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Intellectual Property and Internet Governance

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Tutelage of intellectual property has become a primary issue to build internet governance. Protection granted to copyright, marks and patents is now a key topic when choosing amongst the various regulatory models for subjects that oftentimes do not hold any straightforward — and easily perceptible — relation with the theme of intellectual property.

Given the opportunity represented by the Internet Governance Forum to be held in Rio de Janeiro on November 12-15, 2007, this paper looks into how intellectual property debates have been conducted in internet governance discussion forums. Special attention is given to the analysis of intellectual property theme in IGF-Rio, though the scope of conclusions here in turns to a more comprehensive scenario, where intellectual property is seen as a key topic to build an open, democratic, and plural regulatory environment of the network.

I. Setting up a global forum on internet governance

The Internet Governance Forum (IGF) is the result of efforts made in the World Summit on the Information Society (WSIS), put together by the United Nations Organization (UNO) in two phases: December 10-12, 2003, in Geneva, and November 16-18, in Tunis.[2] In its first phase, the WSIS issued the Geneva Declaration of Principles and the Geneva Action Plan,[3] and in its second phase, the Tunis Commitment and the Tunis Agenda for the Information Society. [4]

1 Paper requested to the Center of Technology and Society (CTS) at Getulio Vargas Foundation Law School, by RITS (Third Sector Information Network), in order to contribute with reflexions on the IGF process, especially on those which refer to the second edition forum (which took place in Rio de Janeiro from November 12th up to 15th, 2007) and all its repercussions.

2 UN General Assembly Resolution 56/183, issued on December 12, 2001. Available at: <http://www.itu.int/wsis/docs/background/resolutions/56_183_unga_2002.pdf>. Access on: 30.10.07.

3 <http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161|1160>. Access on: 30.10.07.

The WSIS was intended to be a forum for discussions on how information and communication technologies could be used to comply with the principles and goals set forth in the United Nations Millennium Declaration.[5] In short, the idea is that ICTs offer great potential to increase access to information and knowledge; therefore, lack of access to these technologies would have negative impacts upon issues of development.

During the WSIS, a much broader concept of internet governance was therefore developed, rather than the usual one that is limited to technical aspects concerning the network's structure and operation, i.e., enabling protocols, standard setting processes, domain names system, and so on, and it has the internet as a "global facility available to the public", whose administration should be democratic and transparent, involving governments, private sector, civil society, and international organizations. As the Geneva Declaration of Principles has it, the administration of the internet involves not only strictly technical issues but also discussions around any public policy of relevance to managing the network as a globally available resource.[6]

The IGF has come into existence within this context, more specifically as a result of discussions held in the second phase of the WSIS, as per provisions in item 72 of the Tunis Agenda, which determined that a new forum should be created to discuss public policies related to the issue of internet governance, in an attempt to encourage dialog among the various stakeholders — a multi-stakeholder approach — in a multilateral and transparent fashion.[7]

Of all IGF attributions,[8] the following can be indicated as the most important ones: to discuss public policies relating to key elements of governance, in order to provide internet with sustainability, robustness, security, stability and development; to interact with intergovernmental entities; to facilitate the exchange of information and best practices, relying on knowledge from technical, scientific, and academic communities; to identify emerging issues and make them be known to governments and people at last, issuing ad hoc recommendations; and to strengthen and encourage stakeholder engagement in current and future internet governance processes. Meanwhile, there is clearly a concern with fomenting social inclusion and having developing countries participate in governance processes, which reflects the WSIS's original connection with the United Nations Millennium Declaration principles.

According to item 73 in the Tunis Agenda, the IGF is intended as an addition to the existing internet governance structures and not as replacement, playing a facilitator role for liaison between the various stakeholders — governments, civil society, companies, intergovernmental organizations — in issues of governance, offering recommendations and best practices as vectors for the implementation of public policies at various levels. The IGF is expected to meet on a periodic base. The Rio meeting, held in Rio de Janeiro on November 12-15, 2007, was second to the first one held in Athens, in 2006, wherefrom a series of "dynamic coalitions" emerged around specific interests, most of which are almost directly related to the debate on intellectual property.

2. Intellectual property and internet governance

"Intellectual property" is not a label devoid of problems. As frequently recalled, it comprises rights in relation to goods that, despite having the common characteristic of intangibility that is natural to information, considered in a broad sense, are rather different among themselves. Whenever *intellectual property* is mentioned, it may be in reference to copyright, patents, trademarks, cultivars, integrated circuit topography, etcetera, so that mentioning intellectual property may sometimes cause undesired confusion, especially while discussing public policies — that which is good for an ideal copyrights regime may not necessarily hold good for an ideal patents regime.[9]

On the other hand, the label may be convenient as converging issues that comprise many, if not all, of the rights involved, such as access to knowledge. At any rate, the term has so forcefully entered the conceptual repertoire of law, economics, and politics, and just as much in corporate institutional structures and in the international legal framework, that it cannot be relinquished now. The problem remains, however, of making distinctions when an ever so comprehensive acronym such as IPRs (intellectual property rights) is used. When proposing to analyze the presence of IPRs in the IGF-Rio, this is a tangible problem: which topics, amongst the broad spectrum, would be relevant?

The IPRs with the highest level of importance in issues relating to internet governance — in the broad sense of governance adopted by the IGF — are *copyrights*, because of the instruments given to the average person by digital

4 <http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=2266|2267>. Access on: 30.10.07.

5 UN General Assembly Resolution 55/2 issued on September 08, 2000. Available on: <http://www.un.org/millennium/declaration/ares552e.htm>. Access on: 30.10.07.

