

## SECTION 5 – RESISTANCE FROM THE SOUTH TO THE GLOBAL COPYRIGHT SYSTEM

### 5.1 Introduction

Countries of the South have not recently learnt about the problems associated with copyright; resistance has been present for some time. Resistance from the global South can, and does, take many forms. Resistance happens within the framework of copyright and intellectual property. For example, the General Public License (GPL) turns copyright on its head by providing incentives to share ideas instead of own them, but the GPL resists copyright from within the paradigm of copyright. A second way of looking at resistance is to see the system of copyright as a system of rights which legitimates a type of violence as people round the world are forced to adhere to the law. Thus, one should ask: how do you go outside copyright and intellectual property rights? Third, given the commonalities with other traditions, it is important to consider building alliances with other areas of resistance to IPRs. This 'environmentalism for the net,' as described by James Boyle, seeks to formulate a diverse movement working towards the same cause. Just as the early days of the environmental movement saw people from different paths of life coming together for a single cause, it is possible to conceptualise resistance to copyright along similar lines. One possibility is to think about intellectual property in the context of the International Information Order as a way of building convergence around the topic.

Though TRIPS is not the only intellectual property regime impacting on the global South, it has served as a focal point for resistance because it clarified the international dimensions of intellectual property and created the conditions for resistance along north/south lines. The TRIPS+ agenda reinforced the view from the South that linking intellectual property to 'free trade' means free trade for the global north and continued poverty for the global south. Thus, ten years after its inception, there are numerous streams of resistance to TRIPS and to copyright specifically.

First, governments in the global south have resisted the TRIPS agreement since the earliest negotiations over the terms of the agreement and have sought to mitigate the most damaging aspects of the agreement (with little success). Second, social movements resisting different aspects of the TRIPS agreement have emerged to raise awareness of how the agreement threatens indigenous culture and creative work and the relationship of TRIPS to the larger agenda of neo-liberal trade harmonization. Third, a growing number of scholars in both the north and the south seek to develop alternative theoretical conceptions to intellectual property. For example, scholars and activists emphasizing the value of the public domain as an alternative to copyright are seeking to provide a different starting point for understanding creative work. Furthermore, developing notions of collective authorship and de-emphasising the role of original creation are conceptual moves important to seeking alternatives to the western copyright model. Fourth, given the fact that most people do not know, or understand, the complexity of copyright law, sharing cultural products freely becomes a form of resistance (and civil disobedience). Fifth, resistance also takes the form of using the language of intellectual property against those who seek to benefit

from it. For example, extending the concept of intellectual property to traditional knowledge usurps the language of property and flips the claim of piracy to account for the actions of Westerners who appropriate freely from 'the heritage of mankind' but claim their own 'original authorship' is the result.

Some of these forms of resistance have been covered by other propositions in the dossier. For example, discussing the cultural underpinnings of copyright and the importance of the public domain can be seen as forms of resistance. In this section we will focus more specifically on direct forms of resistance. However, it is important to acknowledge that resistance will vary given the different approaches countries within the global South may take towards copyright. Within the 'global South' category are developing countries that are signatories to the TRIPS agreement and members of the WTO; indigenous actors within the global South who define their concerns in terms of traditional knowledge and the preservation of traditional culture and not in terms of state interests; and, finally, there are indigenous groups within developed states. In other words, the state may not necessarily represent the interests of indigenous actors and developing states may have different agendas than those of indigenous rights activists. Furthermore, not all states in the global South speak with a unified voice. This makes for a variety of different platforms.

## 5.2 A brief history of Southern resistance to copyright's laws and assumptions

This section focuses on three pre-1990 periods, namely the establishment of the Berne Convention in 1886 and in particular, the initial 'coverage' of this Convention in countries of the South, many of them then colonies and not politically independent countries; the late 1950s and 1960s when many countries became independent and when their dissatisfaction with the inequities of the global copyright system lead to what has been called 'the international crisis of copyright'; and the late 1970s and early 1980s when a number of leading countries in the South proposed a 'New World Information and Communications Order' (NWICO). Any movement must know its own history and this is a 'snap-shot' and 'broad-brush' treatment of this history.<sup>1</sup> The history presented here, it does need to be recognised, remains an institutional history of government action due to the paucity of sources available; a history of how individual 'activists' in the South resisted copyright is yet to be researched and written.

### **The early days of Berne in the South**

The Berne Convention, the leading international copyright convention that has also been incorporated into the TRIPS agreement – meaning it must be followed by all members of the World Trade Organisation – is a Western-based and unreconstructed colonial relic which countries of the South had no role in drafting and which was imposed on them without consultation in an earlier era. The only non-European countries represented at the Berne Convention drafting table in 1886 were Tunisia, Haiti and Liberia. (Japan and the US attended as observers; the latter did not join for more than 100 years, finally signing in 1989.)

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<sup>1</sup> Some parts of this section are adapted from Story, CIPR Study, pp. 49-52.

However, many former colonies that today comprise most of the countries of the South became incorporated into Berne when they were under direct colonial rule. 'When nations such as France, Germany, and the United Kingdom signed the Berne Convention in 1886, they effectively committed their colonies to the Convention's obligations.'<sup>2</sup> For example, all areas that were part of the British Empire in 1886 (e.g., many parts of Africa and Asia) have been under the jurisdiction of the Berne Convention since 1887 when Britain ratified Berne. A map showing the territorial extent of Berne in 1914 shades in vast areas of Africa, the Indian sub-continent and Australia as 'dependent territories'; Berne's foothold in Latin America, by contrast, was limited to a few colonies in the north-eastern section. When colonies across the South became formally independent countries, many during the 1950s and 1960s, they 'increasingly chafed at the imposition of copyright treaty standards that had effectively been imposed on them by a foreign power.'<sup>3</sup>

The importance of the wording of the first 1886 Convention, as originally ratified and thoroughly reflecting Western copyright values, is reinforced by the fact that any amendments or changes to the Convention require the unanimity of all members. Moreover, 'reservations' (an international law concept allowing a country to make exceptions in its own legislation for its own jurisdiction<sup>4</sup>) to the Berne Convention are *not* permitted. Hence, Berne is a particularly rigid and inflexible treaty. And although Berne has been amended – in minor ways – on different occasions between 1886 and 1971, when the Paris 'revision' (the current version) was formulated, its basic structure and ideology has remained in place.

A bit more understanding on the question of reservations is required. Reservations are *not* permitted after a country has acceded to a treaty. Take the example of what might occur if one of the more progressive countries in the South decided it wanted a reservation to Berne allowing much wider educational use of materials within its borders; such a step might significantly loosen the grip of the rich developed countries and their rights holders over the global use of such works. And such a step could provide a significant legal basis upon which to oppose 'the one size fits all' orientation of Berne and the TRIPS Agreement and the WIPO Copyright Treaty. But there is one major hurdle such a country would face; the Berne Convention (and similar international treaties) forbids such a step to be taken. This prohibition reinforces, for countries of the South, the colonial nature of Berne.

Here is when a sampling of some other 'leading' countries in the South who joined and became a party to the Berne Convention: Argentina (1967), Brazil (1922), Egypt (1977), India (1928), Mexico (1967), Pakistan (1948), Philippines (1951), South Africa

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<sup>2</sup> Paul Goldstein, *International Copyright: Principles, Law, and Practice* (New York: Oxford University Press, 2001) p. 22.

<sup>3</sup> *Ibid.*

<sup>4</sup> The official UN definition of reservation: 'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization. See: chapter VI, Reservations to treaties, Part C at <http://www.un.org/law/ilc/reports/1999/english/chap6.htm>

(1928). Numbers of African countries joined in the 1960s and 1970s – and some others in the 1990s.

### **The late 1950's and 1960's: the Southern revolt against copyright**

As is well known, a great number of countries in Asia and Africa gained their political independence in the late 1940's, the 1950's, and early 1960's, sometimes through armed liberation struggles (e.g. Algeria, Angola, and Cuba, among others). Schiller explains that in many of these countries "the impositions of colonialism were still fresh in their minds", that "these countries and their leaderships were in no mood to accept renewed subservience, be it economic, political and cultural" and the "class interest was not, in many cases, strong enough to override the powerful expectations for economic improvement and equality and sovereign control of domestic resources that the liberation struggle generated."<sup>5</sup>

Economic growth and development often led the list of their national priorities. Their needs in the information field – greatly expanded levels of literacy, the rapid establishment of schools and universities at all levels, getting even limited access to printed materials, especially in technical and scientific fields – were very different from those of rich nations. And their proposed solutions were very different as well. For example, the position of India was that "the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by underdeveloped countries."<sup>6</sup>

Independent Third World countries faced three choices in the 1950s and 1960s:

- a) Join (or remain in) the Berne Convention with its 'traditionally very high' standards and strong author's bias (the main/sole purpose of Berne, according to the preamble, is protecting "in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works");
- b) Join the marginally looser Universal Copyright Convention (1952); UNESCO and the US (not yet within Berne) were the main proponents of the UCC.
- c) Not join either because the standards required for membership were too demanding.

