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Introduction

The term "access to knowledge" or "A2K" was coined in 2004 and has become a common reference for a diverse set of agendas that all hope to realize technological and human potential by making knowledge of various types more accessible.[1] A2K's sister, "Y2K," signified the year 2000, the new millennium, and the whole set of computer problems expected to arise at midnight on the dawn of the year 2000: the Y2K problem. The new millennium, now upon us, could become known as the age of A2K – an age of wider, broader, and more universal access to many types of knowledge than ever before thought possible. On the other hand, the new millennium may be destined – much like the millennium before it – to become the age of the "A2K problem." It may be the age where the possibility of broad access existed as it never had before, but where this potential was never realized.

Copyright is a bundle of rights, some complementary, some in tension with one another. While many of the rights in the copyright package are granted to copyright owners, the copyright bundle also contains, or should contain, principles intended to protect the interests of users of works, and public interests more generally.

This study engages with a number of contested terms – "civilizing," "emerging," "developing,"[2] – normative concepts tied to a particular economic and cultural agenda that privileges Western law, culture, and

[1] Ahmed Abdel Latif, "The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing-Country Delegate," in *Access to Knowledge in the Age of Intellectual Property*, eds. Gaëlle Krikorian and Amy Kapczynski (Cambridge, Mass.: Massachusetts Institute of Technology Press, 2010), 99–125.

[2] This book adopts the term "developing countries" with hesitation. Rather than adopting the term uncritically, I have attempted to disrupt to some extent this category, taking the position that all countries are, to some degree, developing in one way or another, although certainly not all on the same path, in the same mode, or toward the same end. For that reason, I do use the term "developing country," but I enclose the term "developed," in reference to the so-called "developed" countries, in quotation marks.

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economic interests. Tied to the agendas of "civilization," "modernization," "progress," and "development," copyright is part of a long economic movement to commercialize cultural production, part of a cultural agenda that has motivated the international dissemination of primarily Western cultural goods, and part of a legal agenda that has taken as a goal the universalization of Western law.[3] Within this framework, countries that have not conformed precisely to the dominant framework of international copyright have been classed as "pirates," "backwards,"[4] or "outlaws" among the copyright nations of the world,[5] "underdeveloped"[6] and "outsiders" from the general community of nations.[7]

Many states, until the 1990s, remained outside of, or contested, the dominant system of international copyright. Some adopted copyright in general and adhered to many of the principles that were part of the dominant system, while objecting to or ignoring others, sometimes in favor of alternative norms. Others, for one reason or another, denounced the regime. These events speak counter to the traditional narrative of copyright history – that of progressive expansion – showing the history of copyright to be, instead, one of continual conflict and dispute.

Many histories portray the development of international copyright law as the gradual and rational (and as-yet-incomplete) extension and perfection of authors' rights over a period of 300 years. I take the contrary view. The international copyright system in its current form has enshrined a set of individual and divisible principles that could have been otherwise, and that can be adjusted. It is a set of principles that arose out of chance and path dependency, and that was established under colonialism, cultural imperialism, and conditions of economic and political inequality among interest groups and states. Conditions of colonialism and inequality have shaped the processes by which particular systems were held up as models, displayed, symbolically interpreted, and copied by other states.[8]

Instead of adopting the conventional view of the rise and expansion of the rights granted to owners of copyright, I trace the principles of access

[3] Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002).

[4] "Urges Revision of Copyright Laws: Official of British Society says Canada Backward in Protection Legislation: Development Retarded," Montreal Gazette, December 6, 1920, 8.

[5] *F.C.T. O'Hara to W.M. Dickson*, June 2, 1919, in Library and Archives Canada, RG20, Vol. 91, File 22655, Vol. 1.

[6] "Urges Revision," 8.

[7] Canada. House of Commons of Canada, *Debates of the House of Commons, Fifth Session – Thirteenth Parliament 11–12 George V., 1921*, Vol. CXLVI (Ottawa: F.A. Acland, 1921), 3833.

[8] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), 581.