6 The Tunis Agenda, the document containing plans for implementing the WSIS principles, further clarifies the ideas of internet and governance in items 34, 58, and 59: "**34**. A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet."; "**58. We recognize** that Internet governance includes more than Internet naming and addressing. It also includes other significant public policy issues such as, inter alia, critical Internet resources, the security and safety of the Internet, and developmental aspects and issues pertaining to the use of the Internet."; "**59. We recognize** that Internet governance includes social, economic and technical issues including affordability, reliability and quality of service".

7 Tunis Agenda, 73.

8 Tunis Agenda, 72.

9 This is why Richard Stallman recommends that the term "intellectual property" be avoided and specific reference be made to the rights at stake. See STALLMAN, Richard. *Did you say "Intellectual Property"? It's a seductive mirage*. Available on: <http://www.gnu.org/philosophy/not-ipr.xhtml>. Access on: 22.10.07.

technology and the network's content distribution structures to reproduce and easily modify information. This paper is on a par with the current prevalence of copyrights in debates dedicated to analyzing public policies around intellectual property, and tries to identify potential points of contact between the event's agenda and copyright related problems in the discussions to be held in the IGF-Rio. However, other IPRs are truly relevant for internet governance, such as those concerning patents and trademarks. Patents are particularly relevant in what concerns the very definition of open standards,[10] a rather prevailing theme at the IGF-Rio, and also in the development of free software, where it plays a very important role for the operation of the network.

Looking at the dynamic coalitions that have been formed at the IGF Athens and also prevailed in the IGF-Rio,[11] there is only one that ostensibly includes the IPRs among their main concerns: *A2K@IGF (access to knowledge* at IGF). The other coalitions only indirectly address the theme, as part of a more comprehensive agenda, or simply do not address it since the theme does not retain any connection with the topic to be debated. The Internet Bill of Rights coalition deserves to be mentioned as a role model that touches intellectual property themes but has more comprehensive goals, such as to establish guidelines for the regulation of fundamental rights — included herein are those related to the IPRs — in the internet environment.

Amongst the themes presented in the IGF, considering the results of those works undertaken by the dynamic coalitions and by the main panels composed by internet governance specialists, we can point out the potential discussion focuses on IPRs in the IGF as follows: **(a)** copyright exceptions and limitations; **(b)** alternative licensing models; and **(c)** TPMs and DRM systems. Evidently, the rich repertoire of copyright issues is not exhausted with these topics, much less intellectual property in general, and others were brought about during the event. For the purpose of this paper, however, suffice it to briefly expose the selected themes and identify their potential connection with sessions of the IGF-Rio.

2.1 Copyrights – exceptions and limitations

As the internet and information/communication technologies in general increase the possibilities for access to content and access to the *tools* for producing content, copyright exception and limitation regimes appear as major governance concerns.[12] If, on the one hand, exclusive rights are ensured to authors (and to those whom these rights are transferred to) as a means to encourage creation there are interests around access to and use of content that need to be weighed against the incentives provided, in theory, by copyright norms.

The issue of exceptions and limitations is extremely relevant for IGF discussions. If a normative architecture is pursued against some ongoing technologic, social and economic changes, the very network structure is likely to be developed against the flow of access to content or in a way that will keep users from manipulating and transforming information. Providing an environment where there is effective balance between the interests of content authors, editors, and users — categories that are increasingly overlapping[13] — without raising obstacles to the new possibilities offered by the internet, whether it concerns new business models or technological development or democratized access to the tools for producing and distributing information, may well be the main concern that comes to mind when ideas of internet governance are associated to copyrights.

However important they may be, a historical analysis of the experience with copyright exception and limitations shows that they remain secondary in many debates where they should be utterly relevant. That is the case, for instance, of the negative effects of an extremely strict and inflexible copyright regime around the very education and content production that exclusive rights are intended to encourage. The main reason why exceptions and limitations are not discussed in due depth and breadth may be attributed to ownership — which has been around since copyright regimes were brought into existence and enjoyed by a reduced number of stakeholders — of the legislative process around the subject.[14] This ownership has legitimated standards that comply with predominantly industrial interests over others that are just as relevant, and imposes discursive barriers to any reform movements whatsoever.

After the internet and the digital technology boom, this situation has undergone gradual changes. Some sectors of society, previously alien to debates on public policies concerning copyrights, were included for the first time in intense discussions revolving around copyright functions and attributes. The issue of exceptions and limitations thus appears as inevitable, for it is intimately connected to the very rationale for a copyrights regime. Ideas such as access to knowledge, furthermore, appear as agglutinating focus for issues related to the production and flow of information, and push to further expose the theme of exceptions and

10 *Open standards* are open specifications that may be implemented in different manners and that play a twofold function of **(a)** keeping consumers from being caught up within proprietary formats that are controlled by certain suppliers, and **(b)** providing greater compatibility possibilities, by standardization, between *software/software, software/hardware and hardware/hardware*. For implementation purposes, they cannot imply payment of royalties of any sort. For a definition, see: PERENS, Bruce. Open standards: principles and practices. Available on: <http://perens.com/ OpenStandards/ Definition.html>. Access on: 22.10.07. One should bear in mind that oftentimes open standards are differentiated from open formats, but this discussion extrapolates the scope of this paper.

11 See <http://www.intgovforum.org/Dynamic%20Coalitions.php>. Access on 22.10.07.

12 There is no difference here for exceptions to copyright limitations. It is possible to differentiate, but it may lead to a semantic vicious circle. One may conceptualize exceptions as limitations, and limitations as exceptions, so it is not useful to outline a distinction. For the purposes of this paper, let us understand that exceptions and limitations are rights relating to permitted use of protected content, regardless of authorization from the copyrights holder.