Most countries in the South quickly realised that international copyright conventions had not been set up with their particular interests or requirements in mind. "Their opinion of the world copyright situation as of 1963 was that it was essentially European in orientation and [...] opposed to their interests."<sup>7</sup>

Meanwhile during the same period, Third World leaders such as Fidel Castro were denouncing the dangers of copyright and intellectual property ideologies. Here are a few excerpts from a speech he delivered in 1967 in Guane, Pinar del Rio, in Cuba on the problems of printing and supplying books in his country. While noting that

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<sup>5</sup> Herbert Schiller, *Mass Communications and American Empire* (Boulder, Colorado, USA: Westview Press: 1992 – Second edition). pp. 19-20

<sup>6</sup> C.F. Johnson, 'The Origins of the Stockholm Protocol', *Bulletin of the Copyright Society of the USA*, XVIII (1970).

<sup>7</sup> *Ibid.*

historically “intellectual creators have generally been poorly paid and many have suffered hunger”, he continued that Cuba had adopted a decision to “abolish” intellectual property.

*What does this mean? We think that technical knowledge should be the patrimony of all mankind. We feel that what man's intelligence has created should be the patrimony of all mankind. Who pays Cervantes his royalties? For intellectual property? Who pays Shakespeare? Who pays the ones who invented the alphabet, those who invented numerals, arithmetic, mathematics? All mankind has benefited in one way or another. All mankind in one way or another uses the creations of man's intelligence throughout history. From the first primitive man who took a stick in his hand to knock down a fruit, mankind began to benefit from a creation of intelligence [...] In other words, all or rather the large majority of man's creations have been accumulating through thousands of years and all mankind feels it is entitled to the enjoyment of the creation of intelligence [...] How is it possible to want to deny man today, hundreds of thousands of human beings, not hundreds of thousands, I am wrong, hundreds of millions, billions of human beings who now live in poverty, in underdevelopment—how is it possible to want to block the access to technology for billions of human beings, a technology that they need for such basic things as nourishment, such as life itself [...] We proclaim that we consider all technical knowledge a patrimony right of all mankind and that the peoples who have been most exploited have a particular right to it because, where is there hunger, where is there underdevelopment? Where is there ignorance? Where is the lack of technical knowledge?<sup>8</sup>*

As a follow-up to several UNESCO-initiated discussions in the early 1960's, representatives from 23 African countries met in Brazzaville Congo in 1963 to begin formulating proposals to reform international copyright conventions in such a way that the needs of 'new' African nations (and Third World countries more generally) could be accommodated. Over the next several years, a number of proposals were drafted; they included a reduction in the duration of copyright, translation rights, easier acquisition of licensed reproduction rights from Western publishers, national jurisdiction over the regulation of uses for educational or scholastic purposes (by contract, Berne did not and does not contain a basic education exemption), the protection of folklore, and some other related matters. Although there was some sympathy among certain organisations in the developed world to the particular needs of developing countries and all governments (with the possible exception of the United Kingdom) agreed to some concessions, the copyright access proposals of the Third World countries were further restricted and further qualified, conference by conference and draft by draft, over the next few years. And even a supposedly final draft, known as the Stockholm Protocol of 1967, which had removed many of the key earlier proposals of developing countries, was still not acceptable to authors' organisations, publishers, and other rights holders in the developed world. To take one example, the sharpest difference between the developed and Southern countries occurred over the educational use issue, according to commentators. Although the term 'educational purposes' was strictly defined in the Protocol, the addition of the

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<sup>8</sup> <http://lanic.utexas.edu/la/cb/cuba/castro/1967/19670430>

words “in all fields of education” was “wide enough to apply to mass literacy and adult education campaigns extending far beyond the confines of the classroom.”<sup>9</sup>

Opposition quickly mounted in developed countries, especially in Europe, particularly among rights holders and their vociferous organisations. Indeed, the period – and the conflicts raised – has led commentators to state that there was ‘an international crisis’ in copyright law and regulation. Among governments in the developed world, the United Kingdom was the Protocol’s principle opponent. On the one hand, UK’s official representatives did speak with a certain honesty and forthrightness in its commentary on the Stockholm Protocol. The UK said that “[t]he Berne Convention is an instrument primarily designed to meet the needs of countries which have reached a certain stage of development.”<sup>10</sup> On the other hand, most British publishers did not mince their words. Sir Alan Herbert, chairman of the British Copyright Council, called the Protocol “a delayed action bomb of dangerous principle into the flagship of copyright; a tunnel under the walls of the copyright fortress.”<sup>11</sup> To continue with Herbert’s military metaphor, the Stockholm Protocol and its principles sank with little trace when confronted with such an onslaught by the well-armed legions from the richest nations. The final set of copyright proposals aimed at meeting the needs of developing countries became the 1971 Appendix to the Berne Convention. But the Appendix contained no provisions for free educational use or for any reduction in duration of copyright. Nor did it adequately address the indigenous knowledge issue. It did, however, permit the possibility of invoking the compulsory licensing of works if voluntary negotiations over translations and reproduction rights – available only under very qualified conditions – were not successful. Since 1971, these compulsory licensing provisions have rarely been invoked by countries of the South. Writing in 1987, Sam Ricketson stated that “only a handful of developing countries have so far availed themselves of its provisions.”<sup>12</sup> But while after 1971 the ‘crisis’ had subsided, opposition then moved to another forum, UNESCO, within a few years.

### **The New World Information and Communication Order (NWICO)**

After limited research, it appears to be the case that copyright issues did *not* play a leading role in the call for a ‘New World Information and Communications Order’ (NWICO) led by the Non-Aligned Movement in the late 1970s. At the same time, repressive copyright laws that prevented access did play an important background role in the concerns about media monopolies and glaring inequalities in the existing information order that had been voiced in the 1960’s as noted above.

A 1976 seminar in Tunis produced a report entitled *Information in the Non-Aligned Countries*. The following excerpts give a flavour of the anti-imperialist sentiment that was being expressed:

- o Since information in the world shows a disequilibrium favouring some and ignoring others, it is the duty of the non-aligned countries [...] to change this

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<sup>9</sup> S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, 1987).

<sup>10</sup> Johnson. Op. cit

<sup>11</sup> *The London Times*, 3 and 11 August 1968, cited in Johnson.

<sup>12</sup> For more on the failure of the Berne Appendix, see above.

situation and obtain the de-colonization of information and initiate a new international order in information.

- The peoples of developing countries are the victims of domination in information and this domination is a blow to their most authentic cultural values, and in the final analysis subjugates their interests to those of imperialism.<sup>13</sup>

The US media and communications theorist Herbert Schiller explains the context and the main concerns of this movement as articulated by a 1980 UNESCO Report.

*The culmination of the Third World effort to restructure the global information condition was realised in the creation by UNESCO in 1978 of the McBride Commission for the Study of Communication Problems. The commission's report, Many Voices, One World (1980), recapitulated many of the themes that had occupied the discussions from the 1960s on: the power of the transnational media conglomerates; the one-way flow of media product and information from New York, Los Angeles, Washington, London and Paris to the rest of the world; the excessive commercialisation of that flow; and the need for protection of national cultural sovereignty in the face of the cultural avalanche from the West.<sup>14</sup>*

NWICO had a relatively brief international profile. The McBride report and its 82 recommendations (grouped under five core policy areas of communication policy, technology, culture, human rights and international cooperation) were ferociously attacked, especially by the US government, the US media and rights holders (as well as other governments such as the UK) as a dangerous attack on free speech, free markets and a free press. Soon afterwards the US withdrew from UNESCO (it later re-joined) and UNESCO itself was overtaken by the WTO and WIPO in copyright matters.<sup>15</sup>

Though their policy roots are not necessarily a part of the NWICO period, certain countries have erected barriers to foreign-produced (and copyrighted) works. In China, for example, the state allows only 20 foreign films to be distributed each year. One report notes that such a release in China "is often delayed for several months, long after pirated DVD versions are available for less than a fifth of the price of a cinema ticket."<sup>16</sup>

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<sup>13</sup> These quotations are taken from Colleen Roach, *The Western World and the NWICO: United They Stand?* in Peter Goldring and Phil Harris, eds. *Beyond Cultural Imperialism* (Sage 1997).

<sup>14</sup> Schiller, 20.

<sup>15</sup> For more on this change, see Section 3.9 in the dossier.

<sup>16</sup> Jonathan Watts, 'Snow White and the seven kung fu monks: Disney sets sights on China', *The Guardian* (UK), 5 July 2005.

### 5.3 National or regional movements opposing TRIPS as interference in their cultural life

There is growing national, international and regional resistance to TRIPS and the impact of copyright on cultural survival and cultural life with numerous organizations active throughout the global south resisting the expansion of TRIPS. The following are examples of regional movements focused on culture and TRIPS.

