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Prospects for a Global Networked Cultural Heritage

Law versus Technology?

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MY SUBTITLE is of course misleading. Law in itself is not against anything, and certainly it is not necessarily against the full and fair development of technology. But domestic law is an expression of national culture, and culture is sometimes clearly against the development of technology as a matter of national policy. The history of the United States has been a long dialogue between culture and technology—the quickest and broadest development of technology has been a national cultural and legislative priority since the early nineteenth century. The most important restraint on such development has been the law of intellectual property, protecting rightsholder monopoly in the name of creativity. For two hundred years Americans learned how to subsidize technological and economic development within the constraints of trademark, patent, and copyright law, favoring creator and producer interests over those of consumers, who were presumed to benefit from the gains in creativity. This, arguably, was as true in the knowledge industries as it was elsewhere in the economy.

But the twin revolutions in telecommunications and information technology over the last third of the twentieth century have vastly

expanded the scope and have transformed the nature of the production, manipulation, and transmission of information. The digital universe is larger, more flexible, and more universal than the Gutenberg universe it is supplanting. One development in particular, the Internet, has swiftly created a more genuinely global environment than exists in any other sector. The concept of "information flow" is as new as the process is old—something both qualitatively and quantitatively new is taking place in the knowledge world.

Nowhere has the information and telecommunications revolution been more apparent than in issues of international security. On the one hand, we have experienced the sad spectacle of New York police officers and firefighters unable to communicate with their own forces, much less those of the other department, as a result of the failure of telephone repeaters in the World Trade Center towers on September 11, 2001, leading to a tragedy for humanity and a triumph for Al-Qaeda.

On the other hand, four years later the *Washington Post* reported that "*al Qaeda* has become the first guerilla movement in history to migrate from physical space to cyberspace":

> With laptops and DVDs, in secret hideouts and at neighborhood Internet cafes, young code-writing jihadists have sought to replicate the training, communication, planning and preaching facilities they lost in Afghanistan with countless new locations on the Internet. (*Washington Post*, 7 August 2005)

The *Post* reported that Al-Qaeda is building "a massive and dynamic online library of training materials—some supported by experts who answer questions on message boards or in chat rooms—covering such varied subjects as how to mix ricin poison, [and] how to make a bomb from commercial chemicals . . ." These sites address the younger generation in the Arab world and constitute "one big *madrassa* on the Internet." A follow-up article on the insurrectionist Abu Musab al-Zarqawi pointed out that he distributed videos and other data through an "information wing" that supports a "specially designed Web page, with dozens of links [to his videos] so users could choose which version to download."

> There were large-file editions that consumed 150 megabytes for viewers with high-speed Internet and a scaled-down four-megabyte version for those limited to dial-up access. Viewers could choose Windows Media or RealPlayer. They could even download "All Religion Will Be for Allah" to play on a cell phone. Never before has a guerilla organization so successfully intertwined its real-time war on the ground with its electronic jihad.

"The technology of the Internet facilitated everything," said an al-Zarqawi site on the Internet, the Global Islamic Media Front. "Today's Web sites are 'the way for everybody in the whole world to listen to the mujaheddin.'" The *Post* quoted a security expert as saying, "Iraq is an urban combat zone. Technology is a big part of that. I don't know how to distinguish the Internet now from the military campaign in Iraq" (*Washington Post*, 9 August 2005). And both sides use the same technology. A few days later the *Post* ran a piece about the use of Web logs by U.S. soldiers in Baghdad. When Sgt. Elizabeth LeBel's Humvee was hit by a roadside bomb, she posted 1,000 words on her "little war story" at http://www.sgtlizzie.blogspot.com. Her site has received 45,000 hits in the past year. Not surprisingly, U.S. army commanders have now "required that all blogs maintained by service members be registered [and] . . . also barred bloggers from publishing classified information" (*Washington Post*, 12 August 2005).

The war in Iraq is simply one example of the failure of law to keep up with technology, but within the United States law creates the environment within which technology must exist. Many different forms of law have structured the development of communications technology and the media over the course of American history. The two most important have been the various regulatory schemes (state and federal) governing communications systems, and the laws protecting copyrighted material. The question for us now, however, is how has the role of law in the stimulation and regulation of information technology changed as a result of the twin revolutions?

