Treaty on Access to Knowledge: Overview and Analysis of Key Copyright Provisions

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I. Introduction

The Treaty on Access to Knowledge[1] ("A2K") is a proposed World Intellectual Property Organization ("WIPO") treaty intended to enhance access to knowledge and information. A2K is intended to remedy problems that developed and developing nations face with regard to access to information and knowledge. It covers many aspects of intellectual property rights. This paper examines A2K's copyright provisions and analyzes whether the proposed provisions will alleviate certain issues in current copyright law.

II. Background

Historically, copyrights have been viewed as a balancing of the broad public interest of promoting the progress of the arts, against an author's interest in controlling and exploiting his creations[2]. The public's interest in access to creative works was usually a primary consideration because copyrights were seen as a way to "enrich[] the general public through access to creative works[3]" and "promot[e] broad public availability of literature, music and other arts[4]."

The temporary statutory monopoly provided by a copyright was viewed as a method for authors to "secure a fair return for [their] creative labor[5]." But the term of the monopoly was "limited so that the public [would] not be permanently deprived of the fruits of an artist's labors[6]." This view was based, in part, on the recognition that the public domain is essential to

foster the growth of human knowledge because almost every new work draws upon the vast store of freely available knowledge[7]. Examples suggests that once a work enters the public domain it is exploited in ways that its author never envisioned, enriching human knowledge and allowing the work to reach wider audiences[8].

The current trend in copyright has changed the focus from the public domain and the enrichment of human knowledge, to protecting economic rights and preventing piracy[9]. For example, the European Union ("EU") and the United States ("US") both felt that it necessary to extend the term of protection to the life of the author plus 70 years in order to properly protect the interests of authors[10], despite the fact that the Berne Convention[11] and the TRIPS[12] agreement already provided copyright protection for the life of the author plus 50 years[13]. Similarly, the No Electronic Theft Act[14] and the anti-circumvention provisions of the Digital Millennium Copyright Act[15] in the US were primarily passed to address the concerns of rights holders rather than those of the public[16].

While some works can benefit from longer terms of protection[17], in most cases, the extensions deny the public access to works they have "already 'paid for' with a copyright term that must have been acceptable to the original author and publisher[18]." While the same argument holds for prior extensions of copyright, the practical consequences were not as significant because the costs of republishing were extremely high. Today, modern technologies, such as scanners and the Internet, reduce the costs of republication and storage[19], make the loss far more tangible. A secondary effect of these copyright extensions is the creation of a large pool of "orphan works[20]." The uncertainty surrounding the ownership of orphan works may mean that these works often remain unexploited, thus depriving the public of access to the knowledge and information they contain[21].

In addition to longer terms, copyright owners have actively pursued Digital Rights Management (DRM) or Technological Protection Measures ("TPM") to protect their content. Although DRM and TPM may protect content from infringement, they can also limit legitimate, non-infringing uses[22]. In many ways, the power of DRM and TPM is not in the technology used, but in the legal regime that severely limits circumventing these protections in order to gain access to the underlying content[23]. By making the circumvention of DRM and TPM illegal, even if a person possesses the tools or knowledge to access a protected, there is no way to legally exercise these abilities, even under a theory of fair use[24]. An additional advantage of the anti-circumvention provisions, from a copyright holder's perspective, is that they have been implemented in ways that shifts some of the enforcement burden from civil litigation to criminal prosecution[25]. Another major concern for many developing nations with regard to DRM and TPM systems is that multinational corporations may be able to lock up knowledge in private pay-per-use systems based around DRM and TPM[26]. Since the citizens of these poorer nations cannot afford to use these systems fear that they will be locked out of both domestic and foreign information and knowledge[27].

The reason developing countries are afraid of the anti-circumvention regime and other copyright restrictions, such as longer protection periods, is that these provisions have been extended far beyond the developed world through treaties such as the WIPO Copyright Treaty[28] and the WIPO Performances and Phonograms Treaty[29]. In addition, fair trade agreements and the WIPO technical assistance program have also exported of such provisions from the developed world to the developing world[30]. Also, the effect of stronger copyright protections on developing countries is not well understood[31] and historical examples suggest that high levels of protection may not be in the best interest of fostering development[32].

The Development Agenda

In order to bring the difficulties imposed by high levels of copyright and other intellectual property protection on developing nations to the forefront of world intellectual property policy making, in 2004 Brazil and Argentina introduced a proposal calling for the establishment of a new development agenda for WIPO at the thirty-first session of WIPO's General Assembly[33]. The Development Agenda emphasized that any intellectual property protections, especially those centered around digital technologies[34], should take into account the levels of development of the countries[35] and the need to ensure that developing countries are not cut off from the free flow of information essential to their long-term development[36]. The Development Agenda also recommended that WIPO take measures, such as the creation of a new "Treaty on Access to Knowledge and Technology" to address the concerns of developing countries[37]. Brazil and Argentina's proposal received strong support from India[38], which emphasized that developing countries need the "same flexibility that [the] developed countries had when they … were at a comparable stage of development[39]."

The WIPO General Assembly accepted the Development Agenda for discussion at its thirty-second session[40]. In the interim, the General Assembly called for several of inter-sessional intergovernmental meetings to examine the proposal[41]. A2K was one of the main topics discussed at these meetings[42]. Despite strong opposition by the US, United Kingdom ("UK"), Japan and the private sector[43], WIPO's General Assembly established a Provisional Committee to continue discussion of the elements of the Development Agenda and provide a report at the September 2006 meeting of the General Assembly[44]. The first meeting of the Provisional Committee is scheduled to be held in Geneva in February 2006[45]. The Provisional Committee and its focus have received strong support from developing nations[46].

III. A2K

A2K is a proposed WIPO treaty intended to further several aspects of the Development Agenda. Its objective is to "protect and enhance access to knowledge, and to facilitate the transfer of technology to developing countries[47]."

Overview

A2K is comprised of twelve parts covering several aspects of intellectual property rights. The first two parts cover the objectives, relations to other treaties, and governance[48]. The provisions regarding copyrights are primarily contained in the third part[49]. Subsequent parts cover patent rights, expanding the knowledge commons, promotion of open standards, control of anti-competitive practices, technology transfer, the free movement of researchers, access to government produced works, and enforcement[50].

Since A2K is not self-executing, nations that agree to the treaty will have to enact legislation that implements its provisions[51]. The treaty describes a minimum level of various rights and exceptions in the copyright and patent laws of member nations and allows nations to enact legislation that provides greater rights and exceptions[52].