AfriTAN—the African section of the TRIPS Action Network —has focused on access to medication as part of their resistance to the TRIPS agreement. Action Aid Pakistan has developed TRIPS resistance to Agricultural Issues. The Gene Campaign has worked with the Centre for Environmental Concerns in India to focus on intellectual property, environment, and agricultural issues. RAFI (Rural Foundation Advancement International) now operating under the name Action Group on Erosion, Technology and Concentration (ETC) has also been instrumental in global south resistance to TRIPS.<sup>17</sup>

In the Pacific region, native Hawaiians and the Maori in New Zealand have also developed a position critical of TRIPS and western intellectual property rights. Mililani B. Trask, Native Hawai'ian and Indigenous Expert to the United Nations for the Permanent Forum on Indigenous Issues stated that, 'The TRIPS agreement within the WTO which is intended to internationalise current intellectual property laws constitutes a major threat to the cultural integrity and rights of indigenous peoples, including territorial and resource rights.'<sup>18</sup> The critique made by Trask is hinged upon the underlying argument that TRIPS puts 'traditional knowledge' outside the protective shield of copyright or patent law and thus 'free' to appropriate as the 'heritage of humankind.' (This underlying conflict between copyright and traditional knowledge is dealt with in Section 3.5 of the dossier.)

However, the fact that TRIPS protects some forms of knowledge, but not others helps to highlight the problems associated with an agreement that emphasizes individual authorship and ownership while ignoring the fact that much of the world's creative knowledge is not individually owned and perhaps should remain that way.

The Maori in New Zealand have also begun resisting cultural theft by developing property rights in cultural and intellectual heritage. They established the Waitangi Tribunal to deal with these issues.<sup>19</sup> The aboriginals in Australia have perhaps moved the furthest down this path by trying to develop a system that would protect their art and culture within the framework of copyright law.

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<sup>17</sup> For occasional papers and updates see: <http://www.etcgroup.org/publications.asp>

<sup>18</sup> Mililani B. Trask, 'Globalization and Indigenous Rights,' Paper presented at the Third International Conference on Diversity in Organizations, Communities and Nations. East-West Center, Honolulu, Hawai'i, February 13-16, 2003, 5.

<sup>19</sup> Leo Watson and Maui Solomon, 'The Waitangi Tribunal and the Maori Claim to their Cultural and Intellectual Heritage Rights Property,' *Cultural Survival Quarterly*, Vol. 24, January 31, 2001, 46.

Resistance is also growing throughout Latin America. In 1999, Brazilian indigenous peoples met at the National Encounter of Pajés to talk about traditional knowledge and bio-piracy where they issued a declaration seeking to stop the theft of indigenous knowledge.<sup>20</sup> In December of 2001, indigenous representatives in Brazil, representing over 360,000 indigenous peoples met in São Luís to again discuss the issue of Indigenous Knowledge and develop a statement resisting the western definition of intellectual property.<sup>21</sup>

These examples suggest that disagreement with TRIPS and its methodologies can be found throughout the globe. However, it is also important to recognize that resistance exists at the governmental level and trans-national level as well. The following two sections help illustrate how resistance is coalescing around the issue of free trade and access to knowledge.

#### 5.4 Venezuela initiative on the rights of authors

In November of 2005, negotiations surrounding the Free Trade of the Americas Agreement (FTAA) agreement broke down amidst massive social protest and differences in how to approach trade between the United States and its trading partners in Latin America. Led by Venezuela, many countries in Latin America have begun to resist the notion of a free trade agreement with TRIPS-like language. Instead, countries throughout Central and South American are beginning to coalesce around an alternative plan and one that more closely aligns trade with poverty reduction and the extension of social services. One important part of this process is the 'authors' rights' initiative developed in Venezuela.

In 2005, Venezuela's Autonomous Service of Intellectual Property (SAPI) created a new initiative to articulate the growing concern of the Venezuelan government regarding corporate control over intellectual property. This new initiative seeks to develop and protect 'authors' rights' as separate from the commercialization of copyrights. The Director of SAPI, Eduardo Samán, said of the initiative that, "The idea is to capture the essence of the author's right, and that this belongs to the natural person, the composers, the writers, the interpreters, the artists, and performers. And that corporations keep away from the legislation, and that they do not enjoy any human right like [sic] authorship."<sup>22</sup>

The author's right would allow for copyright to remain with the individual author and disallow corporations from appropriating these rights to further exploit authors. The intent is to provide more autonomy to the author, who under current practice is required to sign over copyright to the publishing company and thus lose control over

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<sup>20</sup> Stanley Krippner, 'The Manifesto,' Brazil, N. 162, June 30, 1999, 55.

<sup>21</sup> Declaration of Shamans on Intellectual Property and the Protection of Traditional Knowledge and Genetic Resources. Made available to the Intergovernmental Committee by the Delegation of Brazil. Available at:

<http://www.nativeweb.org/pages/legal/shamans.pdf>.

<sup>22</sup> Quoted in María Isabel Cerón, 'Intellectual Property is a Human not a Corporate Right: Propiedad intelectual es un derecho humano no corporativo.' SAPI, Autonomous Service of Intellectual Property. <http://www.sepi.gob.ve/web/index.php>, 2005.

their works. Under this new paradigm, the author would retain copyright control and enter into a contract relationship with a publisher that could be renewed or ended in order for the author to seek a more mutually beneficial relationship.<sup>23</sup>

SAPI itself sees its objectives as promoting sustainable economic and social development by improving access to knowledge.<sup>24</sup> While part of SAPI's task is to protect items falling under an intellectual property rubric, their goals and objectives are distinctly different from many similar organizations found in the global North. Not only does SAPI concern itself with how copyrighted works are shared, but also sees itself as integral in protecting traditional knowledge and biodiversity.<sup>25</sup> Protecting an 'author's right', which maps most closely to a moral rights perspective, is also essential to this initiative.

SAPI's author's rights initiative is part of a much larger resistance to neo-liberal globalization emerging out of the Bolivarian Alternative for Latin America and the Caribbean (ALBA).<sup>26</sup> ALBA is Venezuela's alternative to the Free Trade of the America's Agreement (FTAA) and focuses on poverty reduction and regional integration that benefits more than transnational corporations.<sup>27</sup> ALBA also offers an alternative to intellectual property as defined by the United States:

*The ALBA is also opposed to the intellectual property rights regimes on the grounds that they only protect the areas of scientific and technological knowledge that developed countries control, while at the same time leaving unprotected those areas in which the developing countries have considerable advantage: biodiversity of their territories and the traditional knowledge of peasant and aborigine peoples. The fact also contributes to deepening the asymmetries that exist between countries.*<sup>28</sup>

Venezuela has taken the lead in opposing neo-liberal trade, along with Argentina, Brazil, Paraguay and Uruguay.<sup>29</sup> Venezuela is developing through ALBA an alternative trade approach and has currently established an agreement to sell oil for medication with Cuba.<sup>30</sup> ALBA is not without its critics. Specifically, anti-GMO activists are upset because GMOs would still be traded under the agreement.<sup>31</sup> Furthermore, many see the agreement as not going far enough in attempting to solve the problems faced by many countries in Latin America and offering only a superficial alternative to the FTAA. However, ALBA does offer an alternative to free

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<sup>23</sup> Andrea Coa, '¿Rights of Authors as a Form of Economic and Cultural Domination of Imperialism: Derechos de autor como medio de dominación económica y cultural del imperialismo?' Paper presented at the International Congress of Culture and Development. Ministry of Culture, June 6-9, 2005. <http://www.sapi.gob.ve> or <http://www.cult.cu>.

<sup>24</sup> 'History of SAPI,' <http://www.sapi.gob.ve>.

<sup>25</sup> Ibid.

<sup>26</sup> Teresa Arreaza, 'ALBA: Bolivarian Alternative for Latin America and the Caribbean,' January 30, 2004. <http://www.venezuelanalysis.com/docs.php?dno=1010>.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Cory Fischer-Hoffman, 'Argentina: The People's Summit Against the FTAA,' November 7, 2005. <http://www.upsidedownworld.org/main/content/view/110/1>.

<sup>30</sup> 'An Alternative to the FTAA?' Bugs' Blog. Jueves, 13, 2005. <http://bbugs.blogspot.com/2005/01/alternative-to-ftaa.html>.

<sup>31</sup> Fischer-Hoffman, Op. Cit.

trade as defined by the United States with a different framework that considers not only copyright issues, but issues related to creating a better society for all. As such, it is a form of resistance, if a small act, that is worth commenting upon and researching further.

## 5.5 Resisting the privatisation of cultural life

Resisting the privatisation of cultural life has been taken up in some detail in Sections One and Three of the dossier. Identifying the harms associated with privatisation suggest certain avenues for resistance. Specifically, if the problem with copyright is that it privatises cultural life, then a clear method of resistance is to foster a vibrant public domain, endorse programs that encourage the free flow of culture and information, and make the critique of privatisation as public as possible in order to allow people to understand the costs. Because the global South cannot be easily described as a single constituency with a uniform platform, how countries in the global south resist the privatisation of cultural life will vary.

