

**IP Justice Submission to the
United Nations Internet Governance Forum**
2 August 2006

***Realizing the Internet's Promise of Universal Access
to Knowledge and Development***

**A Case for Balance in Intellectual Property Rights Policies that
Address Online Behavior:
Principles to Preserve an Open and Free Internet**

www.ipjustice.org

Summary

Internet's open and free nature are key to accessing knowledge and development

Internet Governance Policies and Intellectual Property Rights

**IP Justice Recommendations for an Internet Governance Forum Discussion
to Promote the Internet as a Tool for Access to Knowledge and Development:**

1. Preserve Openness of Internet and Free Flow of Information:

Build Freedom of Expression Values into Laws & Architectures

Critical Online Speech Censored by Copyright and Trademark
"Digital Locks" Control Flow of Information and Threaten Interoperability
Preserve Interoperability with Open and Free Technical Standards
Governments Adopt Open Document Formats
Encourage Free and Open Source Software (FOSS) Development

2. Grow the Online Information Commons:

Recognize Internet as Valuable Tool for Access to Knowledge

Protect and Value Public Domain
Database Rights Restrict Free Flow of Information on Internet
Provide Online Access to Publicly Funded Research
Recognize Social Value of Peer-to-Peer (P2P) Software

***3. Build Respect for Civil Liberties into IPR Laws and Procedures Addressing Online
Behavior***

ICANN's Whois Policy Must Conform with Privacy Laws
US DMCA "Notice and Take-Down" Provisions Should Comply with Due Process

**Conclusion: IGF Should Address Relationship Between Intellectual Property
Rights, Free Expression, and Access to Knowledge**

“Realizing the Internet’s Promise of Universal Access to Knowledge and Development”

By IP Justice*

A Case for Balance in IPR Policies that Address Online Behavior: Principles to Preserve an Open and Free Internet

It is undeniable that Internet is among the most important tools ever created for facilitating mass access to knowledge and encouraging development among the world’s poor. The dream of low cost universal education can begin to become a reality thanks to this revolutionary invention that sends and receives tiny bits of data and thereby transforms human life.

Freedom of expression and the free flow of information have flourished in recent years, in large part due to the Internet and its ability to connect people and ideas in an instant. Because more people enter cyberspace everyday to share their vision with the world, knowledge is growing at a faster rate than ever before. The Internet is transforming into a great catalogue in cyberspace for accessing and storing shared human knowledge. By connecting people with new ideas, the Internet ushers in the Information Age, where knowledge is power and connections are key. By denying access to knowledge, one essentially blocks access to power and self-determination.

The Internet was originally designed primarily for communication and educational purposes. Because of its early uses, certain values were built into the architecture, or computer code that runs the networks that have over time become crucial to the success of the infrastructure. The ability to communicate without intermediaries and to self-educate without oversight are two qualities about the Internet that were early design choices which have contributed to its importance as a global resource for knowledge and communication.

We can bridge the gap in the digital divide by continuing to design the Internet with this end in mind, and make technical code and public policy choices that encourage the development of the Internet as a tool of free expression and access to knowledge. If we choose anything other than an “Internet for Development”, we build a Net that serves to widen the gap between those with a wealth of information at their fingertips and those starved for knowledge.

Internet’s open and free nature are key to accessing knowledge and development

It is precisely the free and open nature of the Internet that has led to a robust free flow of information and the enormous increase in shared global knowledge in recent years.

* IP Justice is an international civil liberties organization that promotes balanced intellectual property law in a digital world. IP Justice is a non-profit public charity based in San Francisco and maintains a website at <http://www.ipjustice.org>.

Internet pioneer Mitch Kapor first explained that “architecture is policy” meaning technology design choices inevitably make and enforce policy decisions. For example, when Digital Rights Management (DRM) technology providers build DRM technologies that disable lawful private copying rights, an architectural design choice has been made to limit individual freedom.

Certain core Internet values, such as the Net’s distributed power nature, whereby control is placed at the ends, or in the hands of users, rather than at a centralized point, is a key architectural feature of the Internet that has ensured that freedom of expression and the free flow of information have flourished in cyberspace. As John Gilmore, an early architect of the Internet succinctly put it in 1993, “the Net treats censorship as damage and routes around it.”

Because the Internet was designed for efficiency and not control, it has enabled millions of people all over the world to educate themselves, express their views, and participate in democracy to an extent never before possible. It is important to recognize which core values and design choices have ensured this positive development and work to retain those values as we architect our future cyberspace.