A permanent Secretariat appointed by the Conference of the Parties will be responsible for administering the treaty[53]. Although the presence of a Secretariat instead of an Assembly makes A2K somewhat different from the WCT and the WPPT[54], the combined roles of the Conference of Parties, the Executive Board and the Secretariat are roughly equivalent to that of the WCT and WPPT Assemblies[55].

The copyright provisions of the current draft of A2K are discussed below. As A2K is still being actively negotiated, the provisions in future versions may be different than those discussed herein. Unlike many other treaties that cover copyrights, A2K's copyright section begins with an

enumeration of limitations and exceptions[56]. These limitations cover: (1) the rights of educational institutions to make use of all or part of a work[57], (2) the right to reuse parts of a work in order to criticize it[58], (3) the rights of libraries to migrate works from one format to another and to make copies of orphan works[59], (4) the right to use a work in the process of reverse engineering[60] and (5) the right to use a work in order to make it more accessible to people with disabilities[61]. Subsequent Articles enumerate exceptions and limitations for distance learning[62], additional exceptions for making works accessible for disabled persons[63], DRM circumvention[64] and exploitation of orphan works[65]. The final article in part 3 discusses a compulsory license for copyrighted works for developing countries[66].

Exceptions for Educational Institutions

A2K requires that member states provide educational institutions with the unqualified right to make excerpts and quotations from works and to provide complete copies of works to students as secondary readings[67]. A2K also requires that member statues allow educational institutions to provide complete copies of works to students as primary readings if the copyright owner does not provide the work at a reasonable price and the institution provides the copyright owner with fair compensation[68].

These provisions provide a workable alternative to the cost of textbooks and teaching materials. A study of access to learning materials in Africa found that the cost of materials was "the greatest barrier to accessing learning materials[69]." Even when there was access to materials, the same study found that results are far better when "every single [student] possesses enough appropriate textbooks and is allowed to both own them and take them home[70]." Another study conducted at the University of Sydney found similar problems[71]. The investigators found that even in a developed nation, such as Australia, teachers often "postponed replacing books which

had outlived their usefulness" in order to make the most of limited funds[72]. The investigators also found that teachers were generally "making do" instead of "adopting [to] much more effective and efficient teaching strategies which could lead to more effective and efficient learning on the part of their students[73]." Both studies found that many publishers were unable or unwilling to meet local demands for a variety of reasons including a perception that schools engage in widespread photocopying[74]. The study conducted in Africa also found that publishers preferred to focus on the high profit US and UK markets and were unwilling to engage in most developing markets, because they could not ship sufficient numbers of books to the developing world in order recoup their publishing costs[75].

Under A2K schools that are unable to afford to provide their students with sufficient textbooks at the publisher's prices, will be able to make copies of the necessary textbooks at a price that they can fairly afford. This will allow schools to provide the material necessary to allow their students to learn and will also address the lack of interest publishers have shown in these markets. The A2K provisions also ensure that schools do not exploit the work of textbook authors for free because the schools are required to provide some compensation. This incentive both compensates the authors for their work, but also ensures that the schools will use extra care to extend the longevity of the books they produced because every additional copy that they make to replace a worn out copy will be an additional financial burden on the school.

Even if some of the limitations with respect to educational institutions are eventually modified or omitted, the fact that A2K contains some provisions for educational institutions is a positive step, considering that educational exceptions are left to the discretion of the national legislatures in Berne and the WCT[76]. Even the US, which provides educational institutions with limited exceptions to the exclusive rights conferred by copyright, does not allow educational

institutions to make copies of works for use as secondary or primary readings[77].

Exceptions for Distance Education

Several exceptions relating to distance education are contained in A2K art. 3-2. These exceptions are intended to provide educational institutions with enough rights to "take full advantage of new technologies in the delivery of education[78]." Despite the fact that distance education, especially via the Internet, offers the potential to reach large numbers of students, concerns about copyright liability have, thus far, limited its deployment[79].

Under A2K art. 3-2(b) member states would be required to allow educational institutions to perform non-dramatic literary works, perform reasonable portions of other works and display works in connection with distance learning programs[80]. While these provisions generally apply only to lawfully acquired copies, A2K art. 3-2(c) does allow some use of illegal copies, provided that the educational institution reasonably believed that their copies were legal. In addition to the exceptions in A2K art. 3-2(b), A2K art. 3-2(e) allows educational institutions to record and retain copies of transmissions as reasonably needed for teaching purposes.

These provisions are roughly equivalent to the distance learning rights of educational institutions in the US[81]. However, A2K goes farther because it does not impose a duty on educational institutions to protect their digital transmissions with technological measures that prevent long-term retention of the broadcast by students and distribution of copies to third parties[82]. Even if the A2K provisions are modified to provisions similar to those in the US[83], they will still benefit educational institutions at the international level because neither Berne nor the WCT requires national legislation enacting equivalent rights for educational institutions. The distance education provisions are especially important because the laws in many countries do not currently contain such provisions[84].

Exceptions for Libraries

A2K art. 3-1(a)(v) and A2K art. 3-4 enumerate the main exceptions that apply to libraries. The exception in A2K art. 3-1(a)(v) requires that member states allow libraries to migrate works stored in older formats to newer ones. The exception in A2K art. 3-4 requires member states to allow libraries to lend works without paying royalties to copyright owners. An additional exception relating to libraries is found in A2K art. 3-1(a)(viii). This exception allows libraries to make copies of works that are copyrighted but unexploited for archival and research purposes. The International Federation of Library Associations and Institutions ("IFLA") and the Electronic Information for Libraries Foundation ("eIFL") helped to draft these provisions to address the concerns of its members[85].

Many concerns are driving libraries to convert from older formats to new digital ones. Some libraries are concerned about the physical degradation of older formats[86], while others are more concerned about providing better access to their collections[87]. Digital versions offer several benefits to libraries such as lower storage costs[88] and minimization of the damage to fragile materials[89]. An added benefit of digital formats is that patrons can view a vast range of digitized works simultaneously[90] and search them efficiently[91] allowing them to relate the contents in ways that would difficult with physical media. Despite this, many libraries are reluctant to digitize their collections because of legal uncertainty regarding their right to do so[92]. As an example, the Google Library Project[93] may be permanently shelved because of the copyright concerns raised by the Association of American University Presses ("AAUP"), Association of American Publishers ("AAP"), and the Authors Guild ("AG")[94]. Although Google has made some changes to its Library Project to address these concerns[95], AAP and AG members have found these changes insufficient and have sued to enjoin the project[96].