First, developing countries that are members of the WTO may seek revisions to the TRIPS agreement as a form of resistance. While not the most radical form of resistance, these states have at some level endorsed (or been coerced into supporting) the neo-liberal globalisation model and thus seek to create change from within. States choosing to follow this path may find the Access to Knowledge model discussed below compelling, even if it offers only a limited critique of the current system. States pursuing change within the TRIPS agreement or WIPO through the 'development agenda' are not automatically rejecting the privatisation of cultural life – at least not at the level of publicly endorsed policy, but instead may seek to preserve their own ability to maximize cultural profits. While this dossier remains critical of any approach that seeks the privatisation of cultural knowledge, it should also be recognized that the resistance of many states in the global South takes the form of rewriting TRIPS. The rejection of copyright as currently understood is typically left to activists while governments negotiate terms more in their interests.

A second mode of resistance is constructing alternative creative paradigms. Brazil stands out as one country actively seeking such an alternative to copyright law. Brazil is developing projects focused on the use of the creative commons, free software, and the exchange of music outside the scope of copyright. In Brazil, there is growing interest in, and respect for, the language of open societies that is at the heart of many developing country platforms related to intellectual property. Thus, while the language of open source initially applied only to computer software, it is now being applied to textbooks, music and knowledge more generally. This open source language is meeting with growing endorsement around the world.<sup>32</sup>

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<sup>32</sup> TecTonic: Africa's Source for Open Source News, 'Free Software in Africa – 2005, A Year for Real Growth,' January 11, 2005. <http://www.tectonic.co.za/view.php?id=399> (looks at the application of open source computer technology to Africa); For a South African initiative on open source textbooks see: Free High School Science Texts – <http://www.nongnu.org/fhsst/>; California is seeking to develop a similar program to offset the enormous cost of textbooks in the state. See: California Open Source Textbook Project – <http://www.opensourcetext.org/index.htm>; Finally, there is an initiative to establish a

The rejection of the privatisation model is also articulated in the work of those seeking to protect traditional knowledge. These actors can be found throughout the global South, but also in developed countries (for example, the Maori or the Native Hawai'ians). There are several themes embraced by supporters of traditional knowledge that serve as the foundation for resistance. First, culture should not be commodified. Second, culture is integrally linked to traditional knowledge and both are expressions of groups of people, not individuals. Third, the relationship of people to the environment is essential and should be respected. Fourth, that much of what is considered traditional knowledge is sacred.

Many indigenous groups have attempted to resist the expansion of individualized intellectual property rights by articulating a collective or group right to traditional knowledge. Others demand compensation for the theft of knowledge and resources that have been co-opted into a system of intellectual property. Here are some examples:

### **The National Encounter of Pajés**

Some of the demands of the National Encounter of Pajés, a meeting of Brazilian indigenous leaders from numerous different indigenous nations include:

- *There are patent laws that register under the names of outsiders what, in truth, belongs to us. These laws are neither good nor just for indigenous people. These laws permit the theft of our knowledge. We demand a new law, one that gives voice to the Pajés – as representatives of indigenous people, one that guarantees that we have the rights to what is ours. We want to be heard and we want our wishes to be respected whenever laws are made concerning this matter.*
- *We know that various plants, animals, insects, and even our own blood samples are exported from Brazil to other countries. Our land is like an open market, where anyone can enter and carry away whatever they like. We demand that the Brazilian government monitor its own gateways in order to establish a better protection of its own patrimony.*
- *The future of our traditional knowledge, a rare and precious resource for all humankind, might not be secure. Our Pajés and our elders are dying with illnesses that did not exist in the old days. Many of our children and our young people are dying of illness and starvation. Therefore, we demand that the authorities assist us in maintaining our health and guaranteeing the survival of our people.*
- *The Earth is our Great Mother. Nature is the largest and best pharmacy that exists in the world. Without nature, our traditional knowledge will not be useful to our people or to the rest of humanity. The invaders' greed has resulted in the transformation of our national resources into money. This greed has brought sickness, starvation, and death to our people. During the fires in the northern state of Roraima, many animals, herbs, and vines that we used in our medicines perished, and no longer exist. Our Great Mother Earth is mortally wounded, and if she dies, we will die as well. If she dies, the invaders will have no future. Therefore, we demand protection of our lands. We demand the*

*guarantee, through demarcation, of the space that is necessary for our physical and cultural survival.*<sup>33</sup>

## **The Declaration of Shamans on Intellectual Property**

The Declaration of Shamans on Intellectual Property and the Protection of Traditional Knowledge and Genetic Resources declares that:

*We propose the adoption of a universal instrument of legal protection of traditional knowledge – an alternative, sui generis system distinct from the regimes of protection of intellectual property rights and that addresses, among other aspects: the recognition of indigenous lands and territories and consequently its demarcation; the recognition of the collective property of traditional knowledge as not subject to expiration in time and as non-negotiable and of the resources as public interest goods; the right of local indigenous peoples and communities to deny access to traditional knowledge and to the existing genetic resources in their territories; the recognition of the traditional forms of organization of the indigenous peoples; the inclusion of the principle of prior informed consent and a clear disposition with respect to the participation of indigenous peoples in the fair and equitable distribution of benefits resulting from the use of these resources and knowledge; and the continuity of free exchange of resources and traditional knowledge among indigenous peoples.*<sup>34</sup>

While incomplete, these examples are indicative of platforms expressing an interest in protecting traditional knowledge. They are concerned with an articulation of group rights, collective ownership, establishing walls against the appropriation of knowledge into the intellectual property system, and the establishment of control over what is deemed traditional knowledge. Other concerns over privatisation are addressed through the types of resistances described throughout this section.

## **5.6 Possible alternatives to copyright in the South**

Numerous alternatives have been proposed. These tend to be along the lines of those outlined earlier in this section. They range from the following:

1. A system of group rights that places traditional knowledge in a permanent condition of cultural protection.
2. The use of copyright laws to protect traditional designs and culture from appropriation and misuse.
3. Resisting the expansion of TRIPS-plus type legislation at the international level.
4. Utilizing the concept of open source licensing and applying this concept to all areas of creative work and cultural exchange.
5. Arguing for a strong layer of technology transfer and information exchange at the international level in order to ensure that developing countries do not get left out of technological progress.

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<sup>33</sup> Stanley Krippner, 'The Manifesto,' Brazil, Vol. 162, June 30, 1999, p. 55.

<sup>34</sup> <http://www.nativeweb.org/pages/legal/shamans.pdf>

6. Developing a limited system of rights with short terms for protection but without the lengthy terms inherent in the copyright system.
7. Eliminating copyright.
8. Resisting commodification and attempting to retain access to knowledge as a human right and not a commercial right.

As outlined in the first four sections of this dossier, there are serious problems associated with copyright and its application in the global South. While there may be some role for a system of copyright protection, creativity and invention certainly happen outside the boundaries of copyright law.

A system of copyright allows for creative works to be privatised and primarily benefits the owners of copyrights. The owners of copyright are often not the same as the original creators of the artistic work. Take the example of classic American jazz artists. Many of these talented musicians, responsible for creating one of America's most original musical forms, were paid flat rates for their most important contributions to this music. The bulk of the profits produced by jazz artists went to the labels and producers with many of the most talented musicians dying penniless. Copyrights did nothing to encourage innovation and creativity in this example, but rather established a system of exploitation in which those who create are not likely to benefit from their creations. Furthermore, copyright makes it difficult to build upon the earlier work of other jazz musicians by privatising the music and requiring licences to use even the smallest portions. Such monopolization of music is a barrier to the creation of new works instead of facilitating new creation. The same type of problems will exist as countries throughout the global South come to see music as a form of property instead of a cultural treasure.<sup>35</sup>

Instead of assuming the western system spurs innovation, it is important to recognize that most of the important innovation and creativity happens during relatively open and less regulated eras where people work for the common good instead of individual property rights.<sup>36</sup>

Given this framework, the alternative system must begin with normative assertions of innovation and creativity for the purposes of mutual aid. It is possible to innovate at the most sophisticated levels without the incentive of intellectual property as a guiding force, but with the incentive of providing for the public good. For example, witness the success of Cuban pharmaceutical research in developing essential medicines without recourse to patent law, but instead attempting to ensure that their contributions will not be unlawfully appropriated by the patent system.

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<sup>35</sup> Anthony McCann maps the enclosure of Irish folk music in his dissertation, 'Beyond the Commons: The Expansion of the Irish Music Rights Organization, the Elimination of Uncertainty, and the Politics of Enclosure' (2002. Available <http://www.beyondthecommons.com/beyondthecommons.html>).

<sup>36</sup> Peter Kropotkin makes a very compelling argument for this point, arguing that the innovations of the 18<sup>th</sup> and 19<sup>th</sup> centuries often attributed to individualism would never have been possible without the paradigm of mutual aid that existed in the 15<sup>th</sup> –17<sup>th</sup> centuries. See: Peter Kropotkin, *Mutual Aid: A Factor of Evolution*, Boston, Extending Horizons Books, 1955.

