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**INFORMATION MARKET OR INFORMATION
SOCIETY**

**Beyond a terminology, the stakes of a choice and the
conditions of success of an information society**

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1. The explosion of technology, the convergence of sectors which have served up until now a distinct regulatory logic, the virtual multiplication of services, require the redefinition of the laws on an information market.

2. These laws must be guided by the logic of the information market. In this line of approach, the recommendations of the European Council of the Group of Personalities on the information society, referred to as the Bangemann report, identify some lines of approach.⁴¹

The development of the market requires the setting up of a network with a large capacity and which is open (that is to say interconnectable) as well as the definition of uniform rules on the protection of intellectual property, and even computer crime which should serve the purpose of protecting investment.⁴² Furthermore, this market must be competitive and the development of information networks implies that the safety of the messages (rules on evidence and authentication), the protection of data⁴³ and finally, the interests of the private users of the networks (rules of consumer protection) are guaranteed.

3. This approach as defined by the recommendations can be usefully opposed to another approach which is more present in US recommendations which presides the "National Information Infrastructure" Policy⁴⁴ This second approach does not seek to address the development of the information market in a negative way (that is to say by not limiting the efforts which could be undertaken by the market, notwithstanding the protection of the essential interests of the demand) but rather in a positive manner by stating that giving total meaning to the democratic liberties proves perhaps to be the best foundations and levy for the development of the information market.⁴⁵

⁴¹ See in particular chapter III : Implementation of the programme. "The information market has a universal nature. The group therefore recommends that the Union's action is axed on the creation of a common regulatory framework concerning the protection of intellectual property rights, the respect of privacy and the safety of information, at a European level and possibly at an international level.

⁴² "A large part of the information falls within the public domain, but other information contains an added value which comes from the exclusive ownership and must therefore be protected by intellectual property rights" (Chap. III of the Bangemann Report) (Own translation)

⁴³ In this respect, the strange argument of the Bangemann Report in which the adoption of a legislation on data protection is justified as follows: "Without legal certainty, what would offer (a directive on this matter), the lack of confidence of the consumer would certainly impede the rapid development of the information society". It is true that the rest of the report adds to this argument of pure market rationale the function of Europe in the protection of the fundamental rights in order to come back later on a second market oriented argument: the national regulatory differences as an obstacle to the free movement of data.

⁴⁴ As contained in the document, the National Information Infrastructure: Agenda for Action: Information Infrastructure Task Force, NTIA-NII (Washington D.C.), 15.9.93, op. 1-26.

⁴⁵ It is true that one must not be naive : we recognise that the same economic and industrial preoccupations are at the root of the American approach as the European ones and we add that it

4. The evolution of case law and of legal writing surrounding article 10 of the Council of Europe Convention on the freedom of expression leads to this reflection. At first understood as the freedom to have access to information communication and broadcast media, its scope was later broadened to the acknowledgement of a positive duty from the state to ensure that the necessary information is available to the public in order to enable it to take a free decision in a democratic society. In other words, giving an in-depth meaning and more far reaching consequences to the freedom of expression or opinion can be a formidable vector for the development of information services and their broadcasting.

The same evolution leads to no longer consider the provision of article 8 on privacy as a mere negative duty to prevent abuses coming from the access or the wrongful use of personal data but rather as a positive duty to ensure at the same time as the right to information of private and collective entities, the transparency for everyone of the information image which is held by a third party and the more and more complex circuits the image goes through.

5. The consequence of such a positive approach of our liberties as a basis for an information society highlights the importance and the necessity to redefine the universal service, which is no longer understood as the mere access to the technical methods of communication (infrastructure and the service of voice transport) but also as the requirement to create information contents to which everyone could have access. Therefore, the information could enter the concept of universal service in the light of what is considered "essential" or "vital" in order to ensure the participation of the people to a democratic society. It is, according to the American expression in connection with the definition of the policy of the "National Information Infrastructure", a matter of not introducing a discrimination between those "who have the knowledge" and "those who do not" ("the information have" and the "information have not")⁴⁶

6. This concept of universal service justifies the extension of its scope of application well beyond the narrow field the European⁴⁷ policy would like it to stay, that is to say as the access to certain basic services in the telecommunication sector, the telephone today and the fax tomorrow. It is a matter, through this concept, as the American documents reveal to "oblige the administration to develop a wide and modern concept of universal services, which will highlight the fact that each American will be able to have an easy, cheap and irrespective of his situation, income or abilities, to developed communication services and information.

is perhaps the limits to the European competence which justify the absence of reference to human rights.

⁴⁶ To note: "We can not tolerate, and this country can not stand in the long term a society where some children receive a complete education while others do not; a society where certain adults have access to continuous training while others do not", Al Gore, Remarks prepared for delivery Royce Hall, U.C.L.A., Los Angeles, 1994.

⁴⁷ Annex to the proposition for a resolution of the Council on the principles on the universal service in the telecommunications sector, COM(93)543 final, 15/11/93.

Therefore, the universal service seeks to be a real instrument for promotion of our liberties. In order to achieve this objective, it implies firstly the possible access to all our communication techniques : in this direction, if the interoperability of the networks, the development of broad band networks, at this point in time, the access to voice telephony services, and tomorrow, to message service "identification" services are the first factor towards a universal service, the achievement made by some American States of "Access community televisions" which allows each interest group (consumers, political movements, trade unions,...) to not only have access to cable but also to training required to make film productions appear as the second element of this universal service.