Just as the Net’s early design as an open system was not accidental, Internet policy makers and coders should continue to embrace the design choices of openness and freedom in the laws, policies, and architectural systems of the Internet of the future.

As the Internet becomes more central to our lives, the rules (both technical and legal) that govern the flow of information over the Internet determine our ability to exercise our rights and access online knowledge.

As shown in more detail below, the architecture of cyberspace is being increasingly re-designed away from openness and toward closed systems. Without attention from the Internet governance community, the very qualities that make the Internet so special for freedom and development could be lost forever.

Internet Governance Policies and Intellectual Property Rights

One of the most important rule sets for governing online behavior are laws dealing with intellectual property rights in cyberspace. Because of the unique digital nature of the Internet – *copies* of data are necessarily made to engage in just about any online activity. Since *copies* are made to read an online news article, send an email attachment, or play music on a computer, intellectual property rules (IPR) are automatically triggered by virtually any online activity.

Rules written for one era do not always work well in a different era. Industrial Age IPR rules operated under the premise that in order to disseminate information, it had to be affixed to a tangible object, like paper or a Compact Disc. But cyberspace freed information from fixed objects and now music can pass like the wind. Legal rules should

be re-formulated to reflect the new reality of the Information Age in which information can spread at near-zero cost. The Internet Governance Forum is ideally suited for a discussion about what those Information Age rules could look like.

Fear of the spread of information on the Internet has led publishing industries to push for more restrictive IPR laws that create new and increased rights and fewer limitations and exceptions to those rights. Laws dealing with intellectual property rights on the Internet have become increasingly unbalanced and act against the public interest in favor of narrow private interests. Freedom of expression, access to knowledge, and innovation are all stifled by unbalanced IPR laws designed to control online activity, but that fail to take other social values into account.

Consumers and developing countries have come together in recent years to voice their alarm and disapproval over the growing imbalances in power resulting from ever-increasing intellectual property rights. In 2004, the World Intellectual Property Organization (WIPO) General Assembly adopted a “Development Agenda” for WIPO to reform laws and practices dealing with IPRs to better reflect the global public interest. A Treaty on Access to Knowledge (A2K) has also been proposed at WIPO and a growing coalition of consumer, library, and civil liberties groups support the Access to Knowledge Treaty proposal.

Unfortunately, the global institutions that have historically dealt with IPR are slow to respond and remain tightly under the reigns of the intellectual property industries of yesterday. Global IPR legal institutions treat the Internet as a threat to traditional publishing and end up discouraging new business models that are designed to reward creativity and innovation in new ways. Without a forum to discuss the failure of the global IPR legal regimes to promote the Internet as a tool of development and access to knowledge, change in IPR-specific forums will be even slower in coming, and development further retarded.

It is important for the positive development of the Internet that the institutions that govern online activity view the Internet something more than a “tool of infringement” to fight against, but rather, as *primarily* a tool of development to be embraced. Harnessing the awesome power of the Internet to provide access to knowledge and education cannot be achieved without fundamentally rethinking the application of traditional intellectual property rights in cyberspace.

Without a re-evaluation of the proper balances, society is left with IPR rules written for the Dark Ages which hold back the Renaissance that cyberspace could deliver through universal access to education. All the world’s citizens are guaranteed the right to an education under Article 26 of the Universal Declaration of Human Rights. Internet governance policies should be evaluated in light of the fact that the Internet is a powerful tool that can help to realize the dream of universal education.

The World Summit on the Information Society (WSIS) Civil Society Human Rights Caucus identified the barriers to access to knowledge created by intellectual property

rights as one its top three priorities for discussion at the 2006 Internet Governance Forum.¹ In its submission, the WSIS Human Rights Caucus calls upon IGF to address “Access to Education, Culture and Knowledge and Technical Standards Definition” in Athens.

In 2003, Paragraph 42 of the WSIS Geneva Declaration recognized the need for balance between creating intellectual property rights as an incentive and the benefits of wide dissemination, diffusion, and sharing of knowledge. Because of the tendency for this balance to become unhinged in cyberspace, IP Justice recommends three key principles for setting Internet governance policies.

**IP Justice Recommendations for an Internet Governance Forum
Discussion to Promote the Internet as a tool for Access to Knowledge
and Development:**

***1. Preserve Openness of Internet and Free Flow of Information:
Build Freedom of Expression Values into Laws & Architectures***

The Universal Declaration of Human Rights (Article 19), unambiguously states:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Although agreed to by all United Nations Member States over 50 years ago, these words speak directly to today’s challenges for freedom of expression in cyberspace. Article 19

¹ WSIS CS HR Caucus Priority Issues for IGF Discussions:

<http://www.iris.sgdg.org/actions/smsi/hr-wsis/hris-igfagenda310306-en.html>

3. Access to Education, Culture and Knowledge and Technical Standards Definition

In a similar way as access to infrastructure, access to education, culture and knowledge, which is a universally recognized fundamental right, translates into many requirements in terms of public policy in various sectors, at the national and international levels. Though far from being the exclusive mean of access to education, culture and knowledge, the Internet is a major chance for its realization.