It should also be recognized that sharing innovation does not necessarily mean that no profits can be made, but rather that profits will not take precedent over essential human values such as sharing and mutual aid.

## 5.7 The A2K (Access to Knowledge) treaty group

The Access to Knowledge (A2K) group is a relatively informal and primarily US and European-based group of activists (plus a few academics, mostly American) drafting an 'access to knowledge' treaty. The A2K group aims, in the first instance, to have this draft treaty signed by governments, particularly governments of the South, and especially those pursuing a 'development agenda' at the World Intellectual Property Organisation. There are also persons from the South involved in A2K. The main focus of the group is improving 'access to knowledge,' especially in the South – and hence its work and objectives are worth commenting upon and assessing.

The most recent large session of the A2K group was held in London on 12 and 13 May 2005. What follows is an edited 'backgrounder' to that session—prepared by Kaye Stearman of the Trans-Atlantic Consumer Dialogue (closely linked to the CP Tech group based in Washington, and Consumers International, headquarters in London)—and then it comments briefly on the orientation and direction of the A2K group.<sup>37</sup>

First, Stearman's report:

*In September 2004 an expert group of academics, educators, representatives of libraries, consumer organisations, the open source movement and others gathered in Geneva to discuss reform of the World Intellectual Property Organization (WIPO). The meeting laid down a challenge to WIPO to reform rules relating to intellectual property (IP), such as copyright and patents. The problem is that the balance of some IP rules have shifted too far towards the protection of rights-holders, and removed the traditional rights of users.*

*A major problem was how to provide wider access to knowledge, especially for poorer consumers in developing countries. A second meeting in Geneva in February 2005 determined that the world needed a new treaty, or at least principles, to redress this imbalance as part of a 'development agenda' led by the Consumer Project on Technology (CPTech), an expert group began drafting a Treaty on Access to Knowledge*

*A third meeting convened at Queen Mary College in London on 12-13 May 2005 to take the draft forward. Of around one hundred participants around half were academic or legal experts, and half represented consumer and user groups. A substantial minority came from developing countries, including Brazil, India, Kenya, Malaysia, South Africa and Zimbabwe. All were keen to listen, learn and argue points of law and substance.*

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<sup>37</sup> Before the London session, a 9 May draft of the draft treaty (containing a total of 12 articles on a wide range of access issues) had been prepared; it is available at: <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>

*So where does the draft Treaty go from here? The next step will be to incorporate all the amendments, additions, omissions and other suggested changes to produce a new draft that will be circulated to meeting participants for final comments. When this has been completed, the draft can be presented to governments and promoted around the world, maybe even at the WIPO General Assembly in September 2005. Ultimately, it is hoped that the treaty, or at least the ideas that are driving it, will be adopted and ratified by WIPO, and incorporated into national laws and a modern way of looking at intellectual property.'*<sup>38</sup>

Both prior to the London session and afterwards it seemed (and seems) clear that the starting point and overall philosophy in choosing this particular drafting language and this particular approach was often not derived from the actual on-the-ground access needs of the different users and different constituencies in the South. On the one hand, there has been an extreme paucity of research or discussion within the A2K group as to what such access needs actually are, particularly in the South. To take two examples:

- There is a constant preoccupation with delivering content/access through the Internet when, in fact, many parts of the South, especially in the poorest countries, lack even rudimentary Internet access for a variety of reasons (such as economic conditions, small percentage of population with access to a computer, poor quality telecommunications links, etc.) In any event, what type of 'knowledge' predominates on the Internet and in what language?
- Key access issues for the South, such as 'indigenous (or traditional) knowledge' and translation, are not even mentioned in the draft and others, such as distance learning and libraries, were dealt with as if the access situation under debate was that prevailing solely in Boston or Berlin.

On the other hand, and this is the more critical point, this group and its draft A2K treaty start – and essentially end – by funnelling all access questions through a traditional copyright lens, albeit a slightly more liberal and pro-user friendly version. For example, instituting a more liberal US 'fair use' or UK 'fair dealing' regime in the South is viewed as the principle and essential answer for overcoming access problems in the South. Traditional privileged actors in copyright discourse, such as 'authors' retain a privileged place (as they do with Creative Commons licences; see section 5.9 of this dossier). Well-known copyright barriers affecting, for example, the visually impaired (e.g. how any type of reproduction needed to produce materials in an accessible format is necessarily an infringement of copyright) are not challenged head-on. This document avoids suggesting that changing the format of a document to allow access should legally not be considered as reproduction. (If such changing the format was not considered reproduction, visually impaired groups would avoid any liability for a copyright infringement as they do now.) Nor are collecting societies tackled and current distance learning barriers, which are very important in the South, are simply tweaked (See Section 4.3 of this dossier on distance learning in the South and copyright barriers).

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<sup>38</sup> Funders for this London session were the Rockefeller Foundation, the Open Society Institute, and the John D and Catherine T. MacArthur Foundation

Furthermore, there is an unchallenged belief in the value of existing legal measures and approaches to correct the current imbalance in copyright regimes. Examples include the inclusion of Article 7.1 and 7.2 and some of the discussions in London, such as the remarks of a leader of the A2K group, when he suggested that countries in the South should establish anti-competition and anti-trust measures and regimes as a key way to challenge copyright and IP monopolies. In fact, the litigation and regulatory history from the North (e.g. the US and EU challenges to the Microsoft software monopoly) shows how weak and ineffective such a strategy usually is, especially in isolation. In the same vein, there is an overwhelming focus on compulsory licensing, despite the high transaction costs and 'discouragement' costs they entail as shown, for example, by the abject failure of the Berne Convention Appendix to improve access as discussed in this dossier in Section 4.12. And finally the draft treaty is filled with legal 'weasel words' and phrases such as 'reasonably effective measures' (e.g. Article 3-1). The interpretation of such phrases (presumably by a World Trade Organisation panel) would be based on existing pro-owner jurisprudence and give little certainty or comfort to potential users, except for those with deep pockets who are able to fund such litigation. (See Section 4.12 of this dossier on the problems South African universities have faced in funding such litigation.) Rather than a badly needed and bold analysis of copyright law, its presumptions, its ideologies and how these act as an access barrier, the A2K drafters remain trapped in traditional copyright legal narratives; they focus on 'limitations and 'exceptions' (that is, 'limitations and exceptions' to the normal and 'natural' form of works as copyrighted works) and how to interpret them in a more favourable light. (e.g. Article 3-1).

Conversely, there is an implicit assumption that the proposed drafting language of the A2K treaty would actually 'pass muster' internationally. For example, if country X actually passed such an A2K treaty and included the proposed treaty language in its own domestic copyright legislation, it is assumed that such legislation would actually withstand a legal challenge from a WTO Panel if country Y (likely the US or the European Union) made a complaint to the WTO about such domestic legislation in X. To give one example, the proposed A2K treaty language would, in repeated instances, not fulfil the requirements of the infamous Berne Convention (and TRIPS and WIPO Copyright Treaty) 'three step' test; this test states that reproduction of copyrighted works is permitted "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." (The first (and leading) WTO panel of 2000 to examine the 'three step test' gave a very restricted reading (to users) of the 'three step' test – and the proposed treaty language would not be in accordance with that decision.<sup>39</sup>)

It might, of course, be a valuable exercise for country X to propose draft legislation that challenged Berne Convention presumptions, to have it enacted by country X, and to 'fight the good fight' against country Y if such legislation is challenged at the WTO. And a legal defeat at a WTO panel (say on access for the visually impaired) could, in turn, form the basis for an important agitation campaign over the longer run and an exposé of the rottenness of current international rules. But before country X actually enacted new copyright laws based on the proposed A2K treaty, X's legal

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<sup>39</sup> The decision is available at: [http://www.worldtradelaw.net/dsc/panel/us-copyright\(dsc\)\(panel\).pdf](http://www.worldtradelaw.net/dsc/panel/us-copyright(dsc)(panel).pdf)

experts would likely (if they are good lawyers!) raise the question as to whether any proposed legislation could be squared with the access restrictions of Berne and TRIPS—and is not merely a ‘wish list.’ To do otherwise would simply be foolhardy.

Significantly, a number of the US copyright legal academics in attendance at the London A2K session admitted privately that the proposed A2K treaty would, without any doubt whatsoever, be struck down by a WTO panel for non-compliance with the Berne Convention and TRIPS. But publicly, none of these academics voiced such concerns; hearing such views might have been a sobering experience for those in attendance in London.

The slogan ‘access to knowledge’ is, on the surface, a slogan with which it is difficult to disagree. But to actually have any impact and import – beyond being a mere ‘feel good’ and Enlightenment-based slogan – the notion of ‘access to knowledge’ and especially the ‘knowledge’ component requires more assessment. What ‘knowledge’ are we talking about here? Why is some ‘knowledge’ being privileged? Who is producing ‘knowledge’ and where in the world are they doing it? What are the conditions that are leading to ‘knowledge’ production in some places – and much less so elsewhere (or at least what seems to be termed as ‘knowledge’ by the A2K proponents.)? Who needs to know about such ‘knowledge’? These rather central questions are not addressed by A2K proponents; indeed, even asking them is discouraged. The operative and unchallenged assumption is this: the aim of an ‘access to knowledge’ treaty is primarily to allow users in the North and the South to access the knowledge (and the values and ideology associated with that knowledge) produced in the North. (For more on this important question, see Section 4.13 of this dossier.)

