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IP MATTERS ON IP NETWORKS:
Intellectual Property and the Internet Governance

by
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Introduction

Internet (interconnexion of networks based on *IP-Internet Protocol*) is nowadays a worldwide economical and social phenomenon. Because of this, it questions us insistently about its "governance". How can such an area be regulated ? How rules governing the standard economical and social activities and those expanding the "virtual" sphere of Internet can be balanced?

The Internet "governance" addresses three needs: the definition of common behaviour standards (which are transnationally valid), the search for ways of expression of the various Internet actors (expression of their needs, of their interests – which are possibly antagonistic- and, *in fine*, of their adherence to certain values or rules), and finally, the setting up of institutions for the regulation and the settlement of disputes. It is now clear that due to the present developments of the commercial Internet and the e-commerce, the institutions and standards of the original Internet community do not suit anymore the situation and are no longer sufficient as well².

However, the search for an adapted Internet governance raises difficulties to lawyers, because it could only be done on the basis of various sources such as : private law and the contract practice (it is, above all, a matter of relationship between physical persons), international law (Internet is a world-wide phenomenon which upsets territorial and state regulations) and technical rules and standards (which are necessary to ensure the running of such an open system and also whose contents determine indirectly the practises).

In all these areas, the Intellectual Property Law may have a major part to play. Questions related to the Intellectual Property Law are already among the most sensitive ones raised by the cyber-space governance (insofar as recent Intellectual Property disputes due to the use of Internet brought to light some basic questions on the value of the information and on the rights of individuals in the information society). Tomorrow, the Intellectual Property and its pragmatic mechanisms might become important instruments of the Internet governance and of the information society.

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² See Bertrand Warusfel, "La gestion de l'Internet entre autorégulation et rivalités institutionnelles : un phénomène mondial à la recherche de son modèle de gouvernance", *Annuaire Français de Relations Internationales*, n° 1, 2000, pp. 595-617.

1. Intellectual Property matters are sensitive themes of the Internet Governance

Internet being a global system of exchange of digital contents and information, it is quite normal that its fast development in the past years had an impact on the standard issues of the Intellectual Property (1.1) and created some brand new situations caused by the use of digital network technologies (1.2). This requires the Intellectual Property to produce an important effort to try to adapt itself, which is why it started a fundamental discussion on the legitimacy of its rights and on their economical and social values. This explains why the Intellectual Property Law questions are among the most sensitive issues of the Internet governance, as the way of the future world information society and of its regulating tools will only become apparent through the solutions given to such Intellectual Property questions.

1.1 Standard issues of the Intellectual Property are upset by the digital communication on Internet

Most of Intellectual Property practitioners and specialists agree on the nature of the modifications and of the disruptions due to the digital communication on Internet networks. In his 1998 report for the US Copyright Office, Professor Trotter Hardy counted them, according to him :

*"three patterns of copyright and technology : Copyright law has had to accommodate new technologies repeatedly over the two centuries of its existence. This accommodation gives rise to broadly similar issues time and time again. Those issues can be summarized as issues of new subject matter, new uses of existing copyrighted works, and decentralized infringement."*³

One acknowledges that, from an economical point of view, the digital networks have modified the economy of the costs of reproduction and of distribution of the contents which are protected by the Intellectual Property :

"Digital technology changes two significant costs faced by a publisher of content.

- *Reproduction costs : Digital technology dramatically reduces the cost of making perfect reproductions ;*
- *Distribution costs : Digital technology allows these reproductions to be distributed quickly, easily and cheaply."*⁴

On one hand, the digital technology changes the exploitation of the usual objects of the Intellectual Property and, on the other hand, it generates new situations while reducing the exploitation cost decentralizing the potential infringements.

As a consequence, the usual balances existing between authors, distributors and consumers interests have changed. For example, while protected contents used

³ I. Trotter Hardy, *Project Looking Forward - Sketching the Future of Copyright in a Networked World*, Final Report for the U.S. Copyright Office, May 1998, p. 24.