A2K art. 3-1(a)(v) is designed to deal with these sorts of issues. This provision gives libraries the flexibility they need to determine what types of storage and formats are best for the communities they serve. It should also provide some certainty to efforts like the Library Project, because they are mainly projects to migrate content stored as printed books into digital formats that are easier to maintain and access.

In the US, A2K art. 3-1(a)(v), (viii) could be enacted as a modification to the library exceptions, which already provides libraries with some exception to an author's exclusive economic rights[97]. The exception § 108(c) that allows for libraries to duplicate works only applies to replacement of existing copies in a limited set of circumstances[98]. A2K art. 3-1(a)(v) is not limited to just preservation, it also includes migration from one format to another without any reference to obsolete formats. Since A2K art. 3-1(a)(v) does not require that the a library migrate from a obsolete format to another, the implication is that libraries could choose to migrate from uneconomical formats to economical ones even if the uneconomical format was not obsolete. This would be a change existing US copyright law because § 108(c) currently requires libraries to show that they are migrating from a format that is "obsolete[99]." The problem with an obsolescence standard is that it does not permit libraries to migrate to a newer, more economical format, if equipment for viewing the older format is available[100]. Removing this limitation should help financially strapped libraries from having to make choices between retaining old, inaccessible collections and moving to newer formats.

In the US, the other provisions of § 108(c)(2) would largely be unaffected. The § 108(c)(2) provision requiring digital copies to remain accessible only in the same physical location where the original is kept does not seem to run afoul of A2K art. 3-1(a)(v). Nothing in A2K art. 3-1(a)(v) suggests that the libraries should be allowed to widely distribute digital

copies. Second, A2K art. 3-1(a)(viii) provides libraries with the ability to make archival or research copies in cases where a work is not subject to commercial exploitation. This requirement is similar to the US requirement that a replacement copy cannot reasonably be found[101]. But the interplay of A2K art. 3-1(a)(v) and A2K art. 3-1(a)(viii) will probably required § 108(c)(1) and § 108(c)(2) to be converted into alternatives rather than dual requirements[102]. Otherwise the A2K art. 3-1(a)(v) freedom to migrate from one format to another would be hampered by forcing libraries to continually seek out copies in the archaic format and to select such copies for replacement purposes instead of choosing the preferable path of migration.

The exception allowing libraries to lend works appears similar to the "first sale" doctrine in the US[103]. For libraries in many countries it represents a highly anticipated right because this right is not part of the current law in many parts of the world, including the EU[104]. Also, A2K art. 3-4 covers works that are subject to license agreements that limit the ability to lend works. As more works are available in digital form, copyright owners are using licensing agreements to bypass the "first sale" doctrine and implement pay-per-use systems[105]. This poses a problem for libraries, because such licensing agreements limiting their traditional ability to freely lend works to patrons[106]. Although it is theoretically possible for a library to buy a license that covers all of its patrons, the financial situation of most libraries does not makes this option unrealistic[107]. In order to ensure that licensing agreements do not interfere with normal library operations, the IFLA strongly supports this particular A2K provision[108].

Exceptions for Disabled Persons

As the representative of the World Blind Union stated during an A2K conference, the main problems facing disabled persons are "limited range of formats in which information is primarily offered" and "shortages of accessible copies[109]." While US copyright law provides

exceptions that allow the preparation of accessible versions without authorization[110], similar exceptions are not present in Berne or the WCT. Even the EU's recent ICD leaves exceptions for disabled persons to the discretion of national legislatures[111].

A2K art. 3-3 contains several exceptions intended to improve the situation. The two main exceptions are in A2K art. 3-3(b), 3(e). The exception in A2K art. 3-3(b) allows organizations, such as libraries and schools, to convert works from one format to another in order to make them more accessible to disabled persons. The exception in A2K art. 3-3(e) requires the enactment of national legislation allowing disabled persons to bypass DRM and TPM. By allowing schools and libraries to freely convert works to accessible formats, these provisions should address problem that many works are released in formats that are not friendly to disabled persons. Additionally the provisions should reduce shortages of accessible versions because they do not place restrictions on the number of accessible copies that can be made.

Exceptions for DRM and TPM Circumvention

A2K art. 3-6 attempts to provide some exceptions to the anti-circumvention regime found in the WCT[112], the WPPT[113], the ICD[114] and the Copyright Protection and Management Systems provisions of US law[115]. One problem with current DRM and TPM anti-circumvention law is that it either does not enumerate any exceptions or only provides very narrow exceptions. For example, neither the WCT nor the WPPT require national legislatures to enact exceptions to the anti-circumvention right. While both the EU and the US provide some exceptions, the exceptions are not co-terminal[116], thus legal conduct in the EU may be illegal in the US, and legal conduct in the US may be illegal in the EU, leading to widespread concern amongst researchers and engineers[117].

Another problem with the anti-circumvention provisions is that they may allow copyright

owners to control the right to access and use works even after copyright protection expires because the DRM does not expire. An explicit provision is needed to cover this case because courts have been unwilling to extend the fair use doctrine to cover circumvention in such instances[118]. In addition, a provision is needed to cover the case where DRM is used to limit access to content that is currently in public domain[119]. These issues are particularly acute for developing countries because anti-circumvention provisions can hinder development priorities by allowing content owners to impose private restrictions that local copyright law does not recognize[120].

In recognition of these problems, A2K art. 3-6 requires member states to enact legislation that provides the right to circumvent DRM and TPM in cases where these measures preclude an open-source or free software implementation of the equivalent functionality, do not permit access by devices intended to aid disabled persons or are used to protect predominantly public domain, scientific or factual works[121].

The first exception is intended to help efforts such as LiVID[122]. It should also assist nations like Brazil, which want to replace their expensive, proprietary, closed-source systems with open-source equivalents[123]. The exception for bypassing DRM in order to aid disabled persons should reduce the legal uncertainty surrounding products such as Elcomsoft's AEBPR[124]. The third set of exceptions ensures that copyright owners cannot prevent access to factual and public domain content, which are exempt from copyright protection. This should address the problem that content owners can attempt to limit or prevent access to unprotected works using DRM[125]. For example, consider the movie *Charade*, which is in the public domain because of a failure to include a proper copyright notice[126]. Universal Pictures has released this movie on a DRM protected DVD[127]. Although, in the US § 1201(a)(1)(A) would allow users to

bypass the DRM protection to gain access to the public domain content, the tools needed to bypass the DRM would be illegal under §§ 1201(a)(2), (b)(1). A similar situation is present under the ICD, as ICD art. 6(2) applies to the tools needed to bypass DRM, and makes the provision of such tools illegal regardless of the copyright status of the underlying content[128]. Without the necessary tools, it would be almost impossible to gain access to the underlying unprotected work. This is the exact situation that A2K art. 3-6(b)(v)(1) addresses.

