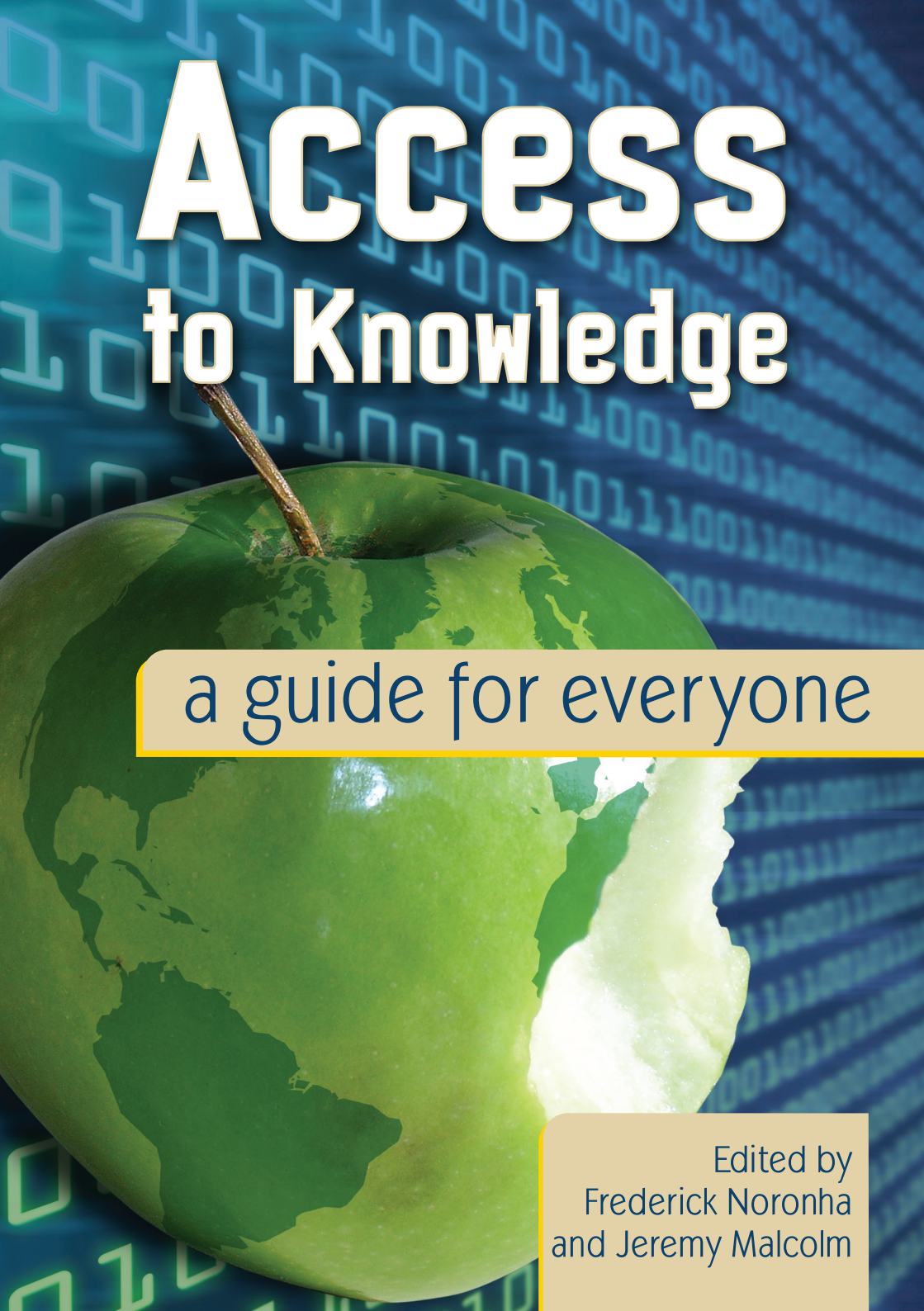
Access to Knowledge

a guide for everyone



Edited by
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and Jeremy Malcolm

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CONSUMERS INTERNATIONAL
KUALA LUMPUR 2010

About Consumers International
Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, we are building a powerful international consumer movement to help protect and empower consumers everywhere. For more information, visit www.consumersinternational.org.

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Preface

Consumers International (CI),[1] the world federation of consumer groups founded in 1960, serves as the only independent and authoritative global campaigning voice for consumers. With over 220 member organisations in 115 countries, it is building a powerful international consumer movement to help protect and empower consumers everywhere.

CI's global programme on A2K (access to knowledge) was established in 2008 to guarantee that consumer interests are adequately represented in national and global debates around intellectual property (IP) and communications rights. This includes exploring the creation of public goods and enhancing the public domain, and fostering a fairer system of managing intellectual property in international and bilateral trade agreements and regimes.

The programme's three main objectives are to:

- Campaign for more balanced intellectual property laws and enforcement practices that take into account consumers' interests.
- Provide capacity building to all stakeholders on consumer issues related to intellectual property and access to knowledge.
- Promote human rights in the information society, particularly in the areas of communications, education and health.

By harnessing the collective voice and effectiveness of consumer groups working around the world and across issue sectors, CI aims to serve as a

[1] http://www.consumersinternational.org/

catalyst for policy change, putting pressure on governments and international organisations to develop more balanced IP and communications regimes.

This handbook, *Access to Knowledge: A Guide for Everyone*, is a part of that broader programme. Its aim is to provide a concise and non-specialist introduction to IP and A2K issues, and selected related issues of communications rights and access to information and communication technologies (ICTs). Its intended readership includes consumer groups and NGOs (non-governmental organisations) who wish to become more knowledgeable in this area, individual academics and activists who could use a simple reference guide to the many related issues of A2K, and consumers at large who are affected by unfair IP laws and practices.

On this note, whilst A2K has not always been high on the agenda of the global consumer movement, CI believes that it is very much of a consumer issue, on a par with the more traditional consumer issues such as food and product safety, sustainable consumption, and unethical marketing. After all, many activities that now form part of consumers' everyday lives, such as accessing learning materials, transferring music, videos or e-books from one device to another, and sharing their interests online, are deeply impacted by IP laws and policies.

Notes on second edition

The first edition of this book was distributed with a DVD copy of Consumers International's film *When Copyright Goes Bad*, and also included a range of freely-licensed books, videos, software, photos and music recordings on DVD ROM. This has been removed for the second edition, but the film remains available for viewing or download from our Web site at http://A2Knetwork.org/film. Some minor corrections to the text have also been made in this edition.

Contents

CHAPTER 1

Background

1.1 Introduction

Those who are new to A2K face quite a high learning curve, and part of the reason for that is that it is a hybrid concept. Although the debate may seem at times to turn around copyright, it also takes in apparently quite distinct issues such as network neutrality, open standards, and freedom of expression. What ties these issues together is that they bear upon the level of access enjoyed by consumers around the world to cultural and educational materials and media.

1.1.1 Outline

This book is meant to guide a reader gently through many fields of the A2K landscape. It starts by explaining the interest of Consumers International in this issue, and in this chapter gives a quick overview of what A2K is, and why it has become such an important concept both for the consumer movement and for a broader coalition of civil society groups.

The next three chapters of the book follow the same structure as the major objectives of CI's A2K programme, as outlined in the Preface. Thus Chapter 2 of the book focuses on the first of CI's objectives, the promotion of fairer laws and enforcement practises – which includes an outline of the issues arising under copyright and patent law, and IP enforcement.

Next, in Chapter 3, we move to alternative ways of sharing information. Included are explanations of the public domain, free and open source software, the Creative Commons movement, Open Educational Resources (OER), and open standards.

Chapter 4 looks at promoting human rights in the information society. This part of the book briefly deals with communication rights and other related aspects, including freedom of information legislation, network neutrality, privacy, and access to ICTs.

The book concludes with a chapter containing useful resources on A2K including a glossary, and a bibliography.

1.1.2 What is A2K

Access to knowledge (A2K) is the umbrella term for a movement that aims to create more equitable public access to the products of human culture and learning.

Fields of advocacy that it subsumes include most centrally copyright and patent law reform, open access, open data and open standards, but also access to public information, broader communications rights such as freedom of expression, and issues around ownership of and participation in public media.

Declarations and other texts on access to knowledge, which give a flavour of the focus and breadth of the movement, have been drafted by a variety of civil society and private sector coalitions. These include:

- The Geneva Declaration on the Future of the World Intellectual Property Organisation;[1]
- The Adelphi Charter on Creativity, Innovation and Intellectual Property;[2]
- A draft Treaty on Access to Knowledge;[3]
- The Paris Accord (an agreement between consumers and creative and inventive communities);[4]
- The Munich Declaration on copyright limitations and exceptions;[5]
- The Free Culture Forum's Charter for Innovation, Creativity and Access to Knowledge;[6] and

[1] http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf
[2] http://www.sitoc.biz/adelphicharter/pdfs/adelphi_charter2.pdf
[3] http://www.cptech.org/a2k/a2k_treaty_may9.pdf
[4] http://www.cptech.org/a2k/pa/ParisAccord-june17draft.pdf
[5] http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_test_final_english.pdf
[6] http://fcforum.net/

- Copyright for Creativity (a declaration for Europe).[7]

1.1.3 A crucial campaign, and its roots

The access to knowledge campaign is a crucial one that emerges from a network of social movements, and their responses to "changes in economy and society produced by new information technologies."[8]

Wikipedia – the free, web-based, collaborative, multilingual encyclopædia project – describes the movement thus:

> The Access to Knowledge (A2K) movement is a loose collection of civil society groups, governments, and individuals converging on the idea that access to knowledge should be linked to fundamental principles of justice, freedom, and economic development.[9]

A unifying concept for much of the A2K movement is "openness"; for example, open source, open standards, open access, open content and open data are all promoted in the A2K movement. There is even a term "Open Knowledge" that seeks to incorporate all of these under one definition.

As set out in the Open Knowledge Definition, knowledge is open if "one is free to use, reuse, and redistribute it without legal, social or technological restriction." Knowledge is interpreted broadly to include:

- Data – scientific, historical, geographic or otherwise;
- Content such as music, films or books; and
- General information for example that produced by government and other administrative bodies.[10]

The early goals of the access to knowledge movement are embodied in a draft treaty, which was intended to ease the transfer of knowledge to developing nations, and to secure the viability of open innovation systems all over the world. [11] As explained by one of the developers of the draft,

[7] http://www.copyright4creativity.eu. See also the European Copyright Code proposed at http://www.copyrightcode.eu/.

[8] Balkin, Jack, *What is Access to Knowledge?* 2006 ⟨URL: http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html⟩.

[9] http://en.wikipedia.org/wiki/Access_to_knowledge_movement

[10] http://en.wikipedia.org/wiki/Open_knowledge

[11] http://en.wikipedia.org/wiki/Access_to_knowledge_movement

CPTech (the Consumer Project on Technology, now Knowledge Ecology International):

> Knowledge is essential for so many human activities and values, including freedom, the exercise of political power, and economic, social and personal development. The A2K (Access to Knowledge) movement takes concerns with copyright law and other regulations that affect knowledge and places them within an understandable social need and policy platform: access to knowledge goods.[12]

Although the treaty itself has gone no further, it remains a valuable expression of the aspirations of the A2K movement, and continues to encapsulate many of its current concerns.

1.1.4 Why A2K?

Provision of A2K is a public issue for every country in the world. Citizens' wellbeing depends on access to the vast amounts of knowledge held by governments. Legal reforms should therefore promote access to government information, freedom of expression and universal access to telecommunications networks.

It is also a private issue. Access to knowledge increases creativity, development and utility. Open source software, as opposed to proprietary software, is an example of a "knowledge environment" where relaxed intellectual property protection can lead to greater information production, as well as opportunities for corporate profit making through the provision of services and development of support networks.

Finally A2K is a development issue. Common development is more important than private wealth. Because knowledge plays such an important role in economic growth, any sustainable attempt at poverty reduction must address knowledge flows. Accountability and transparency must be promoted at the national level.[13]

A 2006 report by CI report revealed that the space for access to knowledge is shrinking not only because of increased pressure for more rights from copyright owners but also because developing countries are giving away public rights.[14]

[12] http://www.cptech.org/a2k/

[13] Panos London, *Common Knowledge: How Access to Information and Ideas Can Drive Development*. 2007 ⟨URL: http://www.panos.org.uk/download.php?id=5⟩.

[14] Consumers International, *Copyright and Access to Knowledge*. Kuala Lumpur: Consumers International, 2006.

The overwhelming emphasis on the protection of the rights of copyright owners has led to the misguided notion amongst the public (especially students, teachers and librarians), that there is no free access to information. They fear that they may be infringing on someone's copyright and consequently do not exercise their own rights in relation to copyright owners.

Governments need to commit to expanding, not reducing access, to information and knowledge in the public domain. They should reform their copyright laws to permit for all the limitations and exceptions that they are entitled to. They should also commit resources towards raising awareness amongst the public on how best they (students, teachers, archivers, academics and librarians) can leverage and capitalise on the free access to copyrighted materials that they are entitled to.[15]

1.2 Issues

As already noted, the A2K movement is a broad one. In this introductory chapter we will not descend into the details of any single issue, but instead give an overview of the most important issues. These substantive issues which the A2K movement is concerned about fall into roughly seven categories:

- Copyright
- Patents
- IP enforcement
- IP alternatives
- Access to government information
- Internet regulation
- Media diversity

The term "intellectual property rights" is being used here as shorthand for two particular legal rights over information: copyright and patent rights. However, the limitations of this term are acknowledged, since copyright and patent rights vary markedly both from each other, and from rights to other forms of property, particularly in that their use is

[15] Kanniah, Rajeswari, CI Study on Copyright and Access to Knowledge. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, p. 17.

"non-rival." That is, their use by one party need not preclude their use by others.[16]

Other forms of so called intellectual property, such as trademark rights, trade secrets, registered designs, database rights, circuit layout rights and plant breeders' rights will not be discussed here due to their lesser importance in the access to knowledge movement.

1.2.1 Copyright

Copyright is a limited monopoly right granted by the government to the authors of literary, artistic, dramatic and musical works.

Performers, phonogram producers and broadcasters of such works are granted related rights (also called "neighbouring rights" – but often loosely considered as forms of copyright).

Whereas copyright is a form of intangible property that can be assigned, moral rights are recognised in many countries as a separate class of right that adheres in the author only, such as the right to attribution and to preserve the integrity of the work.

The monopoly granted by copyright is the right to control of various uses of the work. In the earliest copyright legislation, this right only covered copying the work, and lasted for just 14 years. But since then, copyright has been extended to provide the rights holder with exclusive rights over the adaptation and performance of the work, or a substantial part of it, and – since the WIPO Internet Treaties of 1996 – the exclusive right to make it publicly available. The term of protection has also been lengthened, with many countries now protecting copyright for 70 years after the author's death, or even longer.

The *Berne Convention for the Protection of Literary and Artistic Works*, to which almost all countries are signatories, sets the minimum standard and duration of copyright protection (its counterpart for related rights is the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*). The Convention provides that copyright protection automatically subsists in all protected works, without the need for registration, and that it lasts for at least 50 years from the death of the author (or 50 years from publication, for corporate authors).

Copyright issues will be discussed in more detail in the following chapter at 2.1.

[16] Menell, Peter S; Bouckaert, Boudewijn and Gees, Gerrit de, editors, Chap. Intellectual Property: General Theories In Encyclopedia of Law and Economics. Cheltenham, UK: Edward Elgar, 2000.

1.2.2 Patents

Patents differ from copyright in that copyright can only limit the use of a particular form of expression of an idea, whereas patents can protect the underlying idea. Of course, not all ideas are covered. The idea must:

- Cover a patentable subject matter (be a useful man-made process or product).
- Be novel (not known to the public before).
- Involve an inventive step (or be non-obvious).

As an example of the practical differences between patent and copyright protection, if a copyright work is independently conceived by two different authors, then no breach of copyright has been committed although the two works may be very similar. But if an invention that is protected by a patent is independently conceived by another inventor, the second inventor is still bound by the patent despite perhaps having had no knowledge of it.

The treaties that set minimum standards for patent law are the *Paris Convention for the Protection of Industrial Property,* and the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Under TRIPS, patent protection must be available in all fields of technology, and subsist for a minimum period of 20 years.

Another significant difference between copyright and patent law is that there is (yet) no equivalent provision as in the Berne Convention whereby a patent registered in one country will automatically receive protection in other countries. Rather, in general a patent must be registered in each jurisdiction in which protection is sought.

The problems with the patent system will be discussed in more detail at 2.2.1.

1.2.3 IP enforcement

Perhaps the most active front in the access to knowledge movement is not a positive one, such as the promotion of new copyright flexibilities or alternative licensing models, but a reactive one, against a range of intrusive and consumer-unfriendly mechanisms for enforcement of IP rights, that are being pushed by IP owners particularly from the entertainment industries.

Graduated response

One of the top items on the wish lists of the music and motion picture industry lobbyists has been for ISPs to implement a "three strikes" code for file sharers – with legislative backing, if they can get it.

Such a code, which in its generalised form has become known as a "graduated response" mechanism, would require Internet Service Providers to warn their customers when they are accused by a copyright owner of having downloaded a copyright-infringing file. A second warning would be given if the offence is alleged to have been repeated, and following a third alleged offence, the customer's Internet access would be terminated for as long as one year. This issue will be discussed in more depth at 2.3.3.

Border measures

Various initiatives are in place to strengthen the role of customs officials in enforcing intellectual property laws. The draft ACTA treaty, discussed below at 2.3.1, provides a new, higher benchmark for measures to be taken at national borders against IP infringements. The provisions will likely apply to the import, export, and transit of goods across borders, though there will probably be some sort of *de minimis* exception that will save airline passengers from having their laptops or MP3 players seized because they contain copyright-infringing files.

Nonetheless, even when applied to commercial shipments only, the application of measures such as these has created concern. For example in 2008, consumers were placed at risk of illness or death when Dutch customs authorities seized a legitimate shipment of generic medicines en route from India to Brazil, on the grounds that they were wrongly suspected of being counterfeit.

Criminal enforcement

Another trend in IP enforcement is the expansion of the range of IP infringements that constitute criminal offences, which will form the subject of section 2.3.4 below. The USTR Special 301 Report regularly criticises countries for failing to criminalise IPR violations, and even some acts that are not *per se* violations – such as bringing a camcorder into a movie theatre.

US free trade agreements also require other countries to further criminalise infringements; for example, Australia was required to criminalise

wilful commercial-scale infringements, the decryption of programme-carrying satellite signals, and the possession and use of devices for circumventing TPMs, and to raise the level of penalties.

Digital rights management

Digital rights management (DRM) is the practice of controlling the uses that consumers make of copyright digital material, using technological protection mechanisms (TPMs). It includes the use of proprietary file formats that won't work when you try to shift them from one device to another (for example, Microsoft's WMV media files), equipment that refuses to allow content to be copied (for example, any high definition video equipment with an HDMI plug), and media which is designed to make it impossible for consumers to make copies for private use or backup (such as BluRay discs).

Worse, often DRM systems are used for purposes that are quite extraneous to copyright law. For example, almost all DVDs come with a region code that prohibits them from being played on DVD players from another region. It is not a breach of copyright to play DVDs from one region in another, yet for patently anti-competitive reasons, the movie industry uses technology, in conjunction with a quirk of copyright law, to prevent consumers from doing so.

1.2.4 IP alternatives

"IP alternatives" is another hybrid concept, which is used here to refer to a range of different strategies for ensuring adequate access to knowledge for the community, through mechanisms that are not market-based. In fact, in a strict sense, they are not really *alternatives* to the intellectual property system, as some of them – for example free and open source software licensing, and Creative Commons – actually depend upon copyright law in order to function. Such alternative licensing arrangements are the first set of IP alternatives to be examined in more detail in section 3.2.

Another mechanism for disseminating knowledge is collective licensing, of which there are various forms, some being market-based and others not so; for example, legislation can provide for a compulsory licence to be issued for copyright or patent-protected material, enabling the public to access this material without the need to negotiate with the IP holder in a market. These mechanisms are discussed in section 3.3.

Other practices and institutions that tend to increase the accessibility to consumers of knowledge goods and media include libraries, open standards, and open data, which are all also to be considered in chapter 3.

Creative Commons

Creative Commons (CC) is a non-profit organisation headquartered in San Francisco, California, United States devoted to expanding the range of creative works available for others to build upon legally and to share. The organisation has released several copyright-licenses known as Creative Commons licenses for free to the public. These licenses allow creators to communicate which rights they reserve, and which rights they waive for the benefit of recipients or other creators. Wikipedia is one of the notable web-based projects using one of its licenses. The organisation was founded in 2001 with support of the Center for the Public Domain. The first set of copyright licenses were released in December 2002.

– http://en.wikipedia.org/wiki/Creative_Commons

1.2.5 Access to government information

Access to government information is important not only for the value of the information itself (as in the case of census data and the like), but also as a guarantee of democratic transparency (in the case of information that forms part of the political process).

Amongst the principal means by which access to government information is assured are freedom of information legislation, regulations or policy providing for the open and accessible publication of public documents, and rules that allow for public access to parliamentary, executive and judicial fora of deliberation. Institutional guarantees of the independence of the media, such as freedom of the press, are also important. We will further examine this topic in section 4.1.4.

1.2.6 Internet regulation

The Internet is integral to ensuring access to knowledge, and therefore regulation of the Internet has a direct bearing on the objectives of the movement. Some of the tactics used by rights holders to interfere with access to knowledge over the Internet include graduated response (see 2.3.3), notice and take down procedures such as the American Digital Millennium Copyright Act (or DMCA, something similar to which would

be mandated by ACTA, see 2.3.1), and DRM (for example on videos downloaded from the iTunes Store).

The need to regulate the Internet to restrain its use in terrorism activities, or in the production and dissemination of child pornography, is often used as a pretext for the introduction of wider filtering and censorship measures, as well as privacy-infringing (and often secretive) monitoring of the activities of Internet users. On this point, see the discussion of privacy and freedom of expression at 4.1.2 and 4.1.3, and on other Internet regulation issues such as network neutrality see 4.1.5.

1.2.7 Media diversity

One of the most important international institutions for the promotion of media diversity has been UNESCO (the United Nations Educational, Scientific and Cultural Organisation). UNESCO is noted for the 1980 MacBride report[17] which aimed to establish what was dubbed a New World Information and Communications Order (NWICO) which would provide more balanced coverage of the developing world by mass media. This report was seen as advocating for interference with the freedom of the press by the United States, the United Kingdom and Singapore, which temporarily withdrew from UNESCO in protest; a blow from which the organisation is still recovering.

This issue will be discussed in more depth at 4.1.1.

1.3 Actors

A variety of actors play an influential role in shaping the A2K debate, both positively and negatively. These include intergovernmental organisations, civil society organisations, the private sector, and government. Some of the most important actors from each of these stakeholder groups will be introduced here, as further background for the discussion that is to follow in Chapters 2 and 3.

1.3.1 Intergovernmental organisations

WIPO

The World Intellectual Property Organisation (WIPO) was created in 1970 to take over the role of its predecessor, the Berne-based United International Bureau for the Protection of Intellectual Property or BIRPI. French

[17] http://unesdoc.unesco.org/images/0004/000400/040066eb.pdf

for Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle, the BIRPI was set up in 1983 to administer the Berne and Paris Conventions.

It was the signing of the Convention Establishing the World Intellectual Property Organisation in Stockholm on July 14, 1967 that led to the birth of WIPO three years later. In 1974, WIPO became a specialised agency of the United Nations, with a mandate to "administer intellectual property matters recognised by the member States of the UN."

Article 4 of the WIPO Convention describes WIPO's role – to "promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonise national legislation in this field." The Article also mentions that WIPO is to "encourage the conclusion of international agreements designed to promote the protection of intellectual property."

Headquartered in Geneva, WIPO enjoys a source of income unlike that of other branches of the UN. Instead of being dependent on the contributions of member states, over 90 per cent of its income comes from the collection of fees by the International Bureau under the intellectual property application and registration systems, which it administers. This includes the *Patent Co-operation Treaty*, the Madrid system for trademarks and The Hague system for industrial designs.[18]

The agency currently has 183 member states and administers 23 international treaties dealing with various aspects of intellectual property, including the Berne Convention on copyright, the Paris Convention on patents, trademarks and registered designs, and the Rome Convention on copyright and related rights. The WIPO Internet treaties (that is, the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT)), which came into force in 2002, extend these earlier instruments in light of new digital technologies including the Internet.

WIPO performs most of its work through specific committees. Some of these committees include the Standing Committee on Patents (SCP), the Standing Committee on Copyright and Related Rights (SCCR), the Advisory Committee on Enforcement (ACE), the Intergovernmental Committee (IGC) on Access to Genetic Resources, Traditional Knowledge and Folklore, and the Working Group of the Reform of the Patent Cooperation Treaty (PCT).

WIPO makes decisions by consensus. Each member state has only one vote regardless of population or contribution to funding. This re-

[18] http://en.wikipedia.org/wiki/WIPO

sulted in developing countries being able to block plans by their developed counterparts to expand intellectual property treaties through WIPO. This resistance was evident in the 1960s and 1970s when developing countries blocked expansion plans such as universal pharmaceutical patents.

WTO

To get around this stand-off, developed countries led by the United States in the 1980s moved the discussion on intellectual property standard-setting out of WIPO and into a forum where the developed countries are better able to get their way – the General Agreement on Tariffs and Trade (GATT). GATT eventually evolved into the World Trade Organisation and the American "forum shifting" strategy led to the enactment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The inclusion of IP norms in a global trade agreement arose from the Uruguay Round of the GATT negotiations between 1986 and 1994, following strong corporate lobbying by multinational pharmaceutical, software and entertainment industry groups.