⁴ Carl Shapiro & Hal R. Varian, *Information Rules – A Strategic Guide to the Network Economy*, Harvard Business School Press, 1999, p. 84.

to be mainly diffused by the way of the sale of published copies, they are now more and more distributed through contractual licensing (which is for many years a usual practice for hardware matters). This is changing the overall context, as shown by the authors of the National Academy of Science 2000 Report:

*"Digital information also creates difficulties because it has changed the way information products are distributed. For more than two hundred years, the dominant model of IP transaction has been the sale of a physical copy of a work. However, digital information is often licensed rather than sold."*⁵

In the same way the exemption for making a private copy (established in continental Europe by most of the National copyright laws and by the doctrine of the "fair use" in the countries of the common law) is considered today as dangerous and is challenged by the distributors of information. As a matter of fact, while the analogical reproduction of a copyrighted work does not really undermine the interests of the right-holders, the digital reproduction of a copyrighted work and its possible dissemination by the way of the networks might cause a significant economic imbalance (that the mechanisms of "equitable compensation" might not be able to set off). Moreover we note that the recent European directive on the copyright of 22 May 2001⁶ has listed the exemption for making private copies as a "optional exemption", thus permitting any member state to depart from this exemption⁷.

1.2 New situations created by the technology

In addition to the changes to the way the standard intellectual creations are used in a digital form, brand new situations appear because of the use of technologies. As far as Intellectual Property is concerned, the last years discussions and controversies on Internet governance were dominated by the following two main issues :

1°) The first one concerns the disputes between the trademarks holders (and in some cases, copyright holders or company name right holders) and the domain names holders

Though domain names have no particular legal qualification and only follow some mere technical and functional rules (e.g. addressing), they became in a short period of time a communication and a marketing stake and the necessary cyberspace complement of the trademarks in the "real world" (i.e. an object of identification of the goods and services on which the knowledge and the value of a company or of one of the goods are capitalized).

⁵ Pamela Samuelson & Randall Davis, *The Digital Dilemma: A Perspective on Intellectual Property in the Information Age*, National Academy Press, 1999.

⁶ Directive 2001/29/Ec of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, *J.O.C.E.* n° L 167/10, 22 June 2001.

⁷ On the whole debate concerning the directive (and also the question –evoked upside down- of the technical protection of the rights), see our report for the European Parliament studies department, Franck Leprévost & Bertrand Warusfel, *Study On Security Technologies For Digital Media*, Final Report For Stoa Unit, Bruxelles, May 2001 Pe 296.705/Fin.St..

As a consequence , disputes became unavoidable : but while the obvious abuses (e.g. those of "cyber-squatters", reserving in bad faith domain names using famous people names) are usually quickly settled , disputes between good faith holders taking place in separate activities units or in different territories are by far more difficult to solve. As a matter of fact, the "speciality" and the territoriality rules that govern the trademark law in the physical world (on the basis of which the disputes are solved and the coexistence of the different holders is organised) are completely ignored in the Internet practice because it does not exist on the Internet any geographical differences nor any sector-based compartmentalisation and because all the websites are on the same level for all Net users.

For many years, the Internet community and the legal specialists are discussing this issue. Two of the main results of these discussions are (i) the creation of an authority for the specific governance of the Internet system -named ICANN (Internet Corporation for Assigned Names and Numbers, whose evolution will be a test for the auto-administration of Internet)- and (ii) the promotion by the WIPO of an alternative disputes resolution procedure, which was finally adopted by the ICANN in December 1999 in the name of Domain Name Dispute Resolution Policy (UDPR)⁸.

2°) The second one concerns the peer-to-peer communication technique (i.e. a communication from one computer to another one without going through a server) for sharing and exchanging digital files holding copyrighted works (and, especially, in 2000-2001, copies of digital and compressed MP3 music pieces). The *Napster* case, and particularly the Court action brought by the phonographic industry in the USA, is the most famous one in this matter.