Beyond the access to techniques, it is very interesting to note that the universal service is understood in the US as meaning the possible access for all to certain information services. There is, in some states, a rule that prohibits cable distributors from encrypting certain programmes which are considered of general interest, in this case American football programmes. In other states, the administration has a positive duty to set up either on line assistance services for the filling in of administrative papers, medical or statistical information service. This obligation is based on the state's duty to subsidise certain institutions such as education in order to provide access to such data and even in some cases to broadcast it.

7. In this context of universal service, the statutes concerning the access to administrative documents in particular are considered⁴⁸ as a drive for development of a democratic information society and not in the context of the information market as a risk for development of the existing private sector as an actor in this market.⁴⁹

8. The changing of perspective which is implied by the "Information Society" rather than the "information market" choice of approach also leads to a different study of the traditional themes which are identified by the "information market" from a different angle. For example, the issue of intellectual property rights must not be examined only from the point of view of the methods of control of the use and access by third parties but as a fair remuneration of the author in exchange for the free circulation of his work⁵⁰ I add that technology must be kept in mind -and I refer to the European CITED (Copyright in Electronic Transmitted Documents) project

⁴⁸ The line of action 9 "Provide access to Government information and improve government Procurement" starts by these words: "Thomas Jefferson said that information is currently of democracy".

⁴⁹ Which is undeniably the objective of the "Leading lines to improve the synergy between the public sector and the private sector in the information market" published by the Commission of the European Communities in 1989.

⁵⁰ In this respect, compare the way in which the issue of intellectual property rights is presented in the Bangemann Report (See above no. 3, note 4) and the way in which the American NII Agenda for Action presents it (p.10, point 7): "The broad public interest in prompting the dissemination of information to all citizens must be balanced with the need to ensure the integrity of intellectual property rights..."

which will grant the automatic right to use a digitised "work" (computer programme, film,...) and grants intellectual property rights a strength they have not yet had until today which is not compatible with the rule of free movement and reception of ideas. Furthermore, the unprecedented possibilities of modification and combination which offers multimedia requires perhaps the moral rights of the author to be revived and should the author not have the right to authorise such a manipulation where he only has the right today to seek remedy for damage to dignity.

A further example can be found in the law on evidence: the development of open "wide public" electronic message systems requires the setting up of a universal service of authentication which is in fact only the modern version of the registered postal service. Such a development requires the re-examination of the rules on secrecy of correspondence and of the rules on evidence.

9. To emphasise liberties as a drive for the development of the information society leads also inevitably, as the example on intellectual property rights shows, to highlighting the liberties or interests which underlie the regulatory choices.

Therefore, to emphasise the function of the state in the diffusion of information in the name of the transparency of the administration which is itself the consequence and condition of the freedom of expression of the people, is also to think about the limits of this right. Are they guided by the necessary right to intimacy, other essential liberty, or the equally important right to enterprise, basis of the right to competition?

A second example concerns the secrecy of correspondence. Traditionally, this right to secrecy is limited by the minimal requirements of safety of the state which justifies certain forms of telephone tapping. For this reason, it could be possible to imagine that tomorrow, the safety of the state will justify setting limits on the freedom of blurring messages which are transmitted through electronic highways.

Finally, the last example of these conflicts is the freedom of opinion, which is traditionally guaranteed in media law by the right to competition or, for certain media, by the creation of a pluralistic public service which will justify when frontiers between the broadcasting of programmes - or the difference between public correspondence and private correspondence- will become unclear, where the limits of the media sector will become blurred, the more clear statement of the right for all to obtain a pluralistic and therefore the state backing of various groupings expressing sometimes interests of minorities but nevertheless existent in society. (see 7 above).

10. The function of the state is therefore twofold: to define a universal service in constant evolution and to arbitrate the conflicts of interests and liberties. This function can be performed by developing a more procedural-oriented body of rules rather than content oriented. It is not a case - in the context of moving technology- of prescribing or prohibiting but of setting up independent ⁵¹relay-organs with the

⁵¹ Is it coincidence if the control of the technological development seems to have the effect of precisely multiplying them: the Commission for data protection - the commission for access to

function of initiating public debates on the stakes of the technology choices, in order to enable to take the adequate regulatory choices and which respect democracy. For a state to arbitrate, it is necessary for it to appreciate the interests at stake and this with regard to the evolution of technology which does not allow definite solutions but obliges to appreciate in a transparent way how much the evolution weakens certain equilibria which have just been defined.

11. Everyone is now well conscious of the fact that if Europe wants to create an information society, the law must have an essential function assigned to it for its construction. It is not longer a simple matter of granting the law the function of reducing the national regulatory disparities which damage the European information market. Likewise, it is not a matter of reducing it to serving the only logic of the market, the law would only have the purpose of protection the essential interests of demand and offer. The law must find, in the dynamism of the liberties it defends, the grounds of an information society and finally to place the citizens in the centre of the information society.

information - the audio visual commission - the telecommunications commission and even telematic.....