The TRIPS convention largely incorporates the substantive content of the WIPO-administered conventions, but with the important difference that it treats non-compliance as a barrier to trade, and enables the WTO to impose sanctions on member countries in breach. It also provides for the resolution of disputes between nations through the WTO.

The Development Agenda

By 2001, the backlash against TRIPS from the developing world had gained traction, and in that year, the Doha Declaration on TRIPS and Public Health confirmed the existence of flexibilities to TRIPS that allow developing countries to issue compulsory licenses for pharmaceutical patents to address public health concerns.

The adoption of the Doha Declaration was another contributing step towards the emergence of a coordinated movement against the IP maximalist agenda of developed countries, as pushed by powerful IP exporting industries. It was also the beginning of a close link between the IP agendas of the access to medicines movement and the A2K movement.

A further watershed in this process was the eventual adoption in September 2007 of a "Development Agenda" for WIPO.[19] The Develop-

[19] http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf

ment Agenda had its genesis in a proposal offered by Argentina and Brazil on the "Establishment of a Development Agenda for WIPO". This proposal came out of the Geneva Declaration on the Future of the World Intellectual Property Organisation and was co-sponsored by Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Sierra Leone, South Africa, Tanzania and Venezuela.

> The dilemma for developing countries ... lies in the fact that in the majority of cases these countries are net importers of knowledge and technology. This has increasingly set the alarm bells about the importance and need for reforming the underperforming educational regimes prevailing in these countries, whereby the cycle of knowledge production and development often commences. Notably, the production of knowledge in today's environment is mainly governed and codified by legal rules referred to as Intellectual Property Rights (IPRs).
>
> – Mohammed El Said (Biblioteca Alexandria (2009), 53)

Together with Argentina and Brazil, these countries argued that the various degrees of intellectual property rights protection should reflect the level of development of any given country. The proposal, often referred to as "Item 12" due to its place on the meeting agenda list, was also supported by India, albeit in a separate but similar statement.

"The term 'development' as used by these (developed) countries, including in WIPO, means quite the opposite of what developing countries understand when they refer to the 'development dimension'," said India's representative to WIPO, Debabrata Saha with regards to the Development Agenda proposal.

Saha added: "If you share the perspective of the developed countries, 'development' means increasing a developing country's capacity to provide protection to the overwhelmingly developed country owners of IP rights!"

On 4 October 2004, the WIPO General Assembly agreed to adopt the Argentina and Brazil proposal. Civil society groups too quickly rallied around this proposal, drafting their Geneva Declaration on the Future of the World Intellectual Property Organisation that year, followed by the draft Treaty on Access to Knowledge in 2005.

The Development Agenda itself contains 45 recommendations in six clusters, which include the promotion of a development-oriented IP culture, the preservation of the public domain, and the exchange of experiences on open collaborative projects. To date five meetings of WIPO's Committee on Development and Intellectual Property (CDIP) have been

held, and a number of reports produced towards the implementation of the Development Agenda's recommendations. Part of this ongoing work includes research projects on IP and the public domain,[20] IP and competition policy,[21] and IP, information and ICTs, the digital divide and A2K.[22]

Perhaps the most significant outcome of WIPO's Development Agenda so far has been the discussion of new minimum copyright limitations and exceptions by its Standing Committee on Copyright and Related Rights (SCCR). The addition of this initiative to the committee's agenda was moved by Chile, Brazil, Uruguay and Nicaragua in 2008, elaborating on an earlier Chilean proposal. The limitations and exceptions to be studied by the SCCR include those for education, libraries, archives, innovative services and persons with disabilities. The first concrete proposal in this area is a *Treaty for Blind, Visually Impaired and Other Reading Disabled Persons*, tabled by Brazil, Ecuador and Paraguay in May 2009.[23]

1.3.2 Civil society

This section is intended to provide an overview of some of the groups within organised transnational civil society who are active in various sections of the A2K movement. It does not aim to be complete, but just to highlight some of the central actors and to suggest how they may usefully be categorised.

Amongst the groups further to the periphery of the A2K movement, that have been omitted from this section, include farmers' groups (advocating for the right to seeds), the access to medicines movement, ICT user groups, civil liberties and human right organisations, independent media, privacy groups, pirates and hackers, and ICT for development activists.

Digital rights groups

The A2K movement overlaps with the digital rights movement, though the two movements do remain distinct. The A2K movement is concerned with the dissemination of knowledge both online and offline.

Traditional hard copy textbooks (or photocopies from them) are still the main source of learning material for the vast majority of the world,

[20] http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev.pdf
[21] http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_ref_cdip_4_4_rev.pdf
[22] http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_5_rev.pdf
[23] http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf

and this is an important area for A2K activism but falls outside the concern of the digital rights movement. By the same token, there are some concerns of the digital rights movement, such as digital surveillance and encryption, which are mostly peripheral to the A2K movement.

Notable digital rights advocacy groups at the regional and global level include:

- Electronic Frontiers Foundation[24]
- European Digital Rights Initiative[25]
- Open Rights Group[26]
- Foundation for a Free Information Infrastructure[27]
- Public Knowledge[28]
- Foundation for Peer to Peer Alternatives[29]
- Association for Progressive Communiations[30]
- Students for Free Culture[31]
- Center for Democracy and Technology[32]

Open source and open content communities

The open source and open content communities are central to the A2K movement, though once again the views and objectives of the communities do not entirely coincide. One of the main points of difference between them is that some activists from the open source and open content communities oppose measures to make proprietary-licensed copyright works more widely available, on the basis that this reduces the comparative advantage of freely-licensed works in the marketplace.

[24] http://www.eff.org/
[25] http://www.edri.org/
[26] http://www.openrightsgroup.org/
[27] http://www.ffii.org/
[28] http://www.publicknowledge.org/
[29] http://www.p2pfoundation.net/
[30] http://www.apc.org/
[31] http://freeculture.org/
[32] http://www.cdt.org/

For example, Jimmy Wales of Wikipedia has complained that relying on the fair use copyright exception "discourages us from creatively looking for a way to enlarge the commons".[33] The broader A2K movement on the other hand welcomes measures to improve the accessibility of both proprietary and openly-licensed works.

Having said that, A2K does depend upon content licensed under open source and open content licences as a key platform in broadening affordable access. As such, the following institutions are key stakeholders in the A2K movement:

- Creative Commons[34]
- Open Source Institute[35]
- Free Software Foundation[36]
- Open Knowledge Foundation[37]
- Wikimedia Foundation[38]

Consumer groups

The mainstream consumer movement has more recently become actively engaged in the A2K movement. The objectives of the two movements in furthering access to knowledge for consumers are in general closely aligned, however there are some tensions. Principal amongst these is that there has been a long history of consumer advocacy against counterfeiting, because of the high risk of defects in counterfeit consumer goods.

Whilst this remains good policy, it is important that it does not lead consumer groups to internalise the values of industry in regards to intellectual property enforcement in other areas, such as against the piracy of cultural and knowledge goods, which is not such a core problem for consumers.

Another reason why the consumer movement has not historically been fully congruent with the A2K movement is that some consumer

[33] http://en.wikipedia.org/wiki/Wikipedia_talk:Publicity_photos#This_page_is_dangerous
[34] http://www.creativecommons.org/
[35] http://www.opensource.org/
[36] http://www.fsf.org/
[37] http://www.okfn.org/
[38] http://www.wikimedia.org/

organisations require capacity building to assist them to question the power dynamics of the proprietary media and content industries, and to promote alternatives such as open source and open access content.

In these respects, Consumers International's A2K programme is helping to bring the global consumer and the A2K movement closer together. Without derogating from the fine work of CI's members at a national level, here are a few of its members with a long track record of advocacy for A2K at a global and regional level:

- Knowledge Ecology International[39]
- Trans Atlantic Consumer Dialogue[40]
- BEUC – the European Consumers' Organisation[41]

Libraries and archives

Libraries and archives are also vital contributors to the A2K movement, though with their own particular set of priorities that overlap with, but do not fully encompass, those of the broader movement.

Amongst the specific issues to which the advocacy activities of libraries and archives are targetted are copyright limitations and exceptions for lending and archival, technological protection measures (TPMs), unfair contractual terms attached to electronic resources, public lending rights (which are special fees paid in some countries to compensate authors for the sales revenue lost by reason of public lending),[42] database rights, orphaned works, and open access.

Leading actors representing libraries and archives who participate in the A2K movement include:

- Electronic Information for Libraries[43]
- International Federation of Library Associations[44]
- Bibliotheca Alexandrina[45]

[39] http://www.keionline.org/
[40] http://www.tacd.org/
[41] http://www.beuc.eu/
[42] See 3.4.3.
[43] http://www.eifl.net/
[44] http://www.ifla.org/
[45] http://www.bibalex.org/

- The Internet Archive[46]
- Project Gutenberg[47]

Academia

Finally, there would be no A2K movement at all without the involvement of academia.

Although the lines of the A2K movement had been drawn a few years earlier, for many it was the first international conference on Access to Knowledge at Yale University in 2006 that marked the birth of the movement. This annual conference has since remained a fixture for A2K activists and scholars alike. Important academic centres for the A2K movement are:

- Yale Information Society Project[48]
- Berkman Center for Internet and Society at Harvard University[49]
- The A2K Brazil project at Fundação Getúlio Vargas Rio de Janeiro Law School[50]
- The African Copyright and Access to Knowledge project managed by the Wits University LINK Centre[51]

1.3.3 Private sector

Although the commercial interests of the private sector are generally in favour of strong intellectual property protection, the entire sector cannot be characterised as opposing access to knowledge. Many are also strategic allies of the movement.

For example, the free and open source software community would be considerably smaller if not for the support of commercial firms such as IBM, Oracle and Novell.

[46] http://www.archive.org/
[47] http://www.gutenberg.org/
[48] http://isp.law.yale.edu/
[49] http://cyber.law.harvard.edu/
[50] http://a2kbrasil.org.br/
[51] http://www.aca2k.org/

Moreover, research has revealed that the private sector benefits enormously from copyright flexibilities, such as the "fair use" exception under US copyright law.[52] Thus, some private sector coalitions, such as the Computer and Communications Industry Association (CCIA),[53] have become firm supporters of the A2K movement. This section provides a very brief overview of some of the most central private sector actors on both sides of the movement.

IIPA

The IIPA, or International Intellectual Property Alliance, is a coalition of US-based trade associations representing the interests of copyright holders. It was formed in 1984 and its members are the Association of American Publishers, the Business Software Alliance, the Entertainment Software Association, the Independent Film and Television Alliance, the Motion Picture Association of America (MPAA), the National Music Publishers' Association and the Recording Industry Association of America (RIAA). Each of these is itself a membership-based organisation of industry participants such as publishers of books, software and music, and movie studios.

The IIPA represents the interests of its members in international and regional intergovernmental institutions such as WIPO, the WTO and APEC, as well as in domestic policy setting activities such as the Special 301 Report process described in section 1.3.4, and the development of FTAs (free trade agreements) between the United States and other countries. It was largely through the efforts of the IIPA that the WIPO Internet treaties were established so early in the Internet age, in 1996.

IIPA members such as the RIAA and MPAA, and their local subsidiaries or affiliates, are also active in shaping IP policy. The RIAA is particularly notorious for its campaign of lawsuits over file sharing, not only against companies such as the publishers of file sharing software,[54] but also against many thousands of individual alleged file sharers.

This unpopular and generally unsuccessful campaign of litigation was officially discontinued in 2008,[55] in favour of a focus on "graduated

[52] CCIA, *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use*. 2010 ⟨URL: http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf⟩.

[53] http://www.ccianet.org/

[54] Most recently against Limewire: Sandoval, Greg, *RIAA wins big in LimeWire lawsuit*. 2010 ⟨URL: http://news.cnet.com/8301-31001_3-20004811-261.html⟩.

[55] McBride, Sarah and Smith, Ethan, *Music Industry to Abandon Mass Suits*. 2008 ⟨URL: http://online.wsj.com/article/SB122966038836021137.html⟩.

response"-style enforcement (see 2.3.3).

Microsoft

Microsoft, as the world's dominant software publisher since the early 1990s, is notable for its history of opposition to some of the measures used to advance access to knowledge, including free and open source software and open standards.

On the former count, Microsoft ran a "Get the Facts" campaign from 2004 to 2007 which directly attacked the GNU/Linux operating system platform, and has sued vendors of free and open source solutions for patent infringement, including the TomTom GPS company for its use of the Linux kernel implementation of Microsoft's FAT filesystem (the lawsuit was settled in 2009).[56]

Other open source distributors, including Novell, which markets SuSE Linux, have entered into licensing deals with Microsoft in order to avoid a lawsuit.

In relation to Microsoft's position on open standards, the company is known for its policy of "embrace, extend and extinguish," whereby it would appear to embrace an open standard, but then introduce its own proprietary extensions to the standard with which other implementations would not be interoperable, resulting in Microsoft's implementation extinguishing those of competitors by reason of the former's dominance in the market.[57]

In other cases, Microsoft has simply developed its own standard in order to compete against a more open one, as in the case of its Office Open XML (ISO/IEC 29500), which was introduced in response to the success of the XML-based open standard for office documents, the OpenDocument Format (ISO 26300:2006).

In response to anti-competitive behaviour of Microsoft, competition commissions in both Europe and the United States have initiated action. Amongst the outcomes of these actions have been the requirement that Microsoft share interoperability information with its competitors, the decoupling of Microsoft's Windows Media Player from the European version of the operating system, and the introduction of a "browser ballot"

[56] Fried, Ina, *Microsoft, TomTom settle patent dispute*. 2009 ⟨URL: http://news.cnet.com/8301-13860_3-10206988-56.html⟩.

[57] Rodger, Will, *Intel exec: MS wanted to 'extend, embrace and extinguish' competition*. 1998 ⟨URL: http://www.zdnet.com/news/intel-exec-ms-wanted-to-extend-embrace-and-extinguish-competition/100925⟩.

screen to provide European users with a choice of Web browser to use with Microsoft Windows.[58]

Google

Another important transnational actor in this issue area is Google, which in October 2008 reached a $125 million settlement agreement with publishers over its Google Book Search service, for which Google partnered with libraries to scan millions of books into a full-text index.[59]

The initial settlement was rejected by the court in the face of objections raised by certain groups, amongst them the US-based Consumer Watchdog, that the terms of the settlement unduly favoured Google over other information intermediaries in its access to digitised books. A proposed new agreement was put forward in November 2009, final approval of which remains pending.

Google is generally considered a friend of the access to knowledge movement. It has donated $2m to the American University of Washington for its research into the industry-driven agenda to strengthen IP enforcement practices, and regularly sponsors open source software development through its "Summer of Code".[60]

On the other hand, Google has been criticised for its privacy practices. The company was ranked "hostile to privacy" in Privacy International's 2007 Consultation Report (which led to a bitter war of words between the parties),[61] and in May 2010, Google was embarassed by the revelation that it had been collecting network payload data (including snippets of private emails) from unsecured private wireless networks while collecting data for its StreetView service.[62]

1.3.4 Governments

With close to 200 countries in the world, only a few of the most central to the concerns of the A2K movement will be mentioned here. These include two which are generally antagonistic to the movement's aims, and one which is a strong supporter.

[58] http://www.browserchoice.eu/
[59] http://books.google.com
[60] http://code.google.com/soc/
[61] http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-564075
[62] http://googleblog.blogspot.com/2010/05/wifi-data-Collection-update.html

United States

The domestic law and policy of the United States creates a not unfavourable environment for access to knowledge, with a fairly liberal policy of fair use of copyright materials, as well as constitutional guarantees that most of its trading partners lack. (On the other hand, its default copyright term extends for 70 years after the death of the author, and it provisions on circumvention of TPMs are amongst the world's most restrictive.)

However, it is the way in which it pushes the highest standards of intellectual property protection and enforcement upon other countries, including developing countries, that makes it a regular opponent of the A2K movement. The two main mechanisms through which it does this are the Free Trade Agreements that it concludes with other countries, and its annual Special 301 Report. Both of these are the province of the United States Trade Representative (USTR), and will be discussed in more detail below at 2.3.2.

Through both the above mechanisms, the United States imposes "TRIPS-plus" obligations for IP protection and enforcement obligations – that is to say, obligations that exceed the minimum levels of the TRIPS agreement.

European Union

Domestically, the copyright laws of EU countries are required to comply with a number of directives, such as one (93/98/EEC) mandating a minimum term of protection of 70 years after death of the author, another (2001/29/EC) limiting the permissible exceptions and limitations, and the IPRED directive (2004/48/EC) which sets minimum standards for civil procedures for intellectual property enforcement.

The foreign policy of the European Union on A2K issues is not much more favourable than that of the United States. It, too, concludes TRIPS-plus free trade agreements with other countries. It is also the strongest opponent of a treaty setting minimum copyright exceptions for blind, visually impaired and reading disabled users at WIPO.

Looking beyond copyright law, the EU Telecoms Package, finally passed in 2009, will also impact upon access to knowledge in Europe. This is a package of telecommunications reforms which includes provisions on Internet freedoms. A proposed amendment 138 to the Telecoms Package would have provided:

> that no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened in which case the ruling may be subsequent.

This provision, which was designed to limit the introduction of graduated response measures without judicial oversight (see 2.3.3), was watered down in the final text, omitting any reference to a "prior ruling by the judicial authorities".[63]

Brazil

Brazil has been one of the countries most strongly promoting the access to knowledge agenda at an intergovermental level. It was a member of the "Friends of Development" grouping of countries at WIPO that was responsible for the proposal of the WIPO Development Agenda, and is part of the smaller *ad hoc* group (also including Ecuador and Paraguay) that tabled a proposed *WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons* in May 2009.

At a domestic level, Brazil has taken a stand against the global pharmaceutical industry by insisting upon its right to issue compulsory licences for AIDS medications pursuant to the 2001 Doha Declaration on TRIPS and Public Health.[64]

It has also been a strong supporter of alternatives to proprietary content licensing, such as free and open source software and Creative Commons. A 2003 government directive requires the public sector to adopt free software,[65] and since 2008 the OpenDocument Format is also a Brazilian standard (NBRISO/IEC26300).

Ironically Brazil's present copyright law is not at all favourable to consumers, but it is currently under review, with a new and much more favourable bill currently undergoing public consultation at the time of publication.

[63] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF

[64] Murphy, Bryan, *Brazil's Anuencia Previa: How Brazil's Unique Pharmaceutical Patent Law Illustrates That the United States and Brazil Continue to Disagree on TRIPS' Flexibilities to Protect Access to Essential Medications*. 2005 ⟨URL: http://www.ssc.wisc.edu/~munia/467/BrazilMurphy.pdf⟩.

[65] http://www.planalto.gov.br/ccivil_03/DNN/2003/Dnn10007.htm

Useful links for this chapter

Background information

- A good starting point is the Wikipedia page with its pointers to other pages on A2K. You can also add useful links and information you find here.
  http://en.wikipedia.org/wiki/Access_to_knowledge_movement

- Consumers International's A2Knetwork.org. The hub of CI's global consumer dialogue on Access to Knowledge and communications issues, it contains blog posts, links to upcoming events, and outputs from the A2K programme including CI's IP Watchlist, A2K film and access barrier survey.
  http://a2knetwork.org/

- Of historical interest are the archived resources of the Consumer Project on Technology (now Knowledge Ecology International). This includes information on the draft A2K Treaty; the Paris Accord; the WIPO Development Agenda; the Geneva Declaration on the Future of WIPO; Broad/Web and Cablecasting Protection; Open Document Format and more.
  http://www.cptech.org/a2k

- Intellectual Property Watch is an independent reporting service on international IP policymaking, available online and in hard copy by subscription.
  http://ip-watch.ch/

- Useful background on the WIPO Development Agenda can be found in these statements from eIFL.
  http://www.eifl.net/services/wipo_da.html

- Bibliotheca Alexandrina's A2K Portal (English/Arabic) is a platform to promote awareness about the importance of A2K in accelerating development efforts around the world, and in the Arab region in particular. It offers news and information about international developments, articles on the topic, and some translations into Arabic.
  http://www.bibalex.org/a2k/home/home.aspx

- The Access to Knowledge (A2K) Blog from the United Nations University's joint research and training center with Maastricht University, UNU-MERIT. Categories include: biotech; conference; development; education; FOSS; general; innovation; IPR; medicine; publications: science; and WIPO.
  http://www.merit.unu.edu/a2k/

- A2K Brazil is the focal point of the A2K movement in Brazil, including reference material, updates, event promotion, and past and future activities. The official sites are: http://www.direitodeacesso.org.br

and http://www.a2kbrasil.org.br See also http://www.a2kbrasil.org.br/ENG/-Weblog-ENGLISH-.

- Various links on A2K can also be found via the Del.icio.us bookmarking network. Currently, over a thousand bookmarks are marked with this tag.
  http://del.icio.us/tag/a2k

Organisations

- **A2K Global Academy** – The A2K Global Academy is a network of academic centres dedicated to research, education, and policy analysis promoting access to knowledge. It includes as partners academic institutions in Brazil, China, Egypt, India South Africa, and the United States.
  http://www.law.yale.edu/intellectuallife/6987.htm

- **Alternative Law Forum (Bangalore)** – ALF was started in March, 2000, by a collective of lawyers "with the belief that there was a need for an alternative practice of law." This site offers links to articles such as *Who Owns Your Information*; *Intellectual Property and the Knowledge Culture Commons*; *Piracy_Infrastructure*; *Affordable Medicines And Treatment Campaign*, etc.
  http://www.altlawforum.org

- **Derechos Digitales** (Spanish) – A2K is one of the focus areas of this NGO from Chile, which provides on its Website a communication channel about copyright, human rights monitoring, research and strengthening civil society. This project's idea is to enhance access to knowledge from informed sections of civil society, over copyright.
  http://www.derechosdigitales.org/a2k/

- **EFF** on Intellectual Property – "You'd like to move the tracks you bought from Rhapsody to a personal stereo like Apple's iPod, but the copy protection prevents you. Creating or using the software necessary to make the switch could put you behind bars. You want to distribute your band's music, but the P2P system that's revolutionised your ability to reach listeners is being sued out of existence, a company claiming to own a patent to all streaming media technology is demanding licensing fees, and record labels are breathing down your neck over the samples you've looped. ... EFF fights to preserve balance and ensure that the Internet and digital technologies continue to empower you as a consumer, creator, innovator, scholar, and citizen."
  http://www.eff.org/issues/intellectual-property

- **IP Justice** – "Is an international civil liberties organisation that promotes balanced intellectual property law. The organisation's focus is on international treaties, directives, and other trade agreements

that address intellectual property rights or impact freedom of expression guarantees."
http://www.ipjustice.org

- **Yale Law School Information Society Project** – The Information Society Project at Yale Law School calls itself "an intellectual center addressing the implications of the Internet and new information technologies for law and society, guided by the values of democracy, human development, and social justice."
http://www.law.yale.edu/intellectuallife/informationsocietyproject.htm

Listserves (mailing lists)

- Simply called A2K, the primary listserve for the A2K movement, offers archives of discussions held on the A2K subject right from 2005 onwards.
(From 2010) http://lists.keionline.org/mailman/listinfo/a2k_lists.keionline.org; (earlier) http://lists.essential.org/mailman/listinfo/a2k

- Consumers International's A2K list is for planning, capacity building and information exchange amongst consumer groups and like-minded NGOs.
http://ip.consumersinternational.org/wws/info/a2k

- iCommons is a registered UK charity that promotes collaboration among proponents of open education, access to knowledge, free software, open access publishing and free culture communities around the world. Its listserve is open to all.
http://lists.ibiblio.org/mailman/listinfo/icommons

- Communia is a list intended for general discussion about the digital public domain and related issues.
https://lists.communia-project.eu/cgi-bin/mailman/listinfo/communia

- Denise Nicholson's Information Service is a news bulletin rather than a discussion list, but an excellent way of keeping in touch.
http://lists.wits.ac.za/mailman/listinfo/copyrightanda2kinfo

- Commons-Law is an open platform on the law and the public domain.
http://www.sarai.net/mailing-lists/mailing-lists/commons-law-1

CHAPTER 2

Fairer laws and enforcement practices

In simple terms, the programme of the A2K movement can be divided into two parts. The first is a reactive or responsive programme, whereby it advocates for fairer laws and policies affecting access to knowledge. An example of this first programme is when the A2K movement fights against industry's misuse of DRM to lock out fair uses of copyright material, and opposes laws that support industry's attempts to do so.

The second is a proactive or positive programme, whereby it puts forward alternatives to traditional industry-led models of content development and distribution. An example of that is the promotion of Creative Commons content licensing and legal peer-to-peer distribution.

This chapter deals with the first of the two programmes of the A2K movement described above, and specifically with intellectual property rights (namely copyright and patents).

The ratcheting up of IP protection adversely impacts almost all the rights of consumers. The right to basic goods and services, especially access to education, healthcare and food are reduced by IP protection. The right to choose is reduced when IP laws create monopolies; permit market segmentation, and differential pricing. The consumer rights to access information and education are severely reduced when information and knowledge are made into private property that yields its owners the right to seek rent. The right to a healthy environment is compromised when there is a loss of biodiversity and crop varieties because corporations that find it more profitable to move away from the rich variety of agricultural

species to a limited range control the food chain.[1]

This chapter begins by providing an outline of copyright and patent law, and describing some of the ways in which these laws and the ways in which they are enforced can impeded access to knowledge. The chapter then goes on to look at intellectual property enforcement practices, which can cut across copyright and patents.