However, this opportunity may be squandered if artificial, avoidable barriers are added to education efforts and to the legitimate circulation of culture and knowledge. Such a risk may arise from an extensive copyright regime, especially when its implementation through technical standards makes it the de facto exclusive regime, making it difficult even for international agreements, like the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, to fully apply. It is thus a mandatory issue of Internet governance to ensure that technical standards for Internet infrastructure, hardware and software are developed and implemented in a way that does not prevent access to education, culture and knowledge, as well as the effective implementation of international binding instruments providing for their full realization through public policies.

Issues to be discussed by the IGF in this framework relate to how current copyright legislation, market dominance and digital rights management (DRM) technologies prevent rights to education, culture and knowledge. In particular, the IGF should discuss and assess whether technical standards for Internet infrastructure, hardware and software, allow for the legitimate exercise of fair use for non commercial purposes, the contribution to and enjoyment of an extended public domain of knowledge, and the promotion and sustainability of the production and use of free and open source software and content.

The Geneva Plan of Action has devoted a whole section to access to information and knowledge. This has been reaffirmed in paragraphs 10, 11 and 29 of the Tunis Commitment and in paragraph 90(k) of the Tunis Agenda. Finally, as technical standards are part of Internet critical resources, paragraph 72(j) of the Tunis Agenda makes this issue part of the IGF mandate.

Internet Governance Forum Substantive Agenda Setting from WSIS Civil Society Human Rights Caucus Contribution - March 31, 2006

makes clear that individuals do not give up liberty because their activity takes place on the Internet. Freedom of expression is expressly guaranteed “through any media and regardless of frontiers” by this UN covenant.

Just as freedom of expression guarantees are embedded within legal regimes, these values must also be embedded within the architecture of the Internet for communication rights to have any meaning. All the legal guarantees in the world are useless if the technology is designed to prevent the free flow of information. The open protocols of cyberspace that let data pass without a censor to approve of the message must remain open for the Internet to continue to develop as a tool of free expression. Technologies that aim to protect copyright on the Internet often disregard freedom of expression rights and prevent a large amount of otherwise lawful speech.

Paragraph 42 of the WSIS Tunis Agenda addresses the special online challenges for freedom of expression and other civil liberties on the Internet:

“We reaffirm our commitment to the freedom to seek, receive, impart and use information, in particular, for the creation, accumulation and dissemination of knowledge. We affirm that measures undertaken to ensure Internet stability and security, to fight cybercrime and to counter spam, must protect and respect the provisions for privacy and freedom of expression as contained in the relevant parts of the Universal Declaration of Human Rights and the Geneva Declaration of Principles.”

Paragraph 4 of the WSIS Tunis Commitment further recognized that “freedom of expression and the free flow of information, ideas, and knowledge, are essential for the Information Society and beneficial to development.” And Paragraph 90(o) of the Tunis Agenda reaffirms the commitment to freedom of information on the Internet.

Critical Online Speech Censored by Copyright and Trademark

Copyright and trademark law provide powerful ammunition to a company who wishes to censor critical speech on the Internet -- and the use of these legal theories for this purpose is on the rise. For example copyright infringement lawsuits are routinely filed by the Church of Scientology to prevent discussion on the Internet about controversial church doctrines. Electronic voting machine distributor Diebold filed an infringement claim to prevent online discussion about the technical flaws in their e-voting machines. Websites that are critical of companies, such as “gapsucks.com” are forced to finance expensive lawsuits in order to defend their right to criticize a company. When not balanced against freedom of expression guarantees, copyrights and trademarks become powerful tools of censorship on the Internet. Legal doctrines such as “**copyright misuse**”, which punish rightsholders for using copyright to prevent lawful speech should be more fully developed to act as a check on the abuse of bogus copyright claims in cyberspace.

“Digital Locks” Control Flow of Information and Threaten Interoperability

Copyright holders have begun to use “digital locks” to control the use of music, movies, and other digital information. Besides controlling a person’s ability to use her own digital media collection, these locks are restrict the flow of information on the Internet.