In principle, there is no reason why the technologies of telecommunications and information should have changed the long-term American pattern of norms and behaviors in the law of intellectual property. We are, after all, still working from the same constitutional text, in Article I,

Section 8 of the Constitution of the United States, which gives the federal legislature authority "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." A series of statutes and court decisions have settled the general parameters of this limited monopoly intended to stimulate artistic and intellectual creativity, and in so doing to set the policies under which creators could profit from this right. Should it matter that, increasingly, modes of publication are digital rather than analog? The explicit policy of the late-twentieth-century revision of the U.S. federal law of intellectual property (the Digital Millennium Copyright Act of 1998) was that the law of intellectual property should apply without respect to changes in technology—and indeed this was also the theory of our legislative revision of IP law in 1976. A strong body of opinion, especially in the commercial sector, vehemently supports this position, contending that the issue is still (and simply) the protection of creativity, though simultaneously contending that "minor" accommodations to the old system (anticircumvention rules, for instance) are necessary, and consistent with the traditional IP system.

But others, largely in the consumer community (and note that an increasing number of consumers are also creators), argue that "intellectual property" is no longer an adequate metaphor to describe the realities of the era of digital information. Their view is that the new mechanisms in the DMCA, along with other changes in the marketing of digital cultural objects, constitute an essentially new IP system, one in which rightsholder prerogatives have been strengthened at the expense of the interests of the consumers of culture. Perhaps the best example of a parallel change consumers find threatening is the transition from sales to licensing in the marketing of digital culture. Purchasers have stronger rights and greater protection for their interests than licensees, and the practical implications for users are profound, and not only in increased costs.

The nonprofit cultural sector has almost universally taken such a position with respect to the DCMA. The for-profit cultural sector, which has now nominally reinvented itself as the "creative industries," is firmly in the rightsholder intellectual property camp. But of course there are many creators in the nonprofit cultural camp, and there are also many creators in the for-profit sector who feel that they do not sufficiently benefit from the legal

position of the firms that produce and distribute their products. The cultural property world is as messy as any other. But the politics of the debate over networked digital culture are generally polarized bilaterally and asymmetrically, with user nonprofits set against producer/distributor for-profits.

At least this is how it seems to someone who has spent the past twenty years struggling to help create a national and international networked cultural heritage system. When I became president of the American Council of Learned Society (ACLS), our national humanities organization, in 1986, I felt that my initial duty was to identify the national and international policy issues on which the U.S. humanities community had to focus. Although I was and am a techno-nerd, I quickly came to the opinion that we faced one overwhelmingly opportunity and challenge—the information technology/telecommunications revolution on the creation and communication of arts and humanities knowledge. It seemed clear that nearly everything was changing—libraries, publishing, the conditions for scholarly creativity, the possibilities of scholarly communication generally, the accessibility of sound and image, and cultural preservation.

While my humanities Learned Society constituents did not yet agree with me in the mid-1980s, it was not hard to find allies in the library, computer science, and early-adopter humanities worlds. We soon formed a coalition (initiated by the Coalition for Networked Information, ACLS, and the Getty Art History Information Project) that we called the National Initiative for a Networked Cultural Heritage (NINCH). Our idea was to create a space for the digital arts and humanities communities, to better understand the implications of the digisphere for the development of our fields and institutions, and to explore the ways in which our emerging interconnectedness could be expanded and exploited. The original coalition was based heavily on the academic research library community (represented by the Association of Research Libraries), parts of the arts world (the Getty and the Association of American Museums), some of the larger humanities associations (especially the College Art Association and the American Historical Association), a few federal agencies (especially the Smithsonian Institution and the Library of Congress), and a significant number of smaller institutions. While we called NINCH a "national" initiative, the organization was in fact fairly successful in networking, especially to Europe.