2.1 Copyright

The *Berne Convention for the Protection of Literary and Artistic Works 1886* is the first international treaty on copyright. The UK mooted the idea of international cooperation and the early members were mainly Western European countries (Belgium, Germany, France, Spain, Switzerland, Tunisia and the UK became members in 1887). The US only became a member of the Berne Convention in 1989. The first Asian country to become a member was Japan in 1899. The majority of the developing countries formally adopted the Berne Convention well into the 20th Century.

Copyright originally protected only works that were in text form. The Berne Convention expanded the works covered by copyright to include many new areas such as cinematography, drawings, paintings, architecture, sculpture, engravings, lithography, maps, plans, sketches, illustrations, photographs, art works and music. TRIPS in 1995 and the WIPO Copyright Treaty in 1996 expanded protection to software and databases.

The scope of the right itself has also been expanded. In the 19th Century, the copyright owner enjoyed little more than protection against verbatim copying of the work. The Berne Convention expanded this by granting the copyright holder the right to authorise reproduction, translation, adaptation and communication to the public by broadcasting or loudspeaker. TRIPS added to this, the right to authorise commercial rental in respect of computer programs and cinematographic works. The WIPO Copyright Treaty expanded the right of communication to the public to include communication through the Internet.

Copyright protection is given only for a fixed period of time. Upon expiry, the creation ceases to be protected and falls into the public domain. For literary works, the duration of protection initially granted by the Berne Convention was the life of the author plus 7 years. In 1908, this was extended to the life of the author plus 50 years. TRIPS and the

[1] Rachagan, Sothi, Intellectual Property: A Balance of Rights. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, p. 10.

WIPO Copyright Treaty adopted this, but set this as a minimum requirement. Countries were therefore free to set a higher duration than these minimum requirements. The US and the EU expanded copyright protection to life of the author plus 70 years. In the case of Mexico, copyright duration is the life of the author plus 100 years.[2]

2.1.1 Copyright law and developing countries

The only attempt to streamline the Berne Convention to take into account the needs of developing countries was made at the Stockholm conference in 1967. The attempt eventually failed and the only agreement in this regard was reached in Paris in 1971, where a watered down set of exemptions for developing countries were included as an Appendix to the Berne Convention. Due to the stringency of the conditions attached to them, few developing countries have made use of this Appendix.

Developed countries using their influence at the WIPO and through bilateral and regional trade agreements to further their trade and commercial interests have further expanded copyright protection for owners. The space available to developing countries to adopt policy options suited to their development needs have consequently been reduced. Each of the international treaties and FTAs served to further reduce the options that can be used to enhance access to knowledge and facilitate education.

In particular, the TRIPS Agreement committed all the member countries of the World Trade Organization to adhere to the Berne Convention and the Appendix (except for the moral rights provisions of the Berne Convention) and this regardless of whether they were a party to the Berne Convention.

The Berne Convention, the TRIPS Agreement and the WCT each provide a different set of flexibilities for developing countries. The exact mix of flexibilities available to a country therefore depends on the treaties to which it has become a party.

A country not a party to any of the international treaties is free to fashion its copyright law in any manner it chooses. However, the vast majority of the developing countries in the world have signed on to at least one of the international treaties. In total, 80 countries have signed the Berne Convention and TRIPS while 52 are parties to all three.[3]

[2] Rachagan, Sothi, Intellectual Property: A Balance of Rights. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 1), p. 6.

[3] Kanniah, Rajeswari, CI Study on Copyright and Access to Knowledge. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 15), p. 14.

2.1.2 Copyright flexibilities

Exceptions to copyright are particular classes of work which are ineligible for copyright protection, and limitations to copyright are particular uses to which works may be put without infringing the exclusive rights of the copyright owner. Together, exceptions and limitations are referred to as flexibilities. They are better known in the United States as "fair use" rights (though strictly this describes only one of the exceptions available under US law), in the UK and other common law countries as "fair dealing" rights, and in much of the rest of Europe and other civil law countries as "private use" rights. A better collective term for all of these rights may be "user rights" or "public rights".

Neither the Berne Convention nor the TRIPS Agreement set out flexibilities in detail (except cursorily with a mandatory exception for quotations in article 10(1) of Berne). Instead, both set out a set of criteria which any flexibilities introduced at a national level must meet, known as the "three step test". This test requires that copyright flexibilities must:

1. Be confined to certain special cases.
2. Not conflict with a normal exploitation of the work.
3. Not unreasonably prejudice the legitimate interests of the rights holder.

In the case of the Berne Convention, these conditions only apply to exceptions to the right of reproduction, but under TRIPS they apply equally to the rights holder's other exclusive rights such as performance and broadcast.

If a WTO member country's law provides for flexibilities that do not meet these standards, they may be subject to trade sanctions under TRIPS. For example, a WTO complaint was brought by the EU against the USA over an exception which allowed for free-to-air broadcasts to be played in restaurants and shops. The exception was found not compliant with the three step test.[4]

The EU Copyright Directive (2001/29/EC) further limits permissible copyright flexibilities to a defined list of narrow limitations set out in article 5 (with a grandfathering clause to allow other flexibilities extant in 2001 to remain on the books). Only one of the listed flexibilities is mandatory, namely transient or incidental copying as part of a network transmission or legal use.

[4] Except in the limited case where the broadcast was received on a single residential-style television or radio: see http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf.

Fair use

Most countries have implemented the three step test by enacting piecemeal copyright exceptions for specific purposes or specific classes of consumer, such as the educational, library and disability exceptions described above.

But there is an alternative approach, first and most famously found in the copyright law of the United States, which allows for any use of a copyrighted work that can be described as "fair", considering the purpose and character of the use, the nature of the work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the work.

There are many uses of copyright materials that are allowed under US law as "fair use", that would not be allowed under the more specific exceptions of other countries. These include new and innovative uses of copyright works, such as the production of audio and visual collages or "mash-ups", as well as more prosaic uses such as transferring music to an MP3 player, or recording your favourite television show to watch later. Businesses, too, can benefit from fair use – for example, the way in which an Internet search engine operates, by providing short excerpts from Websites and thumbnail pictures of images, relies on this exception.

The fair use exception of US law is not perfect. Because it is by nature so imprecise, it is difficult to be certain whether a given use falls within the exception or not (in fact, fair use rights have been more cynically described as "the right to consult a lawyer"). However fair use can usefully operate as a "catch-all" exception, to ensure that consumers do not become unwitting infringers when copyright laws fall behind.

Amongst the other countries that have adopted a fair use exception modelled on that of the US are Israel and the Philippines, with Malaysia being expected to adopt one in 2010.

2.1.3 Criticism

One popular view is that the purpose of copyright is to maximise revenues for copyright industries such as publishers, movie houses and retailers, which makes sense to regulators as a source of growth and foreign exchange. But, in fact, the purpose of copyright is to encourage creativity and the diffusion of creative works. Copyright should therefore not be an industrial subsidy, but a tool for access to knowledge. If copyright law gets in the way of creativity and access, it is frustrating this purpose.

Lea Shaver of Yale University's Information Society Project, argues that in assessing copyright law our touchstones should be access, affordability and participation. Our tools to uphold these values can be framed in terms of consumer protection, human development and human rights.

Copyright shapes affordability and access because as the scope of rights expands, the more control is centralised and the less competition. It also shapes participation, because under current law the amateur who wants to build upon existing works is at a disadvantage, and risks running afoul of others' rights.

Distribution of copyright materials, and the ability to shift them between media and devices, is now much easier and cheaper than before. Yet copyright protection is ever increasing, and this cannot be justified by the need for additional incentives for creativity. Rather, it reflects the problem of rent-seeking ("the Disney effect" – so termed for the extension of the copyright term to avoid Disney's loss of its early Mickey Mouse assets).[5]

These negative impacts fall most heavily of all on developing countries. Developing countries are net importers of copyright material. They are in no position to be magnanimous in protecting the rights of copyright owners. Yet, they are bowing to pressure and granting more protection and rights to copyright owners than they need to by their treaty obligations. This has grave implications for the access to knowledge of their people. By increasing the restrictions and excluding the limitations and exceptions, they are permitting for less and less information to be freely available in the public domain. Such curtailment serves the interests of a privileged few at the expense of the millions in need.[6]

Norm setting at WSIS

The World Summit on the Information Society (WSIS), held in 2003 and 2005, brought together civil society and private sector actors to observe (and to a limited extent, influence) the development of an intergovernmental accord on the principles and actions necessary for building an inclusive information society.

The form in which the theme of access to knowledge and information was addressed in the WSIS output documents was as one of 11 main action lines in the Geneva Plan of Action, in which it was declared in 2003

[5] http://a2knetwork.org/access-knowledge-internet-governance-forum

[6] Kanniah, Rajeswari, CI Study on Copyright and Access to Knowledge. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 15), p. 17.

that "ICTs [information and communications technologies] allow people, anywhere in the world, to access information and knowledge almost instantaneously. Individuals, organisations and communities should benefit from access to knowledge and information".[7]

The force and specificity of the recommendations flowing from this principle were in many respects diluted by the imperative to agree them by intergovernmental consensus; thus for example whilst an earlier negotiating text had lauded the benefits of free and open source software (FOSS) to promote access to information, US and EU objections saw this reference removed from the Geneva text in favour of a direction that a variety of software models, including proprietary software, should be promoted.

Frustrated with the limitations of the official WSIS output documents, civil society produced its own alternative summit paper, with stronger recommendations on the promotion of access to information and knowledge.[8] A third WSIS summit is expected to be held in 2015.

Norm setting at WIPO

Given that copyright is intended to strike a balance between the interests of rights holders and users, there is a marked disparity between the detailed specification in international law of the exclusive rights to be granted to copyright holders, and the omission of any such specification of the flexibilities to be reserved to the public. This has led to the proposal by Brazil, Chile, Nicaragua and Uruguay of a broad work programme for WIPO's Standing Committee on Copyright and Related Rights on copyright limitations and exceptions dealing with:

1. Education.
2. Libraries and archives.
3. Innovative services.
4. Persons with disabilities.

In each of these areas, WIPO has commissioned studies,[9] and in the one area the work has proceeded to a norm setting stage. This is the case of

[7] http://www.itu.int/wsis/docs/geneva/official/poa.html#c3

[8] http://www.worldsummit2003.de/download_en/WSIS-CS-summit-statement-rev1-23-12-2005-en.pdf

[9] Ricketson, Sam, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*. 2003 ⟨URL: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.doc⟩; idem, *WIPO Study on Copyright Limitations and*

the limitations and exceptions for persons with disabilities, in respect of which a proposal was tabled in May 2009 by Brazil, Ecuador and Paraguay for a *WIPO Treaty for Blind, Visually Impaired and other Reading Disabled Persons*, based on text drafted by the World Blind Union.

This would be the first international instrument to set new minimum limitations and exceptions to copyright law, thus introducing a new note of balance into international IP norm-setting that has been sorely lacking until now. The treaty would serve two purposes: firstly to set a minimum level for copyright exceptions in this area for all WIPO members, and secondly to legalise the cross-border transfer of adapted copyright works. As expected, developing countries have been most favourable to this proposal, with the EU the most strongly opposed.

The EU proposes instead a non-binding recommendation to address the needs of blind users. A2K activists have put the position that it is unfair and unbalanced for rights holders to be privileged to have minimum standards of copyright protection upheld in international law, where the public is denied that same level of protection for its interests in the copyright system, through minimum flexibilities.

Digital locks

One of the biggest impediments to A2K that was introduced by the WIPO Copyright Treaty was in Article 11, which requires signatories to provide legal remedies against the circumvention of technological protection measures (TPMs) or systems for "digital rights management" (DRM). TPMs and DRM can be colloqially described as "digital locks", since that is essentially what they are: locks on knowledge in digital form.

Digital locks pose problems. They are being used not only to prevent unauthorised access to copyrighted material but also to deny access to material that rightfully belongs in the public domain. For example, both the TRIPS Agreement and the WCT provide that copyright protection does not extend to the data or material contained in compilations of such data or material, but TPMs and DRM are being used for example to control access to such material to only users who pay a fee. They can also

Exceptions for the Visually Impaired. 2006 ⟨URL: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf⟩; Crews, Kenneth, *Study on Copyright Limitations and Exceptions for Libraries and Archives*. 2008 ⟨URL: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192⟩; idem, *Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean*. 2009 ⟨URL: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_4.pdf⟩.

be used to deny access to educational material that is in fact allowed by copyright exceptions.[10]

This is not to say that there is no place at all for digital locks. There are limited cases in which these technologies can prove useful for users and content owners alike, such as allowing for digital movie rental. However rather than being bolstered by additional TRIP-plus legislative protections, such uses should stand or fall in the marketplace alongside non-encumbered alternatives, and should not be allowed to prevent users from exercising their user rights or from accessing works that are in the public domain.

There are early signs of an international consensus that the use of digital locks has gone too far. A WIPO-commissioned scoping paper on the public domain has recommended that the WCT be amended to prohibit a technical impediment to reproduce, publicly communicate or making available a work that has fallen into the public domain.[11]

Brazil has introduced such a provision into its new copyright bill, that would penalise anyone who "hinders or impedes" fair use rights or obstructs the use of work that has already fallen into the public domain. But it has gone a step further in that it would also require that any system of digital locks have "time-limited effects that correspond to the period of the economic rights over the work, performance, phonogram or broadcast."

The Brazilian provision, as with a similar Indian amendment also introduced this year, will also permit digital locks to be bypassed to faciliate the exercise of user rights such as fair use or fair dealing under copyright law.[12]

These new, consumer-friendly limits to the overreaching effects of digital locks conform to a series of recommendations that the Trans-Atlantic Consumer Dialogue (TACD) made in 2005,[13] and to similar recommendations made by CI this year.[14]

[10] Kanniah, Rajeswari, CI Study on Copyright and Access to Knowledge. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 15), p. 14.

[11] Dusollier, Séverine, *Scoping Study on Copyright and Related Rights and the Public Domain*. 2010 ⟨URL: http://www.wipo.int/ip-development/en/agenda/pdf/scoping_study_cr.pdf⟩.

[12] Anderson, Nate, *US could learn from Brazilian penalty for hindering fair use*. 2010 ⟨URL: http://arstechnica.com/tech-policy/news/2010/07/us-could-learn-from-brazilian-penalty-for-hindering-fair-use.ars⟩.

[13] Trans-Atlantic Consumer Dialogue, *Resolution on Digital Rights Management*. 2005 ⟨URL: http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=76&Itemid=⟩.

[14] Consumers International, *2010 IP Watchlist*. 2010 ⟨URL: http://a2knetwork.org/sites/

Legality of temporary copies

The Berne Convention does not require protection for copyright works "unless they have been fixed in some material form", and even the EU Copyright Directive expressly exempts transient or incidental copying as part of a network transmission or legal use. Nonetheless, the United States has been pushing for other countries to include protection for copies made in the temporary memory of a computer. Provisions requiring the protection of such temporary copies have been included in all its recent free trade agreements, including those with Australia, Bahrain, Colombia, Morocco, Oman, Peru, Singapore and South Korea.

This is highly problematic for A2K activists, because browsing any content on the Internet automatically creates a temporary copy of that content in the memory of the computer by which it is accessed. It is impossible to conceive that Internet users should be expected to clear the copyright status of all the content they access online before a temporary copy of it is made in their computer memory.

Even more ironically, the provision may not be in line with US law after all. The *Cablevision II* case (decided after the FTA language had already been promulgated far and wide) deviates from previous precedents that suggested that a right protected by copyright is infringed when a copy is made in a computer's temporary storage.[15] The decision is pending an appeal to the Supreme Court.

2.2 Patents

This section covers some of the problems with the patent system, focussing on three areas of patentable "inventions" that have created impediments to A2K and related consumer interests: software patents, pharmaceutical patents and agricultural patents.

One of the problems common to all these areas is that there is no requirement that a patent holder actually use the patent themselves. This has led to a situation in which many patent holders don't actually create anything useful themselves, but simply use their patents to earn money from others who want to do useful work in the same area. If their patents are broad or numerous enough, they can also use them to warn off competitors from attempting to compete with them in a certain field, or they can use their patent portfolio as a bargaining chip to cross-license

default/files/IPWatchList-2010-ENG.pdf⟩, p. 9.

[15] *Cartoon Network LP v CSC Holdings, Inc* 536 F.3d 121 (2d Cir. 2008)

with their competitors, allowing each of them to share the market while crowding out smaller competitors.

2.2.1 Software patents

Although patents have existed for centuries, they have only more recently become applicable to computer software. This has given rise to intense debate over the extent to which software patents should be granted, if at all. Important issues concerning software patents include:

- Where the boundary between patentable and non-patentable software should lie;
- Whether the inventive step and non-obviousness requirement is applied too loosely to software, and
- Whether patents covering software discourage, rather than encourage, innovation.

Negative effects of software patenting include the risk of some fundamental standards of computing and the Internet becoming encumbered, and the free development of open source software being stifled.

The first of these negative effects has been highlighted by the opportunistic attempts of many patent holders to lay claim to some of the fundamental building blocks of the infrastructure of the Internet. Unisys, for example, only began to enforce its patent for the LZW compression algorithm used in GIF format graphic files after those files became a de facto standard image format for the World Wide Web. (That patent has since expired in the United States in June 2003.)

British Telecom went even further, attempting to lay claim to the concept of hyperlinks that are fundamental to the Web. Its claim, based on a 1989 patent that was originally applied for in 1976, was rejected by a New York District Court in 2003. But most patent claims never get to court, and are settled. In the case of free and open source software projects that do not have the resources to settle on monetary terms, the usual result is that the project is simply shut down.[16]

The second of the above negative effects is illustrated by the closing off of certain avenues of software development from the open source software ecosystem; for example, font rendering on Linux is generally inferior to that on proprietary operating systems not for technical reasons,

[16] http://www.gnu.org/patent-examp/patent-examples.html

but because the most efficient algorithms for font rendering are[17] (or were until this year)[18] patent-encumbered. In fact so many patents for computer software have been granted, particularly in the United States, that developing an application without infringing software patents has become a very hit and miss affair.

There are a number of high profile examples where the patenting of a data exchange standard has forced another programming group to introduce an alternative format. For instance, the PNG format was largely introduced to avoid the GIF patent problems, and Ogg Vorbis to avoid MP3. If it is discovered that these new suggested formats are themselves covered by existing patents, the final result may be a large number of incompatible formats. Creating such formats and supporting them costs money, creates inconvenience to users and even threatens to split the Internet into several partially incompatible sub-networks.[19]

Patentability of software

The largest number of software patents are those registered in the United States. Under United States law, it was decided in 1998[20] that a method of doing business (or a software program) will be patentable so long as it produces a useful, concrete and tangible result, rather than just being an abstract idea. However in June 2010, the *Bilsky v Kappos* decision handed down by the US Supreme Court rejected this broad test, whilst leaving the exact scope for the patentability of software unclear. The test now being used by US trademark examiners looks to whether the invention is tied to a particular machine or apparatus, or transforms a particular article into a different state or thing. Many if not most software inventions that could be patented before, can probably still be patented under this test.

The European Patent Convention, a pre-EU instrument dating from 1974, actually expressly excludes "computer programs … as such" from the classes of patentable subject matter, on the ground that patents are directed towards technical inventions, not commercial methods. Even so, the European Patent Office (EPO) has managed to interpret the qualifier "as such" in such a narrow way, that software patents would be granted so long as they contained an inventive step with a "technical ef-

[17] Paul, Ryan, *First look: new Ubuntu font boosts Linux typography*. 2010 ⟨URL: http://arstechnica.com/open-source/news/2010/07/first-look-new-ubuntu-font-boosts-linux-typography.ars⟩.

[18] See http://freetype.sourceforge.net/patents.html.

[19] http://en.wikipedia.org/wiki/Software_patent

[20] *State Street Bank v Signature Financial Group*, 149 F.3d 1368, 1373

fect". Such a patent is described by the EPO not as a "software patent" but as a "computer-implemented invention":

> an invention whose implementation involves the use of a computer, computer network or other programmable apparatus, the invention having one or more features which are realised wholly or partly by means of a computer program.

In some jurisdictions, computer software can unequivocally not be patented. Most recently, in 2010, New Zealand has taken steps to make software unpatentable.[21]

Several patent holders have offered royalty-free patent licences to free and open source software developers. Companies that have done this include IBM, Microsoft, Nokia, Novell, Red Hat, Sun Microsystems and Unisys. However such actions have rarely appeased the free and open source software communities for reasons such as fear of the patent holder changing their mind, or problems with some of the licence terms.[22]

2.2.2 Phamaceutical patents

Patents on pharmaceuticals are also problematic for the consumer movement and other civil society activists, not least of all health NGOs such as Médecins Sans Frontières (MSF).[23]

Patent holders take advantage of their monopoly rights by charging high prices for medicines, including those for diseases that affect a large number of people. They pressure developing countries to prevent local manufacture or the parallel import of cheaper generic versions of drugs from countries where they are not patented.[24]

Problems with the patent system have become obvious over recent years:

- Millions of poor, each year, die – often from preventable diseases – in different parts of the globe as they cannot afford to buy medicines they badly need. "Why are millions dying in the

[21] Wilson, Dean, *New Zealand to make software unpatentable.* 2010 ⟨URL: http://www.techeye.net/software/new-zealand-to-make-software-unpatentable⟩.

[22] http://en.wikipedia.org/wiki/Software_patent

[23] http://www.msfaccess.org/

[24] Rachagan, Sothi, Intellectual Property: A Balance of Rights. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 1), p. 8.

Global South of diseases there is medicine for?'' asks the Changemaker.Org website.[25]

- One-third of the world's population lacks access to essential medicines.[26] It has been argued that much of the premature death and disability associated with infectious disease could be avoided if poor people had access to affordable medicines. Yet those most in need are least able to afford treatment.

One view on the abuse of pharmaceutical patents is that perhaps patents were the wrong mechanism for funding pharmaceutical production all along. For Knowledge Ecology International (KEI), one of the leading consumer NGOs actively campaigning on access to medicines, the biggest concern in 2010 is creating an alternative incentive for research and development in drug development. This is currently being discussed at the World Health Organisation.

Access to medicine

Access to medicine is an essential part of the human right to health. But about one third of the world's population has poor access to necessary medical treatment. High prices, low quality and inaccurate treatment means that patients in poor countries often get little or no health benefits. Essential medicines should be accessible to all people, and that requires a functioning healthcare system and good infrastructure. The drug industry is also at fault for lack of access to medicine. Patent legislation stemming from the WTO's TRIPS Agreement of 1994 states that there must be a patent on the drug product, rather than just the production process. This gives the patent holder sole manufacturing rights for 20 years, during which time the price skyrockets, making it unavailable to the world's poor.

The World Health Organisation's Doha Declaration of 2001 ensured that governments may issue compulsory licences on patents for medicines, or take other steps to protect public health. However, parallel imports from other countries often are met with strong trade sanctions, making this instrument ineffective in practice.

Another problem is that the drug industry is incentivised to research drugs that will sell in western countries, because that will earn the most money. In the United States, only about 10% of the research funds are used to investigate 90% of the world's health problems. This "10/90 gap" is a huge source of injustice.

– http://www.changemaker.no/English/Global-health/

[25] http://www.changemaker.no/English/Global-health/
[26] http://essentialmedicine.org/issues/access-gap

Members of the European Parliament have taken up this issue and established a new Working Group on Innovation, Access to Medicines and Poverty-Related Diseases.

Another front in the fight against the proprietisation of health, in which progress was achieved in March 2010, was the striking down of US patents over isolated human gene sequences. The overruled patents formerly prevented patients from undergoing affordable tests for genetic problems that could expose them to the dangers of breast and ovarian cancer. The decision is under appeal.[27]

Whilst on the one hand the access to medicines campaign is tangential to the A2K movement, on the other it is seen as having been successful example of consumer advocacy with broader lessons for the movement, because it united an A2K conceptualisation of the problem, with the human rights framework of state accountability, which pointed toward a solution.

2.2.3 Agriculture patents

The seed is the basic unit of agricultural production and the basis of life itself. Its self-reproducing quality has long prevented it being sold on an industrial scale: why would a farmer purchase seeds when she can just replant those harvested from the previous crop? Indeed, for millennia, farmers have saved harvested seeds for resowing and exchange. Seeds are carefully selected on the basis that the plants producing them possess desirable traits – such as high yields, disease resistance or drought tolerance.

This enables ongoing development of crops adapted to local conditions. In most of the developing world, seed breeding continues to be carried out by farmers. However, scientific and technological advances in the early 20th century opened the way for private companies to become major players in industrialised country seed markets.[28]

Farmers now have to buy the seeds they wish to plant. Similarly, patents over seeds and patents for new plant varieties have resulted in farmers having to pay high prices for proprietary seeds. Farmers are not being allowed to save and replant the seeds they produce; they have to

[27] Schwartz, John and Pollack, Andrew, *Judge Invalidates Human Gene Patent.* 2010 ⟨URL: http://www.nytimes.com/2010/03/30/business/30gene.html?_r=1⟩.

[28] Goodman, Zoë, *Seeds of hunger: intellectual property rights on seeds and the human rights response.* 2009 ⟨URL: http://www.3dthree.org/pdf_3D/3D_THREAD2seeds.pdf⟩, p. 4.

buy fresh seeds for each new planting season. This has created a new dependency. Corporations now control the food chain. These corporations are also only interested in a few commercial varieties and consequently there is immense loss of biodiversity.[29]

A significant contributing factor to the gradual corporate dominance of seed breeding was the development of hybrids. Hybrids offer farmers uniform crops (well-suited to mechanised, industrial agriculture) and – often – higher yields. Crucially, as hybrids only produce true hybrid crops once, a farmer wanting to continue producing those crops has to buy new seeds each year – thus ensuring a relatively stable market for commercial hybrid producers.

