Copyright Reform: Portfolio Review Document
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I. Our ambitions

In 2004, the Information Program launched an "Intellectual Property Reform Initiative". At the time, the ambition was to challenge "IP maximalism", i.e. the effort by rightsholders to ratchet up standards of intellectual property protection and enforcement in both multilateral intergovernmental forums such as the World Intellectual Property Organization and the World Health Organization as well as in trade agreements. To that end, the Information Program decided to seed and help develop a global access to knowledge (A2K) movement that was urging a general overhaul of the IP rules arguing that in the balance between rights and obligations, IP maximalists assert their rights without recognizing their obligations. Obligations are also referred to as IP flexibilities which include user rights in copyright such as fair use. The A2K movement also advocated for the strengthening of the knowledge commons in the form of open access journals and free software.

Our energies focussed on the World Intellectual Property Organization (WIPO), the specialised UN agency coordinating international intellectual property treaties. The assumption we held was that by changing WIPO's policy-making agenda, we could strengthen public interest protections in international intellectual property law. Differently put, we decided to focus on the reform of WIPO and were using this project as a means to mobilise forces and build the A2K movement.

I would argue that in today's OSF language this portfolio was a "concept" as opposed to a "field". On advice from the Information Program advisory board, we got operationally involved in both the early efforts of movement building as well as the later project focussed on the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty).

II. Our Place

Constitution of the A2K movement
Today, the Access to Knowledge movement is a loose collection of civil society groups and individuals converging on the idea that access to knowledge should be linked to fundamental principles of justice, freedom and economic development. As alluded to already, I think it is fair to say that the Information Program played an instrumental role in the development of this movement. One can argue that the Budapest Open Access Initiative in 2002 was the start of the A2K movement, even though it was not called so at the time. BOAI was followed by the Geneva Declaration on the Future of WIPO in 2004, which the Information Program also helped to coordinated and launch. The Declaration criticises WIPO for embracing "a culture of creating and expanding monopoly privileges, often without regard to consequences," and argued that WIPO's "continuous expansion of these privileges and their enforcement mechanisms has led to grave social and economic costs, and has hampered and threatened other important systems of creativity and innovation." The signatories include major NGOs such as the International Federation of Library Associations, Consumers International, Medecins Sans Frontiers, Third World Network as well as academics including several Nobel Prize winners and thousands of concerned global citizens. While the well-publicised Declaration did not itself have legal significance, it served as a strong reminder of WIPO's poor record on protecting the public interest and the need for reform. It also helped to focus energies and bring NGOs from different sectors together under the umbrella of A2K.

Shifting focus to treaty development

With the rallying instrument in place, in 2005 the Information Program worked with the strategists of the movement – Knowledge Ecology International (KEI), the Transatlantic Consumer Dialogue (TACD), EIFL-IP and the International Federation of Library Associations (IFLA), the Third World Network (TWN) and the South Centre as well as government officials from the Global South – to develop a reform program. We funded a series of A2K workshops that led to the development of the Access to Knowledge Treaty, which is written in treaty format and includes sections on copyright limitations and exceptions, patent flexibilities, enhancing the knowledge commons and the control of anti-competitive practices. We also set up travel funds for civil society to attend WIPO meetings in order to increase participation by civil society. WIPO had been captured by the IP industries for many years: In 2003, only three of the 50 accredited non-governmental organisations were public interest NGOs. This number rose to 10 in 2005 and by 2008 had reached over 30.[1]

While the A2K Treaty brought together different constituencies to spell out a concrete vision for change, we had to confront the reality that this Treaty would not be adopted as drafted given the strength of the opposing forces. The decision was hence to focus on a more modest yet strategic ask. As a result, we supported the drafting of the Marrakesh Treaty in 2008, which was formally tabled at WIPO by the governments of Brazil, Ecuador and Paraguay in 2009. After an intense civil society lobbying effort led by the World Blind Union and Knowledge Ecology International, WIPO formally adopted the Marrakesh Treaty in June 2013. This Treaty was the first ever binding international IP treaty that mandates the protection of the rights of users, in this case the blind, visually impaired and print-disabled.

