

## Notes taken during Panel 6: Balance between Intellectual Property and Access to Knowledge

Moderator:	Vladimir Garay - Derechos digitales
Civil Society:	Mariana Valente - InternetLab, Brazil Amalia Toledo - Karisma Foundation, Colombia Lua Fergus - FGV, Brazil
Technical Community:	Rodrigo Saucedo - ICANN
Private Sector:	Montserrat Guitart - Arias y Muñoz
Government:	Juan Pablo Vial - ICT Advisor to the Ministry of Foreign Affairs, Chile

### Summary:

#### Agreements:

- In recent years, intellectual property, trademarks, patents and licensing debates have lost relevance compared with other topics such as privacy, surveillance and freedom of expression. Nonetheless, it still is a central topic that must be addressed at these meetings.
- New business models (e.g., business models based on streaming) have provided answers to industry problems such as piracy. The discussion on access to scientific and cultural content is still pending.
- Topics relating to commercial agreements such as the TPP in which the parties are not treated equally exceed intellectual property rights and related topics.

#### Lack of consensus:

- Some participants consider that the problem of access to knowledge must be solved using mechanisms other than intellectual property legislation, for example, through Creative Commons licenses. Others believe that legislation is precisely what should be modified to deal with this problem.

#### Most relevant conclusions:

- Our countries have their own cultures and it seems unnatural to impose licensing models based on other legal systems.

- It is important to continue looking for models that will protect creators and authors while fostering the dissemination of knowledge and innovation.
- Internet governance forums and other international forums must address the problem and support the search for solutions.

Initial reflection by Vladimir: A few years ago, Intellectual Property (IP) and copyright were undeniably prominent issues in Internet discussions. Today, this space has been occupied by other topics such as privacy and surveillance, as well as net neutrality, freedom of expression and hate speech. This is obviously due to multiple causes but I would like to start by asking all of you to reflect on the importance that copyright discussions should have within the framework of Internet regulations and on the internal reasons for this lack of prominence.

What place does intellectual property occupy on the Internet? Has civil society been able to position the topic as it deserves?

**Mariana:**

Clearly, other topics are much more present in Brazil. The Internet has changed, as have the issues considered to be critical. For example, the industry is no longer acting against individuals, as this had negative effects. There are other strategies for controlling piracy. There are problems with domain names or attempts to block domains, and these have generated major debates in my country. Industries have asked for sites that violate intellectual property rights to be blocked. There is a project for punishing websites containing pirate content with up to two years of prison time. Today, one of the most popular discussions concerns bandwidth limitations in fixed broadband connections, similar to the model used for cell phones. When people start using streaming, they will not be able to afford the necessary bandwidth.

**Amalia:**

Language is also part of access to knowledge. Discussions about copyright led the region to deal with many other topics involving personal rights, although certain topics are currently more popular. But this does not mean it has lost any of its relevance. Commercial agreements create more legal, technical and economic barriers that affect access to culture. Our goal is to have balanced dialogue that can be translated into legislation. CS plays a key role in access to knowledge and culture. The

Internet makes it easier to create and share knowledge. It also makes it easier to disseminate information. As citizens, we have become *prosumers* and question the industry's dominant position. It is common knowledge that copyright laws are used to censor freedom of expression (as in the case of Ecuador mentioned earlier). As Frank La Rue used to say, e-learning is still relevant where free access to educational resources or scientific and technological production is limited. Therefore, the topic continues to be relevant, but users are now seen as content producers instead of merely consumers.

**Lua:**

The Trans-Pacific Partnership Agreement (TPP) was negotiated during secret meetings in which we were unable to participate. Everyone talks about multistakeholder Internet governance, but this does not actually translate into reality. The wealthiest countries were able to impose their points of view on the TPP. There is an international lobby. Major content producers defending their rights are based in developed countries. Considering that there have been changes in the duration of intellectual property rights, do you think extending copyright protection will lead to more content production? Those most affected by the measures protecting technology are not the rich. There is a major threat to freedom of expression, justified by intellectual property laws. For example, teenagers born after the disappearance of Napster have a different perception of what it means to download content and access resources. Governments and industry must understand that protective measures are no longer useful. Instead, new business models are needed. Young people cannot afford services such as Netflix or Spotify. Piracy is said to represent a threat; but market policies and pricing are major barriers in Latin America, yet companies are still making money. Instead of punishing piracy, new business models must be found.

**Vladimir:**

All copyright discussions analyze the need to establish balanced systems. Today, however, major decisions regarding copyright legislation are being made within the framework of commercial agreements that are often discussed in closed environments without the participation of sectors such as academia or civil society but which the intellectual property industry can affect just as it influences regulatory practices (e.g., the pressure certain groups such as the MPAA place on ICANN).

The question is how can we balance regulations when policy discussions are clearly biased towards

business?

**Juan Pablo:**

In Chile's experience, it is important to balance incentives for creators with social access to knowledge and culture. This topic is present in Chile because of the TPP, the duration of copyright and the way this protection is enforced online.