Intellectual property rights (IPRs) on seeds are accused of interfering with traditional farming and cultural practices, disempowering women and making farmers more vulnerable to market fluctuations. IPRs on seeds are said to contribute to loss of genetic and cultural diversity and to increased corporate concentration, which could result in environmental degradation and undermine long-term sustainability of food supplies.[30]

Agricultural patents and food security

In October 2009, the UN expert on food said that the "current intellectual property rights regime [is] suboptimal for global food security". Returning from a country mission in Brazil, the UN Special Rapporteur on the right to food, Prof. Olivier De Schutter, presented in New York his report on the relationships between intellectual property (IP) rights and the right to food. He called Members of the UN General Assembly to develop seed policies that encourage innovation, promote food security and enhance agrobiodiversity at the same time.

"The current intellectual property rights regime is suboptimal to ensure global food security today. It is unfit to promote the kind of innovation we need to cope with climate change", said De Schutter, who underlined the importance of seed policies which "respect, protect and fulfill" the right to food of the most vulnerable groups.

This was the first time a UN independent expert analyses the intellectual property regime under the right to food framework, part of international human rights law.

[29] Rachagan, Sothi, Intellectual Property: A Balance of Rights. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 1), p. 9.

[30] Goodman, Zoë, *Seeds of hunger: intellectual property rights on seeds and the human rights response.* 2009 ⟨URL: http://www.3dthree.org/pdf_3D/3D_THREAD2seeds.pdf⟩, *op. cit.*, p. 4.

"Climate change means more extreme and more frequent climatic events. This will severely impact agricultural systems". In this context, said De Schutter, "seed policies should not just aim to improve yields. They should also raise the incomes of the poorest farmers working in the most difficult environments. They should help build resilience to climate change. And they should stem the loss of crop genetic diversity."

According to the UN food expert, there are currently two ways for farmers to access seeds: informal seed systems where seeds are stored from one year to the other and exchanged locally; and commercial systems marketing improved seeds which are certified by public authorities. Increasingly, the former disappear due to their neglect in agricultural policies, while globalisation and the current IP rights regime strengthen the second at an accelerated pace.

"Experts I meet everyday – in Brazil research institutions for example – warn me about the fact that excessive IP rights are becoming an obstacle rather than an incentive for innovation. They say it is becoming harder and harder for public scientists to access and exchange genetic material". And research is primarily oriented towards the needs of rich countries, rather than to those of small farmers in poor countries. "Local indigenous communities of the Amazon have a hard time to convince research institutions to have significant research partnership on their seeds".

Betting on farmers as innovators also makes economic sense. "Real improvements for the most vulnerable groups – those who are hungry – can sometimes be cheaper than multi-million research programmes and high tech biotechnologies. Investing research efforts in orphan crops – crops that have been neglected in research for decades – proves to have exceptional returns on investment." With $10,000 only, a Peruvian researcher has been able to improve oca, an Andean tuber which is the basic foodcrop for nine million people, but which scientists had neglected. Within two years, he was able to produce virus-free plants, leading to a doubling of productivity.[31]

Biopiracy

Biopiracy has emerged as a term to describe the ways that corporations from the developed world allegedly claim ownership of or otherwise take

[31] De Schutter, Olivier, *"Current intellectual property rights regime suboptimal for global food security", according to UN expert on food.* 2009 ⟨URL: http://www.srfood.org/images/stories/pdf/medias/20091021_press-release_current-intellectual-property-rights-regime-suboptimal_en.pdf⟩.

unfair advantage of, the genetic resources and traditional knowledge and technologies of developing countries.

Biopiracy allegedly contributes to inequality between developing countries rich in biodiversity, and developed countries served by pharmaceutical industry exploiting those resources.

Many developing countries have drawn political and ethical analogies between perceived biopiracy and intellectual piracy, claiming that whilst the developing world is often guilty of disrespecting copyright, patents and other intellectual property, the developed world is often guilty of disrespecting the ownership of indigenous biological resources.[32]

The failure to address issues related to traditional knowledge and bioresources even whilst ratcheting upward the protection granted to new inventions doubly jeopardises developing countries. The obvious questions are "If a company takes a seed from a farmer's field, adds a gene and patents the resulting seed for sale at a profit, what reason is there for not compensating for the original seed? If the traditional knowledge of a particular community is the basis for a development that is granted intellectual property status and protection, what is the compensation to be granted the community that is the source of the traditional knowledge or resource? [33]

2.3 IP enforcement

A growing push towards stricter enforcement of IP laws is unfairly penalising consumers in many countries. This programme, led by developed country governments at the behest of copyright industry lobbyists, is being pursued in various and overlapping global, regional and national fora. These include ACTA, as well as initiatives within the World Health Organisation, the World Customs Organisation, APEC, the G8 and the Global Congress Combating Counterfeiting and Piracy. Domestic legislation has been introduced in nations as varied as the US and Kenya, and industry initiatives that compliment these broader efforts.[34]

This section will examine how intellectual property laws are being enforced through four complementary mechanisms: anti-piracy laws, in-

[32] http://en.wikipedia.org/wiki/Commercialization_of_traditional_medicines

[33] Rachagan, Sothi, Intellectual Property: A Balance of Rights. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2, *op. cit.* (as in n. 1), p. 11.

[34] http://www.wcl.american.edu/pijip/go/enforcement

ternational trade measures, enforcement by intermediaries, and enforcement through the criminal law.

We will not specifically consider in this chapter what might, until recently, reasonably have been assumed to be the primary mechanism of enforcement of private IP rights: civil legal action. Whilst this remains a key mechanism of enforcement for certain IP rights (for example, software patents), exclusive rights holders are increasingly calling on the public sector and intermediaries to do their enforcement work for them, thereby avoiding the cost and inconvenience associated with the need to enforce their rights privately through the legal system.[35]

2.3.1 Enforcement through piracy laws

Anti-Counterfeiting Trade Agreement

The Anti-Counterfeiting Trade Agreement is a plurilateral (involving more than two sides or parties) agreement currently under negotiation by a small number of countries outside of WIPO and the WTO. It would create a new global institutional framework for intellectual property enforcement.

ACTA isn't really a treaty against counterfeiting. It uses that name, but in fact the most problematic aspects of the agreement under negotiation have nothing to do with counterfeit goods. Rather, they are designed to crack down on the transfer of digital information, making it easier for intermediaries (such as customs officers, ISPs or internet service providers, and copyright owners) to snoop on consumers exchanging such information, and imposing new criminal penalties in case they have breached someone's copyright by doing so.

ACTA's provisions go too far. They would allow a practice that already exists in some countries called "three strikes" or "graduated response", which means banning users from the Internet if they are alleged to have been sharing copyright files (see section 2.3.3). They may also allow customs officers to go rooting through a traveller's laptop computer or MP3 player looking for copyright-infringing files, and allow ISPs to disclose their users' information to copyright owners without need of a warrant; provisions that infringe consumers' human right to privacy. And these are just the tip of the iceberg.

[35] McBride, Sarah and Smith, Ethan, *Music Industry to Abandon Mass Suits*. 2008 ⟨URL: http://online.wsj.com/article/SB122966038836021137.html⟩, *op. cit.*.

> Around the world, the antiquated assumptions of copyright law and ideology are again being questioned and new conflicts are breaking out. In Brazil, for example, more than 500 musicians, writers, academics and others signed an open letter in late May calling on their government to reform its copyright laws so that users can have more access to music and books. Meanwhile, the well-financed campaign against so-called copyright "piracy" has become even more vocal and threatens us all, except large corporations. Although three of the most important countries in the global South – China, India and Brazil – were not even invited to the talks, a new anti-piracy treaty called ACTA is about to be signed by rich nations in North America and Europe, as well as Japan and a few smaller countries.
>
> – http://copysouth.org/portal/rio

ACTA has been controversial not only for its content, but for the secretive manner in which it has been negotiated. Following considerable public pressure including numerous public petitions,[36] the first public draft of the text was released in April 2010, only after five years of closed-door negotiations.

Beyond this single text, what little we know of the content of the treaty has either been leaked, or has come from a few very terse briefing papers prepared by some of the friendlier negotiating countries. Even a Freedom of Information request in the United States was denied on the ground that the negotiations were a matter of national security! In contrast, while consumer groups (and even the European Parliament) have been left in the dark, privileged industry insiders have been briefed on the negotiations by the United States government.

There are four sub-chapters to the chapter of the draft ACTA text titled *Legal Framework For Enforcement of Intellectual Property Rights* which indicate the main substantive areas to be covered:

- Civil Enforcement
- Border Measures
- Criminal Enforcement
- Intellectual Property Rights Enforcement in the Digital Environment

[36] For example, the Wellington Declaration at http://publicacta.org.nz/wellington-declaration/ and the joint declaration at http://A2Knetwork.org/joint-declaration-acta.

There is also a chapter on *Institutional Arrangements*, which sets out plans to establish a new ACTA Committee, to meet once per year, that could become a competing body to WIPO and the WTO. Its role would include supervising implemention of the agreement, and resolving disputes that arise under it.

It has been widely speculated that the reason for the ACTA negotiating countries establishing a new body is because of the difficulty that those countries would face in raising the bar of IP protection within WIPO or the WTO, due to the power of numbers that developing countries hold within those organisations, and the cross-cutting application of WIPO's Development Agenda to all its norm-setting activities.

Once the most powerful countries – such as the US, EU and Japan – do sign ACTA, they can force its provisions onto smaller developing countries by using it as a bargaining chip in exchange for trade concessions on agricultural goods. This has been a notorious tactic, particularly of the US and EU, who have forced poorer countries to sign Free Trade Agreements (FTAs) including onerous new copyright and patent provisions that exceed the TRIPS minima.

ACTA has also been said to provide a current example of "policy laundering",[37] in that the IP enforcement measures it mandates would likely be politically unpopular if they were first introduced at a domestic level, and their negotiation as a treaty avoids the need to do so. Because they are agreed at an intergovernmental level first, each state that signs the agreement can later claim that the implementation of its provisions in national law was simply a matter of international obligation.

> (A)cquisition of IP rights is of little economic value if these rights cannot be enforced effectively. The credibility of the IP system depends to a considerable extent on the enforceability of IP rights conferred thereby. Well-functioning IP enforcement mechanisms are the best means to limit the number of violations of IP rights and to ensure that right holders and the society as a whole can reap the benefits from the IP system.
>
> – http://www.wipo.int/enforcement/en/

Anti-Counterfeiting legislation in the East African Community (EAC)

Campaigners in Africa warn that a number of recent measures – the *Anti-Counterfeit Act of 2008* in Kenya, the *Counterfeit Goods Bill* in Uganda and

[37] Kravets, David, *Copyright Treaty is Policy Laundering at its Finest.* 2009 ⟨URL: http://www.wired.com/threatlevel/2009/11/policy-laundering/⟩.

now the *EAC Anti-Counterfeits Bill* – would cause public health problems by limiting local production and importation of generic medicines.

Sangeeta Shashikant, a legal advisor with the non-profit international network Third World Network (TWN), was reported as having told the Inter-Press Service that the EAC bill seems to treat every generic medical product as a counterfeit.

"The definition states (counterfeits) are substantially identical copies of the protected goods (produced) without the authority of the owner of the intellectual property rights of the protected goods. This is dangerous for countries that depend on generics in the healthcare system," she said.[38]

East African countries were facing the risk not attaining the millennium development goal (MDG) on universal treatment of people living with HIV and AIDS, malaria and other diseases if the region's parliaments adopted the anti-counterfeits policy and bill under consideration in the region, the IPS report also noted.

Border measures

The use of customs authorities as agents to enforce IP rights dates back only to 1978 in the USA[39] and 1986 in the EU, when those countries first introduced laws to allow seizure of pirated goods on import. These provisions have since been extended to permit the seizure not only of goods that infringe trademarks, but also those that infringe copyright or patents, whether or not the goods are "pirated" in the sense that they claim a misleading origin.[40]

This trend has since escalated to the global level. A heavy-handed initiative of the WCO called SECURE, which was designed to set global customs standards to counter IPR infringements, including a mandate for strengthening national laws, was disbanded in 2009 in favour of a dialogue mechanism that would not include policy-setting activities.[41]

[38] Wambi, Michael, *Anti-Counterfeit Laws Threaten Universal Access to ARVs*. 2010 ⟨URL: http://ipsnews.net/news.asp?idnews=50887⟩.

[39] Lanham (Trademark) Act (15 USC), Section 1526(e)

[40] Ebert-Weidenfeller, Andreas and McCulloch, Alastair J, *European Union: Border Control Measures in the European Union: A Strong Weapon Against Product Piracy and Patent Infringement*. 2010 ⟨URL: http://www.mondaq.com/unitedstates/article.asp?articleid=100276⟩.

[41] New, William, *WCO Kills "SECURE" Group, But Creates Health Enforcement Mandate*. 2009 ⟨URL: http://www.ip-watch.org/weblog/2009/07/09/wco-kills-%e2%80%9csecure%e2%80%9d-group-but-creates-health-enforcement-mandate/⟩.

However, this has only raised the profile of a similar taskforce called IMPACT (International Medical Product Anti-Counterfeit Taskforce), for which the World Health Organisation (WHO) functions as the Secretariat, and which is causing similar concerns.[42] This continues a pattern of forum shopping by rights holders that has been evident throughout the history of the A2K movement – for example the shift from WIPO to the WTO, and again to ACTA.

Why are border seizures a problem? Largely this is because border authorities are unqualified to assess IP claims, and that they do so away from the public oversight of the legal system. Whereas a court hears an IP dispute in the presence of both parties and can deliberate on difficult issues such as the interpretation of fair use and fair dealing defences, a customs officer can seize and detain goods without any such due process.

A case in point occurred in 2008 when Dutch customs authorities seized a legitimate shipment of generic medicines *en route* from India to Brazil, notwithstanding that the medicines were patent protected in neither country. This seizure, which potentially endangered the health of Brazilian consumers, is now the subject of a WTO dispute.

2.3.2 Enforcement through trade measures

One of the key ways in which developed countries push their high standards of IP protection onto developing countries is through bilateral free trade agreements. A free trade agreement (FTA) is a trade treaty between two or more countries. Usually these agreements are between two countries and are meant to reduce or completely remove tariffs to trade. According to the World Trade Organisation there are more than 200 FTAs in force.[43]

> What is called free trade looks to the maintenance of foreign monopoly for supplying us with cloth and iron; and international copyright looks to continuing the monopoly which Britain has so long enjoyed of furnishing us with books; and both tend towards centralisation.
>
> – Henry Charles Carey, American free trade advocate, 1853

> Trade Agreements can create opportunities for Americans and help to grow the U.S. economy.
>
> – Office of the United States Trade Representative, 2010

[42] Raja, Kanaga, *NGOs concerned over WHO's role in "counterfeit" drugs, IMPACT*. 2010 ⟨URL: http://www.twnside.org.sg/title2/health.info/2010/health20100504.htm⟩.

[43] http://en.wikipedia.org/wiki/Free_trade_agreement

The United States has FTAs in effect with 17 countries,[44] and the EU with 11 countries and blocs.[45] Through its FTAs, the US in particular has consistently imposed TRIPS-plus levels of protection on other countries such as Australia, Chile, Jordan, Morocco, Peru, Singapore and South Korea, most notably the extension of the default copyright term from 50 years to 70 years, as well as US-style implementation of the obligations of the WIPO Copyright Treaty,[46] protection for temporary copies, and a broader range of civil and criminal IP offences.

Special 301 Report

Another mechanism by which the US government pushes TRIPS-plus standards of IP enforcement onto other countries is through its Special 301 Report. This is a global survey, conducted by the US Trade Representative (USTR) pursuant to section 182 of the Trade Act of 1974 of the United States, that takes the nature of a "report card," rating other countries on how closely they adhere to the USTR's standards of protection and enforcement of intellectual property law.

Those countries that the USTR considers to fail its standards most egregiously are highlighted on a "Priority Watch List". In the 2010 priority watch list are countries like Argentina, Canada, Chile, Costa Rica, India, Indonesia, Mexico, People's Republic of China, the Philippines, and the Russian Federation.

The USTR's standards are not based on the treaty obligations of the countries concerned. Amongst the criticisms levied against countries in the 2010 Special 301 Report are China's efforts to promote "indigenous innovation" and its provision of electronic access to journals through public libraries, Canada's refusal to implement the controversial WIPO Internet Treaties which include legal protection for digital locks (DRM) on knowledge goods, India for "the perception that IPR offenses are low priority crimes", Malaysia for failing to criminalise the use of camcorders in movie theatres, Spain for allowing peer-to-peer file sharing in exchange for a private copying levy paid by consumers, and numerous countries for failing to grant extra rights to holders of pharmaceutical patents to protect the results of their health tests.

These standards have been shaped by the written submissions of the world's most powerful lobby groups of copyright and patent owners – the Pharmaceutical Research and Manufacturers of America (PhRMA)

[44] http://www.ustr.gov/trade-agreements/free-trade-agreements
[45] http://en.wikipedia.org/wiki/List_of_bilateral_free_trade_agreements
[46] See 2.1.3.

and the International Intellectual Property Alliance (IIPA). Their submissions were respectively 224 and 496 pages long in 2010, and in past years, claims from these submissions have often been adopted by the USTR for direct inclusion in its report.

> Effective action under Special 301 by USTR has been essential in stemming the tidal wave of losses in U.S. jobs and competitiveness that have threatened one of our country's most productive and fastest growing economic sectors. Special 301 and its leverage are a full-time process for the copyright industries which work with local private sector representatives, U.S. government officials, and U.S. Embassy officials to address and resolve copyright problems in scores of countries.
>
> – http://www.iipa.com/special301.html

As a response to the Special 301 Report, CI has published its IP Watchlist, surveying 34 countries for the most recent edition and ranking them not by how well their IP laws and enforcement practices serve IP's exclusive rights holders, but by how well they serve the interests of consumers, including those from developing countries.

None of the countries surveyed by CI in 2010 scored the top mark, for affording their consumers fair treatment in copyright law overall. Particular concerns included enforcement practices that infringe upon consumer rights, and compulsory copying levies that offer poor value for money. However, the CI report also revealed some best practices that could turn the situation around for consumers, if only they were more widely implemented.[47]

Effect on developing countries

In consequence of condemnation and pressure from the United States both through the Special 301 Report and through bilateral channels, consumers particularly in developing countries have suffered as those countries have been forced to abridge provisions of their domestic law that had been passed for consumers' benefit, or to redirect resources from other areas into the protection of the interests of US-based rights holders.

A 2006 study by CI, covering 11 countries in the Asia-Pacific region, found that all 11 countries studied had either expanded the scope beyond what they are required to do or given copyright owners more rights

[47] Consumers International, *2010 IP Watchlist*. 2010 ⟨URL: http://a2knetwork.org/sites/default/files/IPWatchList-2010-ENG.pdf⟩, *op. cit.*.

than necessary under the relevant international instruments.[48] Citing this study and others, a 2010 treatise found that:

> Some countries faced pressure in advance of their first efforts to draft, debate and implement TRIPS-related IP reforms. Once TRIPS-related reforms were in place, many countries subsequently faced additional pressures to repeal, modify or strengthen provisions in their laws. Most countries also faced international pressures in the area of administration and enforcement of laws, including regarding the practical use of flexibilities included in their national laws.[49]

2.3.3 Enforcement by intermediaries

As noted earlier, a growing trend is for countries to adopt what are called "three strikes" or "graduated response" programmes, which amount to the termination of a user's Internet access in response to a repeated allegation against them of sharing copyright files without authorisation. Graduated response systems can be legislated across the entire industry, or they may be voluntary, based on agreement between content owners and ISPs (as for example in Ireland).[50]

France was the first country to introduce a legally-backed graduated response regime, despite a successful constitutional challenge to a previous version of the law which would have allowed sanctions to be applied against alleged copyright infringers, before any judicial authority had ruled on such allegations. The revised version of this HADOPI law, which requires such a ruling, remains in force.[51] Other countries that have adopted graduated response laws, or are in the process of doing so, are New Zealand, South Korea, Taiwan and the United Kingdom.

Graduated response is problematic in part because the penalty it provides is wholly disproportionate to the alleged offence, as it means that user is also cut off from their social networks, their government, their

[48] Consumers International, *Copyright and Access to Knowledge*. Kuala Lumpur: Consumers International, 2006, *op. cit.* (as in n. 14).

[49] Deere, Carolyn, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. New York: Oxford University Press, 2009, p. 18.

[50] Collins, John, *Eircom to cut broadband over illegal downloads*. 2010 ⟨URL: http://www.irishtimes.com/newspaper/frontpage/2010/0524/1224271013389.html⟩.

[51] Pfanner, Eric, *France Approves Wide Crackdown on Net Piracy*. 2009 ⟨URL: http://www.nytimes.com/2009/10/23/technology/23net.html?_r=1⟩.

banking, their family... it is, in short, a gross infringement of their human right to communicate. Indeed, the results of a global BBC survey, released in 2010, reveal that almost four in five people around the world believe that access to the Internet is a fundamental right.[52]

It is also indiscriminate, because the action taken affects not only the alleged offender, but often an entire household (or in the event of an offence committed using a public Internet connection, an even greater number of perhaps unrelated users). In the case of private graduated response regimes, this penalty is imposed without the due process safeguards that the law would provide under a legislated system.

Graduated response programmes can also raise privacy issues, in that aside from terminating the Internet connection of a subscriber, the ISP may also be asked by the content owner to disclose the personal information of the alleged offender.

In a number of European countries attempts to implement a graduated response programme have led to court cases to establish under which circumstances an ISP may provide subscriber data to the content industry. Using such ISP subscriber information the content industry has sought to hold the end-user responsible for all illegal activity connected to his or her IP address. (An IP address is assigned to all Internet-connected computers, but will often change as many ISPs allocate them from a pool of addresses as needed.)

In 2005 a Dutch court ordered ISPs in the Netherlands to not divulge subscriber information because of the way the Dutch content industry group had collected the IP addresses. However, in April 2008, the Bundestag (German parliament) approved a new law requiring ISPs to divulge the identity of those alleged of infringing on a commercial scale.[53]

2.3.4 Enforcement through criminal law

Another means by which IP laws are being more aggressively enforced is by expanding the range of infringements that attract criminal penalties. Indeed, some acts that are not IP infringements at all are being targetted with criminal sanctions.

This agenda is being pushed through a variety of parallel mechanisms including ACTA, FTAs, and the Special 301 Report, as well as at a national and regional level.

[52] British Broadcasting Corporation, *Four in Five Regard Internet Access as a Fundamental Right: Global Poll*. 2010 ⟨URL: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf⟩.

[53] http://en.wikipedia.org/wiki/Graduated_response

In Europe

The second Intellectual Property Rights Enforcement Directive of the European Union, or IPRED2, would have expanded the existing IPRED to include new criminal measures aimed at ensuring the enforcement of intellectual property rights.[54] The draft IPRED2 was widely criticised on the basis that its scope was far broader than the current international standard for criminal IP enforcement in the TRIPs agreement. In the end the proposed directive failed, largely on the grounds that the subject matter of the proposed directive fell outside the European Community's competence (as defined in the EU treaties).[55]

However with the expansion of EU powers under the newly ratified Treaty of Lisbon,[56] IPRED2 could soon be resubmitted by the EU Commission. Language from IPRED2 on aiding and abetting infringement has also made its way into the current ACTA text.

In the United States

In March 2010 Public Knowledge, Electronic Frontier Foundation, American Association of Law Libraries, Medical Library Association, Special Libraries Association, and US PIRG argued that the U.S. government should restrict its actions enforcing intellectual property law to those "violations that cause the greatest harm in clearly settled areas of law."

In addition, the groups said that IP enforcement overseas should be consistent with other foreign policy objectives, such as those related to freedom of speech and economic development. "Overly broad enforcement" of "expansive IP laws" could harm those other goals, the groups said.[57]

In Asia-Pacific and Oceania

Upon the amendment of Australia's copyright law in compliance with the United States–Australia FTA to raise criminal penalties for various copyright infringements, an Australian Federal Court judge observed:

> The determination of the appropriate penalties for criminal offences is a matter on which views differ. In a political

[54] http://en.wikipedia.org/wiki/Proposed_directive_on_criminal_measures_aimed_at_ensuring_the_enforcement_of_intellectual_property_rights

[55] http://en.wikipedia.org/wiki/Proposed_directive_on_criminal_measures_aimed_at_ensuring_the_enforcement_of_intellectual_property_rights

[56] http://en.wikipedia.org/wiki/Treaty_of_Lisbon

[57] http://www.publicknowledge.org/node/2969

> climate in which "law and order" issues play well, Parliamentarians are often influenced to increase maximum penalties by community sentiment. It is, however, unlikely that there is an overwhelming or even substantial community view that copyright pirates should be liable, on a summary conviction in a Local Court, to imprisonment for a term three years longer than that applicable to almost any summary conviction in the same Court under State law. The most plausible explanation for these extremely unusual arrangements is that they are designed to accommodate the arguments of copyright owners that severe criminal penalties are needed to deter piracy.[58]

Although not under direct pressure from a Free Trade Agreement, Malaysia has introduced amendments to its copyright law in 2010 that would introduce a number of new offences. These include provisions to criminalise the simple possession of a single copyright-infringing item, as well as the operation of a camcorder in a movie theatre, and would even impose liablity for the landlords of premises in which infringing items are sold.[59] New US-style statutory damages provisions are also planned.

