GLOBAL INFORMATION SOCIETY WATCH 2009

Focus on access to online information and knowledge
– advancing human rights and democracy

Global Information Society Watch 2009

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Dedicated to A.K. Mahan - an activist who valued intellectual rigour and concrete outcomes.

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Introduction:
Access to online information and knowledge – advancing human rights and democracy

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Information and knowledge are crucial factors in human development. We are reminded of this constantly, from the "knowledge economy" we live in, to the emotional and financial power that information and communications technologies (ICTs) have over our lives. In the words of philosopher Francis Bacon, "*Scientia potentia est*" – knowledge itself is power. Present-day movements for access to knowledge and the right to information have their origins in this simple and arguably ancient idea. Despite a rich history and wide intellectual acceptance, the right to know is not universally granted, and the right to know on the internet is a particularly bitter struggle in many parts of the world.[1]
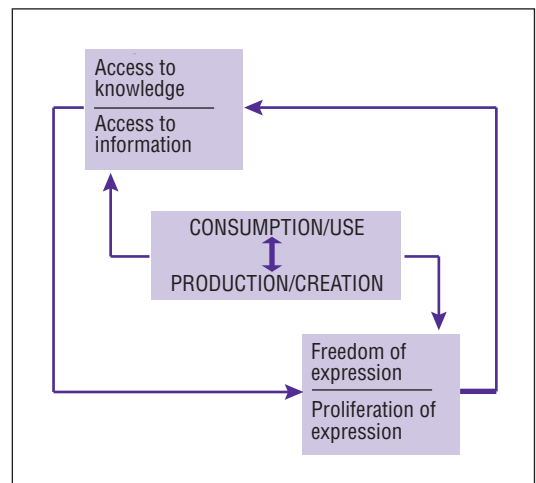
Information, knowledge and access are terms with a multiplicity of meaning. Even as they constitute an ambitious goal that disparate global actors work towards, it is worth considering how these terms are construed in relation to each other.[2]

"Information" in this context usually refers to government and institutionally held records. Legislation that mandates greater transparency is critical. The earliest example of this kind of legislation was implemented in Sweden as far back as the late 18th century, while countries such as South Africa and India have had theirs enacted as recently as 2000 and 2005 respectively. Freedom of information and the resulting power to make informed decisions are bedrocks of liberal democracy, essential tools for active citizen participation – and the foundation of dominant ideas of the better life, such as that of an open society.

"Knowledge" in its most instrumental sense usually refers to the elements of learning; to scholarly and artistic work and its tools. The access to knowledge movement,[3] for instance, works on copyright law reform and the promulgation of open access. Access to knowledge in its present incarnation is a relatively new frame of reference compared to the right to information, which has been demanded for a longer period of time. But it is worth bearing in mind that the underlying theme has always existed and even been expressed, most notably in the hope and anxiety surrounding every disruptive technological shift, from the printing press to the internet.

The most frequently misunderstood term in this troika is, perhaps, "access". The common interpretation of the term is its strict dictionary meaning, which is to use, to consume, to be allowed entry into or contact with. In relation to information and knowledge, however, and especially since the advent of the internet, access is just as much about production as it is about consumption. Knowledge is not something that Northern countries produce and Southern countries consume; it is a vast and porous domain that consists of formal and as yet unrecognised realms, all of which are growing and evolving. To read is a necessary precondition to being able to write; access, by analogy, implies entry not just into the world of knowledge consumption but also knowledge *creation*.

One manifestation of this fusion is Wikipedia, the encyclopaedia that is collaboratively produced online. Granted, many more people read Wikipedia than edit it. Nevertheless, for a growing global volunteer base, it is simultaneously a place to read and consume as well as edit and produce. In a similar vein, it is access to information that propels people around the world to intervene in public processes and change laws; without the information, there could be no change.

With regards to government information, it is important that not only are there mechanisms put in place that facilitate

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1   For one understanding of the right to know, see Stiglitz, J. (2009) On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life, Oxford Amnesty Lecture, Oxford, UK, 27 January. siteresources.worldbank.org/NEWS/Resources/oxford-amnesty.pdf

    For an understanding of how countries restrict access to the full potential of the internet, see Reporters Without Borders' list of "Internet Enemies": www.rsf.org/List-of-the-13-Internet-enemies.html

2   Naturally, all three words offer a wide scope of understanding. The descriptions that follow are only an attempt at clarifying a functional definition, not at fixing definitive meaning.

