886 (Bern Convention for the protection of literary and artistic property)

⁹ Strong, Bill "Copyright in a Time of Change" The Journal of Electronic Publishing. March, 1999 Volume 4, Issue 3 <<http://www.press.umich.edu/jep/04-03/strong.html>>

¹⁰ The Feist's doctrine says that a work, particularly a "sui generis" database, has no protection, because it is not considered a creative work. In the normative system of copyright (differently from the European System) the "sui generis" works are not protected because they are considered not new. Brown, Mary Maureen, Bryan, Robert M. "Database protection in a digital world", Richmond Journal of Law & Technology. Volume VI, Issue 1. Symposium 1999 <<http://www.richmond.edu/~jolt/v6i1/conley.txt>>

antitrust legislation of the different countries. This is not a trite question after the recent Microsoft case.

The danger linked to the reinforcement of the guardianship

Lot people thinks that Internet, but above all the Web¹¹, is a threat to the intellectual property and so a lot of groups of interest are trying to propose changes to the laws, in order to protect their own economical interests, primed on situations of monopoly. Considering the fact that the new means of transportation of contents represent a good market opportunity, there are lobbies in the market that ask the governments to expect new rights in order to protect their interests to the detriment of the law of access to the information, whereas information should be seen like a worldwide public asset.

In the world of E-book, with the aid of "shrink-wrapping" devices licenses limiting the freedom of expression could be introduced, for example in clauses that forbid negative reviews of the "open" digital volume.

Samuelson says that the attempt to avoid copyright¹² through the mechanism of licenses will lead to increase the problems on both sides, the holders of the right of property and the contents users.

Lessig, "an example of synthesis between man of law and technological man"¹³, who loves the use of metaphors, takes to loan the image of the communication network layers to compare different communicative environments. He begins describing the places of Hyde Park Corner, where the londoners usually meet to demonstrate their ideas, in analogy with the Net. The physical layer of Hyde Park is the park in itself, while in Internet this layer represents the first level, the one of cables and machines. The logic layer is the language of the individuals, while in Internet this is given by the protocols that have determined the formal procedure of the use of cables. The contents layer is represented by the speeches of the people that occur in the park, that virtually corresponds to the speeches that move about on Web.

Making a practical example, today the American Online chat software allows to a maximum of a twenty-three persons to discuss together. In such a situation of monopoly, a real square place like Hyde Park, where the cybernautics can protest against the supplier of access (access service provider), does not exist. If at a physical level the proprietors of the infrastructures acquire the power to discriminate at a temporal level the contents that pass through them -wide band Internet- it is also possible an actual control on the third level (the one of the contents) by the holders of the rights, protected by the national and international laws. According to Lessig, this is a serious risk as the capacity of discrimination on the contents is introduced at an Internet level that formerly was neutral¹⁴.

When accumulation of intellectual property occurs, and this is not a proper condition of the authors but of the authorized holders of the right (content service providers, software houses, recording companies), the reasons that lead to protect this kind of property find no justification at a moral level and, at the economical level, the competition in itself is in serious danger.

Many aspects of this thorny and controversial matter were widely treated in a recent international lecture about "Intellectual Property and cyberspace" held in Stresa, Italy on May 2001, where worldwilde experts gathered to talk about the situation¹⁵. International jurists of renown pointed out the danger of the reinforcement of protection and many other

¹¹ IITF Information Infrastructure Task Force "Barriers to the Creation and Use of Library Applications" <<http://nii.nist.gov/nii/applic/lbr/lbrbar.htm>>

¹² Samuelson refers to the United States normative context about the Intellectual Property known as DCMA Digital Copyright Millenium Act, but her statements are valid in any other normative context.

¹³ Di Pasqua, Emanuela "Cyberdiritto e proprietà comune" in "il Manifesto" 13 May 2001

¹⁴ Lessig, Lawrence "Code and Other Laws of Cyberspace", Op. cit.