[58] Sackville, Ronald, *Monopoly Versus Freedom of Ideas: The Expansion of Intellectual Property*. 2004 ⟨URL: http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_sackvillej15.rtf⟩, p. 13.

[59] Alhadjri, Alyaa, *"Don't punish landlords"*. 2010 ⟨URL: http://www.thesundaily.com/article.cfm?id=48767⟩.

Useful links for this chapter

Copyright

- Commonwealth of Learning's Copyright Resources. By gathering experiences from developing countries and synthesising this for WIPO, the Commonwealth aims "to help countries implement education-friendly legislation that makes access to learning content affordable for more people."
  http://www.col.org/resources/knowServices/copyright/Pages/default.aspx

- TeachingCopyright.org by EFF is designed to give teachers a comprehensive set of tools to educate students about copyright while incorporating activities that exercise a variety of learning skills. Lesson topics include: the history of copyright law; the relationship between copyright and innovation; fair use and its relationship to remix culture; and peer-to-peer file sharing.
  http://www.teachingcopyright.org/curriculum/hs

- Wits Copyright Portal provides links to copyright legislation around the world, international intellectual property agreements and conventions, WIPO documents, position papers, reports, articles, newsletters and much more.
  http://web.wits.ac.za/Library/ResearchResources/SubjectPortals/Copyright+and+Related+Issues.htm

- The Electronic Frontier Foundation hosts many very interesting white papers, including:

  - *Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them*, arguing that "copyright owners now have the ability to write their own intellectual property regime in computer code, secure in the knowledge that the DMCA will back the regime with the force of law".
  - *When Push Comes to Shove: A Hype-Free Guide to Evaluating Technical Solutions to Copyright Infringement on Campus Networks*. This paper is intended to help institutions of higher education critically evaluate the principal technological tools and policies being used to enforce copyright on campus networks.
  - *Digital Rights Management: A failure in the developed world, a danger to the developing world*. This paper discusses the failure of DRM, which has produced no benefit for artists but substantial costs to the public and to due process, free speech and other civil society fundamentals.

  http://www.eff.org/wp/

Organisations

- **The African Copyright and Access to Knowledge Project (ACA2K)** – The project is probing the relationship between national copyright environments and access to knowledge in African countries within an access to knowledge (A2K) framework – a framework which regards the protection/promotion of user access as one of the central objectives of copyright law.
  http://www.aca2k.org/

- **CopyNight** – A monthly social gathering of people interested in restoring balance in copyright law. They meet over drinks once a month in many cities to discuss new developments and build social ties between artists, engineers, filmmakers, academics, lawyers, and many others.
  http://copynight.org/

- **GRAIN** – A small international non-profit organisation that works to support small farmers and social movements in their struggles for community-controlled and biodiversity-based food systems.
  http://www.grain.org/

- **Union for the Public Domain** – This is a non-profit citizens group, established in 1996. Its mission is to protect and enhance the public domain in matters concerning intellectual property. It is a membership organisation, acting as an independent voice on intellectual property issues.
  http://www.public-domain.org

- **World Blind Union** – The WBU works to lobby governments to enact copyright exceptions for the visually impaired people in the 120 countries that currently do not have them. "Such legislation would facilitate the production of accessible formats, such as audio, braille and large print without the need to re-clear copyright," says the WBU.
  http://www.wbu.org

Listserves (mailing lists)

- CopySouth looks at copyright issues from the perspective of the global South.
  http://copysouth.org/mailman/listinfo/copysouth_copysouth.org

CHAPTER 3

Alternative ways of sharing knowledge

As explained in the introduction to the last chapter, the A2K movement combines a reactive or responsive agenda, and also a proactive or positive agenda. Until now, most has been written about the responsive agenda, which includes adding new exceptions to copyright law that allow for more "fair uses", opposing enforcement practices such as cutting accused users off from the Internet, and fighting the extension of content owner's rights through stealth using technology like DRM.

The following section will turn to the positive agenda that involves the promotion of alternatives to market-based models of copyright or patent-protection, such as the open source movement, open access publishing, and Creative Commons, as well as collective licensing schemes and libraries.

3.1 Public domain

The public domain is an intellectual property designation for the range of content that is not owned or controlled by anyone. These materials are "public property", and available for anyone to use freely for any purpose.

The public domain is most often discussed in contrast to works whose use is restricted by copyright.

Under modern law, most original works of art, literature, music, etc. are covered by copyright from the time of their creation for a limited period of time (which varies by country). When the copyright expires, the work enters the public domain.

It is estimated that currently, of all the books found in the world's libraries, only about 15% are in the public domain, even though only 10% of all books are still in print; the remaining 75% are books which remain unavailable because they are still under copyright protection.

The public domain also contrasts with patents. New inventions can be registered and granted patents restricting others from using the inventions without permission from the inventor. Like copyrights, patents last for a limited period of time, after which the inventions covered by them enter the public domain and can be used by anyone.[1]

The effect of a work passing into the public domain is that the former copyright owner no longer holds any of the economic rights that formerly attached to the copyright (though moral rights do still apply in certain jurisdictions). In other words, there is no longer any impediment to the work being copied, shared or remixed.

There are a few issues that surround the public domain that are of concern to the A2K movement – apart from the most concerning of all: that the public domain is no longer expanding, due to the repeated extension of copyright terms. One of the other issues of concern is that in some jurisdictions, it is not legally possible for an author to dedicate a work to the public domain ahead of expiry of the copyright term. This ironically detracts from the freedom of both the author and the public at once. A recent report to WIPO has recommended that this issue be redressed by all WIPO member countries.[2]

Another issue is that of access to public domain works. Often, public domain works are held by libraries or archives that may not be willing to provide free access to the public, regardless of the copyright status of the work. For visual works, this is sometimes justified on the basis that a faithful reproduction of a two-dimensional image attracts its own copyright protection. This principle arguably holds in the UK and possibly in other common law jurisdictions such as Australia, but is not good law in the USA.[3] The Wikimedia Foundation's position on this questionable principle has been strongly expressed:

> To put it plainly, WMF's position has always been that faithful reproductions of two-dimensional public domain works of art are public domain, and that claims to the con-

[1] http://en.wikipedia.org/wiki/Public_domain

[2] Dusollier, Séverine, *Scoping Study on Copyright and Related Rights and the Public Domain*. 2010 ⟨URL: http://www.wipo.int/ip-development/en/agenda/pdf/scoping_study_cr.pdf⟩, *op. cit.*.

[3] *Bridgeman Art Library v Corel Corp*, 36 F Supp 2d 191 (SDNY 1999)

> trary represent an assault on the very concept of a public domain. If museums and galleries not only claim copyright on reproductions, but also control the access to the ability to reproduce pictures (by prohibiting photos, etc), important historical works that are legally in the public domain can be made inaccessible to the public except through gatekeepers.[4]

Another even more objectionable assault on the public domain is found in Egypt, where one must pay a licence fee to the Ministry of Culture to use public domain material commercially.[5] Italy has recently introduced a similar provision.[6] Even the United Kingdom has a like provision that essentially grants a perpetual term of copyright, but, oddly, this is limited to a single work – *Peter Pan.*[7]

3.2 Open licensing

3.2.1 Free and Open Source Software (FOSS)

FOSS is an acronym for "free and open source software", encompassing both of the common terms for what was originally known as "free software" prior to the term "open source" being coined in 1998.[8] Importantly, the software is free in more than one sense. Free or open source software is in the FSF's words not only free in the sense of "free beer," but also in the sense of "freedom," encompassing:

- The freedom to run the program, for any purpose (freedom 0).
- The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbour (freedom 2).

[4] http://commons.wikimedia.org/wiki/Commons_talk:When_to_use_the_PD-Art_tag/Archive_1

[5] *Intellectual Property Law*, 2002, No 82, Article 183

[6] http://it.wikipedia.org/wiki/Wikipedia:Bar/Discussioni/Diritto_d'autore,_diritto_di_panorama,_soprintendenze,_varie_ed_eventuali

[7] *Copyright, Designs and Patents Act 1988*, s.301

[8] Raymond, Eric S, *Goodbye, "Free Software"; Hello, "Open Source"*. 1998 ⟨URL: http://www.catb.org/~esr/open-source.html⟩. The former term is still exclusively used by the Free Software Foundation (FSF); see http://www.fsf.org/. An alternative acronym FLOSS is also sometimes seen, adding the French *libre*.

- The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this.[9]

Although it is not required in order to satisfy this definition, certain open source software licences, most notably the GNU General Public Licence (GPL) which is used by a majority of all open source software,[10] require any work copied or derived from software covered by the GPL to be distributed under the same licence terms. This characteristic is referred to by the FSF as "copyleft," as a play on "copyright," in that it requires those who base their own works on copyleft-licensed software to forgo the exclusive rights that copyright law gives them to copy and modify their works, and to share those rights freely with the community.

> The GNU General Public Licence and other copyleft licences use copyright law in order to assure freedom for every user. The GPL permits everyone to publish modified works, but only under the same licence. Redistribution of the unmodified work must also preserve the licence. And all redistributors must give users access to the software's source code.
>
> – Richard Stallman, FSF

More significant than the freedoms associated with open source software are the larger cultural and organisational consequences to which their exercise gives rise. These include the widespread voluntary service that members of the open source community provide in coding and documenting the software projects to which they contribute,[11] and the typical high quality, timeliness and innovation of their output.[12]

Eric Raymond, a hacker himself, has famously described the difference between the development methodology for proprietary software and that for open source software as that between "the cathedral and the bazaar," in his essay of that name. To be built like a cathedral, in that context, is to be "carefully crafted by individual wizards or small bands of

[9] http://www.fsf.org/licensing/essays/free-sw.html. A similar but more comprehensive list of ten requirements of open source software was first published by the Open Source Institute in 1998 in its Open Source Definition (see http://www.opensource.org/docs/osd).

[10] http://www.gnu.org/licenses/gpl.html

[11] Hertel, Guido, Niedner, Sven and Herrmann, Stefanie, *Motivation of Software Developers in Open Source Projects: An Internet-based Survey of Contributors to the Linux Kernel*. 2003 ⟨URL: http://opensource.mit.edu/papers/rp-hertelniednerherrmann.pdf⟩.

[12] Feller, Joseph and Fitzgerald, Brian, *Understanding Open Source Software Development*. Harlow, England: Pearson Education, 2002, p. 131.

mages working in splendid isolation, with no beta to be released before its time," whereas the bazaar style of development was epitomised by the Linux kernel development process, which

> seemed to resemble a great babbling bazaar of differing agendas and approaches (aptly symbolised by the Linux archive sites, who'd take submissions from *anyone*) out of which a coherent and stable system could seemingly emerge only by a succession of miracles.[13]

The same phenomenon of "peer production" has begun to propagate beyond software development into other fields. For example, hundreds of contributors put in many hours each week to the Wikipedia project, producing the most comprehensive encyclopædia ever written. The licensing model employed by Wikipedia is equivalent to that of open source software, although the material licensed may be more accurately described as "open content," and the licence used is from Creative Commons, to which we turn next.

3.2.2 Creative Commons

Creative Commons[14] is an organisation formed in 2001, which was inspired by the free and open source software movement, to create and promote a series of licences to promote the free use of creative works. These licences have proved exceptionally popular, with millions of pages of Web content being licensed under a Creative Commons licence, as well as thousands of books,[15] photographs,[16] videos,[17] music,[18] and comics.[19] Creative Common licensing is also being used by the Wikipedia project,[20] by the Australian government for most of its new publications,[21] and by the US government for non-governmental materials.[22]

[13] Raymond, Eric S, *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*. Revised edition. Sebastopol, CA: O'Reilly & Associates, 2001, p. 21-21.
[14] http://www.creativecommons.org/
[15] http://books.google.com/
[16] http://www.flickr.com/
[17] http://www.youtube.com/
[18] http://www.jamendo.com/
[19] http://xkcd.org/
[20] http://www.wikipedia.org/
[21] http://www.abs.gov.au/websitedbs/D3310114.nsf/4a256353001af3ed4b2562bb00121564/8b2bdbc1d45a10b1ca25751d000d9b03?opendocument?utm_id=HPI.
[22] http://www.whitehouse.gov/copyright

There is not only one Creative Commons licence, but several formed from the combination of the following conditions:

- Attribution – You let others copy, distribute, display, and perform your copyrighted work – and derivative works based upon it – but only if they give credit the way you request.
- Share-Alike – You allow others to distribute derivative works only under a license identical to the license that governs your work.
- No Derivatives – You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.
- Non-Commercial – You let others copy, distribute, display, and perform your work – and derivative works based upon it – but for non-commercial purposes only.

The combination of these terms creates six main licences: CC Attribution, CC Attribution Share Alike, CC Attribution No Derivatives, CC Attribution Non-commercial, CC Attribution Non-commercial Share Alike, and CC Attribution Non-commercial No Derivatives.

A2K activists would like to see more governments introducing policies to promote the use of Creative Commons licensing, particularly for materials produced by the public administration (in jurisdictions where copyright subsists in such materials at all).

There are also concerns to be addressed about the intersection between Creative Commons licensing and collective management of copyright. Some of these are addressed below at 3.3.3. Another such issue is that some copyright collectives (for example in Australia and Germany) actually collect money for the use of free, Creative Commons-licensed content (such as Wikipedia articles). Different activists have different approaches to this anomaly: Wikipedia would prefer that the levy across *all* licensed works be reduced based on the proportion of them that are Creative Commons licensed, whereas others have advocated the exclusion of Creative Commons works from the collective's licensing scheme.[23]

An important turning point for Wikipedia occurred in June 2009 with its transition to a dual-licensing model. This was facilitated by the agreement of the Free Software Foundation to include a clause tailored for this

[23] Browne, Delia, Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment? ScriptED, 6 2009, Nr. 2 ⟨URL: http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/browne.doc⟩.

purpose in version 1.3 of the GNU Free Documentation Licence, under which Wikipedia was originally licensed. As a result all content previously written for Wikipedia, and all future articles, will also be licensed under the more flexible Creative Commons Attribution Share Alike Licence. This enables contents to be more easily shared between Wikipedia and other similarly Creative Commons-licensed publications (such as this book).

3.2.3 Open Educational Resources

Open educational resources (OER) are learning materials that are freely available for use, remixing and redistribution. Thus, OER is a specific application of Creative Commons (and similar) licensing.

The term "open educational resources" was first adopted at UNESCO's 2002 Forum on the Impact of Open Courseware for Higher Education in Developing Countries funded by the William and Flora Hewlett Foundation.

Open educational resources include:

- Learning content: Full courses, course materials, content modules, learning objects, collections, and journals.
- Tools: Software to support the creation, delivery, use and improvement of open learning content including searching and organisation of content, content and learning management systems, content development tools, and online learning communities.
- Implementation resources: Intellectual property licenses to promote open publishing of materials, design-principles, and localisation of content.[24]

Open access publishing

"Open access" is sometimes used to denote that materials are free to access online, but not to modify. This is typically a requirement of academic publishing, in which it is usual to keep an article's content static and to associate it with a fixed author.[25] It may thus be distinguished from "open

[24] http://en.wikipedia.org/wiki/Open_educational_resources
[25] http://en.wikipedia.org/wiki/Open_access_(publishing)

content," which refers to materials that are free to access, copy and modify, under something like a CC Attribution Share Alike licence.[26]

Some publications described as "open access" might not in fact be truly openly licensed, in that it may not be permitted to further redistribute unmodified copies of the works, which is a minimum requirement of even the most restrictive Creative Commons licence. It is preferable to describe such content as "free access" rather than "open access," indicating merely that the content may be accessed without charge or password restrictions.

The increasing popularity of open access publication of journal articles has accompanied the confluence of two factors. First, the cost of subscription journals has been increasing exponentially, by around three times the rate of inflation since 2000: a 2010 survey found the average price range for a year's subscription ranging from $1,094 to $3,792, depending on the discipline.[27]

Second, this does not reflect the underlying costs, which are low. Authors do not get paid for writing journal articles – most are publicly-funded scholars. Neither do referees typically get paid for reviewing articles for publication. Moreover, articles can be distributed online for virtually no cost.

Hence there has been a growing movement[28] placing pressure on journal publishers to allow, at minimum, for authors to self-archive their own articles on their own Websites or on institutional or communal archives. Some research funding bodies now mandate that the research they fund be published in such archives. Beyond this, a range of new journals have emerged that publish all their content on an open access basis.[29] The costs of running such journals are in some cases bourne by the hosting institution, and in other cases subsidised by authors.

In developing countries

Improving access to subscription-only journals is now possible through, for example, the WHO's Health InterNetwork Access to Research Initiative (HINARI), which works with major publishers to enable developing

[26] Confusingly, "open access" also has a second meaning which relates to access to telecommunication infrastructure: see for example http://infopolitics.net/2010/02/open-access-public-investment-can-drive-broadband-development/.

[27] Henderson, Kittie S and Bosch, Stephen, *Periodicals Price Survey 2010: Seeking the New Normal*. 2010 ⟨URL: http://www.libraryjournal.com/article/CA6725256.html⟩.

[28] For example see the declarations at http://www.soros.org/openaccess and http://oa.mpg.de/openaccess-berlin/berlindeclaration.html.

[29] A directory of many of these is available at http://www.doaj.org/.

countries to access biomedical and health literature. More than 6,400 journals are available free to health institutions, workers and researchers in 108 countries.

Similarly, the Access to Global Online Research in Agriculture (AGORA) programme, set up by the UN Food and Agriculture Organisation, has enlisted major publishers to provide 107 developing countries with access to more than 1,200 journals in food, agriculture, environmental science and related social sciences.

There are also many open access journals, including those in the Public Library of Science (PLoS), as well as others listed in the Directory of Open Access Journals (DOAJ), a project set up by Lund University Libraries in Sweden. African institutions can contribute electronic journals to these sites to promote and disseminate their research.[30]

Open course materials

Similar factors have driven the development of open course materials. Consumers International conducted research in 2006 that revealed that an $81 textbook costs the equivalent of $913 to an Indonesian student (based on GDP per capita adjusted for Purchasing Power Parity).[31] This results in a high prevalence of unauthorised photocopying of course materials, to which the OER movement offers an alternative.

One notable project for the development of open course materials is the OpenCourseWare project,[32] which was inaugurated by MIT but has since extended to other institutions.[33] The Wikimedia Foundation offers its own Wikiversity[34] and Wikibooks,[35] and there are even now fee-free (but unaccredited) universities that make use of OER for tuition: University of the People[36] and Peer 2 Peer University.[37]

The Free Technology Academy is one attempt to bridge the gap between such unaccredited learning institutions using OER, and officially accredited university courses. It is a consortium formed by the Open Uni-

[30] Musakali, Joseph Juma, *Bridging the digital divide through open access*. 2010 ⟨URL: http://www.scidev.net/en/opinions/bridging-the-digital-divide-through-open-access.html⟩.

[31] Consumers International, *Final report of the Project on Copyright and Access to Knowledge*. 2008, p. 43.

[32] http://ocw.mit.edu/

[33] http://www.ocwconsortium.org/

[34] http://www.wikiversity.org/

[35] http://www.wikibooks.org/

[36] http://www.uopeople.org/

[37] http://p2pu.org/

versity of Catalonia (Spain), the Open University of the Netherlands and University of Agder (Norway) and led by the Free Knowledge Institute (FKI). In January 2010 it began placing its educational materials online, and providing low-cost tuition based on these resources, which could be used for credit in a full university course:

> The use of Free Software (also referred to as Open Source Software or Libre Software) is rapidly expanding in governmental and private organisations. However, still only a limited number of ICT professionals, teachers and decision makers have sufficient knowledge and expertise in these new fields. The Free Technology Academy aims to address this gap by providing high level courses that fit into larger Master Programmes at the participating universities.[38]

3.3 Collective licensing

An intellectual property owner who holds the exclusive right to control copying and related uses of work can either exercise those rights personally, or licence them to others through contracts. In many cases, it is impractical for rights holders to conclude individual contacts with users of their works, either because there are too many users (as in the case of a karaoke venue in which hundreds of patrons publicly perform songs), or too many works to be licensed from too many rights holders (as in the case of a radio station that might play thousands of different tracks per week). In these cases, various forms of collective licensing are used. This section will examine some of the most important cases.

3.3.1 Orphaned works

Orphan works are those that are still protected by copyright, but for which the copyright ownership cannot be ascertained, perhaps because the work was published anonymously, or the author died without heir, or they simply cannot be found. Under copyright law, such works continue to be protected for a minimum of 50 years after the author's death (longer, in many countries), which means that there is no way in which they can be legally used. This locks away much historically significant newsreel footage, photographs, sound recordings and documents that could be of immense cultural and educational value.

[38] http://www.ftacademy.org

Very often, orphan works become obscure no matter how valuable the material contained in them may be. No future creators are willing to use the orphan work for fear that they will have to pay a huge amount of money in damages if the owner emerges.

An understanding of the magnitude of the orphan works problem can by gained by reviewing the following studies and comments:

- A National Public Radio story on how music becomes inaccessible because companies will not reissue recordings.[39]
- The Center for Public Domain at Duke Law School's study on orphan films.[40]
- Library Copyright Alliance's comment in response to the Copyright Office's Notice of Inquiry on orphan works.[41]
- College Arts Association's comment in response to that same Notice of Inquiry.[42]

The solution to this problem is not straightforward, because one must balance the public value in the availability of these orphan works, against the fact that there will inevitably be cases in which works are treated as orphaned, although the copyright owner is still around and could have licensed the use of their work. The complexity of this issue has resulted in a plethora of different approaches to orphan works, ranging from simply treating them as if they were in the public domain (as in Brazil), to the establishment of a central registry from which those works can be licensed, and which disgorges the licence fees if the rights holder should later step forward (as in Canada).

Since 2005, efforts have been underway to solve the orphan works problem in the United States. Public Knowledge and many other organisations have proposed that the law should allow use of an orphan work if the user searched for the copyright owner in good faith and with reasonable diligence but failed to find the owner to ask permission. The copyright office recommends a similar solution, differing only in how the remedies would be limited. Groups of copyright holders, mainly photographers, illustrators, graphic artists, and textile designers, have opposed

[39] http://www.npr.org/templates/story/story.php?storyId=5139522&ft=1&f=2
[40] http://www.law.duke.edu/cspd/pdf/cspdorphanfilm.pdf
[41] http://www.copyright.gov/orphan/comments/OW0658-LCA.pdf
[42] http://www.collegeart.org/pdf/caa_orphan_letter.pdf

both specific aspects of these proposals and any attempts to permit use without consent.[43]

Legislation was introduced into the US Congress in 2008 that would have limited the remedies available to a copyright owner for copyright infringement where the defendant had undertaken a reasonable search but was nevertheless unable to locate the owner. This legislation lapsed and has not yet been re-introduced.

Meanwhile the Google Books settlement (referred to at 1.3.3) is, in a way, a privatised version of orphaned works legislation for the USA, in that it will allow out-of-print books (including, but not limited to, orphan works) to be redistributed by Google in electronic form, in exchange for licence fees to be administered by an independent Book Rights Registry.

3.3.2 Patent pools

Patent pools are useful in cases where there are so many patents covering a certain field of industry (a "patent thicket") that the costs of innovating in that field becomes unaffordable. In such cases rights holders with patents covering a particular field can pool their patents together and agree on a single formula for licensing the use of those patents through a central intermediary.

Patent pools are receiving growing attention as possible tools for improving technology transfer to developing countries. They offer one big benefit: they can cut through patent thickets to provide access to critical technological innovations. But patent pools are also risky: the agreement to share technologies may run afoul of antitrust issues. And there are other pros and cons:

- Patent pools allow for the transfer of intellectual property, not the transfer of technology. Know-how and trade secrets may also be required to use the intellectual property.

- Patent pools have generally flourished when all companies in a sector are stymied by restrictions on access to intellectual property. This makes them willing to compromise. It is unclear whether or not pharmaceutical companies feel similar inclinations.

- Patent pools have been most successful in the electronics industry, since they facilitate industry-wide standards that create larger markets. Again, this may not apply to drug companies.

[43] http://www.publicknowledge.org/issues/ow

- Patent pools are also expensive to create and maintain.

Despite these reservations, the benefits of patent pools are strong. They create an efficient "one-stop shop" for intellectual property, eliminate stacking licenses, avert litigation, decrease research and administrative costs, and can greatly improve the speed and efficiency of technological development.[44]

Examples of successful patent pools (at least for industry) include those over the MPEG-2 and MPEG-4 video compression standards, the 3G telecommunications protocol, and the DVD medium.[45]

Most recently, civil society activists have been involved in the development of a medicines patent pool to be administered by UNITAID, which is hoped to improve access to newer anti-retroviral medicines for the developing world.[46] However, because participation in the patent pool would be voluntary there is doubt over whether pharmaceutical companies will contribute their most profitable patents to the pool.

3.3.3 Copyright collectives

Copyright collectives (or "collecting societies") work on a similar principle to patent pools, except that they typically allow for the licensing of an entire catalogue of copyright works for a fee that is either flat or based on a simple formula. Copyright collectives usually operate at a national level, but may have affiliates in other countries that also allow for overseas copyright works to be licensed. Copyright collectives may be privately established, or may be established by legislation.

Each collective typically administers only a particular right or set of rights. For some works, this means that several collectives may be involved. For example, to licence musical works for public performance may require a user to obtain a licence from both the collective that administers the rights in the composition, and a separate collective that administers the rights in the recording.

[44] Krattiger, A and Kowalski, S P; Krattiger, A et al., editors, Chap. Facilitating Assembly of and Access to Intellectual Property: Focus on Patent Pools and a Review of Other Mechanisms In Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices. Volume 1, Oxford: MIHR, 2007 ⟨URL: http://www.iphandbook.org/handbook/ch02/p08/eo/⟩, p. 137-138.