The discussions raised by this case showed the peculiarity of the situation created by Napster : from a technical point of view, as the counterfeiting files were not stored in a unique server but were scattered in hard discs of the Net users (which makes their detection and eradication more difficult, bearing in mind that as at the time of its maximum of popularity, Napster claimed to have 50 million users) ; from a legal point of view as well, as the Defenders of Napster claimed that their client was not making any copy of the controversial files but the Net users were, in making them-selves an on-line private use copy of the files. One had to wait for the appeal decision of the Federal Court of San Francisco which found in February 2001 that the Net users sharing the musical files through Napster were beyond the limits of "fair use" (as they were permitting a collective diffusion enabling millions of people to make copies of the content of their hard discs) and were thus committing infringement acts and found that Napster was in league with them (as its website was providing them with the technical means of illegal diffusion and it agreed to save in its data base unauthorised reproductions of copyrighted works)⁹.

⁸ See "The Uniform Domain Name Dispute Resolution Policy : Background and current Status", *World Intellectual Property Organisation*, Geneva, document n° Sct/S1/2, October 26, 2001 ; Hancock D, 'An Assessment of ICANN's Mandatory Uniform Dispute Resolution Policy in Resolving Disputes Over Domain Names', *The Journal of Information, Law and Technology (JILT)*, 2001 (3) <<http://elj.warwick.ac.uk/jilt/01-3/hancock.html>>.

⁹ See United States Court of Appeals for the Ninth Circuit, February 12, 2001 ; United States District Court Northern District Of California, March 6, 2001 (n° C 99-05183 MHP MDL n° C 00-1369 MHP).

In both cases, disputes between the new Internet practises and the Intellectual Property right-holders (on trademarks in the first case, eligible party and musical work-art in the second one) sustained the "public debate" on Internet (and on the Net). Beyond the strict legal discussion, essential questions on the cyber-space were raised: autonomy or dependence of the technical rules for addressing Internet on national trademark laws (and therefore the possible emergence of some kind of "global distinctive sign" or of a worldwide "e-trademark") ; balance between individual liberty and free non-market exchanges values versus commercial distribution rights of cultural goods distribution companies (called "cultural industries" by some specialists¹⁰). In other words, through the decisions rendered in such Intellectual Property disputes of a new kind, one is able to actually perceive the new stakes of the theoretical current debate on a possible autonomy of the cyber-space law vis-a-vis the pre-existing laws of the physical world¹¹.

It is thus not entirely surprising that the adjustments the Intellectual Property law made for a few years to adapt itself to the new digital networks context are sustaining a fundamental debate on the legitimacy of the Intellectual Property and its future. Our opinion is that, far from doubting of the ability of the Intellectual Property to endure in the Internet context, looking at the present evolution of the Intellectual Property Laws, this branch of the law will have a major part to play (but a non exclusive one) in the future regulation of the digital world and that this evolution will be a test for the experimentation of the worldwide information law that should become – together with the human rights declaration- one of the "constitutional" pillars of the Internet governance and of the next information society of the XXI century.

2. The intellectual Property Law is also a mean of the governance

At the same time the Intellectual Property takes the necessary steps to adapt itself to the new constraints of the digital communication, its own legitimacy is challenged. However, its present adapting capacity gives ample evidence of its flexibility and its ability to become one of the most effective tools for regulating the cyber-space and for building the global information law required by the digital society.

2.1 The recent adjustments of the IP to the digital context

While most of the jurists agree that, at the end of the day, as mentioned by the report of the French Conseil d'État dated 1998, *"the Internet's growth warrants*

¹⁰ See Jean-Guy Lacroix and Gaëtan Tremblay, "The Emergence of Cultural Industries into the Foreground of Industrialization and Commodification : Elements of Context", *Current Sociology*, Volume 45, 1997/4

¹¹ See, in favor of an autonomous cyberlaw : David R. Johnson & David G. Post, "Law And Borders -The Rise of Law in Cyberspace", *Stanford Law Review*, 1996, Henry H. Perritt, Jr, "Cyberspace Self-Government: Town Hall Democracy Or Rediscovered Royalism?", *Berkeley Technology Law Journal*, Volume 12, Issue 2, Fall 1997. And for criticism of that perspective, Margaret Jane Radin & R. Polk Wagner, "The Myth of Private Ordering : Rediscovering Legal Realism in Cyberspace", *Chicago-Kent Law Review*, 1999, B. Warusfel, *op. cit.*, AFRI, 2000.

only a few relatively minor adaptations of their national laws"¹², one must admit that the Intellectual Property was one of the first branches of the Law to evolve to take into consideration the reality of Internet and the indirect effects of the digital technology above mentioned.