In conclusion, the current A2K treaty approach is, on the one hand, trapped in existing legal categories, especially those prevailing in the US and Europe and wants to export them to the South. And, on the other hand, the A2K does not appreciate the restraints existing international agreements impose...and does not appear to want to know as it might ‘pop the bubble’ of this project. The words voiced by some at the closing of the London session, that the A2K movement will be able to ‘take over WIPO’, seems rather far-fetched, and even if this fantasy was realised, would actually mean little in providing wider access to ‘knowledge’—however that term is defined.

While the ultimate intent of the A2K process is in question and while the A2K treaty remains fully within the scope of contemporary copyright ideology, there is an effort here to shift the debate, if only by a small increment, to favour the global South. Even the failure of A2K helps highlight the problems associated with copyright law at the international level and the difficulty in changing the system from within.

## 5.8 Free software: a viable and cheaper alternative

Proprietary software is a serious threat to social values throughout the world, and in the global South this threat is even more virulent. First, proprietary software companies engage in anti-competitive behaviour. For example, in Africa, Microsoft

gives away their software and hardware, but then ties those using their products into licensing agreements that require payments over the long term.

In Argentina and Chile, the government provides credit to buy computers with proprietary software installed, but they do not provide the same credits for free software packages. The programs in Argentina and Chile are called “Mi PC” and “Mi primera PC” respectively and are the result of a joint initiative between Intel, Microsoft and other smaller technology companies. Additionally, a program called “Partners in Learning” exists to sell discounted licences for Windows and Office to educational institutions under the condition that schools teach children to use these programs. While the program does not exclude the use of other software, most teachers are unaware of alternatives and with the limited time available simply utilize the proprietary software.

Second, when proprietary software is the primary choice made available, there is no technology transfer because the source code is not transferred with the technology. Given the control proprietary software firms and their business organizations (like the Business Software Alliance) have in the global South, the struggles facing the growing free software movement are immense. However, the free software movement offers an important form of resistance to the monopoly power of proprietary software and a better paradigm for the creation, distribution, and use of computer software.

Free software is not to be confused with open source software. While those involved in the open source movement often conflate the terms ‘free software’ and ‘open source,’ those working within the free software movement seek to keep the concepts and ideas distinct. The concept of free software originated with Richard Stallman, creator of the GNU licence and the free software foundation.<sup>40</sup> Many working in the Linux tradition found the term ‘free software’ confusing (because of the connotations of the word free) and the term ‘open source’ was coined by Christine Peterson, President of the Foresight Institute, as a possible alternative. The term open source has since caught on.<sup>41</sup> The difference between open source and free software is described by Richard Stallman as,

*For the Open Source movement, the issue of whether software should be open source is a practical question, not an ethical one. As one person put it, “Open source is a development methodology; free software is a social movement.”  
For the Open Source movement, non-free software is a suboptimal solution.  
For the Free Software movement, non-free software is a social problem and free software is the solution.<sup>42</sup>*

Thus, open source and free software are distinct entities, which reinforce one another: open source-style development is not possible if the software is not free, and free software is often enriched by software developed in an open source fashion.

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<sup>40</sup> For information on the history and theory behind free software visit Richard Stallman’s website at: <http://www.gnu.org/copyleft/gpl.html>.

<sup>41</sup> See: Sam Williams, *Free as in Freedom: Richard Stallman’s Crusade for Free Software*, Beijing: O’Reilly, 2002, pp.161-162.

<sup>42</sup> Richard Stallman, “Why Free Software is Better than Open Source,” <http://www.gnu.org/philosophy/free-software-for-freedom.html>.

However distinct these entities are in terms of ideas and people behind them, though, the overlap between free software and software developed in open source fashion is large enough to say that they comprise the same programs.

For the purposes of access to computer technology throughout the global south, both open source software and free software can offer substantial advantages over the proprietary model. Furthermore, these movements offer an alternative to the proprietary model that is important in staking out an independent future of countries in the global South. Thus, while not perhaps typically conceptualized in terms of resistance, these software movements are engaged in a form of constructive resistance. Instead of resisting through opposition, free software resists by constructing an important alternative model that can provide the global South with options beyond becoming beholden to the proprietary software packages of the large computer companies.

It is clear that free software is a viable and cheaper alternative to proprietary software for the following reasons.<sup>43</sup> First, as a general rule, deploying free software is cheaper than a proprietary software package. While it is possible for the person with whom the software originates to charge whatever they like for the software, this person cannot keep the user from redistributing the software for free. The consequence is that the price of a copy sinks quickly. For example, the GNU/Linux operating system can be downloaded from the Internet for free and distributed without consequences unlike proprietary software.

Second, because there are no restrictions on how many copies can be made, free software and open source software eliminate the concept of piracy and the legal costs of implementing a software package are reduced considerably. Third, most computer programmers agree that free software is more reliable and secure, reducing costs for computer shutdowns and security patches. Under the proprietary model a user must wait for the software company to address these issues, which may not happen immediately. For example, when a new security hole is found in the Microsoft system, one must wait until Microsoft issues a patch for the hole before it can be fixed. Not so with software package where any number of programmers may issue the patch themselves. Fourth, open source or free software allows a government agency or company to create their own adaptations that tailor the software to their needs, something that is illegal under proprietary software agreements. The ability to tailor software allows companies to remain autonomous of the software companies.<sup>44</sup> However, it is important to remember that free software is about more than the cost. It's a matter of freedom, independence and local capacity. Only by understanding proprietary software within the larger political economy can the true potential of free software and open source as tools for economic liberation be seen.

Instead of wasting resources developing anti-piracy strategies and policing the use of software, one can simply shift to a type of software where these tactics are unnecessary. Open source and free software allows us to rethink our ideas of

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<sup>43</sup> These arguments are detailed by Eric Raymond, a proponent of open source software. See: Eric Raymond, *The Cathedral & the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary* (Beijing: O'Reilly, 1999.)

<sup>44</sup> *Ibid.*

property rights and is an important aspect of any future innovation model.<sup>45</sup> Furthermore, open source and free software highlight that those who suggest a proprietary model is the only or the best way to proceed are simply wrong. Free software constitutes clear and incontestable evidence that the contention that the production of quality software depends on the enforcement of strong copyright, and that innovation depends on patents is wrong. Free Software signs strong copyright away in order to fuel production and innovation and has produced a better product in the process.

## 5.9 The Creative Commons approach

Creative Commons (CC) licences are a relatively new phenomenon and are growing in importance and popularity, including across the South. This section gives a brief backgrounder on CC and its various licences and then essentially lists, in a preliminary way, some of the pros and cons of this approach.<sup>46</sup>

### **What are the Creative Commons and what types of licences do they provide?**

From Wikipedia:

*The Creative Commons (CC) is a non-profit organization devoted to expanding the range of creative work available for others to legally build upon and share ... The Creative Commons website enables copyright holders to grant some of their rights to the public while retaining others, through a variety of licensing and contract schemes, which may include dedication to the public domain or open content licensing terms. The intention is to avoid the problems which current copyright laws create for the sharing of information.*

*Creative Commons was officially launched in 2001. Lawrence Lessig, the founder and chairman of Creative Commons, started the organization as an additional method of achieving the goals of his Supreme Court case, *Eldred v. Ashcroft*. The initial set of Creative Commons' licences was published on 16 December 2002.*

The Creative Commons Licence refers to the name of several copyright licences released on December 16, 2002 by Creative Commons, a US nonprofit corporation founded in 2001.

These licences all grant certain baseline rights, such as the right to distribute the copyrighted work on file sharing networks. The copyright holder has the option of specifying certain extra conditions:

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<sup>45</sup> Steven Weber, *The Success of Open Source*, Cambridge and London: Harvard University Press, 2004. Weber argues the open source allows us to radically rethink our ideas about property.

<sup>46</sup> The main website of CC is <http://creativecommons.org/>.

- Attribution (by): Permit others to copy, distribute, display, and perform the work and derivative works based upon it only if they give you credit.
- Noncommercial (nc): Permit others to copy, distribute, display, and perform the work and derivative works based upon it only for noncommercial purposes.
- No Derivative Works (nd): Permit others to copy, distribute, display and perform only verbatim copies of the work, not derivative works based upon it.
- Share Alike (sa): Permit others to distribute derivative works only under a licence identical to the licence that governs your work. (See also copyleft.)

Mixing and matching these conditions produces sixteen possible combinations, of which eleven are valid Creative Commons licences. Of the five invalid combinations, four include both the 'nd' and 'sa' clauses, which are mutually exclusive; and one includes none of the clauses, which is equivalent to releasing one's work into the public domain. The five licences without the Attribution clause are being phased out because 98% of licensors requested Attribution.