[45] Aoki, Reiko and Schiff, Adam, *Promoting Access to Intellectual Property: Patent Pools, Copyright Collectives and Clearinghouses*. 2007 ⟨URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976852⟩.

[46] http://www.unitaid.eu/en/The-Medicines-Patent-Pool-Initiative.html

Collective licensing of copyright can offer a middle ground in the difficult trade-off between providing incentives to authors and allowing widespread and unfettered access. Collective licensing of music, for example to radio stations and performance venues, has been commonplace in many countries for most of the 20th century. In some countries copyright in written works is also collectively administered: for example, to educational institutions in Australia, under a compulsory statutory licensing scheme.

3.3.4 Competition issues

Both patent pools and copyright collectives raise competition concerns, particularly if the pool or collecting society requires members to relinquish all their rights in their works for collective administration. Thus, critics such as Ariel Katz of the University of Toronto's Faculty of Law argue that "with rare exceptions, the various justifications for collective administration are too weak to justify departure from the competitive paradigm that underlies market economies."

Katz suggests that "in most cases collusion and rent-seeking mainly drive the formation of copyright collectives". Katz suspects that "only rarely such rent-seeking may be justified as a matter of policy, either as a way to improve the incentives to create socially valuable works or on distributional grounds."[47]

For A2K activists, it is a particular concern that collecting societies will typically prevent rights holders from releasing their works under a Creative Commons licence, even if the terms of that licence preclude commercial use. However, progress is being made in this area. Agreements have been reached with collecting societies in countries such as Denmark and the Netherlands to permit members to release their works under Creative Commons licences whilst the society still collects royalties for commercial uses. This has also long been possible in the United States.

In 2010, the Australian Competition and Consumer Commission (ACCC) renewed the licence of one of the Australian copyright collectives, the Australasian Performing Right Association (APRA), on condition that it liberalise its conditions of membership to allow members to licence their works directly to the public.[48] This opens up the opportunity for

[47] Katz, Ariel, *Copyright Collectives: Good Solution But for Which Problem?* 2010 ⟨URL: http://ssrn.com/abstract=1416798⟩.

[48] http://www.accc.gov.au/content/index.phtml/itemId/924027

Australian performers to release their music under free licences if they so wish.

TRIPS allows countries to pass measures to prevent the abuse of intellectual property rights through competition law. For example, abuses of intellectual property rights have been litigated under articles 81 and 82 of the Treaty establishing the European Community. In one case,[49] three British television networks, which produced a television guide containing the listings of their TV schedules, refused to allow the publisher of a competing TV guide to licence the use of those listings. This was held to be an abuse of their copyright in the listings, by reason that

> the aim and effect of the applicant's exclusive reproduction of its programme listings was to exclude any potential competition ... in order to maintain the monopoly enjoyed ... by the applicant on that market.

Factors affecting this decision were that the publication of a TV guide was only a secondary market for the television networks in question, and that there was no other source for the listings information than by licensing them from the networks. It should also be noted that in many other jurisdictions, television listings would not attract copyright protection at all.[50]

3.4 Libraries

Libraries of all types are the starting point from which citizens can have access to information on an equal basis and in a trusted and neutral environment. Library and information services are the "people's universities".[51] Through their vast collections, they enable access for all members of the community to global knowledge resources, ideas and opinions thus fostering a creative and innovative society.

A strong library infrastructure is integral to a nation's development as evidenced by the countries which have ranked number one in the UN Human Development Index over the last ten years, ie Norway and Canada.[52]

[49] Case T-69/89 *Radio Telefis Eireann v EC Commission (Magill TV Guide Litd intervening)* [1991] ECR II-485, [1991] 4 CMLR 586

[50] *IceTV Pty Ltd v Nine Network Pty Ltd* [2009] HCA 14

[51] This section is excerpted from Hackett, Teresa, Libraries: The People's Universities. Asia Pacific Consumer, 43 & 44 2006, Nr. 1 & 2

[52] http://en.wikipedia.org/wiki/Human_Development_Index

In developed countries, libraries accompany citizens through all stages of life, for example, "Bookstart for Babies" programmes in the local public library;[53] "Help with Homework" clubs in the school library; as a student, logging into the university library from home for course-work material; as a professional, accessing the latest market research reports from the in-house company library on your desktop.

Libraries collect, organise and preserve our global cultural and scientific heritage: the memory of humanity. The richness of the content is reflected in the diversity of the media: books, newspapers, journals, audiovisual material, maps, pictures, and music. The *raison d'être* of libraries is to collect and preserve our knowledge for the purposes of making it available to current and future generations.

> Libraries are essential to the free flow of ideas and to maintaining, increasing and spreading knowledge. As repositories of books and other printed material, they are key to promote reading and writing.
>
> – UNESCO and Libraries portal

3.4.1 Bringing down the barriers in developing countries

Electronic Information for Libraries,[54] known as eIFL.net, recognises the key role that libraries play in the exchange of ideas, knowledge and information and the development of open societies. The advent of digital technologies heralded a new era and new opportunities as traditional print journals became available electronically. Within a decade, the information landscape was transformed especially for academic and scholarly resources.

However, in poor countries or those which are undergoing the transition to a market economy, the barriers to access were formidable: little money to pay for expensive electronic resources; poor technological infrastructure and lack of capacity; political and legal "firewalls"; few opportunities to join international experts where pertinent knowledge is shared and discussed.

eIFL.net saw an opportunity to assist libraries and their users in achieving affordable access to electronic scholarly resources. As access to Internet-based digital material can be expanded at marginal cost to the provider, the idea was to leverage the purchasing power of individually "poor" customers and to negotiate with information providers on a

[53] Eg. in Australia http://www.library.act.gov.au/kids/babies
[54] http://www.eifl.net/

multi-country consortial basis with highly discounted prices and alternative business models. In this way, eIFL.net aims not only to lessen the digital divide between north and south, but also to ensure equitable access within individual countries to cover better-funded institutions, as well as smaller libraries lacking the funding for new acquisitions.

With eIFL.net library purchasing consortia now operating in 50 developing and transition countries serving thousands of libraries, access to global research and information has become a reality for millions of users. When first accessing e-resources provided through eIFL.net, Professor Hamlet Isaxanli, Rector of Khazar University in Azerbeijan exclaimed: "It's fantastic. Yesterday I had a dream, now it is a reality."

eIFL.net members are saving millions of dollars each year using licences negotiated by eIFL.net. Cooperation and resource sharing between libraries is growing ensuring long-term sustainability and members are benefiting from expertise in cutting edge information and technology policies and practices.

3.4.2 Striking a balance

However, just as researchers and students in the eIFL member countries are benefiting from access to these new resources, they have also become exposed to the international policy-making environment with regard to copyright and related trade issues. Especially over the last ten years, the global trend is towards more rights for right holders and stricter enforcement laws. Intellectual property now belongs to the global trading system. The public domain, the common cultural and intellectual heritage of humanity and a rich resource for further creativity, is being eroded.

Libraries support copyright because they recognise the need for creators to be rewarded for their work and for creative works to be protected from piracy and other unfair exploitation. But copyright is not just about protection for right holders. Copyright was from its early days meant to balance the need to protect creators with the user's right to access information for teaching, learning and further creative endeavours. The mechanism that makes copyright work is in fact the exceptions and limitations combined with adequate protection of copyright. So if there are no exceptions or only narrow exceptions, how can there be a balance? If there is no balance, then copyright works against libraries, learning and access to knowledge.

Users of copyright material find that they have less rights in the digital environment than in the traditional print world eg. exceptions and limitations granted to print material often do not apply to digital works;

libraries are forced to sign away their rights in non-negotiable licences in order to gain access to essential resources; digital locks prevent libraries from making lawful use of a work.

This places restrictions on the services provided by libraries and prevents innovative new services from being developed eg. distance education services to people living in rural or remote areas, ironically those standing to benefit most from the new technologies.

The Millennium Development Goals are one of the great challenges facing the international community. On reaching these Goals, Kofi Annan says:

> We cannot win overnight... It takes time to train the teachers, nurses and engineers; to build the roads, schools and hospitals; to grow the small and large businesses able to create the jobs and income needed.

Student teachers, nurses and engineers in poor countries often rely entirely on the university library to provide learning and research material for their courses. Developing countries must ensure that learning content is made available to the widest possible base as part of their focus in achieving the Millennium Development Goals.

3.4.3 Public lending rights

Another issue of particular concern to libraries, but otherwise little-known even amongst copyright activists and practitioners, is that of public lending rights (PLR). These are a right of compensation granted to authors for the "potential" loss of sales from their works, which are available on loan in public libraries, the majority of which are fiction works. In other words, a PLR is a "subsidy" paid out of public funds to authors whose books are lent from public libraries.[55]

Calculation of the PLR levy is either made on the basis of how often an author's works are lent out, or payment per copy of an author's work held in libraries, whether or not it is borrowed, ie. on library holdings.

About 41 developed countries to date have recognised a Public Lending Right in their legislation, either through their copyright legislation or through library-related legislation. The UK has a separate Public Lending Right Act.

[55] Masango, Charles and Nicholson, Denise Rosemary, Public Lending Right: Prospects in South Africa's Public Libraries? South African Journal of Libraries and Information Science, 74 2008, Nr. 1.

The US does not have a lending right, which shows that it is not necessary for a thriving creative culture. Since public libraries are funded by the public through their taxes, they are mandated to provide access to their collections to the public and to provide loan facilities to facilitate access to knowledge.

As the IFLA Committee on Copyright and Other Legal Matters (CLM) states in its Background Paper on Public Lending Right, the oft held assumption that primary sales of authors' works may be lost through library use is mistaken. There is no empirical evidence to show any link between the use of works in public library collections and possible loss by authors.

Not only are libraries themselves major purchasers of authors' works, but library users often encounter an authors' works for the first time in a public library, which can lead to further primary sales, or referrals to others to purchase the works. In fact, libraries and authors enjoy a positive symbiotic relationship. Authors receive free marketing from libraries, particularly in developing countries, in a number of ways, eg. through new acquisition lists, new books stands, current awareness services, children's reading hours, adult book clubs, readings by authors or poets, book or author of the month promotions, exhibitions, selected reading lists, circulation of promotional pamphlets, etc. And, most importantly, the advertisement of authors' names and works in print and electronic library catalogues and national catalogues, eg. SABINET and Publishers' catalogues.

Libraries are also the main purchasers of important reference works in analogue and digital formats. These works are generally very expensive and their target market is libraries, not the public. Apart from basic dictionaries, maps and encyclopedia-type works, few, if any reference works would be purchased or even used, if it were not for them being housed in libraries. Authors are not likely to suffer loss of sales of these works from public lending. In fact, libraries provide a "captive audience" for these works, as they are generally only for "in-library use" and not for loan.[56]

3.5 Open standards

An open standard is a standard that is publicly available and has various rights to use associated with it, and may also have various properties of how it was designed (eg. open process).

[56] Nicholson, Denise Rosemary, *Does South Africa need a Public Lending Right?* 2009 ⟨URL: http://kim.wits.ac.za/index.php?module=blog&action=viewsingle&postid=gen11Srv0Nme53_4234_1246874412&userid=8988090205⟩.

The terms “open” and “standard” have a wide range of meanings associated with their usage. The term “open“ is usually restricted to royalty-free technologies while the term “standard” is sometimes restricted to technologies approved by formalised committees that are open to participation by all interested parties and operate on a consensus basis.

The definitions of the term “open standard” used by academics, the European Union and some of its member governments or parliaments such as Denmark, France, and Spain preclude open standards requiring fees for use, as do the New Zealand and the Venezuelan governments. On the standard organisation side, the W3C ensures that its specifications can be implemented on a Royalty-Free (RF) basis.

Many definitions of the term “standard” permit patent holders to impose “reasonable and non-discriminatory” (RAND) royalty fees and other licensing terms on implementers or users of the standard.

The term “open standard” is sometimes coupled with “open source” with the idea that a standard is not truly open if it does not have a complete free/open source reference implementation available.

Open standards which specify formats are sometimes referred to as open formats. Many specifications that are sometimes referred to as standards are proprietary and only available under restrictive contract terms (if they can be obtained at all) from the organisation that owns the copyright on the specification. As such these specifications are not considered to be fully “open”.[57]

Open standards, particularly in relation to information and communication technologies (ICTs), also impact upon access to knowledge. This is because they foster the development of a competitive, interoperable ICT ecosystem, that is inclusive of non-proprietary technologies such as the World Wide Web and free and open source software.

In contrast, proprietary standards can result in “lock-in”, whereby the customer of a certain ICT vendor invests so much in that implementing that vendor’s solution, that the costs of later moving to a competitor or interoperating with a competitor’s products become prohibitive.

The architecture of the Internet has been built around open standards. The IETF (Internet Engineering Task Force) is responsible for almost all Internet standards other than those for the Web, which it has delegated to the more specialised W3C (World Wide Web Consortium). The Internet Protocol used by all Internet-connected computers is an IETF open standard (RFC 791), as is the email protocol SMTP (RFC 821), and the HTTP protocol used for communication between Web browsers and

[57] http://en.wikipedia.org/wiki/Open_standard

Web servers (RFC 2616). HTML, the language of the Web, is a standard of the W3C.

One important battle ground in open standards has been that of video formats. The newest version of the HTML specification, HTML5, will require browsers to natively support Internet video. Because the W3C has a strict policy that its specifications must be free of patent claims, an opportunity arose for the open and patent-free video format, Ogg/Theora, to be incorporated into the HTML specification. However, this was blocked by proprietary software vendors such as Apple and Nokia, who instead have incorporated support for the patent-encumbered (but technically superior) standard H.264 in their browsers.[58]

In May 2010, a dramatic development in this impasse occurred when Google acquired a high-quality proprietary video standard, VP8, and donated its code and associated patents to the open source community, as a project named WebM. This may lead the way for the adoption of WebM as an open, freely-implementable standard for Internet video in HTML5.

3.5.1 Document freedom day

Document Freedom Day is an international day to raise awareness of open standards and free document formats. It was organised on March 31, 2010 (for the third year); the previous focus on the OpenDocument Format (ODF) is broadening to include other free formats such as Ogg Vorbis, and open standards in general.

Document Freedom Day is inspiring lots of passion and creativity around the world. Volunteer groups from the Free Software scene are using this international day to draw their communities' attention to a topic that most people outside the technology world hardly ever think about, according to Karsten Gerloff, writing at Opensource.Com.[59]

The campaign is coordinated by the Free Software Foundation Europe, but the passion and effort in cities around the world are local. In Romania's capital, Bucharest, a group of activists visited a number of government buildings, each time telling the authorities that "I can't read your documents." In South Africa, the Department of Arts and Culture is holding a celebratory hour. In Buenos Aires, Argentina, eight organisations are organising an evening of information and discussion about

[58] McLean, Prince, *Ogg Theory, H.264 and the HTML 5 Browser Squabble*. 2010 ⟨URL: http://www.appleinsider.com/articles/09/07/06/ogg_theora_h_264_and_the_html_5_browser_squabble.html⟩.

[59] http://opensource.com/government/10/3/document-freedom-day-passion-and-politics

Open Standards. In many countries, as in Vietnam, local groups are setting up information campaigns in universities and elsewhere.

Over the past years, numerous countries have adopted policies on Open Standards. The Netherlands lead the way, by mandating that public bodies use free software and open standards from May 2008. Many others have followed, such as South Africa, Japan, Brazil and a number of European countries.

Denmark is the latest nation to join the group, requiring its public bodies to start using ODF for its documents from April 2011. There are differences between all these policies, and they are being implemented with varying degrees of success. But the direction is clear: The public sector is moving to open standards. Not without a fight, though.[60]

3.6 Open data

The open data movement takes the same principle of openness to raw data, including scientific data, maps and statistical information. Examples of prominent data sets that have made freely available include the human genome as part of the human genome project,[61] road maps through the Open StreetMap project,[62] and various countries' census data.[63] Science Commons[64] is an organisation analogous to Creative Commons which advocates for open licensing of data.

There is a tension in copyright law over the protection of data. The Berne Convention provides (in Article 2(8)) that facts are not subject to copyright, but this principle is gradually being eroded. For example, the TRIPS agreement expressly provides (in Article 10(2)) that copyright should be recognised in "compilations of data or other material, whether in machine readable or other form," depending on the intellectual effort that went into their selection and arrangement.

There are also jurisdictions in which databases are protected by *sui generis* legislation (such as the EU databases directive 96/9/EC), and others in which copyright is stretched to cover databases through the application of a "sweat of the brow" doctrine.[65] This doctrine has, however, been significantly limited by a 2010 Australian case which refused

[60] See http://documentfreedom.org/.
[61] http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml
[62] http://www.openstreetmap.org/
[63] http://www2.census.gov/census_2000/datasets/
[64] http://sciencecommons.org/
[65] *University of London Press Limited v University Tutorial Press Limited* [1916] 2 Ch 601

to recognise copyright in the data comprised in a telephone directory.[66] A similar decision had earlier been reached in the United States.[67]

The passage of a new treaty for the protection of databases was proposed at WIPO in 1996, but failed to gain acceptance, largely because such a right did not yet exist in some of the major WIPO member countries including the USA. However, discussions at WIPO are ongoing, and a database treaty may yet emerge.

[66] *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44
[67] *Feist Publications, Inc v Rural Telephone Service* (1991) 499 U.S. 340

Useful links for this chapter

Open access

- Peter Suber's introduction to Open Access is a succinct briefing on open access that expands upon the treatment given in this book.
  http://www.earlham.edu/~peters/fos/overview.htm

- 7 Things You Should Know About Open Educational Resources. From EDUCAUSE, a nonprofit membership association for using information technology to benefit higher education.
  http://net.educause.edu/ir/library/pdf/ELI7061.pdf

- Open Journal Systems is an open source journal software platform being used to produce more than 6,600 online journals, about half of them in developing countries. Here are a survey of 998 of those journals, and an interview with the developer.
  http://pkp.sfu.ca/node/2773 and http://chronicle.com/article/Open-Access-Journals-Break-/64143/

- The American Educational Research Associaton Special Interest Group is developing a wiki-based tool for an annotated list of open access journals in the field of education. They have tried to include only links to electronic journals that are scholarly, peer-reviewed, full text and accessible without cost.
  http://aera-cr.asu.edu/ejournals/

- Open Research Online is the Open University's repository of research publications and other research outputs. It is an open access resource that can be searched and browsed freely by the public.
  http://oro.open.ac.uk/

- The Open Access Tracking Project is a social tagging project for open access resources.
  http://oad.simmons.edu/oadwiki/OA_tracking_project

Open content

- Remixable textbooks: Textbooks are "free online, affordable offline, open license and customisable by editors". According to this network, "educators choose the book – students choose format and price. Everybody wins."
  http://www.flatworldknowledge.com/

- Wikisource is an online library of free content publications, collected and maintained by its community. It contains almost 150,000 texts in the English language library.
  http://en.wikisource.org/wiki/Main_Page

Libraries

- A plea for African digital libraries. The author argues that "African countries are falling behind in building digital libraries and archives to provide continent-wide access to local knowledge — and the poorest are likely to bear the brunt of this".
  http://www.scidev.net/en/news/plea-for-african-digital-libraries.html

Organisations

- **Electronic Information for Libraries** (eIFL.net) – A not-for-profit organisation that supports and advocates for the wide availability of electronic resources by library users in transitional and developing countries. eFIL.net has this useful page of A2K links to reading material and resources.
  http://plip.eifl.net/eifl-ip/issues/access-to-knowledge-a2k

- **International Federation of Library Associations** – IFLA's Committee on Copyright and other Legal Matters (CLM) was created to advise IFLA and represents the voice of the international library community in copyright and intellectual property concerns, and makes regular submissions to WIPO.
  http://www.ifla.org/en/clm

- **Open Knowledge Forum** – Founded in 2004, is a not-for-profit organisation promoting open knowledge: sonnets to statistics, genes to geodata that can be freely used, reused, and redistributed.
  http://www.okfn.org

- **The Foundation for P2P Alternatives** – Led by Michael Bauwens, believes that peer-to-peer networking, on which the Internet is based, also offers a foundation for many other realms of human ordering including commons-based peer production.
  http://p2pfoundation.net/A2K_Access_to_Knowledge

- **Free Knowledge EU** – A self-description: "Inspired by the Free Software movement, the FKI promotes freedom of use, modification, copying and distribution of knowledge in four different but highly related fields: education, technology, culture and science."
  http://freeknowledge.eu

- **Science Commons** – Works to promote "the continuous production and reuse of knowledge that is at the heart of the scientific method," which forms "the building blocks of a new collaborative infrastructure to make scientific discovery easier by design."
  http://sciencecommons.org/projects/publishing/background-briefing

Mailing lists

- Bibliotheca Alexandrina, the new Library of Alexandria based in Egypt, provides this newsletter on library and A2K news.
  http://www.bibalex.org/AllNewsletters/Subscribe.aspx?id=KHS6QDfxvRqCbYdABX7ANA==
- OADL: Open Access Digital Libraries is a community supporting and promoting open access to scholarly literature and developing Digital Libraries for Open Access.
  http://groups.yahoo.com/group/oadl/

CHAPTER 4

Promoting human rights in the information society

This chapter looks at the broader context of the A2K movement, beyond the intellectual property debate. Other issues that impact upon access to knowledge include communications rights (which is itself a hybrid term encompassing things like freedom of expression, censorship and privacy, which impact consumers' ability to send and receive information), access to telecommunications (including telephones, the Internet, community radio, and wireless spectrum) and telecommunications consumer protection.

Here we will address the first two of these larger issues, before briefly looking at the higher level issue of governance: what issues face the global consumer movement in participating in access to knowledge debates?

4.1 Communications rights

The concept of the right to communicate began in 1969 with Jean D'Arcy and evolved in the Right to Communicate Group, the many non-governmental and civil society organisations that made up the Platform for Cooperation on Communication and Democratisation, and the Communication Rights in the Information Society (CRIS) Campaign.

The first broad-based debate on media and communication globally, limited mainly to governments, ran for a decade from the mid-1970s. Governments of the South, by then a majority in the UN, began voicing demands in UNESCO concerning media concentration, the flow of news, and "cultural imperialism." The MacBride Report (1981) studied

the problem, articulating a general "right to communicate." The debate was compromised, however, by Cold War rhetoric, and fell apart after the US and the UK pulled out of UNESCO, as described in more detail below.

> Communication rights go beyond mere freedom of opinion and expression, to include areas such as democratic media governance, participation in one's own culture, linguistic rights, rights to enjoy the fruits of human creativity, to education, privacy, peaceful assembly, and self-determination. These are questions of inclusion and exclusion, of quality and accessibility. In short, they are questions of human dignity.
>
> *– No-Nonsense guide to Communication Rights*

The second phase of the communications rights movement took shape from the 1990s onwards, when NGOs and activists became increasingly active in a variety of communication issues, from community media, to language rights, to copyright, to Internet provision and free and open source software. These coalesced in a number of umbrella groups tackling inter-related issues from which the pluralistic notion of communication rights began to take shape, this time from the ground up.[1]

According to an assessment framework developed by the CRIS Campaign, the Four Pillars of Communication Rights are:

- Communicating in the Public Sphere: The role of communication and media in exercising democratic political participation in society.
- Communication Knowledge: The terms and means by which knowledge generated by society is communicated, or blocked, for use by different groups.
- Civil Rights in Communication: The exercise of civil rights relating to the processes of communication in society.
- Cultural Rights in Communication: The communication of diverse cultures, cultural forms and identities at the individual and social levels.[2]

[1] http://en.wikipedia.org/wiki/Communication_Rights

[2] Communication Rights in the Information Society, *Assessing Communications Rights: A Handbook*. 2005 ⟨URL: http://www.crisinfo.org/pdf/ggpen.pdf⟩, p. 40-41.

A "right to communicate" and "communication rights" are closely related, but not identical, in their history and usage. The former is more associated with the intergovernmental debates that led to the MacBride report, and points to the need for a formal legal acknowledgement of such a right, as an overall framework for more effective implementation. It also makes intuitive sense as a basic human right. The latter emphasises the fact that an array of international rights underpinning communication already exists, but many are too often ignored and require active mobilisation and assertion.

The use of the term "communication rights," in the plural form, implicitly points towards existing human rights that relate to communication, and away from promoting a new formal right to communicate (in the singular) in international law. The emphasis subtly shifts towards realising existing communication rights on the ground.[3] The balance of this section will examine some of the aspects of communications rights in this broadest sense.

4.1.1 Democratic public media

The communication rights debate has been shaped by different forces and thrusts at diverse points of time. As noted above, the MacBride Report to UNESCO articulated most comprehensively a right to communicate in 1981, but its calls for a "New World Information and Communication Order" (NWICO), involving democratisation of the media and more egalitarian access to information was condemned by countries such as the US and the UK as attempts to curb freedom of the press.[4] In 1984, the United States withheld its contributions and withdrew from the organisation in protest, followed by the United Kingdom in 1985 and Singapore in 1986. Following a change of government in 1997, the UK rejoined. The United States rejoined in 2003, followed by Singapore on 8 October 2007.[5]

Nonetheless, "Communication and information" is today one of five major UNESCO programmes,[6] and its International Programme for the

[3] Lee, Philip, Turley, Anna and Thomas, Pradip, *The No-Nonsense Guide to Communication Rights*. 2005 ⟨URL: http://www.centreforcommunicationrights.org/images/stories/database/building_and_recognising_com_rights/communication%20rights.pdf⟩.