For Chile, ICTs are a powerful instrument as well as a catalyst for sustainable development. The government considers the Internet to be a free and democratic space not affecting people's privacy. Chile seeks to achieve the highest standards of protection for individual rights, including access to knowledge. Expanding copyright means that people with fewer resources will have reduced access to cultural assets, and this might affect innovation. Since the Free Trade Agreement with the United States was signed in 2003, copyright is now 70 years, a duration that is in line with other agreements and similar to other territories. Among other measures, the intellectual and industrial property act was modified and a special police brigade was created.

We believe that the potential censorship that might result if ISPs are allowed to withdraw illegal material (intermediary liability) –“eliminate first, question later”– restricts freedom of expression and violates due process. In Chile, as long as certain conditions are met, people do not have the obligation to compensate copyright holders. The intellectual property law was modified, limiting ISP liability in case of user violations. A procedure was defined for eliminating or blocking content after a judicial process, which only a judge can decide. Article 24 of the law deals with net neutrality.

**Rodrigo:**

The positive aspects of intellectual property must be highlighted regarding domain names and trademark protection as well as ICANN's domain name dispute resolution policies. There are people who claim this is undertaken behind closed doors; however, ICANN is a multistakeholder organization with bottom-up processes. Working Groups include different representatives and a consultation process must be completed before final approval by the ICANN Board. As for the new gTLD program, after 8 years, it was decided to expand the domain name system from 22 to 960 gTLDs. The work is done together with the community, especially trademarks and intellectual property, with mechanisms to protect against cybersquatting and malicious trademark registrations.

Three possible procedures exist:

1) Trademark Clearinghouse: Trademarks can be registered before a new gTLD is launched. If someone does not want to register their trademarks and a third party registers the domain name, the database alerts the trademark holder of the situation.

2) Uniform Rapid Suspension System (URSS): Allows protecting trademarks against obvious violations. This system provides protection in case a domain name is similar to a trademark, was registered in bad faith or infringes trademark rights. Claim processing time is shortened from 90 to 17 days, which leads to a quick resolution.

3) Post-Delegation Process: This process addresses disputes arising subsequent to the delegation of a new gTLD.

The entire new gTLD process was agreed by the ICANN community and crime rates have decreased dramatically. We now have a much more mature multistakeholder model. I believe this model works very well and can be replicated.

Question: Isn't this measure being abused when trademarks are used to violate freedom of expression?

Response: ICANN is not a regulator. Monitoring content is not ICANN's responsibility.

**Montserrat:**

All the topics we've discussed relate to rights and involve a financial component. When dealing with intellectual property, we turn to the World Intellectual Property Organization (WIPO), where there are different intellectual property treaties as perceived in our cultures, with the idea of a compensation for the author. Has this leaned too much in favor of the private sector? The principles of freedom and neutrality should also be considered. Authors should be able to decide whether they want to keep their rights for themselves or allow the use of Creative Commons (CC) licenses. I am not in favor of governments making these decisions. Intellectual work is remunerated just as physical work; however, last year in Spain there was an attempt to prohibit the use of CC. I don't like this type of State interference.

As regards access to culture, copyright laws should be adapted to consider new technologies. During the 90's the Internet was regarded as a problem, nowadays it is considered an opportunity. It is true that contents are not free, but access models have greatly improved from an economic point of view. I think there is a global tendency in this sense.

We need to work on modifying copyright laws but I wouldn't like to see governments saying "you don't have the right to choose your intellectual property model."

**Mariana:**

I don't agree with this topic. People use CC as a solution to copyright problems. I believe it is a very important resource for of academic repositories, but may prove to be a problem if left in the hands of authors. This is due to two reasons: some will choose to adopt CC while others will not. There is a copyright industry based on the transfer of rights and many people earn their living from products created in the past (producers, recording companies, distributors). People don't actually know whether it is legal to make a copy of a book or a CD. CC has many advantages but does not solve the issue at its core.

**Amalia:**

As for Chile, my fellow panelist mentioned the fact that terms and procedures have been expanded. Protection lasts excessively long (the author's lifetime plus 70-80 years). Will this promote artistic creation? I participate in discussions about this issue and know that no study has shown the advantages of expanding protection. The fact that the TPP was negotiated under complete secrecy is concerning, but the disparity of the actors involved is also a concern, as certain parties are very strong compared to others and this creates an imbalance in terms of obligations. Financial aspects are important and international discussions are undertaken at the WIPO. However, when things don't work out, countries take their negotiations to organizations such as the World Trade Organization, where commercial interests are much stronger. There are now bilateral and multilateral treaties in place. The entertainment industry and the stronger States are exerting great pressure.

**Lua:**

Educational institutions and libraries are afraid of digitalizing and disseminating documents that might cause trouble for them.

**Montserrat:**

Disparity is the result of the different Latin American realities. There are many problems which are not inherent to intellectual property, but to the general problems of our countries.

**Valdimir:**

I see the industry turning to streaming models, micro-payments. How can we discuss copyright issues when access and payment methods are established by the owners of these platforms? Does legislation become obsolete? Content platforms such as YouTube have internal regulations for dealing with intellectual property issues based on US legislation, but how do we enforce local legislations?