### **The pros and cons of CC licences in the South**

In favour of Creative Commons licences, there are several arguments. CC licences demonstrate a positive attitude towards the sharing of (and wider access to) 'knowledge' and information. CC licences provide some alternatives for authors and other creators, such as musicians, to some of the traditional proprietary presumptions of copyright law. This is obviously positive and we endorse those who wish to break away from the 'traditional' model which allows publishers, recording companies and other large rightsholders to hold unchallenged authority over distribution.

When persons use a CC licence -either as a creator or as a user – they *may become* more open to appreciating how traditional copyright restrictions and restraints block access. In other words, CC *may* provide a reformist window that will open up into a wider and systemic critique of the existing system. At the same time – see the section below – CC users *may*, in the alternative, become more entrenched as to the purported societal benefits of copyright. It will be interesting to watch which strand and which ideology triumphs.

However, there are some disadvantages and some questions that need to be asked as well. CC licences privilege the position of the author as is done in the traditional copyright paradigm: she/he (and not the wider society or users generally) is *the sole person* who decides whether and how and to what extent a work is accessible. This is not surprising as CC operates within the ideological presumptions of copyright; as explained on its website, CC "offers a flexible copyright for creative work [...] Creative Commons offers a flexible range of protections and freedoms for authors and artists. We have built upon the 'all rights reserved' of traditional copyright to create a voluntary 'some rights reserved copyright'." In other words, an actual or potential user of the work is required to accede to the access/use decisions made solely by the author ... who is the person holding copyright.

CC also privileges the notion of the desirability of creating property rights in expressions; cultural and literary products are considered as commodities, albeit ones that the creator can decide (or not decide) to make accessible, much like a person can decide whether or not to invite someone into her or his house. As Lessig

writes, "I am fanatically pro-market, in the market's proper sphere. I don't doubt the important and valuable role played by property in most, maybe just about all contexts."<sup>47</sup>

There is wide variety of CC licences and some of them change traditional access and use provisions by a relatively small degree. One emerging issue that should be of concern is that the increasing numbers of licensing options may become confusing and create additional costs for the use of software.<sup>48</sup> This concern should be watched as the types of licences may become even more complex and confusing until a single model is settled upon.

It is unlikely that more than a tiny percentage of the works created on a global basis in any year will be available under CC licences. Will the percentage be even less within the South? This seems likely. Hence, CC licences will be of limited value in meeting the expansive access needs of the South in the near future. Nor do CC licences provide access to *already published* works or music that are still restricted by copyright laws; these form the overwhelmingly majority of current material.

Focusing on CC licences *may* potentially sideline or detour people from analysing how existing copyright laws block access and how policy changes on a societal level, rather than the actions of individual 'good guys', are the key to improving access and the related problems of copyright laws and ideology which are discussed elsewhere in this draft dossier. Nor does the individualised CC approach challenge the fact that most works are produced by employees, not self-employed persons, and hence are usually owned by their employees. Nor does it confront the fact that many creators (e.g. most musicians, most academic authors) may be required, because of unequal bargaining power, to assign copyright in their own work to a record company or publisher as a condition of getting their work produced or published.

In his own writings, Larry Lessig does not take a critical stance towards copyright itself and he argues that developed copyright systems are close to a pre-requisite for cultural production. He writes: "Copyright is a critical part of the process of creativity; a great deal of creativity would not exist without the protections of the law....And as it (copyright) has expanded, it has expanded the opportunities for creativity."<sup>49</sup> This approach denies the great amount of work that is produced without the motivations of copyright (e.g. the work of most academics), the examples of creative work produced across Asia and Africa (discussed in Section 3 of this dossier), and the work of indigenous peoples.

Given the greatly reduced levels of Internet access in the South (which is the result of many technical and economic factors) and given that most works under CC licences are available – often solely available – on the Internet, what is the future and value of CC licences in the South?

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<sup>47</sup> Lessig, *The Future of Ideas*, p.6.

<sup>48</sup> R. van Wendel de Joode, J.A. de Bruijn and M.J.G. van Eeten, *Protecting the Virtual Commons: Self-Organizing Open Source and Free Software Communities and Innovative Intellectual Property Regimes*, The Hague: T.M.C. Asser Press, 2003. They discuss the types of software licences out there.

<sup>49</sup> Lessig, *Future of Ideas*, pp. 107-108.

While there are certainly concerns with the Creative Commons licensing paradigm, the Copy/South working group has multiple perspectives to offer on the subject. For example, in India, the concept of a creative commons does not resolve the problems associated with the current copyright system. Piracy in India allows access to knowledge and access to creative work and while the Creative Commons may ultimately help provide this, it will not provide the necessary transition. Furthermore, for India, copyright enforcement is characterized by massive and daily violent raids. In such a climate, access to creative commons licensing will do little to resolve the conflicts and a more direct approach to the issue of piracy and the benefits of piracy for India is needed.

However, the use of Creative Commons licensing in Brazil offers an exciting possibility to broaden access to cultural work. According to Ronaldo Lemos, the meaning of Creative Commons in Brazil is very different from that of the United States. In Brazil, the idea of Creative Commons is linked to a larger movement regarding media decentralization. For Brazilians, the Creative Commons licence will be used to 'take over the power of the catalogue' and ultimately it is hoped to end the culture industry as it exists today in Brazil. These efforts are especially prevalent in the Brazilian music scene. In music, parallel industries are emerging in part because traditional music available under copyright and centrally owned by the major labels is not working. Specifically, the centralized culture industry doesn't release Brazilian music in part because the major labels are owned and operated by the large multinationals that control most music world-wide and these industries are not interested in the Brazilian market for local music. The Canto Livre movement is an important response as outlined below.

## 5.10 The Canto Livre example from Brazil

Brazil has been active in staking out the territory of resistance to the intellectual property model advocated by the United States. One exciting opportunity emerging from Brazil is the experimentation happening between the creative commons licensing, Brazilian music, and new models of music creation and sharing. The Canto Livre project is one such example. Ronaldo Lemos describes the project as aiming at, "building an open creative environment for Brazilian music, relying on the idea of sharing and remixing, on the possibilities of collective creation, and on intellectual generosity."<sup>50</sup> Canto Livre means "free singing" or "free corner" in Portuguese, but the emphasis is on the ways in which culture are shared, not necessarily free of charge.

According to Lemos, there is an entire parallel music industry emerging in Brazil taking place on the fringes of the intellectual property markets. One important example is the techno-brega phenomenon, found in the city of Belém in the state of Pará. The techno-brega scene turns the copyright industry upside down. Instead of the CD being the focus of copyright protection and the final product, the techno-brega movement uses the CD as an advertising tool and musicians make their money from

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<sup>50</sup> Ronaldo Lemos, 'Brazil's Canto Livre Project: The Emergence of Society's Creativity,' World Information: IP City Edition, [http://static.world-information.org/infopaper/wi\\_ipcityedition.pdf](http://static.world-information.org/infopaper/wi_ipcityedition.pdf). 2005.

their live concerts and creating 'real-time' CDs of the large musical dance parties associated with the music.<sup>51</sup>

The transformation of industry is an important paradigm for music generation and exchange in the global south. As Lemos states, "Such 'under the radar' institutional arrangements can play an important role in reshaping the interplay between media, culture and the role of IP rights in the developing world. That is especially true when one considers that in fact in the examples such as the one above, copyright is simply not a factor. In this sort of business model, 'piracy' is either irrelevant or economically impracticable."

Ultimately, what the tecno-brega example illustrates is that creation does and can occur outside the copyright maximalist paradigm of the global North. Additionally, it serves as a model for how vibrant, creative and innovative music can be once released from the confines of the huge multinationals that tend to dominate the international and many local music scenes.

### 5.11 Open access journals and open archiving initiatives

The concept of Open Access has gained popularity in the global South recently. In September of 2005 the "Open Access for Developing Countries" international seminar was held in Salvador Bahia, Brazil. The seminar was sponsored by the Latin American and Caribbean Center on Health Sciences Information, the Pan American Health Organization and the World Health Organization. The seminar resulted in the "Salvador Declaration on Open Access: The Developing World Perspective."<sup>52</sup>

The Declaration includes the following mandates:

1. Scientific and technological research is essential for social and economic development.
2. Scientific communication is a crucial and inherent part of the activities of research and development. Science advances more effectively when there is unrestricted access to scientific information.
3. More broadly, open access enables education and use of scientific information by the public.
4. In a world that is increasingly globalised, with science claiming to be universal, exclusion from access to information is not acceptable. It is important that access be considered as a universal right, independent of any region.
5. Open Access must facilitate developing countries' active participation in the worldwide exchange of scientific information, including free access to the heritage of scientific knowledge, effective participation in the process of generation and dissemination of knowledge, and strengthening the coverage of topics of direct relevance to developing countries.

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<sup>51</sup> Ibid.

<sup>52</sup> Available at:

<http://www.icml9.org/meetings/openaccess/public/documents/declaration.htm>.