In addition to these exceptions, A2K requires that members enact legislation that prevents contracts from waiving the right to bypass DRM and TPM in lawful ways[129] and barring the distribution of technology that allows DRM and TPM to be bypassed in lawful ways[130]. In order for the DRM and TPM circumvention provisions to be effective, laws barring contracts that waive these rights, as void against public policy, will probably be necessary because End User License Agreements, hereinafter EULA, are being included in many works, such as CDs[131], which historically were not covered by additional private contract terms. Since courts are generally more willing to enforce private contract provisions, if laws reflecting the public policy that waivers of the circumvention right are void against public policy are not enacted, then these EULAs may be increasingly be used to force users to waive their circumvention rights.

Exceptions for Orphan Works

Many orphan works remain unexploited because it is difficult or impossible to determine who owns the copyright in the work[132]. Usually "[no] living person or legal entity claim[s] ownership of the copyright[133]" in an orphan work, but it may be difficult to know for certain because many works, such as photographs, do not contain a clear indication of who the author was. Although infringement claims are unlikely with orphan works, many scholars and researchers avoid them because the uncertainty in ownership means that the risk that a copyright

infringement action may be brought cannot totally be eliminated[134]. A secondary problem with orphan works is that even when someone is willing to under take a search for the work's author, there are no clear standards regarding what constitutes a diligent search or if use after a diligent search would qualify as a fair use[135].

A2K art. 3-8 is an attempt at addressing this problem. The provisions in A2K attempt to remedy the orphan work problem by requiring that member states enact legislation that provides access to orphan works[136] and allowing usage of orphan works if the copyright owner cannot be determined after a reasonable investigation[137]. The first provision means that member states cannot continue ignore the orphan work problem, which is needed because studies suggest that a large number of the works produced in the last century are orphans[138]. The second provision will probably have the biggest impact toward rectifying the problem. By allowing people to conduct a reasonable investigation before using an orphan work, a double benefit is accrued. First, some authors may be discovered and they may find that a renewed interest in their works creates an incentive to update and popularize their works. Second, in cases where an author cannot be found, the work is exploited and the public is able to enjoy the benefit of a new creative work based on the orphan work.

The A2K reasonable search provision for orphan works[139] bears some similarity to reasonable search provisions for orphan works in Canada[140] and the UK[141]. The UK provision is closer to the A2K provision because both define use of an orphan work as not an infringement provided that a reasonable search was made[142]. The UK provision is more limited in scope than the A2K provision because it only applies in cases where it is reasonable to assume that the copyright has expired or the author has been dead for more than fifty years[143]. The Canadian version of a reasonable search is different than both the UK and A2K art. 3-8(b) because it is

based on obtaining a license to use after proving to the Canadian Copyright Board that the user could not be located following a reasonable search[144]. It seems unlikely that current Canadian system would be considered a sufficient implementation of A2K art. 3-8(b). In addition, the Copyright Office in the US is examining several proposals for handling orphan works including licensing systems similar to Canadian system[145]. Since many countries, including the US, may prefer to implement a centralized system that deals with orphan works because it provides notice and review, this particular provision of A2K will probably need to be revised to accommodate these systems.

Other Provisions and Exceptions

Of the remaining provisions and exceptions to copyright in A2K, two that may have the largest impact are A2K art. 3-12 and A2K art. 5-3. These cover compulsory licenses to copyright works for developing countries and copyright in government works, respectively.

A2K art. 3-12 provides a compulsory license for copyrighted works in developing countries. While the exact nature of the license is still being negotiated, the purpose of such a license is to give developing countries "easier and less costly access to education, science, technology and culture"[146] while eliminating the complexity imposed on developing nations by the Appendix to the Berne Convention[147]. If a simple, compulsory license can be worked out, it should benefit both developing nations and copyright owners, as the developing nations will be able to obtain works at rates they can afford reducing the allure of cheap pirated versions.

A2K art. 5-3 is similar to 17 USC § 105 (2005), and states that works created by government employees conducting essential public functions are not subject to copyright protection. Since many governments conduct significant research and development, the fact that these works will be publicly available should provide a huge boost for researchers everywhere.

IV. Conclusion

A2K is intended to rectify many of the problems with current copyright treaties and national laws. It represents a change of focus for WIPO and, if widely adopted, should enhance the public's ability to access information and knowledge. Although the treaty has strong support amongst the developing world, many developed nations seem hesitant to support its provisions. The success of A2K will depend on whether the developing nations can form a strong enough coalition in the WIPO General Assembly to have the treaty adopted on a wide scale.

V. Copyright and License

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VI. Endnotes

[1] Treaty on Access to Knowledge, May 9, 2005, *available at* http://www.cptech.org/a2k/consolidatedtext-may9.pdf [hereinafter A2K].

[2] Lord Mansfield recognized this policy as early as 1785. See Lord Mansfield, *Sayre v. Moore* (1785), quoted in *Cary v. Longman*, 1 East 358, 362 n. (b), 102 Eng. Rep. 138, 140 n. (b) (1801).

[3] *Fogerty v. Fantasy*, 510 U.S. 517, 527 (1994).

[4] *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975).

[5] *Id.*

[6] *Steward v. Abend*, 495 U.S. 207, 228 (1990).

[7] "No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed." *Emerson v. Davies*, 8 F. Cas. 615, 619 (1845).

[8] For example, once *The Secret Garden* became public domain, movie versions, recordings and electronic versions appeared, greatly enhancing access to the classic. *See* Dennis S. Karjala, Derivative Works Based on Frances Hodgson Burnett's Classic *The Secret Garden* (1911), http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/SecretGardenDWs.html.

Another famous example is the movie *It's a Wonderful Life*. The popularity of this holiday classic can be attributed to the fact that it entered the public domain and could be played by television stations for free. *See* Sam Williams, *Should Auld Copyrights Be Forgot*, http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/Williams12-22-99.html.

[9] In the US Senate debates regarding copyright extensions, Sen. Hatch expressed this view clearly by stating that copyright was "a weapon … to fight the piracy of intellectual property." 141 Cong. Rec. S 3390, 3392 (daily ed. Feb. 22, 1995) (Statement of Sen. Hatch). He further indicated that the major concern of the US should be "[o]verseas piracy of American copyright material", which would only increase as digital technologies became prevalent. *Id.*

Sen. Hatch's remarks are also illustrative of the change in focus of copyright law from the public domain because he saw the importance of copyright extensions as preventing "[d]ozens, if not hundreds, of …valuable songs and motion pictures-the legacy of American culture-… [from] fall[ing] into the public domain." *Id.*

[10] *See* Council Directive 93/98/EEC on Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 1.1, 1993 O.J. (L 290) 9, *available at* http://www.ebu.ch/CMSimages/en/leg_ref_ec_directive_copyright_duree_protection_291093_tcm6-4276.pdf [hereinafter Council Directive 93/98/ECC]; 17 U.S.C. § 302(a) (2005).

