

## **1. ANTITRUST E PROPRIETÀ INTELLETTUALE NELL'ERA DIGITALE: IL CASO GOOGLE BOOK SEARCH.**

The article explores the many facets of the Google Book Search project. In 2004 Google, in the pursuit of the task of digitizing all the world's books through the creation of a universally searchable database, announced partnerships with major academic libraries to digitize the books in their collections. Soon after, in the fall of 2005, the Authors Guild of America and the Association of American Publishers sued Google for its "massive copyright infringement". The dispute ended, after a complex negotiation, in a settlement agreement signed in 2008 and amended a year later after the concerns raised, among others, by the US Department of Justice and the Federal Trade Commission. The decision on whether or not to approve this revised settlement has not yet been taken (on February 2010 Judge Denny Chin of the U.S. District Court for the Southern District of New York postponed the expected ruling using the words "too much to digest").

From the first moment when the Google Book Settlement was launched, several complaints were raised with regard to what has been defined the largest copyright licensing agreement in the history of the United States. The main worries are related to the digitization of the so called orphan works -works for which it is virtually impossible to locate the rights holders to ask for permission to digitize them- because of the risk that Google will gain an unfair advantage over them; James Grimmelman's prediction is that "Google's extraordinary market power under the settlement will come from its unique lock on orphan works". These and other worries led the parties to present a second version of the agreement, the *Amended Settlement Agreement*, but, although the changes made in order to make it more in line with antitrust law, the rules on class action and the copyright legislation, this new version still meet resistance. On the other side, the parties involved in the transaction defend the agreement, in both its versions, alleging that the books-scanning, indexing, and snippet-providing is legitimate in terms of fair use, that nothing in the settlement prevents competitors from following Google and obtain similar licenses on orphan books, and, that, furthermore, it provides new revenue to authors and publishers in relation to digital copies of their books and would benefit the public by making widely available on-line out of print copies of books that otherwise would be difficult if not impossible to trace.

In the first part, both versions of the agreement are presented and analyzed in their details. References to the existing strong doctrinal debate will help to understand the

texture of criticisms and concerns raised by several actors. Once clarified the complexity and importance, cultural as well as economical, of the books digitization, a different, more convincing explanation, will be presented to justify the existence of such strong attacks to a project that would bring considerable benefits. The idea suggested is that beyond those commonly expressed, other concerns are the ones that really foment dissent. A couple of years ago, Geoff Ramsey, Chief Executive Office and co-founder dell'e-Marketer coined the acronym FoG -Fear of Google- to express the concern that the company of Mountain View could become the monopolist of knowledge. This fear hides two major concerns. On one hand, a concern, widespread and entrenched in the business as well as in government, linked to the relentless growth of Google in the worldwide market of data-search and to its entry in new markets. On the other hand, a concern that grips publishers about the fact that the scientific publishing is a powerful instrument of political control of the academic hierarchies on the knowledge-dissemination and, enabling scholars all around the world (even those who live in the poorest countries lacking the means of making independent research) free access to certain contents would lead to a revolution in the way in which knowledge is used and disseminated, a revolution that with a high probability frightens many. Finally attention is drawn to the attempts made on the European side to stop the advance of Google, attempts that for lack of resources and capabilities, are far to produce substantial results in the race to the digitization of cultural heritage. The conclusion is that Google is scary, for many it is an uncomfortable presence but, at the same time a necessary one in the efforts to reach a so called digital "renaissance"; its not a case that many countries in Europe are giving up to its onrush.

## **2. LUCI ED OMBRE DEL PRINCIPIO DI PRECAUZIONE: IL CASO DELLE NANOTECNOLOGIE.**

In 1986 Ulrich Beck has defined the modern society as "risk society", a society exposed to modernization-related risks such as pollution and new illnesses. In this context tort law acquires a fundamental role given the growing attention for the developments of a legal culture inspired to the principle of total justice and the necessity of new schemes of compensation of damages. Actually, a dominant role in the risk society, is played by the nanotechnologies. Nanotechnologies and nanotechnological products, thanks to their extreme small size are potentially beneficial and useful in several fields such as

information, communications, cosmetics, food and medical applications, but, at the same time, uncertain risks for the environment and human health and safety are involved. It's important to underline that the key word is "uncertain": the real problem related to nanotechnologies is the lack of adequate information about the possible risks related to their use and disposal.