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to knowledge that have been embedded, at various points, in the international copyright system. Viewed in this light, the history of international copyright can be seen, in some cases, as an erosion of the principles of access to knowledge. It can be seen not as a win for authors but as a loss for A2K advocates – as well as a loss *of* A2K advocates as more and more countries joined the dominant international copyright system and gave up struggles for alternate models of international copyright. From this perspective one can view "emerging" countries as "disappearing" countries; as countries "emerge" into the dominant system they disappear from other copyright regimes and models.[9]

In introducing his *Social History of Knowledge*, Peter Burke comments:

> One purpose of this book may be described in a single word: "defamiliarization." The hope is to achieve what the Russian critic Viktor Shklovsky described as *ostranenie*, a kind of distanciation which makes what was familiar appear strange and what was natural seem arbitrary.[10]

My purpose in telling this history of copyright differently is similar. The current regime of international copyright makes it hard to imagine a world with different copyright – let alone a world without copyright. In fact, the current model of copyright is so much embedded in thinking, legal regimes, and interlocking international conventions that it is hard to imagine any truly significant change to that model at all. However, the A2K movement is premised on the demand that significant change is necessary. I hope that by imagining differently the history of the current set of rules and norms known as "copyright" it may be possible to imagine differently its future, and that this book is a contribution to that different imagining.

The Berne system

The *Berne Convention for the Protection of Literary and Artistic Works* was established in 1886 between Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia.[11] Though they were

[9] Peter Yu refers to a "crossover point" where a country crosses over from being "a pirating nation to a country respectful of intellectual property rights." "The Rise and Decline of the Intellectual Property Powers," *Campbell Law Review* 34, 3 (2012), 525–577.

[10] Peter Burke, *A Social History of Knowledge: from Gutenberg to Diderot* (Cambridge: Polity Press, 2000), 2.

[11] Actes de la troisième conférence internationale pour la protection des oeuvres littéraires et artistiques réunie à Berne du 6 au 9 septembre 1886 (Berne: Conseil Fédérale Suisse, 1886); Francis Adams and J.H.G. Bergne to the Earl of Iddelsleigh, Report on the Third International Copyright Conference at Berne, September 10, 1886, in Library and Archives Canada, RG6 A3, Vol. 214, File: "Copyright Conference at Berne, 1886."

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not listed as signatories, the convention also encompassed the colonies and possessions of Great Britain, France, and Spain. It competed, until the 1990s, with various other copyright systems, including the Pan American copyright system and the *Universal Copyright Convention* (UCC). However, the Berne system established a position of preeminence over alternate models and has come to act as the core of the international copyright system, superseding its alternatives.

The *Berne Convention* has undergone six major revisions, in 1896, 1908, 1928, 1948, 1967, and 1971. Since 1971 the *Berne Convention* has remained substantively unchanged while additional treaties dealing with international copyright, including the *Agreement on Trade-Related Aspects of Intellectual Property* (the *TRIPs Agreement*) under the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) Internet Treaties, and various bilateral and regional trade agreements, have been established. These more recent treaties build on top of the *Berne Convention*, adopting the main provisions of the *Berne Convention* and adding additional provisions. The *Berne Convention* thus acts as the core of the international copyright system today.

The history of the *Berne Convention* and international copyright generally, though involving a seemingly diverse group of states and other actors, has often been recorded with a focus on the most powerful states involved, including especially Great Britain, France, and Germany. Through international travel and communication, the establishment of transnational networks and centers of certain types of knowledge, culture, governance, and diplomacy, a specific geography of knowledge was formed. These networks constructed distinct cores and peripheries. The historical experiences of the relatively peripheral states, NGOs, and indigenous peoples with the *Berne Convention* are often ignored. Here, I recount a history of international copyright with a focus on the principles of access embedded in the international copyright system, on these more peripheral actors, and on the now dominant Berne system of international copyright.