6. Developing countries already have pioneering initiatives that promote Open Access and therefore they should play an important role in shaping Open Access worldwide.<sup>53</sup>

However, despite general agreement on the part of the developing world that open access is key to scientific development, groups in the developed world have responded by suggesting that open access is dangerous to scientific innovation and will destroy already existing peer-reviewed journals.<sup>54</sup>

To date Open Access scholarly communication initiatives have centred on two types of activities, namely, statements of support for Open Access and the establishment of digital archives or repositories.<sup>55</sup> These two activities are not mutually exclusive, but one does not logically follow from the other either. For instance, statements of support (say at a country level) cannot be read as automatically entailing the wide-scale creation of digital archives. Similarly, the creation of digital archives might not be accompanied by explicit statements of support from the institution developing the archive.<sup>56</sup>

Explicit statement of support for OA →<sup>57</sup> Digital Archive creation  
 NOR  
 Digital Archive creation → Explicit statement of support for OA

That said, two schools of thought exist within the Open Access scholarly communication arena; that of the journal reform school, and the self-archiving school, and both can be regarded as alternative models for access to academic and scientific information, and hence, as ‘open archiving initiatives’.

## Open Access Journals

The central tenet for any Open Access journal is that the subscriber (reader) does not pay to access the intellectual content of the journal. The latter is the necessary condition for its status as an Open Access journal. Other conditions may apply but

<sup>53</sup> Ibid.

<sup>54</sup> David Dickson, ‘Open Access Deemed ‘Dangerous’ by Royal Society,’ SciDevNet, November 24, 2005. Available at: <http://www.scidev.net/News/index.cfm?fuseaction=readnews&itemid=2498&language=1>. Some complained that the Royal Society did not understand the distinction between open access and open archiving. For more on open archiving see: Leslie Chan, Barbara Kirsop, and Subbiah Arunachalam, ‘Open Access Archiving: the fast track to building research capacity in developing countries,’ Science Development Network, Available at: <http://www.scidev.net/ms/openaccess/>. In response to the royal society statement, 42 fellows of the Royal Society issued a letter criticising the statement. See: <http://www.frsoopenletter.org/>.

<sup>55</sup> Adrian K. Ho and Charles W. Bailey, Jr. ‘Open Access Webliography.’ Available at: <http://www.escholarlypub.com/cwb/oaw.htm>. The authors list resources available through the open access movement. Baily has also published ‘The Open Access Bibliography: Liberating Scholarly Literature with E-Prints and Open Access Journals,’ Available at: <http://www.escholarlypub.com/oab/oab.htm>

<sup>56</sup> Digital archive is referred to here in a generic way, entailing both journals and stand alone articles, papers (or other works) not ‘wrapped’ in journal format.

<sup>57</sup> → denotes ‘leads to’

may not always be invoked. One such condition, regarded as a revenue stream, is for research authors to pay article processing fees.<sup>58</sup> Another condition may be the length of time elapsed between the writing of a research piece, and making it available via an Open Access forum. There are differing views on this, but the generally accepted timeframe is anywhere between 'immediately' or 'six months after' the creation of the piece. The latter 'timeframe' argument is usually invoked with self-archiving, rather than OA journals.

From the perspective of the South, OA journals that require Article Processing fees may defeat the purpose of the shift from the traditional journal. While the end user may have 'free' access to the materials, global South researchers may be unable to contribute to these journals because the processing fees could be too prohibitive. The latter has implications for their entry into the science system.

Some OA publishers, such as BioMed Central, allow institutional memberships, which mean that authors from member institutions are exempted from the article processing fee. Starting in 2003, institutions, especially from developing countries, have become members of BioMedCentral with funding support from the Open Society Institute. However, it is doubtful that this funding can be sustained in the long-term. Once the funding is unavailable, the access is also ended and it is unclear how the South can sustain participation.

## **Self-archiving**

Self-archiving takes the form of researchers making versions<sup>59</sup> of their research output available in what are called institutional repositories, and/or subject or topic-based archives. As the names denote, institutional repositories are created by research institutions, usually higher education institutions or science councils. Subject/topic-based archives are usually created by discipline-based scholars for their research community, with funding from either scholarly societies or other interested funders. Another type of institutional repository is referred to as an ETD (Electronic Theses and Dissertations) repository, where only the research works of postgraduate students are made available. The term 'institutional repository' usually denotes that academic research staff are also making their works available in that repository, and it is thus not limited to postgraduate works.

## **Questions from the South**

There are two key and pressing issues for the South in self-archiving their works. One is content-oriented, the other infrastructure-oriented. The first (content-oriented) matter has to do with publisher agreements between authors and publishers. Many developing countries have small yet sustained scholarly publishing industries (existing outside of the large STM publishers arena), and the extent to which small publishers are negotiating copyright terms with developing country authors is unclear. There is much international pressure for multinational publishers to change

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<sup>58</sup> The 'article processing fee' is analogous to the 'page fee' familiar to most actively publishing academic authors. However, the terminology differs at an ideological level, where the 'article processing fee' is propounded by (some) OA proponents, and the 'page fee' denotes the model used in the paid-subscription based journal model.

<sup>59</sup> Whether it is a pre-print, post-print, etc depends on the institution's archiving policy.

their copyright agreements, and for them to support OA self-archiving. The results of the RoMEo study attest to this. It is unclear however how amenable small publishing establishments, especially in developing countries, are to OA self-archiving.

The second (infrastructure-oriented) issue centres on the required technical skills within a developing country to set up and maintain digital archives. These technical skills may be quite limited given that skilled technical staff migrate to other parts of the globe; prefer working outside of the higher education / research sector; or lack sufficient skills to create and maintain their own digital archives using established open source software. Another infrastructure-oriented issue frequently mentioned is the lack of affordable bandwidth capacity in developing countries.

It cannot simply be stated as yet which model(s) is or are the best for those in the South, since both primary models have issues which need to be addressed. However, the concept of open access is a subtle form of resistance to copyright. The growing popularity of open access suggests that academics are beginning to understand that copyright can stand as a barrier to the diffusion of their academic work and it may be the case that an open access model will be a viable alternative.

## 5.12 Co-ordinating activities across the South

Local organizations are forming with links to the surrounding communities, to international NGOs and to international bodies such as WIPO. Thus, the network of resistance grows outward and upward. The Internet and email is an important tool for communicating strategies and linking to other groups around the world. Meetings and conferences at all levels (local, regional, international) help bring together people interested in similar issues and provide strategies for moving forward. Increasingly, WIPO has become a forum for indigenous peoples to meet and develop a common strategy. The same can be said of developing countries who are attempting to use WIPO to help formulate their needs at the international level.

There are numerous strategies that are being employed to resist the expansion of intellectual property. First, direct action against entities attempting to assert strong intellectual property rights are utilized. These tactics are perhaps most visible in the access to medicines struggle in South Africa. Public protests, marches, and acts of civil disobedience are all part of the direct action. Global protests have also used street theatre and humour to highlight the issues.

Second, trying to control the way intellectual property is discussed is an important strategy. Activists successfully made access to medicine an issue of human rights instead of piracy of intellectual property rights. The same can be said to be true about the use of the term biopiracy and bio-colonialism, both of which turn the rhetorical advantage to those resisting intellectual property rights.

Third, activists have developed networks that transcend local areas and integrate the south with the north, local with global, and developed with developing. These networks can be mobilized along many fronts to facilitate action.

### 5.13 Satire and art as resistance

The World Intellectual Property Organization published a comic book in 2001 depicting the problems with piracy and why people around the world should adhere to copyright law. In the comic, Marco wants to be a musician but his parents are against the idea because there is no money in music. Marco comes to understand that in fact he could make a living as a musician if only copyright were respected.

In response to this piece of copyright ideology, the Alternative Law Center in Bangalore, India produced its own version of the comic telling the story of the public domain and the essential need to share and copy from each other. Such satire helps highlight the flaws in the copyright story and expresses an alternative vision of the world that may otherwise be difficult to see. In that way activists are able to assert control over the way the general public perceives creativity.<sup>60</sup>

Art is also being used in an attempt to develop public consciousness regarding copyright and its impact. The World Information City Project is hosting public domain art in city streets throughout Bangalore, India in an attempt to highlight the problems of copyright.<sup>61</sup> The art included in this dossier is a final example of art as resistance that can help render the problems associated with a copyright maximalist position visible.

### 5.14 Co-operation in the South as part of wider intellectual property activism

At the international level – in resistance to TRIPS and the WTO – there is significant overlap between groups that all have an interest in seeing intellectual property law change. For example, resisting the expansion of TRIPS brings environmental activists and HIV-AIDS activists together over issues of patent rights. However, these forms of cooperation do not replace the autonomy of these organizations in many other areas. The relationship between these types of groups is perhaps better described as a network than a partnership. However, when interests coincide within the broader IP framework, activists work together to resist.

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<sup>60</sup> See: <http://www.altlawforum.org/lawmedia/CC.pdf>

<sup>61</sup> See: <http://world-information.org/wio/program/events/1131370562>