They include no mechanism for releasing a work into the public domain when appropriate, but remain locked-up indefinitely. Besides preventing lawful uses of information and entertainment, these digital locks can also be mis-used in ways that have nothing to do with protecting copyright, and everything to do with monopolizing adjacent markets. For example, “digital locks” and the laws forbidding their circumvention (such as the US Digital Millennium Copyright Act (DMCA)) have been invoked to stop a competing garage door manufacturer from selling compatible replacement garage door openers and to stop a competing supplier of printer toner cartridges from selling compatible toner cartridges.

The combination of these “digital locks” and anti-circumvention laws make the creation of competing interoperable technology illegal, stifling innovation and technological development. Because anyone who wants to build a compatible technology will need to “circumvent” the locks, these measures present a tremendous threat to interoperability and an open Internet. Reverse-engineering, a corner-stone of innovation and competition, has become illegal in jurisdictions with anti-circumvention laws.

Online freedom of expression is also directly under threat from anti-circumvention laws. These laws have also been used to prevent an online journalist from hyper-linking to information that revealed technical flaws of a company’s product. And the DMCA has been systematically invoked to prevent scientists from publishing scientific papers that dispute the claims of its provider. Top computer scientists have consistently warned about the danger to computer security from these provisions since they make it illegal to study certain technologies that are crucial to both personal and national security.

The various national anti-circumvention laws that forbid bypassing these “digital locks” are a product of the 1996 WIPO “Internet Treaties”. Unfortunately, the US DMCA, which was among the first implementations of the WIPO “Internet Treaties”, prohibited much more conduct and speech than is required by the “Internet Treaties”. Rather than learn from its mistakes and repeal the excessive provisions of the DMCA, the US has pressured other countries to enact similar (or even more restrictive) DMCA-like anti-circumvention laws in bi-lateral so-called “Free Trade Agreements” with countries including Chile, Jordan, Singapore, and others. The European Union’s Copyright Directive of 2001 contained similar anti-circumvention laws that go beyond what the WIPO “Internet Treaties” mandated and have been used to prevent competition and innovation in Europe as well.

The proposed WIPO Broadcasting Treaty contains similar anti-circumvention laws that would give broadcasting companies the right to lock-up public domain programming and make it illegal for anyone to bypass those locks. The proposal would also make it illegal to distribute that public domain programming over the Internet. Despite the fact that the vast majority of WIPO Member States have publicly stated their opposition to creating new anti-circumvention rights for broadcasting companies, WIPO’s Copyright Committee Chairman has refused to remove the unpopular provisions from the draft Broadcasting Treaty. The inability of existing international legal institutions such as

WIPO to adequately respond to the desires of Member States in steering Internet policy makes the issue prime for discussion at the Internet Governance Forum in Athens.

Building technological restrictions into the architecture of the Net or enacting laws that forbid bypassing technological restrictions threatens the open nature of the Internet and the free flow of information. The Internet Governance Forum should discuss how to maintain an open Internet in the face of “digital locks” and aggressive anti-circumvention laws.

Preserve Interoperability with Open and Free Technical Standards

There is another aspect to IPR and access to knowledge that broader discussions on Internet governance and digital content often overlook: the potentially damaging effect of intellectual property rights in technical standards, particularly technical standards required for effective participation on the Internet. While this has not yet posed a hobbling problem, the increasing proliferation of software patents, competitive business strategies, and the failure of so-called “reasonable and non-discriminatory” (RAND) licensing are likely to stymie future network access and participation. The adoption of open and free technical standards for the Internet is necessary to preserve interoperability and innovation.

Support for open and interoperable standards can be found throughout the WSIS process. Paragraph 44 of the WSIS Geneva Declaration encourages open, interoperable and non-discriminatory international standards so consumers can access the Internet regardless of the underlying technology used. And Paragraphs 28-29 of the WSIS Tunis Commitment affirm the need to promote open or interoperable standards that are affordable and accessible to all and that can be used on any device.

A technical standard is considered “open” if its specifications are publicly available so anyone can use the standard. Open standards promote competition in the marketplace by creating a level playing field among competitors. As stated by EU Commissioner Erkki Liikansen, “open standards are important to help create interoperable and affordable solutions for everybody. They also promote competition by setting up a technical playing field that is level to all market players. This means lower costs for enterprises and, ultimately, the consumer.”

Technical standards are the cooperation agreements that make communication and collaboration across a network possible. They enable participation by anyone who adheres to them (or, more accurately, who uses an application that adheres to them). Technical standards can be created and managed by both formal, de jure standards organizations such as ISO, IEC and the ITU or by consortia, such as the Internet Engineering Task Force (IETF). Organizations that deal with intellectual property rights, such as WIPO, have also taken an interest in policy regarding technical standards.