Since December 1996, the WIPO has managed to convince the major part of the States in the world to sign a new treaty on the copyright, which has in particular created the right for the authors 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"*¹³. Thus, the complete application of the copyright rules to the on-line communication via Internet has been confirmed without any ambiguity, as it had been before by the courts of most of the countries .

Further to this international treaty, some of the major States have adopted several National legislative texts in line with the principles established by this treaty, and the jurisprudence of the courts as well. In the USA, Digital Copyright Millenium Act was passed in 1998. In Europe, the most important text is probably the above mentioned recent directive of May 22, 2001 which –besides the transposition in the community law of the rules established by the Treaty on 1996- gives, for example, a new definition of the scope of the possible exemptions available to copyrights holders when communicating on-line (for example, the directive has established a new compulsory exemption for copies of pure technical kind, used for instance in "proxy" servers or as a "mask" to speed up the connections)¹⁴.

On their side, the courts have progressively clarified their interpretation of the dispositions of the ordinary law of the intellectual property in the case of on-line services or diffusion. If most of the decisions in Europe and in the USA have clearly maintained the application of the intellectual rights (copyrights and also trademark, design and patent) to the Internet, the judges did not hesitate in some cases to change their position with regard to the principles they used to put into practise for the diffusion of the works by physical mean.

In Europe especially, some significant decisions are of particular interest in this respect :

1°) In the copyright area for instance, some court decisions recognise to the press journalists the right to obtain supplementary royalties for their articles when they are diffused on-line, while –traditionally- the

¹² Conseil d'Etat - Section du rapport et des études, *Internet et les réseaux numériques*, Paris, July 1998.

¹³ Article 8 of the WIPO Copyright Treaty of 12, December 1996.

¹⁴ *"Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."* (Article 5.1. of the Directive 2001/29/Ec of 22 June 2001).

jurisprudence used to consider the printed newspapers as a "collective work", the rights of exploitation belonging to the publisher¹⁵.

2°) In the patent law area, contrary to the American *StateStreet* caselaw, the European Patent Office (EPO) still refuse to deliver patents relating only to the computerisation of business method that do not present any technical feature (because this would open the door to the "patentability" of many e-commerce tools based on pure original "business models"¹⁶) while EPO allow since many years the delivery of European patents relating to technical inventions on software form.

Thus, considering that the Intellectual Property Law is a strict law, which is unable to evolve in front of the technological innovation and deemed to be behind the evolution of Internet and the on-line e-commerce is too simplistic.

2.2. The fundamental debate on the legitimacy of the IP

Some observers nevertheless predict (and also wish) the decline of the Intellectual Property because of the networks. In addition to libertarian reasons (to preserve a completely free space of communication of information via the web and to be opposed to the leading "cultural industries" that are supposed to "merchandise" the knowledge and the communication) some observers –among the finest ones- give two arguments :

- 1°) the huge drop of the information reproduction and diffusion costs no longer economically justify the maintenance of the exclusive rights for the creators and the diffusors ;
- 2°) the added value would be moving from the content itself towards the services which such contents support, and the remuneration would be for the service and not for the intellectual content diffusion. For example, in a famous article on this subject, Esther Dyson estimated that : *"The question of what happens to intellectual property on the Net may be summed up like this: value shifts from the transformation of bits rather than bits themselves, to services, to the selection of content, to the presence of other people, and to the assurance of authenticity - reliable information about sources of bits and their future flows. In short, intellectual assets and property depreciate while intellectual processes and services appreciate."*¹⁷

In generalizing this vision of the move of the added value over the simple subject of the Intellectual Property, a author like Jeremy Rifkin promises the progressive obsolescence of all forms of property in favour of new ways of exchanges

¹⁵ See in France: TGI Strasbourg, February 3, 1998, *Dernières nouvelles d'Alsace*, CA Lyon, December 9, 1999, *Progrès de Lyon* ; in Belgium: CA Bruxelles, 9^e ch, October 28, 1997, *Central Station c./AGJB*.