13 See BENKLER, Yochai. From consumers to users: shifting the deeper structures of regulation toward sustainable commons and user access. Federal Communications Law Journal, n. 52, v. 3, p. 561-579.

14 See PATTERSON, Lyman Ray. *Copyright in historical perspective.* Nashville: Vanderbilt University Press, 2004; LITMAN, Jessica. Digital *copyright.* Amherst: Prometheus Books, 2001; DRAHOS, Peter; BRAITHWAITE, John. *Information feudalism:* who owns the knowledge economy? New York: The New Press, 2003.

limitations, now seen under the light of a series of other rights that were either less present in a critical assessment of traditional regimes or seen as living in harmony with these regimes.

Concerning a forum like the IGF, however, some problems in comparative law could be indicated. If some countries still have any tradition discussing the potential negative effects of copyrights over other rights and interests, such as the USA,[15] the opposite is true in countries like Brazil, where a strong discourse of jus naturalis rationale[16] prevents the copyrights function from critical approaches and serious investigations concerning both its theoretical aspects and its practical normative implementation.[17]

In this perspective, authors are taken as fragile geniuses lacking protection at extreme levels,[18] without which the entire process of cultural production would cease to exist, when in fact there are potential different arrangements for the production of information[19] and, consequently, different legislative models that could be proposed to counterbalance the traditional one. There is, thus, a variety of points of view concerning the *strength* of the arguments underlying copyrights between different countries, which should be recalled when it comes to a global forum like the IGF. Remarkably, the dissemination of new arguments concerning information production strategies, such as those indicated by Benkler and von Hippel, among others, must also be recalled insofar as these arguments lead to a reassessment of the traditional utilitarianism and jus naturalism paradigms.[20]

Another problem to be underlined is the existence of more than one model to establish copyright exceptions and limitations. Guided by general criteria, the American model of *fair use* is truly different from the one prevailing in countries of Roman-Germanic tradition, which revolve around strict lists of exceptions and limitations, oftentimes interpreted without any observance to the constitutional foundations of the copyrights regime. The diversity of approaches to the *implementation* of a system of exceptions and limitations is, therefore, another factor to be considered in an international forum. A common repertoire must be found for the discussion of the theme of exceptions and limitations, so that orientations be established to account for the observable diversity among underpinning arguments and implementation formats for the proposal of public policies that are compatible with the current context of the internet and without sacrificing the potential for innovation and access to knowledge that it brings along.

15 See, for instance: PATTERSON, L. Ray; LINDBERG, Stanley W. *The nature of copyright:* a law of users' rights. Athens/London: The University of Georgia Press, 1991.

16 That is, theses that support the copyrights rationale in issues that are prior to the very existence of the legal order, often justifying their presence upon the very human nature, in the relational order of things, or in the sense of a "civilizing process".

17 Note that, though it is not a mistake to that both in *civil law* countries and in *common law* countries the influence of utilitarian and jus naturalis justifications can be pointed as operating jointly to support copyright regimes, as indicated by Goldstein (see GOLDSTEIN, Paul. *International copyright*. Oxford: Oxford University Press, 2001), there is a clear difference when it comes to emphasis. The jus naturalis rationale of copyrights is much stronger in countries of Roman German tradition, which affects the very form of interpreting the utilitarian rationale and eliminates a number of points of view from the legal literature: it is upheld that copyrights are necessary to protect the author's property and personality—sometimes the protection of personality *via* the protection of property—without jeopardizing collective interests and other individual interests and rights that are affected by exclusive copyrights.

18 In good conformity with the romantic concept of authorship, as described by Woodmansee and Boyle. See WOODMANSEE, Martha. *The genius and copyright:* economic and legal conditions of the emergence of the 'author'. *Eighteenth-century studies*, v. 17, i. 4, p. 425-448; BOYLE, James. *Shamans, software, & spleens:* law and the construction of the information society. Cambridge/London: Harvard University Press, 1996.

19 See BENKLER, Yochai. Intellectual property and the organization of information production. *International review of law and economics*, v. 22, n. 1, p. 81-107.

20 See, in general, BENKLER, Yochai. *The wealth of networks:* how social production transforms markets and freedom. New Haven/London: Yale University Press, 2006; HIPPEL, Eric von. *Democratizing innovation.* Cambridge/London: The MIT Press, 2005; HIPPEL, Eric von. Open source software projects as user innovation networks. In: FELLER, Joseph et allii (eds.). *Perspectives on free and open source software*, Cambridge: MIT Press, 2005.

2.2 Alternative licensing models

As the free software movement booms and becomes popular, with the marketing strategy of the *open source* movement, new licensing models that offer alternatives to the standard of copyright laws start to proliferate and to be broadly adopted as platforms for collective collaboration or even to sustain innovative business models based on individual non-collaborative production. The paradigm case is that of the set of Creative Commons project licenses. [21]

The legal basis for developing free licenses is generally the same one established by the traditional copyrights regime, on the basis of author-user concession of variable permissions, as opposed to the usual reservation of *all* rights attributed to the author, typical of the business models that developed after creation of the copyright systems, started in the 18th Century,[22] as cultural production gradually moved from prevailing patronage to market dominance.[23] The entire legal architecture that was erected and then changed to follow along this transition operates on the basis of certain assumptions about the way cultural markets work, and about which would be the best legal-economic arrangements to provide authors with the necessary incentives to produce and to ensure that they continue producing.