The preamble to Council Directive 93/98/ECC states that the reason for extending term of protection is that the term provided "by the Berne Convention … was intended to provide for the author and the first two generations of his descendants" but due to increased longevity of authors "this term is no longer sufficient." Council Directive 93/98/ECC, preamble (5).

Similarly, in the US, Sen. Hatch argued in favor of extensions stating that : "[W]e cannot afford to abandon 20 years' worth of valuable overseas protection. … We must adopt a life-plus-70-year term … to allow American copyright owners to benefit from foreign uses." 141 Cong. Rec. S 3390, 3392 (daily ed. Feb. 22, 1995) (Statement of Sen. Hatch).

[11] Berne Convention for the Protection of Literary and Artistic Works (Sept. 9, 1886; revised July 24, 1971 and amended 1979; entered into force for U.S. Mar. 1, 1989 (Sen. Treaty Doc. 99-27)) 1 B.D.I.E.L. 715 [hereinafter Berne], *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

[12] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M 81 (1994) [hereinafter TRIPS], *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

[13] Berne art. 7(1); TRIPS art. 12.

[14] No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C. §§ 101-803 (2005)) [hereinafter NET Act].

[15] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) [hereinafter DMCA].

[16] Approximately 35 witnesses testified in the hearings. *See* Bill D. Herman and Oscar Gandy, *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 Cardozo Arts & Ent. L. J. at 19 (2006), *available at* http://ssrn.com/abstract=844544.

Nineteen of the witness represented various technology sectors including hardware and software vendors, telecommunications corporations, and Internet Service Providers. *Id.* Nine of the witnesses represented the music, movie and publishing industries. *Id.* The remaining witnesses represented either higher education or intellectual property attorneys. *Id.*

[17] Copyright term extensions have "had the practical effect of helping a tiny number of works that are still in print, or in circulation. Estimates are between 1% and 4% [of published works]." James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 Duke L. & Tech. Rev. 0009 at 6, *available at* http://www.law.duke.edu/journals/dltr/articles/PDF/2004DLTR0009.pdf.

[18] *Id.*

[19] *See* Bruce R. Kingma, *The Costs of Print, Fiche, and Digital Access, D-Lib*, Feb. 2000, http://www.dlib.org/dlib/february00/kingma/02kingma.html (comparing of the storage of works in microfilm/microfiche and digital formats).

[20] Orphan works are "copyrighted works whose owners are difficult or even impossible to locate." 70 Fed. Reg. 16, 3739 (Jan. 26, 2005), *available at* http://www.copyright.gov/fedreg/2005/70fr3739.html.

[21] "Concerns have been raised … orphan works are being needlessly removed from public access and their dissemination inhibited. … The Copyright Office has long shared these concerns." *Id.*

[22] For example, one of the reasons Elcomsoft developed AEBPR was to enable audio readers for the blind to work with eBooks. *See* Electronic Frontier Foundation, *US v. ElcomSoft & Sklyarov FAQ*,

http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html#VisuallyImpaired. Although Elcomsoft's actions would appear to fall under the exception in 17 U.S.C. § 121 (2005), which allows third parties to create copies to provide access for the blind without authorization from the copyright holder, 17 U.S.C. § 1201 (2005), which covers anti-circumvention, includes no such exception.

[23] *See* 17 U.S.C. §§ 1201-1205 (2005); Council Directive 2001/29/EC on The Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 art. 6,7 O.J. (L 167) 10 [hereinafter ICD].

[24] *See* Laura N. Gassaway, *The New Access Right and its Impact on Libraries and Library Users*, 10 J. Intell. Prop. L., 269, 298-299 (2003).

[25] For example, 17 U.S.C. § 1204(a) (2005) allows criminal prosecutions for circumventing DRM or TPM systems in any case involving "commercial advantage or private financial gain." The term "financial gain" is defined in 17 U.S.C. § 101 (2005) as including "receipt, or expectation of receipt of anything of value." This expansive definition has lead to six major prosecutions under § 1204(a) since 2004 and about 37 under a related provision in 17 U.S.C. § 506(a)(1) (2005). See Department of Justice Computer Crimes and Intellectual Property Section (CCIPS), *Intellectual Property Cases*, http://www.usdoj.gov/criminal/cybercrime/ipcases.htm#dmca.

[26] *See* Dick Kawooya, *DMCA-Like Legislations and implications for Library-based Learning in Developing Countries* at 8, *available at* http://ibt.afrihost.com/accessof/files/dmca_south_africa.doc.

[27] *Id.*

[28] *See* WIPO Copyright Treaty, CRNR/DC/94, art. 11, December 20, 1996 [hereinafter WCT], *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

[29] *See* WIPO Performances and Phonograms Treaty, CRNR/DC/95, art. 18, December 20, 1996 [hereinafter WPPT], *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

[30] *See* Kawooya, *supra* note 26, at 2.

[31] Intellectual property protections "may … introduce distortions that are detrimental to the interest of developing countries." Boyle, *supra* note 17, at 4.

[32] The transition of Japan and South Korea from developing countries to developed countries is attributed in part to policies of weak intellectual property protections. *See* Keith E. Maskus and Jerome Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7(2) J. Int'l Econ. L., 279, 290 (2004), *available at* http://www.law.duke.edu/cspd/articles/reichman.pdf.

[33] *Proposal By Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO General Assembly, 31st Sess., WO/GA/31/11 (2004), *available at* http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf [hereinafter Development Agenda].

[34] "[T]o tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models … as exemplified by the Human Genome Project and Open Source Software." *Id.* at 3.

[35] "WIPO[] … should ensure that national laws on intellectual property are tailored to meet each country's level of development and are fully responsive to the specific needs and problems of individual societies." *Id.* at 5.

[36] "[A]dding new layers of intellectual property protection … would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity" *Id.* at 3.

[37] *Id.*

[38] Debabrata Saha, *Statement regarding the Proposal for Establishing a Development Agenda for WIPO* (Oct. 1, 2004), *available at* http://www.cptech.org/ip/wipo/india10012004.html.