¹⁵: At the Stresa Conference a lot of important people were present. Among them: Mr. David Boies, the Napster's lawyer, Richard Urowsky, the Microsoft Lawyer, Jean Jacques Gomez, the judge of the Tribunal in Paris, who emitted the judgement on the Yahoo! nazi-auctions, Guido Rossi was the chairman, Lawrence Lessig of the Stanford University Law School, Guido Calabresi Judge of the United States Court of Appeals and Jack Balkin, director of the Information Society Project at the Yale Law School

lecturers expressed a strong worry on the destiny of fundamental rights like the freedom of expression and the right to access to information, in case of sneaky and imperceptible connection between intellectual property and monopoly. "The sovereignty of the States today is threatened, since the regulation or the architecture of the net that monitor the cyberspace are a concurrent sovereignty to that of the State. But the cyberspace rules could create different values compared to those traditional of our legal normative systems, and they could be violated, oppressed and overcome by opposite values. And this is the reason why the fundamental problem of the cyberspace is legal and particularly of general theory of the State".

The Right to access to the information

In the access to the information there is the potential for the enhancement of the life of man, the increase of the social equity, the acceleration of the commercial trades. These are certainly laudable targets, but their accomplishment depends on what one intend with access to the information, by who and where it is accomplished and also depends on the politics moved in action to reach these targets.

The concept of access to information finds its roots in the library services, in the politics for the telecommunications, and in many other arenas and it can be understood in terms of connectivity of/to a computer net and to the consequent access to contents. Accessibility is not always synonymous of availability, since they are two different concepts although in tight relationship. The concept of accessibility is wide and it involves also the availability of the document, but not only: an available document is not always accessible.

These are the factors or the conditions that limit the access to the contents: a) documents, b) persons, c) countries, d) legislation.

a) the accessibility to a content is given by various factors or conditions of the document that houses the content, and they are grouped in three categories:

1. One of the decisive factors is the necessary technology to read or to open the document: it can be too sophisticated or too heavy to be within everybody's reach.
2. Another condition limiting the access to the content of a document is the electronic shape in which it is presented, or the format in which it is placed on the Net. There are formats that are not accessible to disables users, and also many governative web sites that are not available in the Web¹⁶.
3. If the document is accessible under payment or asks an adequate software on payment for its display, this is a factor that can limit the free access. Usually, it happens inside a "monitored" environments where there are documents under protection in terms of intellectual property. The availability (affordability) is related to the role of who supplies the information (commercial service provider)

b) Accessibility can be limited also because of conditions that do not depend on the documents, but from actual conditions of users and citizens:

1. The user does not have a proper knowledge to reach the information sought and therefore a condition of inaccessibility is established in a broad sense
2. There is a problem of the linguistic barriers not yet overcome by the multiethnic society (this is partly due to the fact that a lot of document are available only in English).

c) In general, we speak about limitation of the accessibility to the intellectual contents and about limitation of the right to access to the information in the following three leading conditions depending on the different countries:

¹⁶ W3C warnings on access to Web contents. WAI-IT Study group on equality of access to librarians services. Italian translation available on AIB-WEB site. <<http://www.aib.it/aib/cwai/cwai.htm>>

1. Whereas geographic barriers exist that hinder the meeting of the people
2. In the Countries where there's no freedom of expression or where the Internet access is restricted or filtered (at present in about twenty Countries)
3. In the developing countries where the concept of NII is not operating due to a lack of informative infrastructures

d) In a meta-level is placed the legal matter related to the laws that regulate the intellectual property:

1. At national level, for each Country
2. At group level (CEE directives, for example)
3. At international level, in relationship with the harmonization of the different systems or normative bodies, or in the agreements and treaties

The intellectual property and the right to access to contents

There is a strong implicit contradiction in the fact that countries that support the global right to access to the information, through politics of development of the informative infrastructures within the GII, are those same countries that impose to the technologically less advanced countries choices aimed at the protection of their economical interest.