It just so happens that, opposite from what habitual logic sustains and from what legal and economic doctrines preach, the phenomenon of motivation for the production of content is not fully contemplated, in all of its subtleties, by the underpinning theories of copyright regimes.

21 <http://creativecommons.org/>. Access on 22.10.07.

22 See PATTERSON, Lyman Ray. *Copyright in historical perspective.* Nashville: Vanderbilt University Press, 2004; GINSBURG, Jane C. A tale of two copyrights: literary property in revolutionary France and America. In: MERGES, Robert P.; GINSBURG, Jane C. *Foundations of intellectual property.* New York: Foundation Press, 2004.

23 See WOODMANSEE, Martha. The genius and copyright: economic and legal conditions of the emergence of the 'author'. *Eighteenth-century studies,* v. 17, i. 4, p. 425-448.

24 BENKLER, Yochai. Intellectual property and the organization of information production. International review of law and economics, v. 22, n. 1, p. 81-107; BENKLER, Yochai. *The wealth of networks.* New Haven/London: Yale Universal Press, 2006, p. 35-58.

Production motivation does not necessarily depend on economic incentives, and even when it does, it may not depend on the existence of exclusive rights.[24]

If, however, on the one hand, alternative licensing models depend on the traditional copyrights regime, on the other, they are also very clear examples of how biased the current system is towards some business models and cultural production structures, which may, in some contexts, act as *negative* incentives to production.[25] Free licensing models are thus part of a movement that takes a "bottom-up" attempt to change established copyright standards,[26] on the basis of contract law, leading to a refreshed look at content producer-distributor-user relations in practice.

For internet governance issues, it is well to underline that just as free licenses act toward sustaining legal platforms to review copyrights and that authors scattered around the world collaborate in a coordinated fashion to produce diverse content, they are also inserted in a context of intellectual property crisis and of counter-attack by stakeholders who are interested in absolutely maximizing the established regime instead of trying to adapt to current technological, social and economic transformations.

Insofar as new creations always depend, to a certain extent, on previous creations, the recent copyrights normative production, as well as other related standards (such as those imposing sanctions to the violation of TPMs and DRM systems), may disturb the institutional ecosystem that enables collaborative production[27], just as individual productions that largely depend on the reuse of material that is not necessarily free from copyright protections.

Since the internet is, par excellence, the environment that enables these new modalities of cultural production, it is important that public policies referring to internet governance incorporate the major concern of defending a space that will provide continuity to information production/maintenance/management initiatives outside the traditional industrial structures. Remarkably, in the case of software, this implies having in mind not only the copyright standards but also the legislation on patents.

2.3 TPMs and DRM systems

Another relevant theme for the discussions around intellectual property in the Internet Governance Forum IGF-Rio process is that of the TPMs (technical/technological protection measures) and DRM systems (digital rights management).

Both TPMs and DRM systems are usually recalled jointly, though the concepts are not entirely equivalent.[28] There is much overlapping between them, but, strictly speaking, TPMs are any technical measures intended for the control of access to and/or use of content, whereas DRM are complex arrangements of technologies focused on automated compliance with electronic contracts. Since the most visible function of a DRM system is, in effect, to control access to and use of content, TPMs and DRM are compared, which may impose obstacles to an adequate understanding of the phenomena.

The debates are focused around non-authorized reproduction and piracy, when in fact DRM systems are mostly intent on becoming self-executable contracts of adherence to digital content, thus enabling business models based on abusive price discrimination,[29] involving, at the same time, content use charges that were not practiced before, such as the number of times a song can be heard. Another usual component of DRM systems is the use of instruments to monitor consumer habits and form databases that, besides serving directed marketing, are products themselves, protected, in some countries, as intellectual property.[30]

Both TPMs and DRM systems have serious implementation problems. These can be **technical**, since there has been no unbreakable DRM system to date,[31] and, save for a single utopian trusted computing system — an entirely closed ecosystem of hardware and software components —,[32] there is no perspective of effectively controlling information reproduction and manipulation by technological means. Implementation problems are also **legal**, due to the fact that DRM systems may find barriers in the law of some states, such as Brazil, whose consumerist legislation prevents current practices when it comes to electronic contracts of digital content, such as consumers' waiver of rights by means of subscription contracts.[33] Lastly, there are **circumstantial** implementation problems because the current economic, social and technological context is hostile to insistent business models that only try to modify the previous ones for the network space instead of adapting to the radical changes triggered by the transition from an industrial information economy to a network information economy, and by the ever more intense collaborative forms of content production leveraged by the internet.[34]

25 DRAHOS, Peter; BRAITHWAITE, John. Information feudalism: who owns the knowledge economy? New York: The New Press, 2003, p. 179.

26 LEMOS, Ronaldo. *Direito, tecnologia e cultura*. Rio de Janeiro: FGV Editora, 2005, p. 75

27 BENKLER, Yochai. *The wealth of networks*, p. 383-459.

28 KERR, Ian; MAURUSHAT, Alana; TACIT, Christian S. *Techinical protection measures*: part I, p. 18-19. Available on <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/protection_e.pdf>. Access on 01.01.07; RUMP, Niels. Digital rights management: technological aspects. In: BECKER, Eberhard et allii (eds). *Digital rights management:* technological, economic, legal and political aspects. Berlin: Springer, 2003, p.3-4.

29 See GILLESPIE, Tarleton. *Wired shut:* copyright and the shape of digital culture. Cambridge/London: The MIT Press, p. 267-274; MEURER, Michael J. Copyright law and price discrimination. *Cardozo law review*, v. 23, n. 1, p. 55-148.