History and international copyright

The history of the international copyright system has been portrayed as a progressive history of justice for authors and other creators, modernization, and civilization. This historical narrative tends to obscure the inequality and exploitation that also marks the history of international

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copyright.[12] The *Berne Convention* embeds and reinforces the substantive inequalities of the international system, enshrining rich countries and corporations, the primary producers of copyright works, as the main beneficiaries of international copyright, and locking economically poorer countries and groups into a system that requires the exporting of royalties from relatively poor countries and groups to rich ones with few mechanisms to ensure that local public policy goals are met.[13] The Berne system of international copyright has been called, for this reason, an "ideology . . . exported to the South" – a system that, while appearing just, hides the inequalities and injustices that it actually perpetuates.[14] The particular system of property that is thus constructed – specifically international intellectual property – is the key instrument of exploitation. International copyright replaced, in many senses, the imperial copyright system that came before it by designing a system that would protect the works produced at the core, allowing businesses at the core of the international system to own "property" around the world, to expand, to profit, and to influence via the circulation of their works and ideas in the periphery.[15] The international copyright system is thus intricately connected to colonialism and economic imperialism.[16]

'Postcolonialism' signifies not a world where colonialism no longer exists, but rather a world where colonialism continues to shape international, economic, and cultural systems in new ways. Such processes, embedded in institutions – including in international institutions – continue to perpetuate unequal economic and cultural relations, to create elites, and to inspire resistance.

In the context of decolonization, many thinkers have pointed to the role of international law and international institutions in founding and continuing the colonial project of the European imperial powers. As Antony Anghie points out, today's international law and institutions were founded, in the late nineteenth and early twentieth century, on

[12] Peter Drahos, *A Philosophy of Intellectual Property* (London: Ashgate, 1996), 101; Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed," *Houston Law Review* 40, 3 (2003), 763–803.

[13] Story, "Burn Berne." [14] Ibid., 794; Drahos, *A Philosophy of Intellectual Property*, 101.

[15] Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism 1886–1971* (Vancouver: University of British Columbia Press, 2013).

[16] Alexander Peukert, "The Colonial Legacy of the International Copyright System," in *Staging the Immaterial: Rights, Style and Performance in Sub-Saharan Africa*, eds. Mamadou Diawara and Ute Röschenthaler (Oxford: Sean Kingston, Forthcoming).

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legal positivism, which recognizes only Western-style law.[17] Under legal positivism:

> Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.).[18]

According to Anghie, this set of ideas about international law worked to perpetuate colonialism. International law, as formulated by European positivist jurists, first "purported to expel the non-European world from the realm of legality by insisting on the distinction between civilized and noncivilized states," the latter not seen as having the requisite structures of governance, under the positivist legal paradigm, to produce law.[19] Second, following decolonization, international law "proceeded to enact the re-admission of non-European states into international society" by defining "the terms and methods by which they were to be assimilated into the legal framework."[20] This reentry took place "on terms that completely subordinated and crippled non-European societies."[21]

International institutions played prominent roles in the decolonization process by setting these terms, and by spreading new legal, economic, and social norms globally. In a sense, they act as, "'missionaries' of our time, [a]rmed with a notion of progress, an idea of how to create the better life, and some understanding of the conversion process."[22]

The discourse and practices of this process divided the world into categories, classifying societies and peoples according to particular systems and ideas of progress – some societies and peoples as "developed," and

[17] See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002).
[18] Leslie Green, "Legal Positivism," in *Stanford Encyclopedia of Philosophy*, Fall 2009 edition, ed. Edward N. Zalta, http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/.
[19] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40, 1 (Winter 1999), 31.
[20] Ibid. [21] Ibid.
[22] Martha Finnemore and Michael N. Barnett, "The Politics, Power and Pathologies of International Organizations," *International Organizations* 53, 4 (1999), 699.

