

**INTELLECTUAL PROPERTY AND THE DIGITAL CULTURAL DIVIDE:
MAKING CYBERSPACE A MULTI-CULTURAL TERRITORY**

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Like other domains of literacy, [The Internet is] ... a site of struggle between different ideological and political forces.²

Cyberspace has been described as a new borderless frontier, offering unprecedented opportunities for the exchange of information across time and space. This new technologically created world is home to a virtual community, with its own standards, its own ability to regulate errant members, and a virtually barrier free cost of entry. New web pages, the coin of this new realm, double every nine minutes.³ Tracking something so changeable as "the Net" is virtually impossible (pun intended), yet current statistics estimate that the Net now boasts over 554 million users, spanning nearly every country in the world.⁴ Cybercafes have sprung into existence in the most remote regions of the world,⁵ while traditional intellectual property doctrines have become outmoded as access appears prized over creation and the "public domain" approaches synonymy with "capable of being communicated in digital form."⁶ This new, low cost, global information source, a bastion of unrestrained free speech, seems too good to be true. It is.

² Mark Warschauer, *Language, Identity and the Internet*, in RACE IN CYBERSPACE (Routledge 2000).

³ Mike Gould, *Where is Everything?* at <http://mondodyne.com/b2b/smbiznet.18.html> (last visited May 19, 2003).

⁴ *How Many Online?* at http://www.nua.ie/surveys/how_many_online/ (last visited May 19, 2003)

⁵ I have personally seen Internet cafés in such far distant cities as Chisinau, Moldova and Lhasa, Tibet. Even least developed countries generally have at least some Internet access in their capital cities, making the digital world, at least *potentially*, global in nature.

⁶ For example, recent debates over copyright in the digital age have emphasized the right of access (often phrased in terms of "public domain") over author's rights. See, e.g, Jessica Litman, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL ON THE INTERNET* (Prometheus Books 2001); Lawrence Lessig, *THE FUTURE OF IDEAS* (Random House 2001); Siva Vaidhyanathana, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (New York University Press 2001).

No one seriously doubts that a digital divide exists between the technology-rich and technology-poor. Even in the United States, which has one of the highest Internet⁷ penetration rates in the world,⁸ there is at least a digital divide based on economic differentiation.⁹ On the global scale, there is another divide about which current public discourse is woefully quiescent. It is what I refer to as “the cultural digital divide.” This divide is as critical to global accessibility as the digital divide, and requires immediate attention.

In the developed world, discourse on Internet public policy focuses largely on the Westernized concern over the balance to be struck between private rights (generally protected under trademark and copyright laws) and public access to "information." This focus itself is emblematic of a greater problem on the Net than who owns the property rights in what is being distributed. It reflects a cultural bias that excludes or marginalizes most of the world's cultures, and concerns, in favor of the same debate over private rights that has marginalized many cultures' non-technological innovation and creativity.

As Gail Hawisher and Cynthia Selfe demonstrate in their introduction to *Global Literacies and the World-Wide Web*, cyberspace is largely Anglo-centric in nature.¹⁰

⁷ I have chosen to capitalize the term “Internet” to conform with traditional norms. I agree that the Internet has become so common place that, like the telephone and the telegraph, it may no longer require capitalization to represent its cutting edge uniqueness. Nevertheless, I have chosen to capitalize the term to avoid distracting the reader since the Internet’s lack of uniqueness is not relevant to the current discussion.

⁸ See, e.g., *How Many Online?* at http://www.nua.ie/surveys/how_many_online/ (last visited May 19, 2003).

⁹ There is also a cultural digital divide, based on race, gender and ethnic/cultural differences in the United States. Although a detailed discussion of this divide is beyond the scope of this paper, the same forces which have created a digital cultural divide on a global scale, have created a similar divide in the United States. Similar remedies are required to bridge this divide.. For the same reasons discussed in this paper that the digital cultural divide remains unremedied on a global scale, it remains unremedied on a domestic scale.

¹⁰ Gail E. Hawisher & Cynthia L. Selfe, *GLOBAL LITERACIES AND THE WORLD WIDE WEB* (Routledge 2000).

This Anglo-centricity, which admittedly has its roots in history,¹¹ includes the use of English as the primary language of the Net, “the economic and political ordering of Web resources at the service of capitalism, democracy and other free market sources” and “reliance on westernized instantiations of authorship, visual design, text and representations.”¹² Fortunately, non-English web sites are coming into existence in greater numbers. Some even suggest that as companies leave their island mentality, more companies will translate their sites into other languages.¹³ Despite this hopeful sign, Anglo centric methods of communication remain embedded in the operational structure of the Web.