[4] Idem, *The No-Nonsense Guide to Communication Rights*. 2005 ⟨URL: http://www.centreforcommunicationrights.org/images/stories/database/building_and_recognising_com_rights/communication%20rights.pdf⟩, *op. cit.*.

[5] http://en.wikipedia.org/wiki/UNESCO

[6] http://www.unesco.org/webworld

Development of Communication (IPDC) is an enduring outcome of the MacBride report.

A second UNESCO programme with relevance to the access to knowledge movement is its Information For All Project (IFAP), established in 2000, which aims to promote access to information through ICTs. The International Federation of Library Associations and Institutions (IFLA) and its member Electronic Information for Libraries (eIFL) are other international institutions that promote this vision.

4.1.2 Privacy

Privacy (from Latin *privatus* "separated from the rest, deprived of something," and from *privo* "to deprive") is the ability of an individual or group to seclude themselves or information about themselves and thereby reveal themselves selectively.[7]

There are differences in the legal treatment of privacy in different jurisdictions, with the EU in particular having much stricter standards than the US. Likewise, there is a trade-off between privacy and security. In recent years, terrorism, piracy and child pornography have been increasingly used to justify privacy intrusions.

Online privacy as such is a much broader domain than can be adequately covered here, ranging from cloud computing, to childrens' online privacy, Facebook, the Google Books settlement, medical record privacy, national IDs, open government, search engine privacy, the smart grid, social network privacy and even whole body imaging.[8] However, a few cases of particular relevance to the A2K debate will be discussed in turn.

Online anonymity

For long, posting on the Internet could be done anonymously, or using pseudonyms that were not personally identifying. This offered users more freedom of expression, if less accountability. One example is of the collaboratively-crafted online Wikipedia encyclopedia, written mostly by authors with unidentifiable pseudonyms or IP addresses.

In recent times, it has become increasingly difficult to maintain online anonymity. IP addresses can be tracked, making it possible to track from which computer or network a certain post was made – though not the actual user. Some countries have tightened their laws on Internet use, aggravating the problem. For example, in July 2010 China revealed

[7] http://en.wikipedia.org/wiki/Privacy
[8] http://epic.org/

its plans to require Internet users to register their real names before posting online.[9]

There are however some "anonymising services" like I2P and Tor which are designed to bypass IP tracking technologies. It is believed that their distributed technology approach might offer better security than centralised anonymising services, where a central point exists and could disclose one's identity.[10]

Tor

Tor is free software and an open network that helps you defend against a form of network surveillance that threatens personal freedom and privacy, confidential business activities and relationships, and state security known as traffic analysis.

Tor protects you by bouncing your communications around a distributed network of relays run by volunteers all around the world: it prevents somebody watching your Internet connection from learning what sites you visit, and it prevents the sites you visit from learning your physical location. Tor works with many of your existing applications, including web browsers, instant messaging clients, remote login, and other applications based on the TCP protocol.

Hundreds of thousands of people around the world use Tor for a wide variety of reasons: journalists and bloggers, human rights workers, law enforcement officers, soldiers, corporations, citizens of repressive regimes, and just ordinary citizens.

– Excerpted from http://www.torproject.org/

Data retention

The retention of data relating to users' online activities is one area in which privacy principles collide on the one hand with the desires of law enforcement authorities, and on the other with the marketing plans of the private sector.

As far as law enforcement is concerned, many countries have either legislated or introduced "voluntary" codes of practice to require ISPs to retain a variety of data recording their users' activities on the Internet. The EU data retention directive (2006/24/EC) applies to both voice and data communications. As far as Internet access is concerned, is requires ISP to retain the user ID of users, email addresses of senders and recipi-

[9] Chang, Anita, *China seeks to reduce Internet users' anonymity*. 2010 ⟨URL: http://news.yahoo.com/s/ap/20100713/ap_on_re_as/as_china_internet⟩.

[10] http://en.wikipedia.org/wiki/Anonymity

ents, the date and time that users logged on and off from a service, and the IP address (whether dynamic or static) applied to their user ID.

This directive is implemented in the UK in the form of a Voluntary Code of Practice on Retention of Communications[11] which took effect in 2009, and which requires logs of emails and Websites visited to be retained for between four days and six months. In February 2010, the FBI was reported to be seeking similar requirements of US ISPs.[12] An equally stringent data retention regime is proposed for Australia.[13]

Data retention is also practised by the private sector for their own purposes, which include online marketing. On this count, many of the large Internet businesses have had a poor record on privacy. For instance, Facebook raised concern by its repeated changes of its privacy policy. In March 2009 it was noted as having announced "another set of revisions" to this policy, which was seen as making it easier for Facebook to gather locational data on users and to disclose user data to third-party Websites. "It also appears that Facebook will make more use of data set to 'Everyone."', said the epic.org site.[14]

Surveillance and IPR enforcement

One particularly worrying application of the practice of surveillance and data retention by ISPs is for the purpose of identifying users suspected of intellectual property infringement. It is quite simple for rights holders to obtain the IP address of those who participate in file sharing over the Internet. It is also relatively simple for the ISP who controls that IP address to provide the personal details of the customer who was using it at the time of an alleged infringement.

Whilst almost all ISPs will require a subpoena or court order to release customer details, there are ways rights holders can get around this. In April 2010, the Irish High Court determined that a private "graduated response" regime that formed part of a settlement agreement between the Irish Recorded Music Association (IRMA) and its largest ISP, Eircom, did not infringe its users' privacy, despite the fact that IRMA and Eircom would be dealing in users' IP addresses. The reason is that the personal details associated with a given IP address would not be disclosed

[11] http://www.opsi.gov.uk/si/si2003/draft/5b.pdf

[12] McCullagh, Declan, *FBI wants records kept of Web sites visited.* 2010 ⟨URL: http://news.cnet.com/8301-13578_3-10448060-38.html⟩.

[13] Grubb, Ben, *Inside Australia's data retention proposal.* 2010 ⟨URL: http://www.zdnet.com.au/inside-australia-s-data-retention-proposal-339303862.htm⟩.

[14] http://epic.org/2010/03/facebook-announces-changes-to.html

to IRMA, and an IP address alone does not constitute "personal information". In the month following the judgment, Eircom commenced its policy of disconnecting users.[15]

Another privacy concern for the A2K movement is deep packet inspection (DPI), a technology by which Internet traffic generated by a user is monitored for certain characteristics: for example, to detect whether the connection is being used for file sharing. Since November 2009, UK ISP Virgin Media has been using DPI to measure copyrighted material passing through its network, without informing its users. This led to a complaint from Privacy International[16] to the European Commission, which remains pending.[17]

4.1.3 Freedom of expression

Freedom of speech implies being able to speak without censorship or limitation. Freedom of expression goes beyond free speech and also involves the ability to seek, receive and impart information or ideas in any medium. Most countries impose certain limits upon the exercise of free expression – for instance curtailing hate-speech and the fomenting of inter-religious strife.

Whilst privacy is more strongly protected in Europe than in the US, for freedom of expression the opposite is the case: the US constitutionally protects much speech that would be disallowed in parts of Europe, such as holocaust denial.

The United Nations High Commissioner for Human Rights (OHCHR) has addressed the issue of freedom of expression on the Internet by calling on all states to:

> refrain from imposing restrictions which are not consistent with the provisions of article 19, paragraph 3, of the International Covenant on Civil and Political Rights, including on: … (c) Access to or use of modern telecommunications technologies, including radio, television and the Internet.[18]

[15] Collins, John, *Eircom to cut broadband over illegal downloads*. 2010 ⟨URL: http://www.irishtimes.com/newspaper/frontpage/2010/0524/1224271013389.html⟩, *op. cit.*.

[16] http://www.privacyinternational.org/

[17] Anderson, Nate, *EU has doubts as ISP rolls out DPI for copyright enforcement*. 2010 ⟨URL: http://arstechnica.com/tech-policy/news/2010/01/eu-has-doubts-as-isp-rolls-out-dpi-for-copyright-enforcement.ars⟩.

[18] United Nations High Commissioner for Human Rights, *The right to freedom of opinion and expression*. 2002 ⟨URL: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2002.48.En⟩.

Cultural sensitivities aside, there is an obvious relationship between freedom of expression and access to knowledge. Freedom of expression protects the ability to communicate existing knowledge to new parties and enables collaboration for the development of new knowledge. Hence, upholding freedom of expression is important in promoting access to knowledge.[19] Policies that impede freedom of expression, such as censorship, arrests, book burning, or propaganda, are opposed by A2K activists as roadblocks to knowledge.

Lea Bishop Shaver argues that access to knowledge is "shaped by a variety of factors, including but not limited to: access to education, support for innovation, technological diffusion, freedom of expression, and intellectual property regulation." Shaver argues that "substantial political and scientific consensus exists" over respect for the freedom of expression and a balanced intellectual property regime.[20]

The A2K@IGF Dynamic Coalition of the Internet Governance Forum has argued for the need of both A2K and freedom of expression in the realm of information and communication technologies.[21] There is also a separate Dynamic Coalition on Internet Rights and Principles, formed from the merger of the former "Framework of Principles for the Internet" and "Internet Bill of Rights" dynamic coalitions. One of its current activities is to review the APC Internet Rights Charter that was last revised in 2006,[22] which includes "Freedom of expression and association" and "Access to knowledge" respectively as its second and third main themes.

Another new institution in this arena, though less multi-stakeholder in composition given that it lacks governmental membership, is the Global Network Initiative (GNI).[23] The GNI, which includes Microsoft, Google and Yahoo from the private sector, alongside civil society groups such as the Electronic Frontiers Foundation (EFF) and Centre for Democracy and Technology (CDT), released a set of Principles on Freedom of Expression and Privacy in October 2008 that is intended to delineate the degree to which the private sector will cooperate with governments that seek its assistance in interfering with the freedom of expression or privacy of their customers.

[19] Shaver, Lea, Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge. I/S: A Journal of Law and Policy for the Information Society, 4 2008, Nr. 2.

[20] Idem, Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge. I/S: A Journal of Law and Policy for the Information Society, 4 2008, Nr. 2, *op. cit.* (as in n. 19).

[21] http://www.intgovforum.org/cms/dynamic-coalitions/74-a2k

[22] http://rights.apc.org/charter.shtml

[23] http://www.globalnetworkinitiative.org

4.1.4 Freedom of Information

Freedom of information legislation guarantees access to data held by the state. It establishes a "right-to-know" legal process by which requests may be made for government-held information, to be received freely or at minimal cost, barring standard exceptions.

Also variously referred to as open records or (especially in the United States) sunshine laws, governments are also typically bound by a duty to publish and promote openness. In many countries there are constitutional guarantees for the right of access to information, but usually these are unused if specific legislation to support them does not exist.

Over 85 countries around the world have implemented some form of such legislation. Sweden's Freedom of the Press Act of 1766 is the oldest.

Other countries are working towards introducing such laws, and many regions of countries with national legislation have local laws. For example, all states of the United States have laws governing access to public documents of state and local taxing entities, in addition to that country's Freedom of Information Act which governs records management of documents in the possession of the federal government.

A related concept is open meetings legislation, which allows access to government meetings, not just to the records of them. In many countries, privacy or data protection laws may be part of the freedom of information legislation; the concepts are often closely tied together in political discourse.

A basic principle behind most freedom of information legislation is that the burden of proof falls on the body asked for information, not the person asking for it. The requester does not usually have to give an explanation for their request, but if the information is not disclosed a valid reason has to be given.[24]

One of the recommendations made at the WSIS summit in 2003 was that governments should "provide adequate access through various communication resources, notably the Internet, to public official information". The most important recent development in this area was the signature in June 2009 of a Convention on Access to Official Documents by 12 of the 47 members of the Council of Europe, which for the first time laid down an intergovernmental benchmark for access to official documents held by public authorities.[25]

[24] http://en.wikipedia.org/wiki/Freedom_of_information_legislation
[25] http://wcd.coe.int/ViewDoc.jsp?id=1377737&Site=CM

Civil society plays a strong role as watchdog in this area. Amongst the key organisations are the Sunlight Foundation,[26] Transparency International (focussed on corruption),[27] Reporters Sans Frontières[28] and Freedom House[29] (focussed on freedom of the press).

In the developing world

As an example from the developing world, the Right to Information Act is a law enacted by the Parliament of India allowing citizens of India to access to records of the Central Government and State Governments. Under the provisions of the Act, a citizen may request information from a "public authority" (a body of Government or "instrumentality of State") which is required to reply expeditiously or within 30 days.

The Act also requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to request for information formally.

This law was passed by Parliament on 15 June 2005 and came fully into force on 13 October 2005.

Information disclosure in India was hitherto restricted by the Official Secrets Act 1923 and various other special laws, which the new RTI Act now relaxes. That law secured information related to security of the State, sovereignty of the country and friendly relations with foreign states, and contained provisions which prohibited disclosure of non-classified information.[30]

There are however other countries throughout the developing world, such as Malaysia, that still lack a Right to Information Act and in which a colonial era Official Secrets Act remains in force.[31]

4.1.5 Network neutrality

Network neutrality (also net neutrality, Internet neutrality) is a principle proposed for user access networks participating in the Internet that advocates no restrictions by Internet Service Providers or governments on

[26] http://sunlightfoundation.com/
[27] http://www.transparency.org/
[28] http://rsf.org/
[29] http://www.freedomhouse.org/
[30] http://en.wikipedia.org/wiki/Right_to_Information
[31] http://en.wikipedia.org/wiki/Official_Secrets_Act_(Malaysia)

content, sites, or platforms, on the kinds of equipment that may be attached, and on the modes of communication allowed.

The principle states that if a given user pays for a certain level of Internet access, and another user pays for the same level of access, that the two users should be able to connect to each other at the subscribed level of access.

Though the term did not enter popular use until several years later, since the early 2000s advocates of net neutrality and associated rules have raised concerns about the ability of broadband providers to use their last mile infrastructure to block Internet applications and content (eg. websites, services, protocols), particularly those of competitors. In the US particularly, but elsewhere as well, the possibility of regulations designed to mandate the neutrality of the Internet has been subject to fierce debate.

Neutrality proponents claim that telecom companies seek to impose a tiered service model in order to control the pipeline and thereby remove competition, create artificial scarcity, and oblige subscribers to buy their otherwise uncompetitive services. Many believe net neutrality to be primarily important as a preservation of current freedoms. Vinton Cerf, considered a "father of the Internet" and co-inventor of the Internet Protocol, Tim Berners-Lee, creator of the Web, and many others have spoken out in favour of network neutrality.

Opponents of net neutrality characterise its regulations as "a solution in search of a problem," arguing that broadband service providers have no plans to block content or degrade network performance. In spite of this claim, certain Internet service providers have intentionally slowed peer-to-peer (P2P) communications. Still other companies have acted in contrast to these assertions of hands-off behavior and have begun to use deep packet inspection to discriminate against P2P, FTP and online games, instituting a cell-phone style billing system of overages, free-to-telecom "value added" services, and bundling.

Critics of net neutrality also argue that data discrimination of some kinds, particularly to guarantee quality of service, is not problematic, but is actually highly desirable. Bob Kahn has called the term net neutrality a "slogan" and states that he opposes establishing it, however he admits that he is against the fragmentation of the net whenever this becomes excluding to other participants.[32]

[32] http://en.wikipedia.org/wiki/Net_neutrality

US FCC on "Open Internet"

The Federal Communications Commission (FCC) has proposed stricter rules to, "ensure that Internet providers don't block or slow traffic over their networks." The FCC also launched a website it says is specifically designed to encourage thoughts and ideas on an open internet.

OpenInternet.gov "will continue to adapt to best facilitate input and participation in the commission proceedings as this discussion evolves," says the site.[33]

In 2007, the Associated Press reported that network provider Comcast was actively interfering with attempts by some of its high-speed Internet subscribers to share files online. "Comcast's interference affects all types of content, meaning that, for instance, an independent movie producer who wanted to distribute his work using BitTorrent and his Comcast connection could find that difficult or impossible." The AP found that Comcast's conduct had a "drastic effect . . . on one type of traffic – in some cases blocking it rather than slowing it down."

Over twenty thousand Americans similarly complained of "Comcast's blatant and deceptive blocking of peer-to-peer communications" and requested the FCC to "take immediate action to put an abrupt end to this harmful practice." The FCC investigated and ruled against Comcast, asking it to disclose to subscribers in the future how it plans to manage traffic. Comcast had said that its measures to slow BitTorrent transfers, which it voluntarily ended in March, were necessary to prevent its network from being overrun.[34]

In an April 2010 order, the US Court of Appeals for the District of Columbia Circuit vacated the FCC's earlier ruling against Comcast, on the basis that the FCC lacked the authority to enforce net neutrality rules. The FCC has since sought the extension of its regulatory authority to enforce net neutrality principles against US ISPs.

4.2 Access to ICTs

Ideally, access to information and communication technologies allows users to participate in a rapidly changing world in which work and other activities are increasingly transformed by access to varied and developing technologies. ICT tools can be used to find, explore, analyse, exchange

[33] http://www.shareconnector.com/fcc-launches-open-internet-website

[34] http://www.katonda.com/blog/990/net-neutrality-dead-us-comcast-defeats-fcc-court

and present information responsibly and without discrimination. ICTs can be employed to give users quick access to ideas and experiences from a wide range of people, communities and cultures.[35]

In practice however, the digital divide makes this a dream for many. The term "digital divide" refers to the gap between people with effective access to ICTs and those with very limited or no access at all. It includes the imbalances in physical access to technology as well as the imbalances in resources and skills needed to effectively participate as a digital citizen.

The term is closely related to the knowledge divide as the lack of technology causes lack of useful information and knowledge – hence the profound relevance of access to ICTs to the A2K movement. The term "global digital divide" refers to differences in technology access between countries or regions of the world.[36]

The global digital divide between the developed and the developing world is an aspect of a much broader social problem of economic inequality. The United Nations' Millennium Development Goals (MDG) are an umbrella programme for addressing such issues at the broadest level,[37] including the need for investment in Internet infrastructure and services in regions suffering from the digital divide.

4.2.1 Access to the Internet

Access to ICT services including the Internet depends on a number of factors, including infrastructure, which are constrained in most developing countries. David Souter, a specialist in ICTs for development, notes that global institutions continue to focus on policy and regulatory change, rather than direct investment, in addressing communications infrastructure deficits. Private sector investment remains high and is expected to continue to grow, with mobile communications businesses seeming increasingly likely to lead the provision of broadband access in low income countries, as they previously led the provision of telephony.[38]

The International Telecommunications Union maintains a regularly updated index of access to the Internet around the world. Its 2009 statistics show that over 90% of the population of the Scandanavian countries of Sweden, Norway and Iceland were Internet users, as against close to 0% in developing countries such as Bangladesh, Timor-Leste, Myanmar

[35] http://en.wikipedia.org/wiki/Information_and_communication_technologies
[36] http://en.wikipedia.org/wiki/Digital_divide
[37] See http://www.un.org/millenniumgoals/.
[38] Souter, David; Finlay, Alan, editor, Chap. Institutional Overview In Global Information Society Watch 2008. Uruguay: APC and Hivos, 2008, p. 43.

and Sierra Leone.[39] For broadband Internet, the highest percentage of users was in Liechtenstein at 75%, with a great many more countries closer to 0%. Having said this, the statistics show that the gap in access between developed and developing countries is narrowing over time.

In Africa

Most educational institutions have little or no access to the Internet and networks, and bandwidth is limited. Expanding networking would encourage institutions and local journal publishers to build websites and provide content online, so helping users to access research materials – particularly if they were made available free of charge.

To this end, the arrival of fibre-optic cables in African countries is very timely. In July last year, the first of four undersea fibre-optic cables went live, connecting Africans along the east coast to high speed broadband Internet. The lines touch ground in Kenya, Tanzania, Mozambique and South Africa.

Developing strong ICT policies is not just about improving Internet coverage – it also includes supporting institutions to manage intranets, repositories and networking projects. For example, the Kenya Education Network Trust (KENET) promotes the use of ICT in teaching, learning and research in higher education institutions.

KENET aims to connect all of Kenya's universities, colleges and research institutions through a private network that also has high-speed Internet access. It enables electronic communication among students and faculty in member institutions and sharing of learning and teaching resources by collaborating on the development of educational content.

African researchers can also make use of external networks, particularly those of non-governmental organisations that are committed to disseminating information. The UN University, for example, offers free support, guidance and course materials to universities in the developing world that want to share courses and develop their own open access Websites.[40]

[39] http://www.itu.int/ITU-D/ict/statistics/

[40] Musakali, Joseph Juma, *Bridging the digital divide through open access*. 2010 ⟨URL: http://www.scidev.net/en/opinions/bridging-the-digital-divide-through-open-access.html⟩, *op. cit.*.

4.2.2 Low cost computing

Since computers have become an increasingly indispensable tool for accessing and spreading information, the cost of computing is a crucial issue which decides how effectively we can gain access to information and knowledge.

As the cost of hardware declines, the type of software used – whether proprietary or free – is an important concern. ("Free" refers to "freedom" and not necessarily "zero-price", though "free" software can also be copied freely.) Says the Appropedia: "By using Linux, we encourage and tap into a community of users and open-source programmers who are likely to support our efforts. Windows also is more resource-hungry, less reliable and stable than Linux."[41]

Attempts have been made to lower the price of hardware too. There are several projects to develop and sell a low cost computer for the developing world. Some have been more successful than others. Many have failed to live up to their promised potential.

Some such projects include the XO-1 (formerly known as the $100 Laptop or Children's Machine), and being developed by the One Laptop per Child (OLPC) association; the Simputer attempt from India (of sharable computing); Classmate PCW being developed by Intel; Eee PCW cheap Laptop being developed by ASUS; Jhai Foundation's work in Laos; the Nigerian project to build a very sturdy and dust-resistant though costly (US$1100) computer; the simplified Inveneo computer (a computer for rural areas) designed in San Francisco by Inveneo (costs from about US$300 to US$470, is small, runs from a 12VDC battery, and uses a fraction of the power of a regular computer); along with numerous projects not focused on the developing world, that could be easily ported.

Other attempts have been made by deploying second-hand computers, working on Computerbanks, and the like. For some years computers have been sufficiently powerful to be used by more than one user (even using a graphical interface). What is needed to tap this capability is to equip computers with one or more graphic cards supporting more than one monitor, and several USB keyboards and mice.

4.3 Governance

The final class of issues to be briefly described under the heading of promoting human rights in the information society are issues of governance.

[41] http://www.appropedia.org/Low_cost_computer_guide

This is an overarching concern for the global consumer movement that relates to the ability of civil society to participate in the development of global public policy for the information society.

A number of governance institutions have opened up allow civil society participation in some form, but barriers of cost and capacity still impede consumer representatives from fully participating in these institutions. It is particularly difficult to ensure that the views of consumers in the global South are adequately represented in policy development processes at a global and regional level.[42]

4.3.1 Participation

Amongst the global institutions whose decisions bear on access to knowledge are:

- Specialised IP agencies such as WIPO and the TRIPS Council of the WTO.
- Other UN agencies such as the United Nations Economic and Social Council (ECOSOC).
- Narrower plurilateral treaty organisations such as the ACTA committee.
- Regional groups such as the EU, the Organisation for Economic Cooperation and Development (OECD), Transatlantic Economic Council, Asia-Pacific Economic Cooperation (APEC), South Asian Association for Regional Cooperation (SAARC), Mercusor, and Association of South East Asian Nations (ASEAN).
- Standards bodies such as the IETF, W3C, ITU and International Standards Organisation (ISO).
- Bodies involved in critical Internet resource distribution such as the Internet Corporation for Assigned Names and Numbers (ICANN) and regional Internet registries.
- Multi-stakeholder discussion fora such as the Internet Governance Forum.

[42] Panos Institute, *Louder Voices: Strengthening developing country participation in international ICT decision-making*. 2002 ⟨URL: http://www.panos.org.uk/?lid=324⟩.

The level of participation that civil society is afforded in such institutions varies widely, from none at all (as in negotiations over ACTA), to an active observer role (as in WIPO standing committees), to formal advisory groups (as in OECD advisory committees), to equality with governments (as at the Internet Governance Forum).

Obviously, civil society wishes to have the maximum possible level of input into decision making on A2K issues. But this is complicated by the lack of standards for civil society participation in international fora dealing with these issues. The closest that exists to such a standard comes from the World Summit on the Information Society, which acknowledged that "international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organisations."

Following from this, the Summit made two recommendations: firstly by calling for the establishment of "a process of enhanced cooperation" by which governments are to lead the development of globally applicable public policy principles for the Internet, and secondly (but as a part of that broader process) by establishing an Internet Governance Forum (IGF) as a new forum for multi-stakeholder policy dialogue in which governments can take an equal role and responsibility for Internet governance and policy making in consultation with all other stakeholders.[43]

In this respect, the IGF marks a significant progression, in that it is open to all stakeholders, including (uniquely for a UN body) unaffiliated individuals, with the object of allowing civil society an equal opportunity to participate in policy discussion with all other groups in an unsegregated forum. To date however, this ethic of multi-stakeholderism has not permeated very well through to other institutions of global governance that deal with A2K issues.

4.3.2 Transparency

Transparency is a means of holding public officials accountable and fighting corruption. When government meetings are open to the press and the public, when budgets and financial statements may be reviewed by anyone, when laws, rules and decisions are open to discussion, they are seen as transparent and there is less opportunity for the authorities to abuse the system in their own interest.[44]

[43] http://www.itu.int/wsis/docs2/tunis/off/6rev1.html
[44] http://en.wikipedia.org/wiki/Transparency_(behavior)

As in the case of opportunities for participation, the level of transparency that exists in A2K policy making varies widely between institutions. The lack of transparency in the ACTA negotiations has already been observed. In comparison, at WIPO, civil society organisations have relatively easy access to plenary negotiations (though not to private bloc negotiations), and negotiation texts are distributed and published on the Internet.