3   The movement for access to knowledge (sometimes abbreviated as A2K) refers to a loose grouping of individuals and institutions who work locally as well as on a potential international treaty on access to knowledge; an early draft is available at: www.cptech.org/a2k/a2k_treaty_may9.pdf

access to it, but also that these mechanisms work. The history of events leading up to the enactment of the Right to Information Act in India provides valuable lessons as to what the scope of government information should be, in how punitive measures can be implemented to guarantee that the process works, and, above all, as to how marginalised citizens can gain the space and the means to use the law to their advantage.[4] To a large extent, the rich genealogy of the right to information has naturalised it as an obvious, just and urgent issue. Furthermore, it is an umbrella concern, covering as much as specific local contexts demand.

In contrast, the movement for access to knowledge works primarily on one crucial barrier, namely, intellectual property. For some, this focus is problematic. If, for instance, knowledge is imparted by education, then isn't access just as much hampered by the lack of skilled teachers as restrictive intellectual property laws? This is certainly true, and yet, there are at least three good reasons why this narrow focus makes strategic sense. One: education is a long-standing priority of societies and governments the world over, and there is an inestimably large group of individuals and institutions who work in the area. However, relatively few people are aware of the impact of intellectual property on access to educational material, and even fewer research it. Two: the advent of the internet has created hitherto unprecedented opportunities in the knowledge domain, opportunities that could turn into unrealised potential if the application of intellectual property online is decided by copyright industries alone. Three: knowledge is more than just formal education, and the internet provides limitless ways in which it can be redefined and multiplied. The overzealous application of intellectual property significantly limits the manner in which knowledge operates online.

A chain of events that unfolded in France over the last two years dramatically illustrates the level of threat faced by those seeking information and knowledge online. In 2008, at the insistence of the domestic recording industry, the French government began considering the enactment of a law designed to thwart online piracy. As industry forces pressed on and Nicholas Sarkozy added his support, the effort culminated in a bill that would be popularly known as HADOPI[5] after the enforcement agency it intended to create. HADOPI employed the three strikes principle. If an internet user was found to have committed an act of piracy, the copyright holder in question was entitled to warn the user through HADOPI. No details as to the exact nature of the copyright violation were required to be provided other than that a violation had occurred. After three such warnings, internet service providers (ISPs) in France would be mandated under HADOPI to bar the user from being allowed access to the internet for a period of up to one year.

The prospect of HADOPI had people up in arms. A broad coalition of internet users, consumers and their allies quickly assembled in France and elsewhere in the world. To users in France, it represented an immediate threat; to users elsewhere in the world, it represented the extent to which their online freedoms could be restricted in the future. Apart from the draconian nature of the punishment meted out by this bill, users were outraged that every kind of misdemeanour – whether deliberate, inadvertent, supposed or even mistaken – would be treated the same, with the benefit of doubt given to the copyright holder.[6]

Throughout 2009, the bill faced several setbacks, including a complete rejection by the French National Assembly. But its backers pushed on, eventually winning approval after modifications; until 10 June 2009, when the Constitutional Council of France struck down HADOPI on the grounds that it was inconsistent with the country's Constitution – for going against freedom of expression and the presumption of innocence.

To involve infrastructure providers (ISPs) in enforcing private copyright disputes and suspend user privileges in the wake of alleged copyright violations, as HADOPI wished to do, was admittedly an extreme step. But there are other, less visibly harmful ways by which access to online information and knowledge is threatened and thwarted, and the problem is that some of these ways appear innocuous – though in fact any investigation of them would provide cause for serious alarm. Of the many concerns that exist, at least a few deserve our immediate attention: (a) Digital Rights Management (DRM) and Technological Protection Measures (TPMs); (b) copyright law provisions that affect online education, whether by distance or in a physical classroom setting, or in a library; (c) the lack of provisions that would meaningfully allow disabled learners and users (particularly the visually disabled) to access information and knowledge online; and (d) the extent to which users can usefully integrate online copyrighted material into their lives in a manner that would be considered fair.

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4   For an understanding of the concerns of a key Indian social movement, the Mazdoor Kisan Shakti Sangathan (MKSS), in the years leading up to the enactment of India's Right to Information Act, see Sampat, P. and Dey, N. (2005) Bare Acts and Collective Explorations, in Narula, M. et al. (eds.) *Sarai Reader 05: Bare Acts*, Sarai, New Delhi. www.sarai.net/publications/readers/05-bare-acts/02_preeti.pdf

5   HADOPI: Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet (High Authority for the Diffusion of Works and the Protection of Rights on the Internet).