30 Damage to consumer privacy is the most obvious consequence of this practice. See COHEN, Julie. DRM and privacy. *Communications of the ACM*, v. 46, n. 4, p. 48

31 See the recent AACS system fiasco, which has several security cracks: REIMER, Jeremy. New AACS 'fix' hacked in a day. *Ars Technica*. < http://arstechnica.com/news.ars/post/20070531-new-aacs-fix-hacked-in-a-day.html>. Access on 22.10.07. For further examples, please check the non-exhaustive list available on: <http://www.cdmediaworld.com/hardware/cdrom/cd_protections.shtml>. Access on: 07.01.07. Or, still, the traditional *crack* search system for TPM and DRM system violations, *Astalavista:* <http://astalavista.box.sk/>. Access on 07.01.07.

32 See WALKER, John. The digital imprimatur. *Knowledge, technology, & policy*, v. 16, n. 3, p. 24-77. Also available on: <http://www.fourmilab.ch/documents/digital-imprimatur/>. Access on 06.12.07

33 Consumer Defense Code, art.51, I.

34 See BENKLER, Yochai. *The wealth of networks:* how social production transforms markets and freedom. New Haven/London: Yale University Press, 2006.

It is important to observe that, as DRM systems start to be used, there is a basic normative core movement from copyright standards imposed by the law to contract right standards imposed by only one of the parts in consumer relations concerning regulation of conduct towards the use of intellectual goods. A totally private system is thus established for standards relating to access and use of digital format materials: one of the objectives of this system is, indeed, to establish self-executable standards, provided they are implemented by technical means, for content control and access, in blatant disrespect to copyrights established by the existing legal framework.[35]

Since TPMs and DRM systems often depend on remote communication between computers and internet structures, they may be considered a priority in governance discussions, particularly when they lead to structural mutations to the very configuration of the network, if certain standards, practices and content control systems are pushed, by legal means, to become mandatory. There are various reasons to defend that these systems not be adopted,[36] but there are also various interests that they be not only technically implemented but also sustained and protected by law, in jeopardy to any other rights affected.

3. The debate around intellectual property in the IGF-Rio

Now we are going to analyze all those themes which have to do with intellectual property within sessions and thematic groups in the second FGI session (in Rio de Janeiro).

The IGF-Rio agenda has been divided into six theme groups: *critical internet resources*, *access*, *diversity*, *openness*, *security*, *and emerging issues*. For further details, one may consult the *synthesis paper* developed from all the contributions sent to the IGF by stakeholders,[37] but theme groups can be summarized as follows:

35 Even if there was an intention to respect copyright limitations, it would be virtually impossible in a DRM system environment, for practical reasons. Only problematic situations that admit yes or no as a valid answer could be effectively implemented in a DRM architecture. Deciding, for instance, what a "small passage" of a literary piece means for the purposes of reinforcing the limitation under article 46, II, of the Brazilian Copyrights Law is something that calls for human intervention and verification on a case by case basis. Systems of exceptions and limitations such as the American *fair use*, in its turn, are even more difficult to implement in the context of a DRM system, for they demand even higher degrees of human interference to observe compliance with legally established principles in every concrete case. See ERICKSON, John S. Fair use, DRM, and trusted computing. *Communications of the ACM*, v. 46, n. 4, p. 34-39.

36 The following reasons may be indicated: **(a)** Wasted resources: the money spent on developing DRM systems could be used for other purposes, including content production; **(b)** the anti-consumerist nature of DRM systems may keep consumers at bay and be counter-productive in market terms; **(c)** standards protecting TPMs and DRM systems against violation may cause immense side effects to research and education; **(d)** system users' right to privacy is at stake, as non-transparent databases are constructed, usually without stakeholder consensus; **(e)** these systems cannot meet the requirements of limitation and exception regimes, and contract rights become "alternative author's rights", which is not the same as provisioned for in the law; **(f)** as a consequence, the is total transference, from the public to the private realm, of normative decisions on public policies referring to information use, flow, control, and production, imposed by automatically executed electronic contracts.

37 <http://www.intgovforum.org/Rio_Meeting/IGF.SynthesisPaper.24.09.2007.rtf>. Access on: 26.10.07.

a) **Critical internet resources** is a label that makes reference to predominantly technical topics related to internet infrastructure, such as the system of domain names, setting standards, peering, and interconnection etc. These subjects are more intimately linked to the idea of the original, more strict sense of network governance;

b) **Access** brings together all concerns with digital inclusion, looking at an analysis of public policies that could encourage institutional environments that are ready to stimulate the development of technical/socio-economic infrastructure that will enable access to non-connected populations;

c) **Diversity** handles, in short, linguistic diversity on the internet. The English language is, today, the *língua franca* on the internet, and some stakeholders are concerned with the comparatively smaller space dedicated to other languages on the network and with a consequently scarce non-English content;

d) **Openness** addresses the access to and flow of information, concerning both freedom of expression and intellectual property rights;

e) **Security**, as the name leads us to conclude, brings together topics that are as varied as the prevention of digital crime, privacy, terrorism, and the protection of children on the internet;

f) **Emerging issues**, lastly, is intended to discuss the development of public policies for the internet, considering issues such as the economic and political impacts of internet growth, effects resulting from the expansion of user generated content and the possibility of applying the anti-trust legislation to ensure free competition on the internet.