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others as "underdeveloped," some as "civilized" and others as "uncivilized," with the latter regarded as powerless and peripheral.[23] Only the former were deemed to have the requisite sovereignty to participate in the decision-making processes of international institutions.[24]

Reflecting this categorization, only representatives of "civilized" countries were invited to the founding of the *Berne Convention*. In the case of copyright, a draft convention was circulated to the "governments of civilized countries," along with an invitation to a conference in 1884 to discuss its contents.[25] The negotiations that founded the *Berne Convention* took place in the same years as the 1885 conference at Berlin that would divide up the African continent among European powers; no Africans were invited to the copyright conference, nor were representatives of colonies in other parts of the world.[26] Neither were representatives of Asian countries initially invited.[27] The institutions and legal norms associated with Western intellectual property were recognized, engaged, and globalized, while the existing systems of norms and jurisprudence of "uncivilized" countries and indigenous peoples with respect to traditional knowledge, cultural expressions, and genetic resources – not having arisen from the requisite legal and legislative institutions – were expelled from the realm of legality, and forms of knowledge and creativity that were not recognized under the Western intellectual property system were not afforded protection.[28]

Even so, most postcolonial scholars are reluctant to see international law and institutions as either *simply* a continuation of empire, or as institutions of *emancipation* from empire. Pahuja emphasizes this:

> [a]rguably there is something distinctive about the relation implied in the 'postcolonial' – both a break from and a continuity with past forms of

[23] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, N.J.: Princeton University Press, 1995).

[24] Anghie "Finding the Peripheries," 31.

[25] Actes de la première conférence internationale pour la protection des oeuvres littéraires et artistiques du 8 septembre 1884 à Berne (Conseil Fédérale Suisse, 1884, 9; Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd edition (London: Oxford University Press, 2006), 52–58; Max M. Kampelman, "The United States and International Copyright," *American Journal of International Law* 41, 2 (1947), 406–411.

[26] Actes 1884, 9. [27] Ibid.

[28] Madhavi Sunder, "The Invention of Traditional Knowledge," *Law and Contemporary Problems* 70 (Spring 2007), 97; Brad Sherman, "From the Non-Original to the Ab-Original: A History," in *Of Authors and Origins: Essays on Copyright Law*, eds. Brad Sherman and Alain Strowel (Oxford: Clarendon Press, 1994); Story, "Burn Berne."

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> domination – and something particular about the capacity of law to be both appropriated to imperial ends and used as a force for liberation.[29]

Some international institutions, by embracing the principle of universality, brought a (somewhat) wider array of groups and representatives to the table of international norm-setting. Pahuja writes:

> international law . . . contains within it what we might call the condition of the postcolonial. Succinctly stated, this can be understood . . . as the paradoxical inclusion of the excluded necessitated by the claim to universality of this constitution. This dynamic accounts for both international law's imperializing effect and its anti-imperial tendency.[30]

Postmodern and poststructural thinkers emphasize the interconnectedness of power and knowledge, the role of power in constructing knowledge, and the role of knowledge in constructing power, viewing the two as sides of a coin that can never be separated. The ability, therefore, to participate in the construction of knowledge – to be a "nodal point" on the networks where meaning is constructed – is an essential source of power.[31] Thus, postcolonialism does not view ideas as purely in the hands of dominant groups; imperial law, culture, and ideas, while working to maintain a hegemonic order, are also appropriated in projects of resistance and change. While imitation, mimicry, and the tendency of dominant groups' ideas to infuse the imaginations of the oppressed are powerful forces, oppressed groups are themselves also recognized as possessing agency and interests that may be poorly expressed, or left unexpressed, by elites empowered to speak on their behalf. This is true in particular of indigenous peoples, whose interests were largely unrepresented within the international copyright regime, and the larger nation-state system, through much of its history, as discussed in Chapters 5 and 9 below.

Postcolonial theory is especially interested in the power of literary and artistic works as a vehicle for spreading the power of the dominant core, and copyright – and international law in general – is a key vehicle for doing so.[32] In relation to copyright, we can see similar trends; legal scholar Michael Birnhack notes that, as with other types of law, copyright

[29] Sundhya Pahuja, "The Postcoloniality of International Law," *Harvard Journal of International Law* 46, 2 (2005), 460.
[30] Ibid.
[31] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*. Minnesota: University of Minnesota Press, 1984.
[32] On international law in general as tool of postcolonialism: Antony Anghie, "Finding the Peripheries," 1–71.