Technical standards form the backbone of the Internet and the World Wide Web, as these both continue to converge with other industries and applications such as healthcare, transportation, media, safety, and telecommunications, technical standards will become

increasingly important -- and valuable. The early use of open protocols is a key factor explaining why the Internet has become such a powerful tool for communication and human development.

There has been a steady rise of embedded intellectual property rights in technical standards over the past few years. For standards that might be particular to a specific industry or local application, this might not pose much of a threat to the general public. However, embedding IPR in technical standards that are required for effective participation on the network -- say for audio and video feeds or document formats -- is likely to have a chilling effect on access and participation. Costs will rise, and competition and choice are likely to be thinned; both of these ultimately affect access and participation. Software patents, in particular, are discouraging innovation and investment in Internet technologies.

Technical standards organizations have responded to the rise of software patents and other IPR by creating IP policies that state its members must promise to license any essential IPR under "reasonable and non-discriminatory" terms. However, these IP policies are false security. Who gets to define what these terms are? Who policies their implementation? Do they change over time? How is "fair" determined? Are these terms explicitly and publicly known before adoption of the technical standard? Do the terms preclude open source implementations? There is a thick cloud of uncertainty over issues dealing with IPR in technical standards, threatening the continued health and growth of the Internet and limiting access and participation by all.

A discussion at IGF on the use of technical standards that can promote interoperability and innovation would help to ensure the Internet's continued open nature. And a better understanding of the impact from intellectual property rights in technical standards is necessarily part of any discussion on the barriers to accessing knowledge and the free flow of information on the Internet.

Governments Adopt Open Document Formats

A growing number of national governments are switching to Open Document Formats for the use and archiving of government records.² Public records saved in an open non-proprietary format can be read by anyone and do not require the purchase of particular software in order to access or the documents. Besides the enormous cost savings for governments from no longer having to purchase expensive Microsoft licenses for each government employee, the Open Document Formats provide a more stable and non-discriminatory tool for preserving digital information.

Open Document Formats are also better equipped than proprietary formats for preserving information over long period of time since people often switch computer systems and no longer have access to the (obsolete) proprietary software needed to access certain data.

Paragraph 46 of the WSIS Tunis Agenda reaffirms the right of individuals to access information. Paragraph 27 of the WSIS Tunis Commitment recognizes the need for long-

² See Open Document Format Alliance at <http://www.odfalliance.org/>

term preservation of the digital information that is being created. Open Document Formats can help to achieve that long-term preservation and universal accessibility.

Government officials in Belgium were worried about becoming dependent upon a particular software provider and passed legislation to mandate that official government data be saved and exchanged in an Open Document Format. Spain, Malaysia, and Denmark have embarked on similar paths as countries see the savings and other advantages to switching to Open Document Formats.

With Open Document Formats, people are not “locked-in” and forced to use a single software vendor, reducing user-dependency. Open document formats encourage competition and innovation among software vendors, and provide choice and stability to consumers. IGF is an ideal forum for a discussion among all stake-holders on how to best use technology to preserve critical government information and other data.

Encourage Free and Open Source Software (FOSS) Development

The Internet is largely run on free and open source software. A number of governments and businesses are switching the operating systems used to run computers from proprietary to non-proprietary systems (such as GNU Linux). The proliferation of Free and Open Source Software (FOSS) applications have revolutionized the Internet. FOSS has also empowered individuals by giving them the ability to write software that is customizable to their own individual needs.

Governments also switch to free software in order to reduce their own dependency on large software companies. Encouraging a diversity of computer platforms, so that innovation does not depend upon a single vendor, benefits everyone in the Internet community. Like any environment, the Internet flourishes best when there is a diversity of providers of core infrastructure. But existing intellectual property rules are often designed around one specific business model, such as copyright’s “pay per copy” model that disadvantage FOSS models.

Because FOSS applications are open, they are transparent and can be read by all. This increases the security of those systems because there cannot be any “hidden code” to compromise personal privacy or computer security. “Spyware” is a growing problem for Internet users and FOSS tools can help to prevent against such attacks due to their transparency. Any discussion regarding network security would not be complete without mentioning the enhanced security features FOSS applications provide.

Paragraphs 49 and 53 of the WSIS Tunis Agenda support the development of software from a variety of sources including open source, free, and proprietary providers. And Paragraph 29 of the WSIS Tunis Commitment recognized the need to encourage and foster collaborative development, interoperable platforms and free and open source software development. Paragraph 27 of the WSIS Geneva Declaration noted that “access to knowledge can be promoted by different software models, including proprietary, open source and free software in order to increase competition, access by users, diversity of choice, and enable all users to develop solutions which best meet their needs.”