We did not have at the outset a clear view of either strategic objectives or short-term tactics. Our sense was that we were related communities that had not collaborated fully in the past, communities for whom the digital environment created both the opportunity and necessity for working together. But it did not take us long to realize that an external agenda was being set for us, because NINCH was starting up just as the Geneva WIPO negotiations were heating up. ACLS, like the Association of Research Libraries, was then represented in the CONFU (U.S. Department of Commerce, Conference on Fair Use) discussions. The question of fair use seemed a proxy for the sorts of IP issues that were basic to humanities involvement in digital cultural heritage, but what we learned at CONFU was that even collectively we did not have the clout to get a hearing for our concerns, much less the power to stand up to the large commercial entities in the communications, software, and entertainment industries that dominated the discussion (and later the framing of the DMCA). Interestingly, up to that point in time neither the universities nor the cultural nonprofits had been much interested in IP policy. We had allowed the library community to carry our IP water, and the ARL in particular had traditionally done well by us. But by the early 1990s our concerns ranged far beyond "fair use," "first sale," and the other longtime library issues. And yet the universities, which had long since recognized their financial interest in patent law developments, did not see the emerging relevance of copyright law to their core concerns. The AAU took several years before taking the issue seriously. And by then the DMCA was a *fait accompli*, the Sonny Bono Act (properly known as the U.S. Copyright Term Extension Act of 1998) had come and gone, and our task was to accommodate ourselves to the New World IP Order. Meanwhile, by about 2002 or 2003, even though we had successfully expanded to include the art museum community, it had become clear that the cultural heritage community could not sustain even the modest overhead expenses of NINCH, which set into the digital sunset.

Which is where the nonprofit networked cultural heritage community is now. In many ways, of course, a global networked cultural heritage is thriving. More and more cultural information of all kinds is either being digitized or created in digital form; networks are wider, faster, and more dense; there is greater access to the Internet worldwide; and there is a

heightened understanding of the significance of the cultural digisphere. Most cultural institutions now have a presence on the Internet, and some of them are creative and interactive in the kinds of information they display, although too many (especially museums) view their Web sites as little more than marketing tools. Culture is expressed in an increasing number of languages, though English is still dominant. Improved searching technologies enable us to find relevant information, and some of it is even being archived (though this remains a huge cultural challenge). Image and, increasingly, sound are moving to the fore. When I think back a decade, I realize that all of this far exceeds the expectations of the founders of NINCH.

Are we having fun? No. Why is it that I do not feel good about the current state of global information flows? Mainly because I believe that we have not been able to get a handle on the sorts of legal constraints that preoccupied NINCH from the start. It is fascinating to think that although the organization was not built in contemplation of participating in the intellectual property wars, IP almost immediately became the principal factor defining our agenda. The simple fact of the matter is that the U.S. legal regime imposes severe constraints on the development of a vigorous and extensive networked cultural heritage domain. I do not argue, and am not arguing here, for an entirely open access/public domain world. I believe that rights of creators should be respected, and that creativity should be rewarded economically. But I do hold with those who believe that the laws of IP currently reflect a hardening of rightsholder dominance in a manner that is not based on the original constitutional principle of offering limited protection to creators. The examples are too numerous and obvious for me to mention, but suffice it to say that I think that rightsholders, unreasonably afraid of giving up more than they realize they are conceding, are restricting access to cultural objects that are crucial to the digital cultural heritage—recent works of literature and music, artistic images, and much more. We will see, for instance, whether the current discussion with the U.S. Copyright Office about "orphaned works" leads to a thoughtful resolution of an important cultural access question. Permit me to doubt that it will.

The refusal to sell digital information and the unwillingness to archive it reliably constitute another important range of problems. The funding necessary to digitize, archive, and transmit the cultural heritage is an increasing problem for the nonprofit sector. The much-heralded space for nonprofit–commercial joint enterprises is being oversold, because it will work for only a narrow range of cultural objects. As Americans, I suppose we should not be surprised that law reflects the dominant economic interests in the society, but I do not think we have yet come to terms with the ways in which the current law of intellectual property stands athwart the development of local digital culture—and, by extension, global digital culture.