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has been appropriated, modified, translated, and used in new ways by postcolonial states.[33] Colonial legal transplants take place on a spectrum, with some transplants being voluntarily accepted, and others externally imposed. The interaction of local and imperial is often complex and sometimes involves a back-and-forth process.[34] In that sense, international copyright is a system containing imperial and potentially anti-imperial tendencies.

Progress

This book differs from some approaches to the political economy of communication in that it takes change to be far more complex than what is portrayed in some more teleological accounts. It does not assume that history progresses in any particular direction. Rather, the direction that history does take is determined in part by institutions that mediate ideas and material interests. This approach leaves open the possibility of a more complex and less teleological history, and the possibility of addressing the embeddedness of power in institutions. Such a conceptual framework allows for the analysis of the expansion of a single copyright regime to be divorced from the idea of unidirectional progress.

"The very use of the language of progress," Alexander Peukert notes, "is an ideological strategy."[35] As Michael Carroll also notes, any particular system represents a different configuration of benefits and costs to the various parties involved, and thus comes with advantages and disadvantages: "The displacement of prior arrangements by copyright should not necessarily be viewed as a form of legal progress."[36] Rather, such changes "should be understood as the outcome of a specific political struggle."[37] As Birnhack points out: "[w]e should ask whose progress is advanced, at what cost, and whether there are alternatives."[38] The "first in Europe, then

[33] Michael D. Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (Oxford: Oxford University Press, 2012).
[34] Ibid., Chapter 1 "Colonial Transplants."
[35] Peukert, "The Colonial Legacy," 28.
[36] Michael Carroll, "The Struggle for Music Copyright," in Villanova University School of Law: School of Law Working Papers, Paper 31 (Villanova, PA: Villanova School of Law, 2005), 956, http://law.bepress.com/villanovalwps/papers/art31.
[37] Ibid.
[38] Birnhack, *Colonial Copyright*, 45. See alsoMichael D. Birnhack, "The Idea of Progress in Copyright Law," *Buffalo Intellectual Property Law Journal* 1 (2001) and Margaret Chon, "Postmodern Progress: Reconsidering the Copyright and Patent Power," *DePaul Law Review* 43, 1 (1993), 97–146.

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elsewhere" version of historical time set a path of European domination and consigned alternatives to the sidelines.[39]

Within this larger context and complex set of processes, it is important to consider the degree to which one international institution or another, or one property model or another, serves or responds to both dominant players and more peripheral actors, and the extent to which a particular institution might contribute to change. Thus, this book takes a meso-level approach that takes on board both the relatively pessimistic perspective outlined above, which portrays countries of the South as the objects of manipulation, and the relatively optimistic perspective of postcolonial appropriation. At the meso-level, it enquires into the particular historical and institutional characteristics of the international copyright system that shore up power while also creating possibilities for change.

Access to knowledge: ideas, interests, and institutions

We can point to three forms of access to knowledge that are key to this study's analysis. The first form of access to knowledge relates to ideas; here, "access to knowledge" means access to the sources of knowledge – to memory and databanks, copyright works, and corpora of scientific and technological knowledge. The second relates to interests: the recognition of the interests of particular groups and their legitimate right to have voice. Here, "access to knowledge" means the ability to be recognized as a source of knowledge, to influence the direction and shape of the discourse that defines what knowledge is, what knowledge is valued, and what knowledge is recognized as being knowledge. The third form of access to knowledge is focused on institutions. Here, "access to knowledge" involves access to the processes and institutions of the creation, circulation, and regulation of knowledge, including the educational, scientific, political, and regulatory institutions that are central to the production of knowledge.

It is important that discussions about access to knowledge should focus on all three forms of access to knowledge, especially since copyright law has too often focused on the first form of access to knowledge to the exclusion of the latter two. Ultimately, all three forms of access are linked. As Willinsky notes, institutional failures, resulting in lack of access to the institutions for the production and dissemination of knowledge, can lead to failure to be recognized as a source of knowledge; such institutional

[39] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference.* (Princeton, NJ: Princeton University Press, 2009), 7–8.

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