Some organisations and networks, for example, the GNU/Linux community and Indymedia, insist that not only the ordinary information of interest to the community is made freely available, but that all (or nearly all) meta-levels of organising and decision-making are themselves also published. This is known as radical transparency.

Part of A2K activism involves advocating for greater transparency in policy processes, as necessary to maintain a public sphere in which civil society can have effective input and oversight of those processes. One of the tools that activists use in this endeavour is the mass media. When that fails, they often have recourse to peer-to-peer communications channels such as the "blogosphere," Twitter, and Web sites such as Wikileaks.[45]

Policy laundering

An antithesis to transparency is the practice of policy laundering, commonly used as a tactic by IP maximalist lobbyists. The term policy laundering is used to describe means to disguise the origin of political decisions, laws or international treaties. The term is based on the similar money laundering. One common method for policy laundering is the use of international treaties which are formulated in secrecy. Afterwards it is not possible to find out who supported which part of the treaty. Each party can claim that it was not them who demanded a certain paragraph but that they had to agree to the overall "compromise".[46] ACTA is the archetypal example of policy laundering in action.

A civil society coalition dedicated to exposing this tactic is the Policy Laundering Project,[47] which focuses on issues such as communications surveillance; travel surveillance; identity documents; terrorist watch lists; migration and border controls; security cooperation and financial surveillance.

[45] http://www.wikileaks.org/
[46] http://en.wikipedia.org/wiki/Policy_laundering
[47] http://www.policylaundering.org/

Useful links for this chapter

Communications rights

- UNESCO's Information Society Portal is an Internet-based gateway to online resources on ethical, legal, socio-cultural and policy issues of the Information Society.
  http://www.unesco-ci.org/cgi-bin/portals/information-society/page.cgi?d=1

Privacy

- EFF's Top 12 Ways to Protect Your Online Privacy
  http://www.eff.org/wp/effs-top-12-ways-protect-your-online-privacy

Access to information

- Free Government Information is a librarian-launched initiative "to raise public awareness of the importance of government information and create a community with various stakeholders to facilitate an open and critical dialogue."
  http://www.freegovinfo.info

Organisations

- **EPIC** – The Electronic Privacy Information Centre, is a public interest research center in Washington, D.C., set up in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the US First Amendment, and constitutional values.
  http://epic.org/

- **Electronic Frontier Finland** – EFF's equivalent body in Finland. Set up to "defend the citizens of electronic rights". Links to action, publications, more about the association, and online links.
  http://www.effi.org

- **European Digital Rights Initiative** – Founded in June 2002. Some 27 privacy and civil rights organisations, from 17 countries of Europe, are EDRI members. Members aim to "defend civil rights in the information society." This group sees growing regulation regarding the Internet, copyright and privacy as originating from European institutions, or from international institutions with a strong impact in Europe.
  http://www.edri.org

- **Foundation for Information Policy Research** – A body that studies the interaction between information technology and society. Its goal is "to identify technical developments with significant social impact, commission and undertake research into public policy alternatives, and promote public understanding and dialogue between technologists and policy-makers in the UK and Europe." Among its links are those pointing to surveillance, copyright, e-democracy and health privacy.
  http://www.fipr.org

- **OpenNet Initiative** – The OpenNet Initiative is a collaborative partnership of four leading academic institutions which aims "to investigate, expose and analyse Internet filtering and surveillance practices in a credible and non-partisan fashion." It also intends to uncover the potential pitfalls and unintended consequences of these practices, and thus help to inform better public policy and advocacy work in this area.
  http://opennet.net/about-oni

CHAPTER 5

Resources

5.1 Frequently Asked Questions

Why is A2K important?

Access to knowledge is the building block of any "knowledge society." A2K links the idea of access to knowledge to fundamental principles of justice, freedom, and economic development. Access to knowledge is crucial for individuals, institutions and countries who wish to leverage the power of information to move ahead in a competitive knowledge-driven world.

Human societies have always been dependent on knowledge accumulation and knowledge transfer. However, now there is a greater propensity for knowledge to be viewed as a commodity in itself, and as the basis of economic and political configurations of society.

A sophisticated machine may be purchased by a developing country, but that is of no use without the know-how on using it. While earlier the barriers on acquiring such know-how had to do with geographic distances, now it is more a matter of artificial restrictions placed by intellectual property laws of copyrights, patents, trademarks, etc.

The access to knowledge movement aims at "enhancing citizen participation in cultural, civic, and educational affairs, and sharing of the benefits of scientific advancement" by seeking to overcome the disparities in wealth, development, and participatory capabilities created by lack of access to knowledge resources.

Thus, access to knowledge is, as Jack Balkin puts it, "a demand for justice" from developing countries for wider and more equitable distri-

bution of knowledge and is both an issue of economic development and an issue of individual participation and human liberty.

How does A2K affect me personally?

Whether it means accessing books in a library, magazines on the web, or the cost of medicines, the implementation of A2K has a crucial impact on how much information we can get and from where. "Access to knowledge" is not just an abstract concept but one that affects the daily lives of consumers. Whether it is an issue of being able to freely borrow a VCD from a rental library (which is illegal in India), or a matter of reasonably-priced software, access to knowledge affects consumers in a variety of manners.

In a "knowledge economy" such rights make a crucial difference when it comes to accessing infrastructure, the right to access knowledge for health and medicine and education. Such rights, or the lack of them, can make a crucial difference to our daily reality.

What does A2K involve?

A2K issues include everything from:

- Ability to purchase non-exorbitant textbooks, to photocopy materials, to issue books from a library.
- Ability to share music and videos.
- Ability to access governmental data, maps, news.
- Ability to access scientific discoveries and academic publications.
- Ability to access drugs, electronic hardware, computer software, and other "knowledge-embedded goods."
- Ability to prevent misappropriation of traditional knowledge, traditional cultural expressions, traditional means of production (of agriculture and seeds, of medicine, etc.)

These not only promote equitable growth, but also enable democratic participation and enjoyment of civil rights.

The goal of access to knowledge is to improve access to four components of the knowledge economy: access to human knowledge, access to

information, access to KEGs [Knowledge-embedded goods], and access to tools for producing KEGs.[1]

Should I be concerned about A2K even if I'm not primarily a knowledge worker?

Firstly, the distinctions between those who are knowledge workers and those who aren't are breaking down to an extent. Even if you aren't a knowledge worker, you might still use computers and software, and might still listen to music and watch movies, or might still need to put a child through school. When so much of what we do revolves around knowledge of various kinds (knowledge, information, knowledge embedded goods, and tools for working with knowledge embedded goods).

Access to information is critical to addressing the more obvious human rights concerns such as health, food, and women's rights, as argued by Prof Molly Beutz Land of the New York Law School.

How can I get involved with the A2K campaign?

There are a number of organisations working around the world on A2K issues, including Bibliotheca Alexandrina, Electronic Information for Libraries, UNESCO, Yale's Information Society Project, Free Software Foundation, Electronic Frontier Foundation, Shuttleworth Foundation, Knowledge Ecology International, Third World Network, Consumers International, IQSensato, Centre for Internet and Society, Escola de Direito do Rio de Janeiro da Fundação Getulio Vargas, Students for Free Culture, Creative Commons, and a great many other organisations.

You can subscribe to one of the mailing lists, inform others about access to knowledge issues that you face or are aware of, volunteer to help one of these organisations, spread awareness through various media, including blogs, social networks, letters to editors, etc. You can talk to students and librarians and others who are already part of the campaign.

Understand the issue. Search online for groups working on it. Link up with groups campaigning on this front. Implement suitable global ideas at your local level.

[1] Balkin, Jack, *What is Access to Knowledge?* 2006 ⟨URL: http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html⟩, *op. cit.*.

If I'm interested in only one aspect of A2K, why should I try to understand the campaign as a whole?

You don't necessarily have to. Some people are fine with high cost of access to scientific publications as long as governmental data is available for use by the citizenry. Some are okay with inflexible copyright laws as long as patent laws provide adequate flexibilities.

However, there is an alarming trend of various intellectual property laws all increasing (as was the case when the TRIPS Agreement of the World Trade Organisation came into force). This requires greater understanding of the whole campaign.) Moreover, one reform may help out multiple issues, and a single issue may need reform of multiple provisions in copyright law. So, while it is not necessary to understand the campaign as a whole, it is better to do so.

A2K's charm has been its ability to connect diverse campaigns into a cogent whole. At first glance, there might seem little in common software freedom, copyrights, grain, and affordable medicine, the A2K movements explains what common issues are involved here. This helps to build coherent strategies on seemingly unrelated fronts.

5.2 Glossary

A2K – Access to Knowledge is a movement with the objective of ensuring more equitable access to our society's creative and scientific output. Included in its agenda is the reform of copyright and patent law, but also the promotion of alternatives to intellectual property for the protection of creativity and innovation – for example, Creative Commons licensing and innovation prizes.

ACTA – The Anti-Counterfeiting Trade Agreement is a plurilateral agreement in negotiation, outside of WIPO, between developed nations such as the US, EU, Japan, Australia and Canada that would increase the strength of intellectual property enforcement. The ACTA process has been strongly criticised for its secrecy.

Berne Convention – The Berne Convention for the Protection of Literary and Artistic Works is the original global treaty on copyright from 1886 that sets the minimum standard and duration for the protection of literary, artistic, dramatic and musical works. It is administered by WIPO. *See also: copyright, WIPO*

BSD – The BSD (Berkeley Software Distribution) licence was the original licence of the BSD variant of Unix, but is now better known as a general purpose FOSS licence that does not contain any copyleft term.

This means that derivative works of it may be licensed as proprietary software.

CI – Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, we are building a powerful international consumer movement to help protect and empower consumers everywhere. For more information, visit www.consumersinternational.org.

copyleft – Copyleft is a licence term referred to by Creative Commons as share-alike, and sometimes pejoratively as "viral" licensing, which requires those who receive a work under the terms of a particular licence to release any derivative works under the same licence. *See also: Creative Commons, GPL. Synonyms: share-alike*

copyright – Copyright is a statutory monopoly given to the author of a creative work which protects the form of expression of that work against copying or modification by others. The minimum standard of copyright protection is set out in treaties such as the Berne Convention. *See also: Berne Convention*

Creative Commons – Creative Commons is the name of a set of licences which allow a copyright owner to licence his or her work to the public under terms that are less restrictive than what he or she could impose under copyright law. The minimum protection retained by the copyright owner is the right of attribution, but commercial usage or the making of derivative works may also be restricted, and those distributing derivative works may be required to do so under the same licence as the original. *See also: copyleft, open access*

derivative work – The right to create a derivative work of a copyright work, such as an adaptation, translation, arrangement or abridgement, is one of the exclusive rights of a copyright owner. Under US law, the creation of a derivative work may be permitted without licence of the copyright owner under the doctrine of fair use if it is sufficiently transformative.

DRM – Digital Rights Management is a scheme by which a copyright owner seeks to use Technological Protection Mechanisms (TPM) to control the exercise of any of his or her exclusive rights, such as the right to copy or modify a copyright work. DRM includes copy-protection and region coding schemes. *See also: TPM*

eIFL – Electronic Information for Libraries, a prominent NGO which advocates for the interests of libraries and library users.

fair dealing – Fair dealing, not to be confused with the broader doctrine of fair use under US law, allows copyright material to be used for certain enumerated purposes. There is no global list of limitations and

exceptions that constitute fair use, but commonly education and research, parody and satire, review and criticism and the reporting of news are amongst the purposes for which fair dealing exceptions exist in national law. *See also: fair use*

fair use – The doctrine of fair use under US law allows copyright material to be used freely in many circumstances based on the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. *See also: fair dealing*

FOSS – Free and Open Source Software (FOSS), or Free, Libre and Open Source Software (FLOSS) refers collectively to the older term "free software" preferred by the Free Software Foundation (FSF), and the newer term "open source software" preferred by the Open Source Initiative (OSI). Both refer to software licensed on terms that allow it to be copied, modified and distributed freely – for which access to the software's source code is a condition. *Synonyms: FLOSS*

FSF – Free Software Foundation, a prominent NGO promoting the use and development of FOSS.

FTA – A Free Trade Agreement is a bilateral agreement between two countries by which they agree to lower trade restrictions in exchange for certain concessions. In the case of FTAs agreed between the US and other countries, it is usual that the FTA will require the other country to heighten the level of its protection for intellectual property, for example by increasing the length of copyright protection from 50 to 70 years.

GNU – GNU (GNU's Not Unix) is a project of the Free Software Foundation (FSF) to develop a complete FOSS replacement for the proprietary computer operating system Unix. Software released as part of the GNU project is commonly found in distributions of the Linux operating system, leading the FSF to recommend that such systems be referred to as GNU/Linux. *See also: GPL*

GPL – The GNU General Public License is a FOSS licence usually applied to computer software. It contains a provision sometimes referred to "copyleft" (or in Creative Commons parlance as share-alike) which requires any derivative works to be released under the same licence as the original. *See also: copyleft, GNU*

graduated response – Graduated response is a process that copyright owners have negotiated with ISPs, sometimes with legislative back-

ing, to involve ISPs in copyright enforcement. Typically ISPs are required to give two warnings to users whom the copyright owners allege are infringing copyright, then after a third alleged infringement to terminate or suspend the user's Internet connection. *Synonyms: three strikes*

ICANN – The Internet Corporation for Assigned Names and Numbers is a non-profit private body responsible for developing and administering the policies for the allocation of Internet resources such as domain names and IP addresses.

ICT – Information and Communication Technologies include computers, telephones and communication networks such as the Internet.

IETF – The Internet Engineering Task Force is a standards body responsible for development of most of the networking standards for the operation of the Internet.

IGF – The Internet Governance Forum is a forum formed under the auspices of the United Nations, to provide "a transparent, democratic, and multilateral process, with the participation of governments, private sector, civil society and international organisations, in their respective roles" for dialogue on Internet Governance policy.

IP – Usually refers to intellectual property – that is, principally copyright, patents and trade marks. It can also refer to the Internet Protocol which is a component of the TCP/IP networking standard on which the Internet is based. Intellectual Property has been described as a misnomer on two grounds: firstly, different types of intellectual property such as copyright and patents are quite dissimilar legally. Secondly, none of them have much in common with real or personal property. *Synonyms: IPR*

ISP – Internet Service Provider

Linux – Linux is the kernel of a free computer operating system released under the GNU GPL. In common usage, it also refers to complete operating systems based on the Linux kernel and also incorporating other software, including GNU software.

net neutrality – Net neutrality is a movement advocating the equal treatment of Internet content by telecommunications providers and ISPs. The alternative is that differential treatment may be applied to different types of content based on its source or other criteria, including the payment of money by the content provider. *Synonyms: network neutrality*

ODF – OpenDocument Format is an ISO open standard for office documents such as word processing, spreadsheet and presentation files.

It was first implemented by the FOSS OpenOffice.org office suite but is now supported by numerous other products.

open access – Open access is a movement for the publication of documents, especially learning materials, online under free licenses, such as Creative Commons licences. *See also: Creative Commons*

open standard – There are a number of incompatible definitions of what an open standard is, but the definition of the Open Source Initiative (OSI) requires that the standard be freely and publicly available and that it be capable of being implemented in FOSS on royalty-free terms. Another common requirement (for example of the W3C) is that the standard was developed by a neutral body in an open and transparent process.

OSI – Can refer either to the Open Source Initiative, the organisation that promotes the use and development of FOSS, or to the Open Society Institute, a charitable foundation and one of the sponsors of A2Knetwork.org.

Paris Convention – The Paris Convention for the Protection of Industrial Property of 1883 is an intellectual property treaty administered by WIPO that most notably gives contracting parties recourse to each other's intellectual property for the registration of patents. *See also: WIPO*

patent – A patent is a statutory monopoly given to the inventor of a man-made process or product that is novel (that is, not known to the public before) and involves an inventive step (that is, would not be obvious to someone familiar with the existing state of the art). Unlike copyright, a patent can be infringed unintentionally.

public domain – After the term of copyright protection expires, or earlier with the agreement of the copyright owner, a work is said to pass into the public domain. Such a work is no longer subject to the exclusive rights that copyright grants, and as such may be freely copied, modified and broadcast by anyone.

Rome Convention – The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was agreed in 1961 and extended copyright protection to live performances and recordings or broadcasts thereof. It is administered by WIPO. *See also: WIPO, WPPT*

SCCR – WIPO's Standing Committee on Copyright and Related Rights, which is the committee responsible for considering proposals for any new agreement to harmonise or expand copyright limitations and exceptions on a global level. *See also: WIPO*

software – A computer system comprises two parts: hardware and software. The hardware is the physical device which includes a central processing unit (CPU) along with input and output peripherals to allow for communication with the outside world. The software is a set of coded instructions that the computer uses to perform tasks. The most basic tasks are performed by operating system software, and more specific tasks such as word processing by application software.

Sonny Bono Act – The Copyright Term Extension Act 1998 was the United States law that extended the term of protection of most copyrights from 50 to 70 years. It is commonly known as the Sonny Bono Act because it was introduced by congressman and former performer Sonny Bono.

TACD – The Trans-Atlantic Consumer Dialogue is a body affiliated with Consumers International concerned with European and American policy on trade and intellectual property issues affecting consumers.

TPM – Technological Protection Mechanisms are any technical means that a copyright owner may use to implement Digital Rights Management (DRM). The circumvention of TPMs is prohibited by the WIPO Copyright Treaty (WCT) and the national legislation that implements that treaty. Much such legislation is over-broad and even prohibits the circumvention of TPMs for purposes that would qualify as fair use or fair dealing under national law. *See also: DRM, WCT*

TRIPS – TRIPS (Trade-Related aspects of Intellectual Property rights) is one of the intergovernmental agreements to which members of the WTO must agree. It requires members to adhere to earlier intellectual property treaties such as the Berne Convention, but also goes further in requiring the protection of computer software and databases. Failure to abide by the TRIPS agreement can result in trade sanctions.

W3C – The World Wide Web Consortium, the standards body responsible for developing the standards that underlying the World Wide Web.

WBU – The World Blind Union is an NGO representing the interests of visually impaired people, and is largely responsible for pushing the case within WIPO for a new treaty for copyright exceptions and limitations for blind and visually impaired users.

WCT – The WIPO Copyright Treaty of 1996 gives copyright owners a new right of making their work available (for example, by making it accessible on the Internet), and introduces a new prohibition on the circumvention of Technological Protection Measures (TPMs) such as Digital Rights Management information (DRM). *See also: TPM, WIPO*

WIPO – The World Intellectual Property Organisation is an intergovernmental organisation formed in 1967 as a specialised agency of the United Nations. It is responsible for administering the main intellectual property treaties such as the Berne Convention, Paris Convention and Rome Convention. More recently it has also begun to develop new treaties such as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). *See also: Berne Convention, Paris Convention, Rome Convention, SCCR, WCT, WPPT*

WPPT – The WIPO Performances and Phonograms Treaty of 1996 updates the rights of performers and broadcasters as laid out in the Rome Convention by adding new exclusive rights such as the right of rental and the right of making available or communication to the public. *See also: Rome Convention, WIPO*

5.3 A2K quotes

- Knowledge goods are also fundamentally different from physical goods and services. They can be copied. They can be shared. They do not have to be scarce. – Knowledge Ecology International[2]
- Access to knowledge is essential for the functioning of a healthy and democratic society. Without a well informed citizenry, enlightened public discussion cannot take place on political, social, environmental or economic issues. Without widespread debate, the broad consensus upon which a healthy democracy is based cannot be achieved. – eIFL.net[3]
- Access to information/knowledge (is) a basic human right – essential for human survival and development. – Denise Nicholson, ACA2K Policy and Dissemination Advisor[4]
- Access to knowledge is fundamental to education and research and the creation of human capital upon which the development of societies depend. This is especially true in the information society where economic progress depends on having a literate and educated population. – eIFL.net[5]

[2] http://www.cptech.org/a2k/

[3] http://plip.eifl.net/news/spotlight/libraries-promoting

[4] http://www.aca2k.org/attachments/247_ACA2K%20COPYRIGHT%20FOR%20SA%20NATIONAL%20DIALOGUE%20NOVEMBER%202009%20(slides%20only)-Nicholson.ppt

[5] http://plip.eifl.net/news/spotlight/libraries-promoting

- While the A2K movement is concerned about fairness and access to knowledge, it also is supportive of creative and inventive communities. To reconcile these interests, we promote new paradigms for the creation and management of knowledge resources. – Knowledge Ecology International[6]

- The rich and the poor can be more equal with regard to knowledge goods than to many other areas. – Knowledge Ecology International[7]

- If the 20th century's primary objects of trade were oil, steel and unskilled labor; the 21st century deals in information, technology and knowledge. – Lea Shaver[8]

- Access to knowledge is important in many different dimensions; including but not limited to personal, social and economic development, the advancement of science, health, freedom and the exercise of political power. The freedom to use inventions and new knowledge is also important for technological innovation. – James Love[9]

- A2K, i.e. Access to Knowledge = open access to knowledge and knowledge tools for the broadest number of people. A2K is a meme which tries to unify various approaches such as Open Access, Open Content, Open Knowledge, Creative Commons, etc under one umbrella. It is also a loose coalition of groups who fight for this goal. – P2P Foundation[10]

- The Access to Knowledge (A2K) movement is a loose Collection of civil society groups, governments, and individuals converging on the idea that access to knowledge should be linked to fundamental principles of justice, freedom and economic development. – Wikipedia[11]

[6] http://www.cptech.org/a2k/
[7] http://www.cptech.org/a2k/
[8] Shaver, Lea, editor, *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development*. New Haven, CT: Yale University Information Society Project, 2008, p. 8.
[9] Biblioteca Alexandria, *Access to Knowledge Toolkit II*. 2009 ⟨URL: www1.bibalex.org/a2k/attachments/references/reffileu24bkg55ykqwgc55zysxzq45.pdf⟩, p. 7.
[10] http://p2pfoundation.net/A2K_Access_to_Knowledge
[11] http://en.wikipedia.org/wiki/Access_to_Knowledge_movement

- Access to Knowledge is a set of principles that emerge from a loose Collection of different social movements. These social movements, in turn, are responding to changes in economy and society produced by new information technologies. – Jack M Balkin[12]

- Access to knowledge refers to four different things.

  - Human knowledge – education, know-how, and the creation of human capital through learning new skills.
  - Information – like news, medical information, data, and weather reports.
  - Knowledge embedded goods (KEGs) – goods where the inputs to production involve significant amounts of scientific and technical knowledge, often but not exclusively protected by intellectual property rights. Some key examples are drugs, electronic hardware, and computer software, but in contemporary economic life, information and intellectual property provide an increasingly important share of almost all valuable goods.
  - Tools for the production of KEGs – examples include scientific and research tools, materials and compounds for experimentation, computer programs and computer hardware. – P2P Foundation[13]

- Access to Knowledge is a demand of justice ... Access to Knowledge is both an issue of economic development and an issue of individual participation and human liberty.... Access to Knowledge is about intellectual property, but it is also about far more than that. – Jack M. Balkin[14]

- A2K has become an established global movement, though without structure or formal membership. Like the beginnings of the environmental movement half a century ago, A2K has united a variety of groups and individuals in a common cause – in this case librarians, consumer and disability organisations, academics, the free software community and public health activists. They are brought

[12] Balkin, Jack, *What is Access to Knowledge?* 2006 ⟨URL: http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html⟩, *op. cit.*.

[13] http://p2pfoundation.net/A2K_Access_to_Knowledge

[14] Idem, *What is Access to Knowledge?* 2006 ⟨URL: http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html⟩, *op. cit.*.

together by the belief that fair Access to Knowledge is a vital component of an open and democratic society, encouraging creativity and fostering innovation, culture and economic development. – Barbara Stratton[15]

- Access to knowledge (A2K) is essential for promoting human rights, economic and cultural development, innovation, individual freedom and creativity. – Yale Law School Information Society Project[16]

[15] Biblioteca Alexandria, *Access to Knowledge Toolkit II.* 2009 ⟨URL: www1.bibalex.org/a2k/attachments/references/reffileu24bkg55ykqwgc55zysxzq45.pdf⟩, *op. cit.*, p. 18.
[16] http://www.law.yale.edu/intellectuallife/7118.htm

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This handbook is a collaborative work that draws together materials from a wide range of freely-licensed sources, with new and linking text written especially for this book. Passages that are cited from Creative Commons-licensed original texts have been adapted into the text with a footnote for attribution, but generally without being marked as quotations. Please follow the URL in the footnote that accompanies each passage for the exact licensing terms of the original.

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a2knetwork.org

Access to Knowledge

a guide for everyone

Access to Knowledge (A2K) is the umbrella term for a movement that aims to create more equitable public access to the products of human culture and learning. The ultimate objective of the movement is to create a world in which educational and cultural works are accessible to all, and in which consumers and creators alike participate in a vibrant ecosystem of innovation and creativity.

These goals are of interest to a broad coalition of consumer groups, NGOs, activists, Internet users and others. However for many of them, coming to grips with the issues involved in the A2K movement can be daunting. These issues, including copyright and patent law reform, open content licensing, and communications rights, often involve legal and technological concepts that even specialists find difficult.

The purpose of this book is to provide an accessible introduction to the A2K movement and the institutions, concepts and issues involved in it, for those who would like to become involved but don't know where to start. In a truly collaborative exercise, information from various freely-licensed sources has been combined with text especially written for this book, and the whole has been made available for you to freely copy, share and modify.

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