To justify the expense and investment associated with building required Internet infrastructure, supporters rely on the myth of the digital network as a “culturally neutral medium that has been built to support a larger global community, one that transcends the problems of race, geopolitical borders, national interest and culturally specific values that hinder communication, free exchange, and shared understanding.”¹⁴ Yet this purportedly culturally neutral medium with its reliance on reading and writing as main social, communicative acts denigrate and often isolate communities where oral, face-to-face interactions are prized.

¹¹ Originally developed from the Arpanet program by the US Department of Defense, it makes sense that the Internet would be Anglo-centric in language and structure in its incipency. See, e.g., *Barry M. Leiner, et al, A Brief History of the Internet*, <http://www.isoc.org/internet/history/brief.shtml#Origins> (last visited May 19, 2003). Given the global reach of the Internet, however, such Anglo-centricity, or more precisely the limits which such Anglo-centricity imposes, are no longer justifiable.

¹² *Id.* at 9.

¹³ See, e.g., Bill Dunlap, *Aren't Websites in English Sufficient for People Overseas?* at <http://www.marketingsource.com/articles/viewall/40> (last visited May 19, 2003)

¹⁴ *Id.* at 8.

In a study of the impact of Greek cultural practices on Internet use, Aliko Dragona and Carolyn Handa found that Greek culture relies strongly on interpersonal communications.¹⁵ These interpersonal communications are particularly important in the context of the extended family network, in the areas of economic and moral support. As a result, the Net in Greek culture serves largely as a source for “professional information.”¹⁶ This “professional” use underscores another undeniable feature of the Internet. Its access is limited to those who share a relatively advanced educational and economic milieu. Those who cannot afford the luxury of a personal computer, or at least the price of connectivity charges for a cybercafe, cannot hope to participate in the “advantages” of the global digital network.

Those who do manage to become a member of the “Networked World” find themselves in a largely homogenized universe with little welcome for those who represent the “Other.” It is axiomatic that the more welcoming a media is to disparate voices, the greater use of that media will be made by those voices. Yet the Internet provides no such welcoming environment. Nineteenth Century colonial narratives and novels such as *In the Levant* by Charles Dudley Warner and *Kim* by Rudyard Kipling portrayed foreign lands as exotic locales whose “exoticness” was largely marked by their backwardness and their existence outside the forces of (Western) history. Behind these descriptions was a message that such exotic “otherness” was largely undesirable but could be overcome by the developmental forces of imperialism.¹⁷ History repeats itself as these same narratives of superiority and “otherness” are adapted to the newest area of

¹⁵ Aliko Dragona, and Carolyn Handa, *Xeres Glosses: Literary and Cultural Implications of the Web in Greece* in GLOBAL LITERACIES AND THE WORLD WIDE WEB (Routledge 2000).

¹⁶ *Id.* at 60.

¹⁷ See, e.g., Matthew Frye Jacobson, BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN

colonial imperialism – the Internet.

Early advertising for the Internet, designed to encourage the public to get connected to the Internet, emphasized the glories of reducing the world to a single "global village," speaking the same language (computer speak) and outlawing any sense of "Otherness" that does not fit within this homogenized space.¹⁸ Studies show that even in areas of difference such as chat rooms and "Sim" sites where an end user can allegedly create his own digital identity, there exist embedded parameters of homogenized differences.¹⁹ These differences, like those contained in 19th Century narratives, are not true images of difference, but merely acceptable homogenizations, traces of quaint exoticness ordered so suit Western tastes. Thus, for example, in early images of the cyber future in popular works such as *Blade Runner* and *Neuromancy*, it is an homogenized Oriental Other that is acceptable, one that bears no relationship to authentic Asian culture.²⁰

We may be free to create our own websites, reflecting our own personal points of view, but those websites reside in a world for which some level of English is generally required, and for which regulation on the basis of content that may be offensive to other

PEOPLES AT HOME AND ABROAD: 1816 – 1917 (Hill and Wang 2000); Edward W. Said, *CULTURE AND IMPERIALISM* (Alfred A. Knopf 1993).

¹⁸ Lisa Nakamura, *Where Do You Want to Go Today?* in *RACE IN CYBERSPACE* (Routledge 2000). It is interesting to note that early commercials such as "Anthem" by MCI, "World Without Limits" by AT&T, and "Travel" by IBM all emphasize the homogenized global world of the Internet, with images of pyramids, India and Africa that are strongly reminiscent of the travel images of the 19th Century.