[39] *Id.*

[40] *See* WIPO General Assembly Decision on a Development Agenda, Oct. 4, 2004, http://www.cptech.org/ip/wipo/wipo10042004.html.

[41] *Id.*

[42] Three separate intersessional intergovernmental meetings were held. The first meeting occurred in April 2005, the second occurred in June 2005 and the third occurred in July 2005. *See* IIM/1 - Intersessional Intergovernmental Meeting, http://www.cptech.org/ip/wipo/iim1.html; IIM/2 – Second Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, http://www.cptech.org/ip/wipo/iim2.html; IIM/3 – Second Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, http://www.cptech.org/ip/wipo/iim3.html.

A separate workshop devoted entirely to A2K was held in May 2005. *See* Manon Rees, manon.ress@cptech.org, to a2k@lists.essential.org (Apr. 25, 2005), *available at* http://lists.essential.org/pipermail/a2k/2005-April/000268.html.

[43] The US, the UK and Japan argued that the mandate of the development agenda ended with the thirty-second generally assembly and that any further discussion should be moved to WIPO's Permanent Committee on Cooperation for Development Related to Intellectual Property, hereinafter PCIPD. William New, *U.S. Holds Out on Extension of High-Level Meeting on*

Development Agenda (Sept. 30, 2005), http://www.ip-watch.org/weblog/index.php?p=93&res=1024_ff&print=0. Developing countries resisted this alternative because of concerns that restricting the discussion to the PCIPD will marginalize their concerns. *Id*.

Lobbying groups representing the pharmaceutical industry, software vendors, the music industry, film industry and publishers also attended the thirty-second general assembly to lobby delegates against the development agenda. See William New, *Industry Concerned About Development Agenda at WIPO* (Nov. 4, 2005), http://www.ip-watch.org/weblog/index.php?p=125&res=1680_ff&print=0.

[44] *Report of the WIPO General Assembly*, 32d Sess. at 40, WO/GA/32/13 (2005), *available at* http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_32/wo_ga_32_13.pdf.

The establishment of the Provisional Committee was a compromise by the developing nations that accommodated the US and the UK because the PCIPD ceases operating while the Provisional Committee undertakes further discussions of the Development Agenda. William New, *New Committee for WIPO Development Agenda; Patents Reinvigorated* (Oct. 3, 2005), http://www.ip-watch.org/weblog/index.php?p=97&res=1680_ff&print=0.

[45] *See* William New, *Chile Urges WIPO to Act to Protect Public Domain* (Jan 12, 2006), http://www.ip-watch.org/weblog/index.php?p=191&res=1680_ff&print=0.

[46] Chile, in particular, has called for the committee to undertake detailed analysis of the proposals for "protection and identification of and access to the contents of the public domain" and for WIPO, as a whole, to consider the public domain in all of its policy-making. *Id.*

[47] A2K art. 1-1.

[48] A2K art. 1-1 covers the objectives of the treaty. A2K art. 1-3 covers the relationship of A2K to other treaties, such as the Berne convention. A2K art. 2-1, 2-2, 2-3 contain the governance provisions.

[49] A2K art. 3-1 to 3-12. An additional exception providing that works created by government employees and contractors engaged in essential public functions are public domain is contained in A2K Art. 5-3.

[50] A2K art. 4-1 covers patent rights.

A2K art. 5-1, 5-2, 5-3, 5-4, 5-5, 5-6 contain the provisions covering expansion of the knowledge commons.

A2K art. 6-1, 6-2, 6-3, 6-4 contain the provisions for promotion of open standards.

A2K art. 7-1, 7-2, 7-3, 8-3 contain the provisions for the control of anti-competitive practices.

A2K part 9 contains the provision regarding technology transfer.

A2K art. 10-1 covers the free movement of researchers. This provision is intended to reduce the barriers for researchers to obtain visas in order to attend conferences or to collaborate with researchers in other countries.

A2K art. 10-2 covers access to works created by governments.

A2K part 12 will contain the enforcement provisions. Currently it is just a placeholder. Some of the enforcement provisions may be drawn from TRIPS Part III because it is one of the only intellectual property treaties that features explicit enforcement provisions. Berne, the WCT and the WPPT do not feature explicit enforcement provisions.

[51] *See* A2K art. 1-2 ("Members shall give effect to the provisions of this Agreement").

[52] See A2K art. 1-3 ("Members may … implement in their law more extensive measures to promote access to knowledge than are required by this Agreement").

[53] The Conference of Parties, which is to meet at least once every two years, will be comprised of representatives from the member states. *See* A2K art. 2-1. The Conference of Parties is responsible for appointing an Executive Board, which in turn is responsible for creating the

permanent secretariat. *See* A2K art. 2-2 ("[the] Executive Board (EB) shall designate a permanent secretariat").

[54] Both the WCT and the WPPT have Assemblies rather than Secretariats. *See* WCT art. 15; WPPT art. 24.

[55] The WCT and WPPT Assemblies meet at least once every two years just like the A2K Conference of the Parties. *See* WCT art. 15(4); WPPT art. 24(4). Furthermore, the WCT and WPPT Assemblies expected to "deal with matters concerning maintenance and development" of the treaties. *See* WCT art. 15(2)(a); WPPT art. 24(2)(A).

[56] A2K art. 3-1.

[57] A2K art. 3-1(a)(i), (iii)-(iv).

[58] A2K art. 3-1(a)(ii).

[59] A2K art. 3-1(a)(v), (viii).

[60] A2K art. 3-1(a)(vi).

[61] A2K art. 3-1(a)(vii).

[62] A2K art. 3-2(b), (e).

[63] A2K art. 3-3(b), (e).

[64] A2K art. 3-6(b).

[65] A2K art. 3-8.

[66] A2K art. 3-12(b).

[67] A2K art. 3-1(a)(i) contains the unqualified right to make excerpts and quotations. A2K art. 3-1(a)(ii) contains the right to provide complete copies of works to students as secondary readings.

[68] A2K art. 3-1(a)(iv).

[69] *See* Beulah Thumbadoo, *Users' Perspectives on Access to Learning Materials in Southern Africa* at 6, *available at* http://ibt.afrihost.com/accessof/files/thumbadoo.doc.

[70] *Id.*

[71] Kevin Laws and Mike Horsley, *Educational Equity?*, http://alex.edfac.usyd.edu.au/Year1/cases/Case 14/Textbooks_in_Secondary_Sch.html.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 15-16.

[75] *See* Thumbadoo, *supra* note 80, at 16. The study found that publishers were willing to engage in the Indian probably because they could provide the same books as in the US and UK markets to a large English friendly audience. *Id.*

[76] Berne art. 10(2).