Flexible license schemes such as Creative Commons (CC) use the Internet and copyright law to encourage access to knowledge and the free flow of information. For example, many artists release their music under Creative Commons licenses that allow for the non-commercial sharing of their music via the Internet. IGF could showcase a number of FOSS or CC projects that have benefited local communities by enabling access to information on the Internet for little cost. To promote a healthy global information society, IGF should help ensure that alternative business models and non-proprietary systems of development remain lawful.

2. *Grow the Online Information Commons:* ***Recognize Internet as Valuable Tool for Access to Knowledge***

For the Internet to reach its full potential as a tool for universal education and access to knowledge, core impressions regarding the value of the public domain should be re-evaluated. An IGF meeting focused on creating “an Internet for Development” provides an ideal forum for the examination of the Internet as a tool for growing the information commons.

Paragraph 90(k) of the WSIS Tunis Agenda noted the need for universal access to information, culture and knowledge for all people, and Paragraph 42 maintains a firm “commitment to the dissemination of knowledge” via the Internet. Paragraphs 9-10 of the WSIS Tunis Commitment further recognizes that access to information and sharing and the creation of knowledge contributes significantly to strengthening economic, social and cultural development by removing barriers to universal, ubiquitous, and equitable access to information. It also calls for improving access to information and communication and knowledge.

Protect and Value Public Domain

One of the most exciting things about the Internet is its ability to catalogue and provide access to a vast amount of shared human knowledge, most notably – the public domain.

Creative works are given the initial incentive of an exclusive monopoly right on the condition that the works pass into the public domain at the end of the term of the copyright or patent. The Internet is place where all such public domain information can reside and be freely usable by anyone without fees or restrictions. The public domain is a valuable resource that all share together, and from which education heavily draws. Proper recognition for the value of the public domain in enriching society would be an important step in an information age.

Paragraphs 25-26 of the Geneva Declaration re-affirms that a rich public domain is essential for the healthy growth of an information society, and Paragraph 42 recognizes the need for balance between creating intellectual property rights as an incentive and the benefits of wide dissemination, diffusion, and sharing of knowledge.

The increase in scope and duration of information “protected” by intellectual property rights presents another grave threat to freedom of expression and the hope of building an online global information commons. Copyright terms are mindlessly extended in national laws and international treaties without any attempt to evaluate the social or economic costs of those extended monopolies. Countless historical movies, books, plays, poetry, sound recordings, and other information may not be lawfully accessible on the Internet because of copyright term extensions.

The increased use of technological restrictions to control the use of digital information also threatens the public domain and the Internet as a tool for universal education. Copyright holders who encode music or video in Digital Rights Management (DRM) technology, provide no mechanism to unlock those works so they may pass into the public domain when the term of exclusive ownership expires. The music or video remains locked up forever because it is illegal to bypass those digital locks -- even when the work belongs in the public domain.

Paragraph 93 of the WSIS Tunis Agenda states:

“We seek to digitize our historical data and cultural heritage for the benefit of future generations. We encourage effective information management policies in the public and private sectors, including the use of standards-based digital archiving and innovative solutions to overcome technological obsolescence, as a means to ensure the long-term preservation of, and continued access to, information.”

The Internet revives the hope of the ancient Library of Alexandria – if managed properly it will create a global public resource for universal education. But if managed for the benefit of politically connected industries or out-dated business models, we will lose this opportunity to build a strong and robust public domain of shared knowledge.

Forward-thinking companies such as the British Broadcasting Corporation (BBC) have begun to make recordings and other valuable information available for free to citizens via the Internet. Technology-savvy librarians at the Internet Archive have been posting public domain books, recordings, and images on the Internet for public download for years. Project Gutenberg makes public domain films and other video available for free over the Internet as part of its cultural archiving mission.

Without a shared recognition that the public domain enriches everyone and creates value for society, information policy cannot evolve to address the opportunities cyberspace presents. The Internet Governance Forum should address the status of the public domain as it explores how the Internet can be maximized as tool for access to knowledge and an “Internet for Development”.

Database Rights Restrict Free Flow of Information on Internet

Another threat to the development of the Internet as a tool for growing the information commons is the creation of new “database rights”. Database rights give companies the right to the exclusive control and ownership of facts, scientific data, and other

information that they collect or compile. Database rights are separate from and in addition to traditional copyrights.