6   For one account of the story of HADOPI, see O'Brien, D. (2008) The Struggles of France's Three Strikes Law, Electronic Frontier Foundation. www.eff.org/deeplinks/2008/05/struggles-frances-three-strikes-law

A primary anxiety around copyrighted material in the online environment has been, on the part of copyright industries, how to regulate the flow of exchange. Previous to the advent of mass use of the internet, a song or a book was limited in its capacity for exchange by the physical, tangible form it came in. With the proliferation of digital material and peer-to-peer systems, however, the possibility for exchange is virtually boundless, and this makes content industries nervous – for it signals the end of an already outdated business model and the beginning of another. In return, industry retaliation has consisted of a strategy of lockdown. The tools of this strategy are DRM and TPMs – software that regulates what one can do with a digital file, or rather cannot do – and the vehicles by which these are legislated and proliferated around the world are a set of World Intellectual Property Organization (WIPO) agreements collectively known as the WIPO Internet Treaties.[7]

DRM is oblivious of the specific circumstances of the user, and is therefore unaware of both the user's individual needs as well as her rights – for example, the nuances of copyright law in the country of the user's residence. It doesn't matter therefore that a user may be blind, or work for a public library, and that national copyright law in the country might specifically extend provisions to visually disabled people and libraries (for instance, by enabling permission-free format changes and reproductions for research). DRM will still operate on a one-size-fits-all model that supersedes national law. In some countries, fair dealing – or fair use – might allow for ways of personal consumption of copyrighted material that the DRM withdraws, resulting in a situation where the whims of a multinational industry render national law meaningless.

DRM is software that can be hacked – up to an extent. In this way, it is still possible for users to legitimately exercise their rights with and upon DRM-protected material. Yet, following the model of the Digital Millennium Copyright Act (DMCA) – the United States' (US) interpretation of the WIPO Internet Treaties – many countries have legislated that such circumvention constitutes a copyright violation. In some cases this renders sections of their own copyright law redundant, and in effect, casts an unnecessarily heavy shroud over certain copyrighted material merely because it happens to be online. More worryingly, the WIPO Internet Treaties themselves do not ask of countries that anti-circumvention provisions apply even when a user is exercising a legitimate right such as fair use, and yet countries around the world have allowed

their laws to imply so[8] because of bilateral persuasion, often from the US or the European Union, without a clear understanding of how this can stunt the potential of the internet within their borders.

It must be noted that copyright law in general – in most countries around the world[9] – generally does not do enough for access to knowledge. To the extent that the majority of the world learns not online but from the printed and spoken word, copyright law in its general application matters tremendously. When considering the potentially limiting aspects of copyright regulation online, one must keep in mind that many countries around the world do not have the kind of provisions that could be limited by new regulation of online material. In fact, most countries do not expressly facilitate distance learning, nor make all the provisions they can for access for the visually disabled, or freedom of information, or even education in general.[10] In part, this is because ever since the globalisation of intellectual property rights, including as recently as the founding of the World Trade Organization (WTO) in 1996 and the instituting of its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[11] there has been a distinct shift away from the minimum copyright protection demanded by this trade rule to a maximally protectionist approach.

In the majority of national circumstances today, copyright law is what is referred to as TRIPS-plus, which is to say, excessively protective of copyright-holders' interests. The excess is overwhelmingly in favour of copyright industries and at the expense of users of copyrighted material. In such a situation, when copyright as it applies offline is already imbalanced, it is even harder to demand a balanced interpretation of copyright in the online space.

Finally, it hardly needs repeating that without a strong sovereign commitment to freedom of speech and information – in effect, a guarantee against censorship – any gains made in access rights stand to be nullified. And this commitment, worryingly, is by no means universally evident. ∎

7   The WIPO Internet Treaties consist of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

8   For instance, in a recent eight-country study in Africa, it was found that Morocco, Kenya and Egypt all have anti-circumvention provisions enacted into law. See the ACA2K Briefing Paper for the WIPO Development Agenda meetings, April 2009: www.aca2k.org/attachments/180_ACA2K%20 Briefing%20Paper1_WIPODevtAgenda-042009.pdf

9   Among several country studies, regional and international reports, one recent survey that confirms this finding is the Consumers International IP Watch List report for 2009, in which it is reported that in relation to access to knowledge, "no countries adequately took account of consumers' interests." See: a2knetwork.org/sites/default/files/ip-watchlist09.pdf

10 Ibid.

11 TRIPS is currently the overarching international trade rule that governs the global sovereign application of intellectual property; for the full text of the TRIPS agreement, see: www.wto.org/english/tratop_e/trips_e/trips_e.htm

GLOBAL INFORMATION SOCIETY WATCH (GISWatch) 2009 is the third in a series of yearly reports critically covering the state of the information society *from the perspectives of civil society organisations across the world.*

GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels
- **Encouraging** critical debate
- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy.* It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

In addition, 48 country reports analyse the status of access to online information and knowledge in countries as diverse as the Democratic Republic of Congo, Mexico, Switzerland and Kazakhstan, while six regional overviews offer a bird's eye perspective on regional trends.

GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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2009 Report
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