All IGF sessions and workshops may be related to at least one of the above mentioned groups. The most directly relevant group, concerning IPRs, is that of openness, but there was space for intellectual property rights discussions, however much on a tangent, in any of the others — mainly if we consider the expansionist character of IPRs debate, which make fundamental concepts about this theme become necessary even in more technical debates.

For a proper assessment of intellectual property rights in IGF-Rio sessions, one should first find the ones where they are likely to be considered as more *directly* relevant. Looking at the event program, we may point the following as sessions of special interest: *Freedom Online*, *The Digital Education and Information Policy Initiative: Towards the Development of Effective Exceptions to and Limitations on Copyright in the Realm of Digital Education*, *Fundamental Freedoms in the Internet Governance Forum: Protecting and Promoting Freedom of Expression, Freedom of Assembly and Association, and Privacy in the Information Society*, *Internet Bill of Rights*, *Content Regulation and the Duty of States to Protect Fundamental Rights*, *Upholding Human Rights on the Global Internet - Toward a Unified Industry Solution*, *Open Standards, The Intersection of Open ICT Standards, Development and Public Policy*, *Signposts, Benchmarks, and the Public Interest: Solving the Challenge of Keeping an Open Medium Open*, *Online Collaboration, Cybercrime Convention*, *A2K@IGF and Public Policy on the Internet*.

It should be noted that, in order for a session to be considered as "directly relevant" in terms of IPRs, the issue of intellectual property rights should be looked at from a broader perspective than that of a mere bargain between private entities and the collectivity, counterbalancing with incentives for the production and access to information. It is important to consider the *side effects* that an inflexible regime or intellectual property may have upon *fundamental rights* such as privacy, freedom of expression, education, on the one hand, and on the other, state issued public policies such as, referring to the brazilian example, "to ensure national development" (CF/88, art. 3, II), "to eradicate poverty and marginalization, and to reduce social and regional inequalities" (CF/88, art. 3, III), to foster "production, promotion, and dissemination of cultural goods" (CF/88, art. 215, II), to promote "scientific development, research and technological capacity" (CF/88, art. 218, caput), among others.

It was only after considering an intellectual property concept whereby certain normative configurations that would grant exclusive rights to creators could have side effects *beside* the more visible imbalances between the public and private realms in the play between incentives for the creation and access to cultural goods that the above list of sessions was put together.

The intellectual property issue is also relevant to the various sessions dedicated to the issue of freedom of expression, which is a right that may suffer very serious side effects as a result of an umbalanced régime of intellectual property.

However, one may very certainly say that IPRs were a relevant issue in the structure of the following sessions: *The Digital Education and Information Policy Initiative: Towards the Development of Effective Exceptions to and Limitations on Copyright in the Realm of Digital Education, A2K@IGF, Internet Bill of Rights and Open Standards.* The very nature of ideas revolving around *access to knowledge and information policy* impose a discussion of intellectual property themes, and the digital education session explicitly refers to the issue of exceptions and limitations to copyrights. The *open standards* depend, also, as recalled, on exemptions from paying royalties of any sort, where the IPRs come in as an issue to be discussed. Lastly, the dynamic coalition session on the *Internet Bill of Rights*, also relates with that theme because it includes a vision about ruling intellectual property rights in such a way that it guarantees the access to knowledge and other underneath interests. Searching for a positive way to encourage fundamental rights and to guarantee their application in an international scenery, the mistakes and right choices made during the formation of IPRs tutelage is always a reference to be remembered.

It is still important to remark that, in IGF-Rio program, in some sessions, intellectual property is an indirectly relevant theme. The following sessions fit into this profile: *Public participation in Internet Governance: Emerging Issues, Good Practices and Proposed Solutions, Promoting Network Security and Constructing a Harmonious Internet, Freedom of Expression as a Security Issue, Protecting Children from Sexual Exploitation through ICTs, 'Quality' and the Internet: Using and Trusting Internet Content, The Global Culture for Cybersecurity, Child Protection Online, Legislative Responses to Current and Future Cyber-threats, Security and Privacy Challenges for new Internet Applications: A Multi-stakeholder Approach, Privacy, 'Privacy in Internet Identity Management: Emerging Issues and New Approaches', Towards a Development Agenda for Internet Governance and Framework of Principles for the Internet.*

In general, during the FGI-Rio it was possible to see a great number of sessions related to internet security. There are two reasons for that: a) since the base technology for security has a high degree of overlapping with the technology used for TPMs and DRM systems, and since these systems may also be conceptualized as responses to security problems, the floor is open for a discussion, via reflex route, of IPR related issues; b) expressions such "cybersecurity" and "cyberthreats" may yield connections with "threats" such as piracy, possibly associated, on purpose, in a marketing strategy, to other threats, such as terrorism and child pornography. Evidently enough, argumentative artifices such as those indicated above will not necessarily appear in the IGF process as a whole, but it is indeed a strategy that some players in the content industry often use.

4. Some reflections on the role of intellectual property in the future process of internet governance

Some conclusions may be drawn on the role played up to now by the debate around intellectual property in the composition of the IGF, in view of the Forum's initial structures (Athens and Rio), making comments on the debate's evolution.

Initially, it is important to underline that the concept created by IGF-Rio organizers in the sense that the forum held in that city should be an "Athens-plus" version abounds with meanings. That concept was created as it was perceived not to belittle the first version of the forum, held in Athens, in 2006, but, rather, pointed at the need to excel, to advance the debates started in Athens.

This idea of advancing debates on governance issues represented an opportunity to make the Rio event a baseline for reflection upon the IGF process. We speak of "process" here because in Athens, since it was the first meeting of the forum, there were expectations around how the event and its irradiations would accommodate. In Rio, on the other hand, since it was the second meeting of the Forum, it was a past upon which to reflect and a future to be built.