**Q&A:**

- Pilar (Karisma): Does ICANN have a trademark dispute resolution mechanism? I believe ICANN is responsible for this procedure. In Colombia, an organization called ICETEX offers student loans that have led several young people to bankruptcy. A group created a website under ICETEX-te-arruina.com. Godaddy complained of trademark misuse. Question: Would ICETEX be able to submit a complaint before ICANN?

- Salvador (ISOC Mexico): I am in favor of copyright and intellectual property rights, but I don't think this goes against access to culture. In my opinion, there is no opposition but synergy instead. If innovation is not protected, there will be no investors. Other forums don't properly address this topic. In Mexico, piracy represents the second source of income for drug the illegal drug trade. Both rights should work together. Question to Rodrigo: Why wasn't the PDDRP a success?

- Mark (São Paulo University): Data reveals that there is a considerable amount of pirate digital content in LAC. The industry considers this to be piracy, but I consider it to be unmet demand. Why is piracy still regarded as a crime in our region, considering that many services (i.e., Netflix) are changing their business models?

- Gonzalo (ALIC): Results of the TPP negotiated so far are not bad *per se*. Early negotiations were asymmetric, yet the treaty respects the intermediary role achieved after long discussions. ICANN establishes the URP, the dispute resolution policies and removal criteria, as well as the criteria that must be met to demonstrate "fair use."

**Rodrigo:**

My answer to Karisma's question is yes. The institution might request the cancellation or transfer of a domain name before a national court or the WIPO. However, ICANN does not make any decisions: it simply obeys court orders.

**Lua:**

Is drug trafficking financed by piracy? Mark mentioned the informal market that exists today. However, investigations prove that consumers of pirated products end up buying the original products.

**Amalia:**

The free trade agreement with Chile was not viewed in a positive light by the USA, so negotiations with Colombia were far more limited.

**Amalia:**

There is debate about the US and their influence on our national commercial policies, the existence of negative recommendations, red lists, pressure groups.

**Montserrat:**

Intellectual property was brought up in the midst of a far broader debate. Free trade agreements place excessive weight on intellectual property.

**Vladimir:**

Why are we following the guidelines of developed countries? How can we think of intellectual property agreements that are more in line with this meeting in terms of institutionality and development models?

**Questions:**

**Nicole (Fund. Acceso):**

We are all part of the Internet. If you don't want us to pirate your content, don't upload it to the Internet. The Internet is for sharing experiences and culture. The logic behind intellectual property must change, we are privatizing what we actually want to release. ICANN is losing power in the eyes of the hacker community. There are now alternatives such as .onion. Creation does not come out of nowhere. We can't appropriate ourselves of the knowledge of generations or peoples. We can't continue to patent things that don't belong to us. The debate on intellectual property exceeds the



Internet.

**Fatima Cambroner:**

The topic was originally copyright, but intellectual property and trademarks were also discussed. ICANN noted that cybersquatting rates had decreased. Are there any sources to confirm this information?

**Margarita (NIC Chile):**

Domain names are the Internet's content infrastructure. ICANN is only involved with new gTLDs. The case is different for top or secondary level domains. New gTLDs have a contract and each country code is subject to dispute resolution laws (local legislation).

**Emilio (ISOC Salvador):**

A transculturation process is occurring as countries adopt agreements with considerations that stem from other cultures. The right to be forgotten was much discussed, mostly based on the moral rights of our various cultures, with less focus on economic implications. There is great disparity in terms of how these laws which originated in other countries are enforced.

**Kathy (ICANN NCUC):**

Private agreements are dangerous as each one adopts its own criteria. An external vision is needed. ICANN has trademark protection systems in place, but are these systems fair and appropriate? A new group within ICANN is working on this model and I am its coordinator. There is a new tendency within ICANN towards agreements between domain holders and content producers. These agreements are closed and not necessarily fair.

Final Remarks

**Rodrigo:**

In reply to Fátima: A report by an independent trademark clearinghouse commission has been published. I will provide the link.

**Amalia:**

Right are not neutral; they respond to various interests. Copyright responds to the interests of copyright holders, as opposed to those of users. "Every law has a loophole." Large industries know how to circumvent the law. Licensing practices are stepping over copyright, flexible clauses that exist in all legal systems. This is what I see in WIPO debates: large industries don't want to negotiate with international organizations. Instead, they prefer to use private licensing systems. This creates licensing barriers. Women are the most affected. What we need today is a legal system with updated laws that are adapted to current needs.

**Mariana:**

International treaties establish new temporary agreements, but this makes no difference in Brazil where the duration is already 70 years. Brazil didn't negotiate TPP. TRIPS? This is an agreement the country had to sign in order to be part of other commercial agreements.

**(Participant whose name was not recorded):**

Intellectual property was thoroughly discussed in youth meetings, where several potential solutions were suggested. For example, it was proposed that the State might be in charge of collecting CC royalties, limiting protection to 30 years, but nobody wants to abandon the Berne Convention. This model must be abandoned and modified based on the actual practices of those who produce Internet content. Legislation must be based on reality.