¹⁹ As Lisa Nakamura demonstrates in *Head-Hunting on the Internet*, although the purportedly anonymous nature of the Internet theoretically allows users to construct their own identities, the construction of trans ethnic identities on the Net actually results in the construction of stereotyped gender and race identities. Such "identity tourism" "has deep roots in colonial narratives such as Rudyard Kipling's *Kim*, T.F. Lawrence's *Seven Pillars of Wisdom* and Richard Burton's writings." Lisa Nakamura, *Head Hunting on the Internet* in *CYBERTYPES: RACE, ETHNICITY AND IDENTITY ON THE INTERNET* 61 (Routledge 2002)..

²⁰ See, e.g., Lisa Nakamura, *Race in the Construct and Construction of Race*, *CYBER TYPES: RACE*,

than white, English speaking, heterosexual males remains largely non-existent. Perry Barlow's "virtual community"²¹ has become a mass of cyber- communities, many of whom appear to be using the Internet as a source of power to re- create the lost imperialistic (and racist) bygone eras of the 19th Century.²² The recent Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems²³ may be a small step towards altering the racist nature of many Internet sites. It provides for criminalization of , inter alia, the intentional distribution or making available of "racist and xenophobic material to the public with a computer system."²⁴ Its ultimate impact (and desirability),²⁵ however, remains doubtful. In the face of strong free speech doctrines in the United States, as evidenced by, inter alia, the refusal to enforce a French

ETHNICITY AND IDENTITY ON THE INTERNET (Routledge 2002).(discussing the role of "identity tourism" on the Internet, particularly in the early pseudo-Asian images of the cyber future).

²¹ Perry Barlow of course, did not coin the term "virtual community. See, e.g, Michael Travers, Into the Matrix Archive at <http://www.memex.org/cm-archive8.html> (stating that although Howard Rheingold is often credited with coining the term "virtual community," the term was actually used previously). He is, however, one of the popularizers of the term as it applies to content regulation on the Internet.

²² Tara McPherson, *I'll Take my Stand in Dixie net: White Guys, the South and Cyberspace* in RACE IN CYBERSPACE (Routledge 2000).

²³ <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm> (last visited May 19, 2003). Currently 12 countries have signed the Protocol. They are Armenia, Austria, Belgium, Estonia, Finland, France, Germany, Greece, Luxembourg, Malta, the Netherlands, and Sweden.

²⁴ Additional Protocol at Article 4.

²⁵ If, as I believe, one of the goals of Internet policy should be to foster greater inclusiveness of different voices, some of those voices may necessarily expound offensive views. Moreover, the criminalization of certain censoring activities may be perceived as a tacit recognition that broader censoring activities are also acceptable at the international level. As the self-proclaimed "Group of Specialists on On-line Services and Democracy" indicated in comments they filed regarding a draft version of the Protocol, such acts may well give the green light for legislation criminalizing other on-line speech such as speech which insults the dignity of the nation or its leaders. Group of Specialists on On-line Services and Democracy, Comments, [http://www.coe.int/t/e/cyberforum/Internet_literacy/HGeneral_Report\(E\).asp](http://www.coe.int/t/e/cyberforum/Internet_literacy/HGeneral_Report(E).asp) (last visited May 19, 2003). Despite claims that the technological architecture of the Internet prevents successful censoring of content, see, e.g. Testimony of Vinton Cerf, *La Ligue Contre Le Racisme et L'Antisemitisme v. Yahoo, Inc., Decision* (Court of First Instance November 20, 2000) at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm#texte> (discussing testimony regarding the alleged inability of Yahoo US to block through effective technological means reception in France of US-based Yahoo auction sites), other studies indicate, unfortunately, that censorship of the Internet through technological and other means may not be so ineffective. See, e.g., Jonathan Zittrain, et al, *Empirical Analysis of Internet Filtering in China* at <http://cyber.law.harvard.edu/filtering/china/> (last visited May 20,

court order blocking the sale of Nazi paraphernalia on the French Yahoo website,²⁶ hate sites may merely transfer to the apparent safe harbor of the United States.²⁷

The unwelcome nature of cyberspace is not limited to content-based exclusionary practices. Virtual regulation through netiquette" and acronyms has become merely another way to create barriers that make the Internet a less-than-welcoming territory for marginalized "Others" ²⁸ The self regulating nature of these virtual communities has given way to an unfriendly terrain for those who stumble into its midst.

The exclusionary practices that make the Internet culturally unavailing to the majority of the World's population also reduces the vibrancy of the global information economy by discouraging a majority of potential vendors and customers from participating in the digital marketplace. Worse, it threatens to make permanent the second class status of many of the developing countries as 19th Century trade practices find a new digital analog in the 21st Century. The former colonies find themselves once again on the receiving end of Western European market needs and desires, while they become permanent clients of their technology-exporting former colonial masters.