In fact, the IGF-Rio became, even though its potential, into a forum meant to approach, in an almost profoundly way, all those current problems related to intellectual property rights. Unfortunately, this forum did not contribute to deeply discuss any of the preceding themes, in spite of its many virtues. Even though all those themes were mentioned, this forum was far from achieving any debate articulated around them, and from its relationship with internet governance according to the extent sense suggested by the forum itself and it was consequently, far from proposing any public policies or "better practices" that were expected to be achieved.

Not much formal agreement about the treated themes was reached, as it was expected considering the real nature of this event. The nature of the IGF, as it was created by

Tunis Agenda was to make contacts and debates easier among those people interested in internet governance: a multi-stakeholder platform for discussing the web's future. The Tunis Agenda's discourse speech and synthesis papers which took place in the forum's sessions still give us the impression that IGF was intended to be more than it was. Perhaps this impression was transmitted by the forum in Rio to the sessions in Hyderabad, India (2008).

It is really unthinkable that IGF would come to consolidate itself as another international annual congress, with inevitably heterogeneous manifestations both in quality and contents, but with questionably practical use even when related to internet governance in its strict sense. Thus the plain synthesis paper about IGF-Rio has a self-boasting tone and it refers to its virtues: "open", "pluralist", "democratic" and "dynamic" forum process that minimizes its absent focus and its small repercusion, less than it was expected in such an important event. The excessive use of words such as "multi-stakeholder" and "dialogue" is particularly curious if we consider that most of the IGF-Rio manifestations are really monologues accepting or refusing the importance of isolated themes which do not cover the whole spectrum of interested people who, one by one, did not seem to be necessarily looking for any agreement.

In this direction, it is necessary to think over the shape of an event which spends long sessions to manifestations which do not essentially overcome the simple diffusion of obvious statements like: "we must promote digital inclusion" or "there must not be any lack of respect for human rights". Just like in a traditional congress, one of the IGF's virtues is, at last, that of gathering groups of individuals interested in acquiring, expanding and consolidating contacts, being physically joined in a same place. The dynamic coalitions constituted in Athens and once more assembled in Rio may eventually become vectors of meaningful action. However, out of FGI, in itself worthwhile, its meetings seem to continue with the same shape.

One of the factors which makes the FGI future impact run a risk in the future is the extent of the themes discussed in the main forum sessions and this comment applies both to the Athens' event as well as to the Rio's. The subjects' composition which have a great deal of abstraction together with other concrete themes may be considered as an advantage because they give the facility to arrange panels in which each exponent can generally offer a different point of view about the same topics. For instance, taking into account those panels on "openness" and "diversity" there are so many topics which may be included under those titles, that they may have a negative result when considering the achievement of practical effects in their proposals. As panels cover a large range of possible subjects that may be treated, they always run the risk of lacking a series of debates as well as having a series of short speeches which have not any visible connections for the less specialized audience.

Later on, these sessions will be commented. On the other side, the possibility of transforming the main panels into places used for the presentation of short speeches with a small mutual reflection becomes worse because of the exponents' different profiles which conform each panel

in the end. At this point, it is necessary to analyze the concepts of plurality and multistake-holder which prevail in the IGF's discussions. It seems to be right that profile's plurality composing discussion panels is one (if not the only one) way to guarantee IGF process legitimacy. And this is exactly what it is: notions of plurality and process are the point that should be paid attention for those who participate in a forum's organization of high quality like IGF really is.

As this forum has plural and different profiles, it expresses the most various opinions about the most different topics related to internet governance. Thus, it is an effort to organize the exhibited ideas and to present them in such a way that they show their connections and divergencies. This is one of the challenges in a forum's organization.

Plurality should be a forum's virtue and there is no reason why this event would lose efficiency and strength to present its proposals. This is why it is necessary to join plurality and process concepts: one of the ways of transforming plurality into a motive power for obtaining results is to build the IGF process without being overcome by the organizing commission as if all discussions needed a new start.

It is necessary that the IGF had a process which overcomes the events fulfillment in themselves and that this forum during the one year interval that separates each presential forum from the next one, gives rise to methods to encourage all those debates that took place the previous year, aiming to more concrete results in the following event.

As it has been said before, this role is in the current IGF dynamics, played by the dynamic coalitions which meet themselves within the annual forums. These coalitions have started, in most cases, presenting some significant results transforming the actors' plurality into something not only valuable for the process legitimization but also essential for the achievement of concrete effects.

From the IGF-Rio onwards, it will be valuable to start up with a process which maintains the forum working during the whole year and also to create effective proposals on internet governance, during the five years' time previously planned for its fulfillment. The IGF is not, and cannot be another great international seminar in which participants from very different sectors gather themselves to listen and discuss, in a few days, current matters about technology and its forms of regulation. Specifically speaking about intellectual property, the very few moments during which this subject was discussed, it was not treated the way it should, taking into consideration the importance of internet governance in its extense sense. Those sessions which were expected to have an explicit preoccupation about intellectual property were left aside in an event that could not provide a lot, according to its conception and structure, to the initiatives that could result from those actions with a minimum level of conciseness.