Not that there are not additional problems in the global information environment. We are surrounded by them. Let me briefly mention two. The first is the Google Books project. This is a vastly ambitious commercial project by the leading U.S. search engine site. Or at least Google used to be no more than the world's best digital indexer of material already on the Web. But now Google has decided to convert analog content to digital form by entering into agreement with five of the largest international libraries. The basic idea is to digitize and index everything, and to display for free anything in the public domain, while displaying such "snippets" of copyright-protected materials as "fair use" will permit. The company asserts that its mission is "to organize the world's information," nothing less. It admits that "much of that information isn't yet online. Google Books aims to get it there by putting book content where you can find it most easily—right in your Google search results" (www.print.google.com/googleprint/about.html).

So who could be against such a public-spirited effort to stimulate the global flow of information? Rightsholders, which is to say publishers. The first group of publishers to respond was the academics, the Association of American University Presses, which in May 2005 called the Google effort "a broad-sweeping violation of the Copyright Act."

> The fact is Google Books Library Project appears to be built on a gigantic fair use claim, which we think is questionable at best. If the fair use is not valid, it could be a gigantic copyright violation. There are fundamental questions about copyright that need to be answered.

Could the Association of American Publishers be far behind? Hardly. A month after the AAUP letter of protest to Google, President Pat Schroeder of AAP weighed in with a letter to Google asking for a six-month moratorium on digitization until the fair use issue could be settled. Two months later, in early August, Google announced that it would not scan (i.e., digitize) any copyrighted books until November to allow for time for discussion with the publishers. Here we have two corporate behemoths (Google is the most successful IPO in many years, after all) going against each other, with the larger entity apparently displaying contempt for assertions of rightsholder prerogatives. The AAP was reduced to alleging that the Google "procedure places the responsibility for preventing infringement on the copyright owner rather than the user, and turns every [*sic*] principle of copyright on its ear" (*New York Times*, 12 August 2005).

Think about what is involved here. Google is attempting to digitize large quantities of copyrighted material and is offering publishers the opportunity to withhold consent for "snippets" to be displayed (along with links to publishers' online sales portals); publishers say that permission must be granted before display. Rights before efficiency. Whatever one's view of the legal niceties (or of economics, for admittedly a lot of money is potentially at stake here), this is a dispute that simply could not have occurred at any earlier point in U.S. history. What is new is that a leading telecommunications corporation thinks that it can profit hugely by making information available without cost. The publishers are simply contending that the cost is being shifted to the "rightsholders." Who's on first?

And it is not only the property owners who are complaining. The Europeans are now telling us that Google is fomenting an international culture war. The head of the Bibliothèque nationale de France, M. Neanneney, is opposing the creation of the Google Library: "It is not a question of despising Anglo-Saxon views. . . . It is just that in the simple act of making a choice, you impose a certain view of things. . . . I favor a multipolar view of the world in the 21st century. I don't want the French Revolution retold just by books chosen by the United States." He also didn't want the story told in the English language, I assume. But, more positively, he is undertaking a project to make twenty-two French periodi-

cals and newspapers dating back to the nineteenth century available in digital form on the Internet. Later, the European Union jumped into the war on the side of the French and announced a European text digitization project, which should remind us that cultural and linguistic nationalism have not been abolished by the Internet. To the contrary, they have simply found new sites for expression. And we know that national attempts to regulate speech on the Internet have the potential to disrupt cultural communication much more generally.

But a much more important concern is signaled by the current debate over the UNESCO Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions. This came out of the 2003 UNESCO General Conference, and it is currently being debated by the member states. The Preamble of the Draft Convention affirms the "fundamental right of all individuals and societies to share in the benefits of diversity and dialogue as primary features of culture, as the defining characteristics of humanity." It ups the ante of the discussion by analogizing cultural diversity to biological diversity, as the "mainspring of sustainable development." The Preamble recognizes that "cultural diversity is nurtured by constant exchanges between cultures, and that it has always been a result of the free flow of ideas by word and image." It reaffirms that:

> . . . freedom of thought, expression and information, and its corollary, pluralism of the media, ensure that cultural expressions may flourish within societies, and that the greatest possible number of individuals may have access thereto.