In 2007, a coalition of non-governmental organizations submitted the eight *Principles for the Oversight of Nanotechnologies and Nanomaterials* to provide foundation for effective oversight and assessment. The first principle, a Precautionary Foundation, states the importance and necessity of a regime based on the precautionary principle to govern the world of nanotechnologies. Several definitions have been given of this principle all converging on the idea "better safe than sorry". The implications are that preventative action is required to face uncertainty, that all the possible alternatives to new activities must be considered and that producers and actors involved in the creation, development and commercialization of nanotechnologies and nanotechnological products must bear the burden of proof-in other words they must show the free risk state of the technologies-: "no health and safety data, no market".

Easy to say, difficult and dangerous to improve. Initially, the introduction of the precautionary approach was justified to counterbalance the reluctance of adopting precautionary measures, in terms of both environment and public health, in absence of an absolute proof of harms -it's almost impossible to have an absolute proof of harm- but there is the reverse of the coin: a strict application of the precautionary principle can lead to paralysis, impede innovation and technological development -it's impossible to obtain an absolute proof of safety-. It can sound strange but the search for a total security is neither good nor suitable for a society and this for the risk of technological-paralysis and even because the inaction itself brings risks (the *technological stagnation* is dangerous in the sense that it doesn't offer a solution for the so called *background risks* and *harms* -as epidemics and famines- which are nature-related rather than innovation-related). As pointed by Becks, it doesn't exist a "zero risk", what we need is a culture of uncertainty to break the taboo of the residual-risks culture, on one side, and that of the total-security culture, on the other side; the goal must be a tolerable level of insecurity -the choice of the less risky among the available options-.

Actually the application of the precautionary approach to the field of nanotechnologies is subject to a strong debate. I think that the solution is not black or white, that a third way

among the two extremes: “no risk regulation” and “no absolute proof of safety no innovation” must be found. The main problem related to nanotechnologies is the information deficit on the side of both innovators/producers and consumers, the lack of adequate research -such as tests and monitoring- and adequate understanding of the risks. Ex post, when damages are occurred (avoidable thanks to the adoption of adequate precautions) its relative clear to state which precautions should have been adopted to avoid or limit damages and its easy to have regrets. But, the decisions have to be taken ex ante, when the information on the characteristics and probability of a risk can be inadequate, when due to scientific uncertainty risks are only potential. In this respect it is necessary to determine the exact role that is played or, better, should be played by tort law in terms of incentives and deterrence. The point is that all the efforts of producers in making studies, test, analysis on specific products and their possible adverse effects are proportional to the probability they subjectively give to the circumstance that absent this research, the arms caused by their products will be successfully attributed to them by the victim. And the decisions of consumers about the use of specific products are influenced by their perceptions and the information available. Given this, the first decision to take, in terms of liability, is if a producer must be held liable only for the risks he should have reasonably known at the time of the product’s introduction on the market or even for the risks that he couldn’t have reasonably foresee. The second decision is if a duty to warn must be imposed on the producer’s side.

The alternative approach to the precautionary principle is the pro-actionary principle formulated by the extropian philosopher Max More in defence of the people’s freedom to innovate. Two main points: 1) risks and opportunities must be assessed according to available science rather than popular perception; 2) both the costs of the restrictions themselves and those of opportunities foregone must be evaluated. Most important “being proactive involves not only anticipating *before* acting but learning *by* acting”. It is in this framework that I suggest to set, thanks to the help of Calabresi and Klevorick, the third way.

In 1985 the article *Four Tests for Liability in Torts* was published. In this article Calabresi, with his co-author, extended his famous analysis of negligence and strict liability rules to take into account the temporal dimension in the specific contest of products. This article, written in a period characterized by increasing scientific uncertainty about health and safety risks of technological innovations (among others asbestos and radiation poisoning) is useful for the ex ante/ex post analysis provided: the

famous strict liability and Learned Hand tests are analysed taking into account the temporal dimension and its implications in terms of risk knowledge and investments in precautions.