[77] Under 17 U.S.C. § 110(1) (2005), only "performance or display of a work … in the course of face-to-face teaching activities" are deemed non-infringing uses.

[78] A2K art. 3-2(a).

[79] *See* Distance Learning Net, *Copyright Concerns in the Age of Distance Education*, http://www.distancelearningnet.com/reports/13/1.

[80] A2K art. 3-2(b)(1) covers performance of non-dramatic literary works. A2K art. 3-2(b)(2) covers performance of reasonable portions of all other types of works. A2K art. 3-2(b)(3) covers the display of works.

[81] *See* § 110(2).

[82] *See* § 110(2)(D)(ii)(I) ("the transmitting body … in the case of digital transmissions … [must] appl[y] technological measures that reasonably prevent … retention of the work … [and] unauthorized further dissemination of the work").

[83] See § 110(2).

[84] For example, §§ 29.4 to 29.9 of Canada's Copyright Act, provide educational exceptions but these do not cover distance learning. *See* Copyright Act, R.S.C., c. 24, art. 18 §§ 29.4-29.9 (1997) (Can.), *available at* http://laws.justice.gc.ca/fr/C-42/35468.html#article-29.4; *Interim Report on Copyright Reform*, Standing Committee on Canadian Heritage, House of Commons Canada at 15 (2004), *available at* http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf.

[85] *See* IFLA and eIFL, Statement at the Inter-sessional intergovernmental meeting on a development agenda for WIPO 3rd Session (July 20-22, 2005), *available at* http://www.ifla.org/III/clm/p1/A2K-6.htm.

[86] As an example, some movies are stored on film that will physically deteriorate before the copyright expires. *See* Jesse Walker, *Copyright Catfight: How intellectual property laws stifle popular culture*, http://reason.com/0003/fe.jw.copy.shtml.

[87] *See* Eleanore Stewart, *Why Library Preservation Should Plan for a Digital Future*, http://palimpsest.stanford.edu/byorg/abbey/an/an22/an22-3/an22-302.html.

[88] *See* e-ternals.com, *Retrospective Digitization: Microfilm vs. Direct Digitization*, http://www.e-ternals.com/english/infobase/infobase03col2.html; Michael Lesk, *Substituting Images for Books: The Economics for Libraries*, http://lesk.com/mlesk/unlv/unlv.html (estimating that the cost of storing a book digital will be approximately $2.70 per year as compared to physical storage which costs approximately $5.60 per year).

[89] For example, "Pierre-Charles L'Enfant's original 1791 plan for the city of Washington is so brittle and deteriorated that the Library of Congress no longer allows researchers to examine it. But [] millions can view the digital reproduction on the library's website." Daniel J. Cohen and Roy Rosenzweig, *Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web*, http://chnm.gmu.edu/digitalhistory/digitizing/1.php.

[90] "Digital surrogates can bring together research materials that are widely scattered about the globe, allowing viewers to conflate collections and compare items that can be examined side by side solely by virtue of digital representation." Abby Smith, *Why Digitize?*, http://www.clir.org/pubs/reports/pub80-smith/pub80.html.

[91] Searching digital content is "orders of magnitude faster and more accurate than skimming through printed or handwritten [notes]." Cohen, *supra* note 100.

[92] *See* Central New York Library Resources Council, *LSTA Digitization Project*, http://clrc.org/lstadigital/orientsummreport.shtml.

[93] *See* Google, *Library Project – An enhanced card catalog of the world's books*, http://print.google.com/googleprint/library.html. The Library project aims to scan in the collections of the University of Michigan, Harvard University, Stanford University, The New York Public Library, and Oxford University so that these books can be searched via Google. *See* Google, *What libraries are you working with?*, http://print.google.com/googleprint/common.html#1.

[94] *See* Jeffery R. Young, *University-Press Group Raises Questions About Google's Library-Scanning Project*, http://chronicle.com/free/2005/05/2005052301t.htm.

[95] *See* Jeffery R. Young, *Google Answers Complaints About Project to Scan Millions of Books, but Publishers Are Not Won Over*, http://chronicle.com/free/2005/08/2005081201t.htm.

[96] AAP and AG members have filed separate copyright infringement actions against Google alleging that by scanning portions of the University of Michigan's library collection, which includes works written by AAP and AG members, Google has infringed their copyrights. *See McGraw-Hill v. Google*, No. 05-CV-8881 (S.D.N.Y filed Oct. 19, 2005), *available at* http://www.publishers.org/press/pdf/40%20McGraw-Hill%20v.%20Google.pdf; *Author's Guild v. Google*, No. 05-CV-8136 (S.D.N.Y. filed Sept. 20, 2005), *available at* http://pub.bna.com/eclr/05cv8136comp.pdf.

The action by the AG members is potentially more threatening to the Library Project because it is a class action and the AG includes most published American authors. *See* Complaint at 2, *Author's Guild* (No. 05-CV-8136).

[97] Migration from one format to another is already permitted if the format a work is stored in becomes "obsolete." 17 U.S.C. § 108(c) (2005).

[98] § 108(c) only applies if the work has been "damaged, [is] deteriorating, [was] lost, or stolen" or is stored in an obsolete format.

[99] *Id.*

[100] A format is considered obsolete under § 108(c)(2) only "if the machine or device necessary to render [the work] … is no longer manufactured or is no longer reasonably available in the commercial marketplace."

[101] Under § 108(c)(1) libraries have a duty to make a reasonable effort to "determine[] that an unused replacement cannot be obtained at a fair price."

[102] § 108(c)(1), (2) are dual requirements because of the word 'and' at the end of § 108(c)(1).

[103] 17 U.S.C. § 109(a) (2005).

[104] *See* Council Directive 92/100/EEC on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, art. 2, 1992 O.J. (L 364) 61 [hereinafter Council Directive 92/100/EEC] ("Rightsholders … [have] [t]he exclusive right to authorize or prohibit rental and lending.").

[105] *See* Gassaway, *supra* note 22 at 270.

[106] *Id.*

[107] *Id.*

[108] *See* IFLA, *Limitations and Exceptions To Copyright and Neighboring Rights in the Digital Environment: An International Library Perspective*, http://www.ifla.org/III/clm/p1/ilp.htm.

[109] *See Proposal for the Disabled and Visually Impaired Persons*, Experts Meeting on the WIPO Development Agenda and a Treaty on Access to Knowledge (2005), available at http://www.cptech.org/a2k/mann01312005.doc.

[110] 17 U.S.C. § 121(a) (2005).