Intellectual property was left aside in the IGF-Rio, even when it deserved being placed in a more outstanding place. As soon as the event began, an interministerial ordinance was announced from the Ministeries of Culture, Cience and Technology and from the Extraordinary Ministery of Strategic Affairs inaugurating, thus, a new plan for the construction of a "national infovia" (including backbone and mile) which included intellectual property explicitly

in its program. This plan, presented by the Minister of Culture, Gilberto Gil, and by the Minister of Extraordinary Strategic Affairs, Roberto Mangabeira Unger, aims to design an international structure of internet governance, by means of digital inclusion and qualification. In that context, a series of initiatives are planned, aiming to encourage the production of national contents, longing for suggesting innovations for the property´s régime together with the innovators' colective help instead of the individual owner's will.

The brazilian interministerial plan associates internet governance with the intellectual property régime's own outlines. As if it were a doubtful bet — and at this point it is useless to discuss both the ordinance and the ministers' speeches — this theme appears with strength and presence with which this should have emerged during the last session's time. Together with that announcement, the IGF opening session went on in the main hall with a huge series of isolated intervations and extremly concised presentations, which were repeated in the principal sessions during the following days.

In none of them, intellectual property theme was treated with the necessary emphasis except in the opening session about Openness. Diversity's session could have directed debates relating the new regulatory approaches for the authors rights' régimes to the possibility of spreading and producing both less homogeneous and more plural contents. Instead, this session was reduced to presentations defending the need of language diversity in internet and of an international domain names. Even though this kind of debate could happen, due to the board's context, it was expected that a greater presence of subjects connected with intellectual property could occur.

In spite of all those observations it is necessary, however, to recognize the right answers and to plan a future in which intellectual property will have a more outstanding place in the IGF process, thus helping the forum to stand out as it should be. There are relevant "discursive" conquests in the IGF-Rio which systematize and "pack", we may say, important subjects and problems on internet governance. Whether present times still reveal certain confusion about technical, legal and social fenomena which develops at such a confusing speed, the program (about problems an their multiple implied answers that show internet's own concept as a "global resource") maybe cosidered as a conquest which deserves to be polished and pushed forward in the international public sphere.

The composition of the IGF central subjects, by themselves, may be celebrated. Introducing difficult and multifaceted themes in traditional forums of consent, as regards of intellectual property's rights (World Intellectual Property Organization — WIPO — and World Trade Organization — WTO) is an unpleasant work if the conceptual and semantic index, that is usually used, does not offer a sufficient place for a deep and critical analysis on the involved interests and the consequences particular political options may cause. Straggling against categories filled with historical, moral and philosophical meanings such as "public", "private", "author", "inventor", "creator", "society" and "individual" is inevitable but unsufficient taking into account the complex transformations that are carried on.

Any outline of new "woven" concepts and problems — even when they are vague, imprecise or conveniently flexible — contributes to the dissolution of argumentative structures which have stopped the construction of a less anachronic, unbalanced and unjust regulatory system in the most relevant international forums. It is possible to mention at least two important attempts to take advantage of the FGI space and thematic shape in favour of a similar potential. Even though these attempts did not deeply affect the FGI-Rio context, they may at least make significant breaks and justify more than an intellectual property maximalist agenda, in case those attempts are reconsidered and introduced in a coordinated way and strategically planned not only in the FGI's future process but also in those forums which really produce linked legal documents.

Ronaldo Lemos, presenting the board on Openness took advantage of this theme to state explicitely how opening is a common element in all other FGI's subjects, emphasizing three different dimensions to examine it. At first, there is a legal dimension which leads us to certain matters such as adaptability and balance of systems of the authors' right limitations and exceptions as well as to the civil responsibility rules for access and service suppliers. There is still a political dimension which refers to the creation of public politics to encourage "opening" as the defence of the development agenda in the WIPO's sphere. And there is also an economical dimension for the Openness, such as the open business models due to the increase of the companies' value and also to the promotion of innovation and benefits of competing with the reduction of the markets entrance barriers.

Such an analysis like this of Lemo's in a reasonably high level of abstraction, specially if we consider that the final aim is the proposal and discussion of public politics. An interface which allows the skip of systematizations like that one to a plan of concrete action, among others, is the second example we can mention in the IGF-Rio considering the benefit from the thematic shape of the discussion groups in order to change the usual directions of intellectual property politics. The dynamic coalition of the Internet Bill of Rights, even in its incipient stage, may come to acquire a considerable impact in case its objectives were defined in a more incisive way. The traditional model/instrument of the declaration of rights (in the sense of statement, assertion of rights) widely used in constitutional and international rights, is an evident resource, even though it acquires or not linked strength, may be the way for reconceptualizing the intellectual property régime by means of a normative declarative shape which may enter into national legal orders and may also be somehow assimilated.

Robin Gross' manifestation in the coalition session is a good example of the way intellectual property rights may be elaborated in a field of a declaration of rights for internet associated with the rights which are very different at first sight, such as anonymity and privacy, and also with those rigths that maintain a closer relationship, such as expression and communication freedom.

Finally, we may point out that whether the intellectual property role in the IGF-Rio was poor in terms of depth in the debates, those moments in which this subject was discussed, made its evident importance. And this

is so because, with great expectation, we hope that the discussions on intellectual property in the IGF-Rio will be multiplied in the future sessions.

The IGF process should develop in a growing way, looking for achieving effective proposals for the regulation of those themes that are included in the meetings program. In order to reach this aim we believe that regulation of intellectual property right may serve as a micro-cosmos of the administration of a series of themes related with the internet governance process. The way in which the IGF handles the intellectual property will be a cue to show the history of lost potentials or the reasons for an international success. We hope that this five years period will be, in the end, the second result that comes true and that the IGF may be placed in a field in which proposals, debates and changes will be the leading vectors towards a global internet governance.