Western debates over the usefulness of replacing "outdated" modes of distribution for records, films, software, books and other copyrighted works to meet the challenge of digital piracy ignore the multinational impact of the elimination of traditional media

2003); Jonathan Zittrain, et al, *Documentation of Internet Filtering in Saudi Arabia* at <http://cyber.law.harvard.edu/filtering/saudi Arabia/> (last visited May 20, 2003).

²⁶ *Yahoo, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D.Cal. 2001).

²⁷ See, e.g., European Commission Against Racism and Intolerance: *Legal Instruments to Combat Racism on the Internet*, CRI (2000) 27 (August 2000). .

²⁸ Cameron Bailey, *Virtual Skin: Articulating Race in Cyberspace* IN IMMERSSED IN TECHNOLOGY, ART AND VIRTUAL ENVIRONMENTS (MIT Press 1996).

Increasingly, defenders of Internet piracy assert that the creation of digital distribution systems are the answer to Net piracy.²⁹ Setting aside the unproven assumption that end users who are used to obtaining digital music for free would suddenly be willing to pay for it, the assumption that digital distribution should replace hard goods distribution systems ignores a fundamental truth of the Internet. It is not available to everyone. If “hard” sources of goods and information are removed or significantly reduced in favor of the lure of cyberinformation, the *economic* have-nots will be rapidly transformed into *informational* have-nots, with catastrophic results in today's increasingly globalized information economy. With the increasing amount of information on employment, health and educational opportunities being published on the Net, the non-connected in all countries will fall further behind. As Kofi Anan recognized in a speech before the Telecom 99 Conference in Geneva, Switzerland: "People lack many things: jobs, shelter, food, health care and drinkable water. Today, being cut off from basic telecommunications service is a hardship almost acute as these other deprivations, and may indeed reduce the chances of finding remedies to them."³⁰

Reluctance to re-examine Western based assumption about key legal issues surrounding the Internet will only serve to continue the imperialistic marginalization of the other from yet another domain of literacy. Non-Western cultures are no doubt used to such treatment. The debates over whether intellectual property based protection should be extended to non-traditional forms of creativity and innovation has floundered

²⁹ Numerous defenders of Internet piracy have suggested that once record companies develop inexpensive digital distribution systems, piracy will shrink

³⁰ Kofi Anan, Speech Before Telecom 99 in Geneva, Switzerland (October 1999) as reported in "*Bridging the Digital Divide*" (October 14, 1999), at http://news.bbc.co.uk/2/hi/special_report/1999/10/99/information_rich_information_poor/466651.stm (last visited May 20, 2003).

in the face of Western intransigence to recognize their value.³¹ Just as current intellectual property regimes reward technological and individual creativity over non-technological and communitarian efforts,³² so too the debate over Internet policy favors technology over culture. By denigrating the value of protecting intellectual property on the Net because of its relatively easy accessibility, by emphasizing that the solution to digital piracy is less protection or more digital distribution, legal policy threatens to undermine current efforts to fashion international remedies that protect traditional knowledge, folklore and other forms of indigenous innovation and cultural expression.³³ If works of individual authors, which fit within the narrow constraints of traditional forms of intellectual property, are no longer worthy of protection, and should (in the view of many Netizens) be freely exploitable without constraint, how can the cultural expressions of indigenous peoples be safe from deculturizing exploitation? Even more problematic from a trade development point of view, less intellectual property protection may also mean less opportunity for developing countries to create viable domestic industries. Numerous countries have successfully used copyright protection to develop domestic cultural industries. Yet, if copyright protection is reduced for the sake of digital convenience, we may be condemning others to less economic opportunities in the future not more.

The "virtual community" has demonstrated a surprisingly ability to model the worst in human nature in the "hard world," including racism, hate speech, child

³¹See, e.g., Doris Estelle Long, *"Globalization": A Future Trend or a Satisfying Mirage?*, 49 J. Copyright Society 313 (2001); WIPO WIPO, Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998 -1999) (WIPO 2000); .WIPO Budget Main Program, www.wipo.int. (1999).

³² See, e.g., Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C.J. Int'l L. & Com. Reg. 101 (1998).

³³ See generally WIPO, Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998 -1999) (WIPO 2000)(discussing diverse attempts to protect the non-technological "traditional knowledge" of diverse countries and the dearth of international protection regimes for this form

pornography, and the same imperialistic attitudes toward developing countries that divided the world of our ancestors in the 19th Century, and whose effects we are still feeling today. By ignoring the real world impact of Internet legal policies on the *entire* international community, the West continues to demonstrate the same egotism of 19th Century imperialists.