Although the US Supreme Court has rejected database rights as unconstitutional, the European Union Database Directive of 1996 created an entirely new set of database rights that control the flow of information on the Internet and impede access to knowledge. Weather data, sports scores, comparative prices, news, and scientific information can now be restricted in its online distribution with the creation of the new database rights.

If database rights continue to grow, they will bring the free flow of ideas to a screeching halt on the information superhighway. If facts can be owned simply by compiling them, online educational resources will be severely restricted. A discussion at the IGF on the significant barriers to accessing knowledge should include further dialogue on the impact of database rights on the Internet.

Provide Online Access to Publicly Funded Research

Governments and other multi-stakeholders should work together to enable online public access to scientific information that is acquired at public expense. Unfortunately, the trend is for the public to pay for the research directly the first time via taxes, and then to pay again to access the data after the information has been commercialized. Much scientific research is conducted at public expense and then auctioned off for commercialization of the research results. The Internet provides a powerful tool to give the public immediate and direct access to the fruits of scientific research results. Providing online access to publicly funded research data also increases its overall value for society (i.e. tax payers) by allowing as much re-use of data as possible.

A growing consumer response has emerged from the increasing privatization of research conducted with public resources. In May 2006, a bill was introduced in the US Senate that would require US government agencies that fund over \$100 million in annual external research to make electronic manuscripts of peer-reviewed journal articles that stem from that research publicly available on the Internet. The Federal Research Public Access Act of 2006 has already been endorsed by thousands of individuals and institutions as an important step towards creating a global information commons.³

Recognize Social Value of Peer-to-Peer (P2P) Software

Peer-to-Peer (P2P) software (or file-sharing software) allows Internet users to connect directly together without any intermediary to moderate or restrict the data exchange. File-sharing on the Internet remains one of the Internet's most popular activities as music fans discover new artists or experience rare recordings and never heard before performances of their favorite bands. A new community of musicians use P2P file-sharing software to advertise themselves to the general public by authorizing the non-commercial sharing of their music over the Internet.

³ See Alliance for Tax Payer Access at <http://www.taxpayeraccess.org>.

UK indie band the Arctic Monkeys attributes its success to making Internet recordings freely available via its website and permitting P2P file-sharing of its music. The first album released by the Arctic Monkeys made rock history by becoming the fastest selling debut album in UK chart history in early 2006. The 1970's singer-songwriter Janis Ian publicly stated the value of making her recordings available for download via the Internet since she could not get traditional radio play. Rock legend the Grateful Dead also continues its tradition of permitting the free and open sharing of the band's music over the Internet.

But music swapping is only one possible legitimate use for file-sharing. Public domain information and other data for which it is lawful to share are also regularly traded on file-sharing systems. Law makers often fail to take this into account when setting policy regarding P2P file-sharing. Often times, infringement is presumed and software makers or providers can be held strictly liable for the infringing activity of others who use the software. There is also growing pressure to criminalize the use of P2P software in international and bi-lateral trade agreements. The increased criminalization of the software has dried up investment funding in an otherwise very important tool for the direct exchange of information. Without investment and funding, P2P software developers must find work in other areas and innovation in information sharing tools is stymied. Because of its direct, person-to-person connection, P2P enables a true free flow of information, and its value should be recognized and promoted as such.

Technologies like P2P software breathe life into the often repeated words of Thomas Jefferson, author of the US Declaration of Independence:

“He who receives ideas from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening me.”

The unique ability for individuals to connect directly together and share information without oversight is a key attribute of the old Internet architecture that must be preserved for future freedom and innovation. The IGF should discuss the benefits of P2P file-sharing and its role in providing access to knowledge and promoting free expression.

3. Build Respect for Civil Liberties into IPR Laws and Procedures Addressing Online Behavior

Laws and policies that deal with infringement of intellectual property on the Internet must respect other traditional civil liberties, such as privacy rights and due process rights. The connection between freedom of expression, the right to be anonymous online, rights over personal data, and legal due process in dealing with Internet activity cannot be overlooked. For freedom and openness to be encoded into the future Internet, both the laws and the technical structures of the Internet must be embedded with civil liberties values.

ICANN's Whois Policy Must Conform with Privacy Law

Paragraph 46 of the Tunis Agenda states in part:

“**We call upon all stakeholders** to ensure respect for privacy and the protection of personal information and data, whether via adoption of legislation, the

implementation of collaborative frameworks, best practices and self-regulatory and technological measures by business and users.”

One of the great tragedy’s of Internet governance policy-making has been the inability of ICANN to enact a policy for dealing with domain name registrant’s personal information that does not violate national and international privacy laws. ICANN’s “whois” policy currently requires the open publication of Internet users’ personal information including home address and telephone number in an online database.