¹⁶ See the EPO decision, *Pension Benefits System Partnership* (T 931/95), 8 September 2000 ; our comment : B. Warusfel, "La brevetabilité des méthodes commerciales : l'Office Européen des Brevets résiste toujours", *Propriétés intellectuelles*, n°1 – octobre 2001, pp. 80-84.

¹⁷ Esther Dyson, "Intellectual Value A radical new way of looking at compensation for owners and creators in the Net-based economy", *Wired*, 3 July 1995.

essentially based on the service and the temporary access to the resources¹⁸. Without going deeper into the economic forecasting and prophecy, the traditional defenders of the Intellectual Property are sometimes worried that – as indicated recently by a French author- "*Copyrights ... are nowadays questioned by the double threat of technology and free trade*"¹⁹. As a matter of fact, there are two possible sources of the present questions on the grounds of the Intellectual Property : on one side, the technological progresses that may get round the standard legal protections of the Intellectual Property rights and, on the other side, a certain view of liberalism that might, in the name of a completely free behavior of the economic actors, claim for the abolition of any intellectual monopoly covered by law and, in order to determinate the conditions of use of every information resource, to refer to the control of the access rights and to the agreement between the parties (which would lead to the generalisation of the "pay-per-view" practises and the "licensing", which the technologies of control and of management will enable to do more and more easily).

2.3. The IP can become a strong pillar of the cyberspace regulation

For regulating Internet, we need tools with specific skills; ability to manage rights and duties in an intangible context (the virtual "cyberspace"), international harmonization (because the Net has no border) and experience in alternative dispute resolution procedures (because national jurisdictions with territorial enforcement are more expensive and less efficient in most of the Internet disputes).

Intellectual Property Law complies with all of these requirements: IP is familiar with intangible objects (the IP rights) , IP is largely harmonized at the global level (from Paris Union Convention of 1883 to TRIPS Agreement of 1994) and IP disputes are frequently addressed by alternative resolution processes (arbitration, negotiation, expertise, ...).

Of course, Intellectual Property Law - in itself - cannot be looked upon as the whole legal framework for the cyber-regulation. Like some other lawyers, I think we need a real "Information Law"²⁰ that will become The legal framework of cyberspace and of the all information society. And in this new legal body, IP will be only one aspect among other "information rights".

As explained by Nick Moore (of the City University of London) in his impressive 1998 paper, it is time to add to the three classical kinds of rights (civil rights, political rights and social rights) a new category:

¹⁸ Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism Where All of Life Is a Paid-For Experience*, Tarcher/Putnam, 2000.

¹⁹ Bernard Bovier-Lapierre, "La double menace sur les droits des auteurs", *Géoéconomie*, n° 17, printemps 2001, pp. 19-28.

²⁰ For example Pr. Benkler discussed about "*Internet law, or, as I prefer to, information law*" (Yochai Benkler, "Siren songs and Amish children: Autonomy, information, and law", *New York University Law Review*, vol. 76:23, April 2001, p.113) and Pr Hugenholtz asked for "*a new body of information law*" (P. Bernt Hugenholtz, "Code As Code, Or The End Of Intellectual Property As We Know It", *Maastricht Journal of European and Comparative Law*, Volume 6 (1999), No. 3, p. 308-318).

*"As we develop into an information-intensive society, it is now possible to discern a fourth set of rights. These we can call intellectual rights. They are the rights that we, as citizens of the state, require in order to function effectively within a state that is increasingly sophisticated and more and more reliant on information."*²¹

And in this intellectual rights category, he places the *"right to exploit Intellectual Property"* at the first place, but followed by four other items: the right to protect personal information, the rights of access to information, the right to be protected from obnoxious information and the right of access to information and advice services.