[111] *See* ICD art. 5(3)(b) ("Member states may provide for exception and limitations to the [exclusive] rights … for the benefit of people with a disability.").

[112] WCT art. 11.

[113] WPPT art. 18.

[114] ICD art. 6(1), 6(2).

[115] 17 U.S.C. § 1201(a), (b) (2005).

[116] The ICD allows circumvention of DRM/TPM for the purposes of teaching, making works accessible for the disabled and public security. *See* ICD art. 6(4) ("Member States shall take appropriate measures to ensure that … exception[s] or limitation[s] [are] provided for in national law in accordance with Article[s] … (3)(a), (3)(b) or (3)(e)."). ICD art. 3(a) contains the teaching exception. ICD art. 3(b) contains the disabled persons access exception. ICD art. 3(e) contains the public security exception.

In the US, § 1201(d) allows circumvention (1) by libraries for the purpose of deciding whether to acquire a work, (2) by law enforcement, (3) for reverse engineering and (4) for encryption research.

[117] For example, Alan Cox, one of the main developers behind Linux, resigned his positions with the USENIX ALS committee over DMCA concerns. *See* E-mail from Alan Cox, to USENIX ALS Committee (July 20, 2001 12:31:02 BST), http://old.lwn.net/daily/alan-quits-als.php3.

Another example is the case of Edward Felten; the Recording Industry Association of America, hereinafter RIAA, threatened to sue Professor Felton violating the anti-circumvention provisions in § 1201 because he wanted to publish results detailing insecurities in the Secure

Digital Music Initiative. *See* Electronic Frontier Foundation, *Felten, et al., v. RIAA, et al.*, http://www.eff.org/IP/DMCA/Felten_v_RIAA/.

[118] *See Universal City Studios v. Corely*, 273 F.3d 429, 459 (2d Cir. 2001) ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").

[119] In the US bypassing DRM in order to gain access to a current public domain work would not itself be a violation of § 120 as public domain works are not protected by the Copyright Act of 1976. *See* § 1201(a)(1) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

But providing the tools necessary to bypass the DRM is most likely still a violation of § 1201 because circumventing DRM to access public domain works is probably not a sufficiently "commercially significant purpose." See § 1201(a)(2), 1201(b)(1).

This problem is already present in the case of many E-Books. For example, the E-Book version of *Alice's Adventures in Wonderland*, contains restrictions that do not permit the text to be copied or printed. *See* Gassaway, *supra* note 22 at 299.

[120] For example, if a country has an exemption "for works used to teach in rural schoolhouses, it will … [ineffective] in the face of DRM locks placed on works that admit no such exemption." Cory Doctorow, *Digital Rights Management: A failure in the developed world, a danger to the developing world* at 8, http://www.eff.org/IP/DRM/drm_paper.pdf.

[121] A2K art. 3-6(b)(i) covers circumvention for open-source implementations. A2K art. 3-6(b)(iii) covers circumvention to provide access to disabled persons. A2K art. 3-6(b)(v)(1) covers circumvention for predominantly public domain works. A2K art. 3-6(b)(v)(2) covers circumvention for scientific works. A2K art. 3-6(b)(v)(4) covers circumvention for factual works.

[122] The LiVID project needed a method to bypass DRM on DVDs in order to produce an open-source DVD player for Linux. *See* LinuxDevices.com, *What is LiVID?*, http://www.linuxdevices.com/links/LK3940442972.html.

[123] *See* Wired.com, *Brazil Gives Nod to Open Source*, http://www.wired.com/news/infostructure/1,61257-0.html.

[124] *See supra note* 22.

[125] *See supra* note 119.

[126] *See* IMDB.com, *Trivia for Charade (1963)*, http://www.imdb.com/title/tt0056923/trivia.

[127] See Amazon.com, *Charade (Anamorphic Widescreen) - Criterion Collection DVD*, http://www.amazon.com/gp/product/B0001J3SVI/qid=1137779164.

[128] See ICD art. 6(2).

[129] A2K art. 3-6(e).

[130] A2K art. 3-6(f).

[131] For example, Sony's XCP CDs included a EULA that precluding circumventing the DRM software that the CD automatically installed on a person's computer. *See* Sony BMG Music Entertainment, *End User License Agreement* Art. 3.1(c), (f), *available at* http://www.sysinternals.com/blog/sony-eula.htm.

[132] *See* 70 Fed. Reg. 16, 3739, 3740 (Jan. 26, 2005), *available at* http://www.copyright.gov/fedreg/2005/70fr3739.html.

[133] *Id*.

[134] *Id*.

[135] Under 17 U.S.C. § 107 (2005), the four factors that are considered related mainly to the work that was produced and how much of the orphan work it used. Although it would seem that a court should consider under § 107(4) that there was hardly any market for the orphan work and that it was an orphan in terms of its nature under § 107(2), it is not clear that any court has accepted this reasoning. In addition, courts may reject the whole notion that the work is an orphan if the author is asserting a claim of infringement.

[136] A2K art. 3-8(a).

[137] A2K art. 3-8(b).

[138] *See* 70 Fed. Reg. 16, 3739, 3741 (Jan. 26, 2005), *available at* http://www.copyright.gov/fedreg/2005/70fr3739.html.

[139] A2K art. 3-8(b).

[140] Copyright Act, R.S.C., c. 24, s. 50 § 77 (1997) (Can.), *available at* http://laws.justice.gc.ca/fr/C-42/35725.html#article-77.

[141] Copyright, Designs and Patents Act, c. 48 § 57 (1988) (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_4.htm#mdiv57.

[142] Copyright, Designs and Patents Act, c. 48 § 57 (1988) (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_4.htm#mdiv57 ("Copyright in a literary, dramatic, musical or artistic work is not infringed … [when] it is not possible by reasonable inquiry to ascertain the identity of the author"); A2K art. 3-8(b) ("Use … is not an

infringement of copyright when the user has conducted a reasonable investigation and can conclude that the work is an orphan work”).

[143] *Id.*

[144] Copyright Act, R.S.C., c. 24, s. 50 § 77(1) (1997) (Can.), *available at* http://laws.justice.gc.ca/fr/C-42/35725.html#article-77.

[145] See U.S. Copyright Office, *Orphan Works*, http://www.copyright.gov/orphan.

[146] A2K art 3-12(a)(iii).

[147] *See* Manon Ress, *Compulsory Licensing under the Appendix to the Berne Convention*, http://www.dtifueyo.cl/Simposio/papers presentados/Ress-Berne-v9.pdf.

[148] *See* Creative Commons, *Creative Commons Deed*, http://creativecommons.org/licenses/by-sa/2.5/.