And it recognizes the "fundamental right of social groups and societies, in particular of members of minorities and indigenous peoples, to create, disseminate and distribute their cultural goods . . . to have access thereto, and to benefit there from for their own development." It emphasizes the "vital role of the creative act" and the role of creators, "whose work needs to be endowed with appropriate intellectual property rights."

So far so good, but the drafters are convinced that although "cultural goods and services are of both an economic and a cultural nature," "they

must not be treated as ordinary merchandise or consumer goods." And now we get to the moment of truth: "while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, these same processes also constitute a threat to diversity and carry with them a risk of impoverishing expressions" (Preamble, Preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expression, Paris, July 2004).

Why such concern about cultural diversity? There seem to be two separate reasons. The first is the fear of major countries that their national cultures (including national languages) under globalization will be swamped by either particular foreign cultures (for which here read: the American entertainment industry, especially films and TV) or by the homogenizing force of market-driven global culture. France is the poster child for this response, though Canada is not far behind, and it is embodied in the famous *exception culturelle*. The second reason is the desire of many countries, especially those in the developing world, to protect the cultures of indigenous peoples from being commodified and appropriated by corporate interests. The underlying theory of free trade (and neo-liberalism) is, after all, that of international capitalism, and in principle protectionism of any kind threatens the free exchange of property. Should cultural protectionism be an exception?

As an article in the 2 March 2005 *International Herald Tribune* put it, France and Canada seek protection beyond that gained in the last round of global trade liberalization:

> By enshrining cultural diversity in a legally binding UNESCO convention, they hope to shield culture from the free trade rules of the Geneva-based World Trade Organization. Why France and Canada? Both countries view cultural independence as an essential part of their political identity. . . . In contrast, as the world's largest exporter of movies, television programs and other audiovisual products, the United States can only lose from any restriction on cultural exchange. . . . While supporting the principle of cultural diversity, [the U.S.] warned that "controlling cultural or artistic expres-

> sions is not consistent with respect for human rights or the free flow of information." It further noted: "Mounting trade barriers, including efforts to prevent the free flow of investment and knowledge, is not a valid way to promote cultural liberty or diversity since such measures reduce choices."

Well, here we have globalization and culture caught in a web of contradictions. What does this mean in terms of legal public policy for culture? The "principle of balance, openness and proportionality" of the Draft Convention (Art. 2, sec. 8) says that nations adopting measures to support national cultural diversity must also commit themselves to guaranteeing "openness to the other cultures of the world." But member states have the right to adopt financial and regulatory measures to protect and promote diversity of local cultural expression, and, to that end, they may subsidize local culture through public financial aid.

One does not have to think long about the Draft Convention in order to perceive conflicts of law, economy, and culture inherent in its framework. How does one reconcile WTO standard of free trade with the suggested norms of cultural protection in the Draft Convention? It contains explicit solicitude for minorities and indigenous peoples within nations, and implicit support for cultural nationalism. Is one man's (one nation's) information flow another man's (nation's) Sword of Damocles? Should a combination of intellectual property and free trade law be permitted to ensure the rule of the wealthiest national cultures in a networked cultural heritage infrastructure? Perhaps international law should protect and nurture local cultures? If so, should cultural rights trump (intellectual) property rights? Should international law protect national cultures?

I have been asked to raise the question of the role of cultural heritage in the context of global information flows. This little essay intends to do no more than to moot the question, and to suggest that it is ripe for fuller investigation. My intention here is simply to challenge us to think locally and to ask what the role of the cultural sector might be in shaping the legal environment for the global flow of information. I remind you that everything that is global happens somewhere at some time. My suggestion is that the sector has not been effective in pressing its case within

the United States, and to argue that we also need to consider how what we do nationally relates to what needs to be done internationally. The underlying dilemma is the near-total domination of the global information environment by commercial interests, and the definition of information rights as property rights. Those of us who are enormously optimistic about the role of information and communications technology for cultural development believe that the sun is appearing on a great era of global cultural networking. But as Benjamin Franklin remarked at the Philadelphia Constitutional Convention, we cannot be sure whether that sun is rising or setting.