My suggestion is to take the best of each approach that is to integrate the application of the ex post Learned Hand test with the application of the strict liability test -in the light of a duty to warn on the producer's side- splitting the analysis of each specific case into two phases. The ex post Learned Hand test (losses remain on victims unless on the basis of current ex post data the risk taken by the injurer fails a cost-benefit test) is useful to stimulate the acquisition of information and continue efforts in terms of tests and researches. An actor who knows that his behaviour will be evaluated not on the basis of what he knew or should have known at the time of the action but on the basis of an ex post test (in consideration of all those facts that have come to light since) has more incentives to anticipate future evolutions, to acquire more information before acting, to monitor the development of the products and technologies (liability is placed on the injurer not because he ought to be chosen safety than risk when he acted but because now the action taken is found to be too costly given its risks). On the other side, there is the risk -this can be demonstrated by means of several examples- that the use of a mere ex post Learned Hand test would create an excessive burden for the victims. Therefore after the application of the ex post Learned Hand test, given the duty to warn, it must be considered if the producer gave an adequate warning in relation to its products. An appropriate warning, specific and exigible enough, is a way to prevent some uses and, consequently, some risks. (By applying a strict liability test, the Kaldor-Hicks criteria comes into action: if the payoff is positive -profits less the costs for the victims' compensation- there is, in any case, an incentive in terms of investments in research; if, instead, the payoff is negative, there will be an application of the precautionary principle with all the related limits

To sum up. First, the ex post Learned Hand test could be applied to evaluate the reasonableness of the production activity in the light of the information available after the incident has occurred -this means that what the producer knew or should have known at the time of acting is irrelevant-. Once established the reasonableness of the production activity the strict liability test could be applied to decide who should bear the consequences of the accident because best suited to make a cost-benefit balance, a choice among the adoption of precautions and the cost of the accident itself. More precisely, once established some parameters such as specificity, the adequacy of the producer's

warning must be evaluated: if it is adequate the loss should lie on the victim, otherwise the victim should be compensated by the producer.

### **3. COME TOGLIERE DAL GIRO I DANNI NON PATRIMONIALI: NOTE IN MARGINE ALLA “TEORIA DELL’ASSICURAZIONE”.**

In the 1980’s a liability crisis broke out in the USA. Products and services were withdrawn from the market, much due to high and unpredictable damages, especially non-pecuniary awards. Among others, Priest argued that the main reason for the crisis was the increased third party liability. In a report of the American Law Institute it was claimed that: “[The] most pressing current issue [of tort liability and its reform] is probably the matter of compensation for pain and suffering.” In this scenario the theory that Pryor in her critical article named the ‘insurance theory of compensation’ was developed. This theory represents the foundation for ‘the insurance approach’ that constitutes not only the basis of the modern debate about non-economic losses but, more, the main obstacle to their compensation.

Non-economic losses, or non-pecuniary losses, can be considered as “losses which are not damage to a person’s assets or wealth or income and which are therefore incapable of being quantified in objective financial manner by reference to a market”. However, tort law recognizes, to a certain extent, the necessity of their compensation through monetary awards. Precisely, in the law and economics debate two main theories address the problem of the compensation of these losses: the prevention theory and the insurance theory. To understand the difference, two points must be clarified. First, the problem of accidents is a two-side problem (there are injurers, on one hand, and victims, on the other hand); second, tort law is frequently said to serve two different purposes: the achievement of deterrence and the compensation of the victim. The prevention theory, with its focus on deterrence, states the necessity of having the injurer fully compensating both the economic and non-economic losses he caused to the victim; only if injurers are charged all the costs of the damage they cause, in fact, they are induced to invest in an optimal amount of precautionary measures. The insurance theory, with its focus on an ‘adequate compensation’ states that the victim should not be compensated for his non-pecuniary losses because, in the pre-accident scenario, he would have not bought an insurance, if available, against these losses given that they cannot be undone with money after an accident as occurred. What follows is that between these two theories there is a conflict:

the application of the insurance theory creates a problem of under-compensation (only the compensation of economic losses is allowed) of the victim by the injurer and, therefore, a non-efficient result in terms of primary costs reduction. Is this conflict, its analysis, the core of this paper. The purpose is a threefold one: to provide an understanding of this conflict by means of theoretical and legal references; to explain why and how the problem has been overestimate; to suggest a way to resize the insurance theory's claims. In the first part of the article a preliminary characterization of non-pecuniary losses is presented, they are analyzed from a legal point of view and is explained why damages for pain and suffering are necessary in terms of deterrence. The analysis continues by introducing the insurance theory, its claims, and showing its conflict with the economic approach to tort law. In the end, some considerations about the stringent hypothesis (rationality, self interest, full information of the parties involved) under which the insurance theory works are presented to reach the conclusion that an insurance for non-economic losses does not exist because of a lack on the supply side rather than a lack on the demand side: the insurance theory's claim loses its all validity. The consequence of this result is that, in practice, there are no obstacles to the compensation of non-economic losses, therefore, the attention can shift again and be focused on the problem of the accurate assessment of these losses.