Professor Lessig has repeatedly pointed out that code is law and the Internet is regulatable³⁴. If this is true, legal regimes and norms will help determine which communities are allowed to thrive in cyberspace.³⁵ Such laws must be fashioned to require governments and others to provide the funds, training, and more importantly the technology necessary to create a multi-cultural information network.

In my international intellectual property class, I have my students negotiate a treaty for the encouragement of the growth of the Internet. The divide between the developed and developing world is apparent. Without coaching by me, students reflect real world politics. The developed countries want to talk about ISP liability and enforcement. The developing countries want to talk about technology transfer. We can't eliminate the cultural view of the Internet as another tool of imperialism unless we open it to all cultures.

One of the first steps toward opening the Internet to all cultures is by including the problem of technology transfer in the policy debates. International technology transfer requirements under TRIPS must be elevated. Governments must be required to

of intellectual property).

³⁴ Lawrence Lessig, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books 1999).

³⁵ See, e.g., Peter K. Yu, *Introduction to Symposium – Bridging the Digital Divide: Equality in the Information Age*, 20 *Cardozo Arts & Ent. L.J.* 1 (2002).

offer more than hortatory incentives for the transfer of the technology required for constructing and operating the Net.³⁶ Real incentives, including significant tax breaks, must take the place of gentle persuasion. Transferred technology must include both telecommunications and software development capability, as well as the legal infrastructure needed to support a viable digital information marketplace.

Beyond providing the tools for Internet access, international protection standards for Internet content must be created with sensitivity to the impact such standards have upon non-Western cultures. Current debates over such topics as ISP liability, content regulation under intellectual property regimes and uses of technological protection measures to prohibit unauthorized access to digital media focus almost exclusively on technology over culture, with little concern for the digital cultural divide.

Access must be available on a non-discriminatory basis, at an affordable price. Such access includes enabling the creation and running of personal websites so that public participation on an international, and more significantly multicultural, basis is encouraged. To facilitate such multicultural participation, new standards and paradigms for Internet communication need to be explored that incorporate non-English, non-Western structures for accessing and disseminating information. New methods for funding Internet growth and access must also be explored, including the potential use of multinational organizations to facilitate such funding initiatives.

Legal regimes must be developed to resolve the question of the international treatment of racist and hate speech and images on the Net. The Report on Legal

³⁶ See Agreement on Trade Related Aspects of Intellectual Property Rights, Article 7 (stating that the

Instruments to Combat Racism on the Internet by the European Commission against Racism underscores the growing use of the Internet by individuals and groups to disseminate racist messages and the unfortunate fact that many of these sites originate in the US³⁷. While international issues should not drive domestic Constitutional law, required availability of voluntarily used, non-proprietary filtering software, with fully-disclosed filtering architecture, may provide a beneficial accommodation of conflicting domestic policy norms. Technological solutions that would reduce cross border content conflicts such as those in the Yahoo case,³⁸, without chilling domestic free speech rights, may also prove a useful method for reducing cross cultural tensions.

Conclusion:

As public policy choices are made, we must remember that different cultures approach the Net in uniquely different ways. Some see the Net as a continuation of imperialistic exclusion. Others see it as a gateway to the world. Cultural inclusiveness requires that these different groups be included in any policy making process and their concerns fully raised. Unless the Net-connected world reconsiders its chauvinistic belief in the global benefits of technological homogenization and provides adequate tools to begin to bridge the cultural divide of the Internet, its promise, like the promise of globalization, may stumble on its own excesses.³⁹ Present Internet protection standards must do more than simply "foster Internet growth." They must address the negative

protection of intellectual property rights "should contribute to the ...transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge.").

³⁷ See note 15 *supra*.

³⁸ *Yahoo, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D.Cal. 2001).

³⁹ See, e.g. Doris Estelle Long, "Democratizing" Globalization: *Practicing the Policies of Cultural Inclusion*, 10 *Cardozo J. of Int'l & Comp. L.* 217 (2002)(discussing the disintegratory trends of indigenization created in part by economic and cultural globalization).

impact the choices and assumptions made about such Western concerns as the protection and use of traditional forms of intellectual property have upon the cultural accessibility of the Net. Standards for the protection of non-traditional forms of expression must be removed from the back burner. To continue to ignore the digital cultural divide by treating these concerns as separate from the issue of intellectual property protection is to continue to marginalize them. The ultimate price to be paid may be the strengthening of digital cultural divide until it becomes an impassable chasm. Driving potential end users, traders and customers from the global digital marketplace serves no one's interests.