The developed countries of the world, through the power of their economical supremacy - GATT agreement, General Agreement on Tariffs And Trade¹⁷, or threats on commercial relationships (embargo)- have brutally obliged the rest of the world to approve rules and laws incompatible with cultures and local traditions, laws that have the purpose to guarantee to everybody the rights of intellectual property, right that for us has been expected for centuries. The only advantage is for a market that does not take into account cultural and social differences.

In China and other Asian countries, the intellectual property is grafted on a cultural layer that had seen "imitation" as one of the necessary and basic activity for two thousand years in order to learn and convey culture through generations. In the former Soviet Union capitalism has taken the place of the state as an entity that seeks to impose some rules to the traffic of the intellectual property. That's why the Soviets have developed, during their cultural and political life, an increasing fear and intolerance almost hatred for any form of control on the access to the contents, considering rather valuable the free circulation of the ideas. Useless to say that speaking about royalties or fair remuneration, it is rather tough in these countries, as the rules on the intellectual property are seen in negative sense, like a limitation of the freedom of expression.

In Africa, where peoples have lived immersed in the oral culture for millennia and where the artistic expression has been almost totally religious in its leading characterization, the copyright is now seen as a colonial concept, abstract and contradictory. These countries have a perception of control like an attempt made by the rich countries to maintain the old colonialist system¹⁸.

"Freedom of expression and intellectual property in the digital era" was the provocative theme proposed at the Stresa meeting by Jack Balkin¹⁹, who underlined the tight relationship between freedom of expression and intellectual property. "The matter of the intellectual property should be considered a bottleneck in the chain of the information knowledge and in the fruition of some assets and whoever find himself in the bottleneck has duties of public nature. An acrobatic game for men of law who are in the position of defending inviolable laws, sometimes masked in the confusion carried by the new

¹⁷ GATT includes also the TRIPs agreement (Trade-Related Aspects of Intellectual Property Rights).

¹⁸ Strong, Bill "Copyright in a Time of Change" The Journal of Electronic Publishing. March, 1999 Volume 4, Issue 3

<<http://www.press.umich.edu/jep/04-03/strong.html>>

¹⁹ Stresa International Conference, Op. cit.

economy". Balkin supports the thesis that the duration of protection, to the opposite of what has happened and is still happening in various countries, should be drastically reduced. Recently, such duration has been raised from fifty to seventy years. Balkin says that a reduction like that (twenty years) would result a considerable stimulus to cultural growth. The Balkin's statement, which is very pragmatic, hillocks on the space/time coordinates. He says that the space or the field of protection, should be broadened to defend the intellectual property in terms of originality of the creative work of the authors, so plagiarism will find little space of manoeuvring.

I want to conclude citing Lessig's favourite example taken from the real world and of whom you can find references in the Web²⁰.

In the thirties when Architect Robert Moses determined to join Long Island to New York, he planned the construction of tight bridges in order to hinder the buses full of poor black people to reach the beaches and the parks of the island. Long Island, in the Moses's planning design would have been attainable only by the rich middle-class automobiles. The technological architecture of the global infrastructure of the information should lean on foundation of freedom where barriers to the right to access to the information and to the expression of freedom should not exist at all. The use of the architecture, mostly in the construction of bridges and roads, can be an instrument of strong limitation and, in the net, these obstacles can become even more dangerous, since barriers are almost always invisible.

Traduzione di Antonella De Robbio

"TRADUZIONE PROVVISORIA; LA TRADUZIONE USCIRÀ IN VESTE DEFINITIVA NEGLI ATTI CARTACEI CHE SARANNO PUBBLICATI DALLA EDITRICE BIBLIOGRAFICA DI MILANO"

²⁰ The Master Builder: How planner Robert Moses transformed Long Island for the 20th Century
<www.lihistory.com/7/hs722a.htm>