From my point of view, the best thing for democracy and the free flow of information would be to combine in that sense, IP with the others aspects of information law (privacy and access of information, in particular) rather than refuse IP as such and try to replace it by the sole rights of access and free negotiation of contracts.

In other words, legal fences are better than technical fences. And the database protection controversy is a good example of this paradoxical position. The European Database protection established by the EU 1996 directive is widely criticized by some lawyers and economists who fear that it could limit the public domain²². But if database producers had no legal basis to fight against misappropriation of their data and to negotiate licenses with users, they would hardly be encouraged to use technical barriers (i.e. encryption, authentication, pay-per-view services) in order to restrain access to their databases. In this sense, I consider that a legal protection for databases (by copyright or by *sui generis* rules) is an incentive for publishing data on line and to maintain a free access to large collection of information.

For the same reasons, a Net only based on the access rights and the free negotiation of contracts -without any intervention of Intellectual Property rights- would be actually governed by the sole economical and technical choices made by software makers (especially regarding the use of technical means, like encryption), as explained by Pr Hugenholtz:

*"Encrypted information products and services will enforce their own pre-programmed conditions of use automatically. Lex Informatica will rule the Internet with iron logic."*²³

The risk of a Net governed by technical rules rather than by legal rules was emphasized by Pr. Lawrence Lessig under his famous formula *"Code is law"*, combining the two senses of the word "code" :

"I've been speaking of two sort of code. One is the "code" that Congress enacts (as in the tax code or "the US Code"). (...) In our country it is

²¹ Nick Moore, "Rights and Responsibilities In An Information Society", *The Journal of Information, Law and Technology JILT*, 1998-1 (cf. http://elj.warwick.ac.uk/jilt/infosoc/98_1moor/).

²² A brilliant and prominent voice in that way is Paul A. David, "A Tragedy of the Public Knowledge 'Commons'? Global Science, Intellectual Property And The Digital Technology Boomerang" WP 04/00, *OIPRC Electronic Journal of Intellectual Property Rights*, <<http://www.oiprc.ox.ac.uk/EJWP0400.pdf>>.

²³ B. Hugenholtz, *op. cit.*

primarily East Coast (Washington DC) activity. Call it "East Coast Code". The other is the code that code writers "enact" –the instructions imbedded in the software and hardware that make cyberspace work. This is code in its modern sense. (...) We can call it "West Coast Code"."²⁴

And Lessig has predicted a similar development as stated above:

*"The future of Net regulation will be more West Coast Code. More and more, those with interests to protect (copyright holders, for example) or interests to exploit (feeders on personal data) will use code writers of Silicon Valley rather than Congress to secure their interests."*²⁵

In that context, if we are reluctant to submit all the Internet transactions to the brutal constraints of the new "age of access" (in which all access would be pay) and of the *dicktat* of some big IT companies, we have no other choice than to promote reasonable intellectual property rules as a part of a general regulation for the Net.

We must continue to adapt some of these rules to the particular aspects of the digital communication, and –in some cases- it will be necessary to review the balance of rights because, in the new digital context, as explained J. Boyle some years ago:

*"with some products more intellectual property protection might be required while with others a lower level of protection would still produce an adequate return to encourage future production."*²⁶

An Internet regulation excluding Intellectual Property matters is a utopian view. This would not only be inefficient (because property remains a very attractive concept particularly in a free economy system and a good incentive for creation and innovation), but it would also be dangerous because appropriate IP rules are a real protection against unfair monopolies whether economical or technical ones.

Forever criticized but always adaptable, Intellectual Property Law could become a strong pillar of the cyberspace regulation. And as demonstrated by the ICANN creation – even though a still imperfect body-, IP disputes are already contributing to the emergence of a new kind of governance on the Net.

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²⁴ Lawrence Lessig, *Code and other laws of cyberspace*, Basic Books, 1999, p. 53.

²⁵ L. Lessig, "Code is law", *The Industry Standard*, April 9, 1999.

²⁶ James Boyle, "A Politics of Intellectual Property: Environmentalism For the Net?" 47 *Duke Law Journal* 87 (1997).