ICANN’s whois policy has been widely criticized for violating a number of national and international privacy laws that deal with the handling of personal data on the Internet. EU Privacy Commissioners and other privacy advocates have repeatedly spoken out against the whois policy for violating EU data protection laws. Privacy experts have explained that whois also violates the privacy guarantees found in Article 12 of the Universal Declaration of Human Rights. The whois policy also conflicts with Canadian and Australian privacy law protections. The US Federal Trade Commission has reported that data theft is the number one crime in the US and online databases (such as the whois database) significantly contribute to the theft and abuse of personal information on the Internet. In addition to Paragraph 46 of the Tunis Agenda, Paragraph 58 of the WSIS Geneva Declaration also recognized the need to protect privacy and personal data on the Internet.

Institutions that set Internet governance policies should consider and comply with the international and national privacy laws that deal with the online publication of personal data. ICANN’s whois policy must be reformed for ICANN to have credibility as a responsible care-taker of the Internet in its technical and policy making duties.

ICANN’s over-reaching whois policy is largely a result of the pressure of intellectual property rights lobbyists to encode into ICANN policy a means of instantly obtaining personal information about any domain name registrant. The whois policy also points to a direct failure in existing Internet governance structures to promote a global public interest. Since its inception, ICANN has been criticized for favoring the rights of IP holders over the freedom of expression or privacy rights of Internet users. By promoting certain narrow interests against the general public good, ICANN has encouraged a backlash by the greater Internet community.

IGF can begin to implement Paragraph 46 of the Tunis Agenda and its support for privacy and personal data by providing a forum in Athens for a long over-due discussion on reforming ICANN’s whois privacy policy.

US DMCA “Notice and Take-Down” Provisions Should Comply with Due Process

Web sites can and have been censored in a variety of ways. For Web sites hosted in the United States, one of the easiest methods is for someone to send a “take-down notice” to the website’s Internet Service Provider (ISP), as provided in Section 512(h) of the Digital Millennium Copyright Act (DMCA). This provision provides a safe-harbor from copyright liability for ISPs that “expeditiously” comply with notices complaining of

copyright infringement. Once notice is given to the ISP, the ISP is required to expeditiously remove the material, and is not required to notify the user who made the information available until after the material has been removed.

These DMCA take-down notices have become notorious tools of abuse for IP rights holders to prevent freedom of expression on the Internet. One study of 876 website take-down notices found that at least a third of the notices contained at least one major flaw which posed significant questions about the claim's enforceability in a court of law and/or invited serious concerns about the fairness of the process.⁴ Another study found that almost half of the take-down notices received in 2004 either threatened to chill expression that probably did not violate IP laws or targeted material that was possibly fair use or First Amendment protected.⁵ The research revealed that 65% of online information was totally or partially removed in the face of weak copyright or trademark claims, and 41% of the material in the "strong fair use" category was removed.

Conclusion: IGF Should Address Relationship Between Intellectual Property Rights, Free Expression, and Access to Knowledge

Undoubtedly the laws and technologies addressing intellectual property rights can become imbalanced in some cases harm the growth and development of Internet. An examination of the proper balance for intellectual property rights in cyberspace is necessary at IGF, particularly since excessive IPRs create a significant barrier to accessing knowledge and the free flow of information on the Internet.

Internet law and policy makers can no longer turn a blind eye to the social costs of increasing IPRs in cyberspace. Rules intended to serve as an "engine of free expression" and increase access to knowledge in an industrial world can inhibit the dissemination of knowledge and squelch freedom of expression in an information age. Zealotry to crack down on online IPR infringements often sweeps individual privacy and due process other traditional civil liberties under the rug.

IGF can help to provide a forum that celebrates the value of the public domain and examines how best to use it to provide universal access to education. IGF can recognize the need to encode civil liberties values into the network architecture, laws and policies dealing with the Internet. IGF can facilitate a dialogue among all stake-holders about the need to achieve a proper balance between intellectual property rights and freedom of expression rights in cyberspace.

⁴ Jennifer M. Urban & Laura Quilter, Symposium Review: Efficient Process Or "Chilling Effects"? Takedown Notices Under Section 512 Of The Digital Millennium Copyright Act, 22 Santa Clara Computer & High Tech. L.J. 621, 666 (May 2006).

⁵ Marjorie Heins & Tricia Beckles, Brennan Center for Justice, Will Fair Use Survive? (2005), available at <http://fepproject.org/policyreports/WillFairUseSurvive.pdf> p. 32.