Our role in this protracted yet ultimately fruitful advocacy campaign was multi-faceted. As a neutral party, I convened strategy conversations including, for example, regular strategy calls during the final stages of the Marrakesh Treaty campaign. I published articles on the A2K reform agenda[2] and worked with OSF Communications to increase media coverage of the campaign I commissioned papers including a paper[3] on the legal feasibility of a binding international instrument on limitations and exceptions to copyright, which initially had been questioned by rightsholders. I leveraged the extensive OSF network to engage experts and constituencies; this included mediating between the broader disability community (including a board member of the OSF Disability Initiative) and the community of the blind who disagreed over the value of the Marrakesh Treaty. Mort Halperin, Senior Policy Advisor in the OSF Washington Office, mobilised his contacts to assist with lobbying the US government, the most outspoken opponent of the Marrakesh Treaty besides the EU. We complemented these efforts with grant making: I awarded project grants including for WIPO travel funds and workshops (e.g. for a convening of Latin American negotiators and NGOs) and we provided core or program grants to what I considered to be the most strategic players in the field: NGOs specialised on intellectual property—our grantees included Knowledge Ecology International, Innovarte, Third World Network, IP-Watch and South Centre (we co-funded most of these with the OSF Public Health Program)

- consumers groups including the Transatlantic Consumer Dialogue (TACD) and Consumers International (CI)

[1] CIS, Innovarte, EFF, FGV, IDCID, LCA, OKF, PK, AIB, TWN, KEI, Action Aid, Alfa Redi, IQSensato, CIEL, CSC, SPSR, CC, EIFL, EBLIDA, WBU, UPD, BEUC, 3D, EDRI, ENCES, FFII, FSF Europe, ICTSD, IFLA, ISOC, IPJustice (Source: http://www.wipo.int/members/en/organizations.jsp?type=NGO_INT)

[2] "Back to Balance: Limitations and Exceptions to Copyright", Vera Franz, in: Access to Knowledge in the Age of Intellectual Property (2010) Zone Books/MIT Press (http://mitpress.mit.edu/books/access-knowledge-age-intellectual-property)

[3] "Conceiving an International Instrument on Limitations and Exceptions to Copyright", Ruth Okedji and Bernt Hugenholtz (2008) (http://www.opensocietyfoundations.org/reports/conceiving-international-instrument-limitations-and-exceptions-copyright)

- library groups including EIFL-IP and the International Federation of Library Associations (IFLA)
- groups representing the blind community including the World Blind Union
- digital rights groups (which we funded out of the digital civil liberties portfolio)

What drove the selection of grantees? I decided to support groups that I felt were the strongest strategic players on the WIPO front. Most of these grantees were NGOs specialised in intellectual property reform. This, for example, included a group from Brazil, the Center for Technology and Society at FGV, which we supported because we needed a partner in Brazil to pressure the Brazilian government to advance the WIPO reform agenda. Another criterion that drove the selection of grantees was their independence and willingness to take uncompromising advocacy positions. This largely meant that those NGOs did not receive money from governments or corporations, and as a result were mostly very small and often fragile NGOs. Again, I felt that this is where our money would make the biggest difference. Examples include KEI, Innovarte and others. Finally, we supported several NGOs that represented constituencies such as consumers, librarians or the blind; we awarded mostly program or project support to bolster their IP work. Please consult the Annex for an overview of our core grantees and their contributions to the A2K reform effort.

III. The environment

Fragmentation of the funding environment: When the Information Program started to invest in this area, the Rockefeller Foundation, MacArthur Foundation and Ford Foundation were all important funding partners for OSF. In fact, we benefitted greatly from other foundations in the early years. Elspeth Revere from the MacArthur Foundation first inspired us to work on IP reform, and Anthony So from the Rockefeller Foundation joined the Information Program advisory board soon after our decision to make a major investment in this area. Unfortunately, around six years ago all the above private foundations decided to exit the field, partly due to restructuring and partly for political reasons. This left the movement in a very vulnerable position and overly dependent on OSF. Besides OSF, who invested between $800,000 and $1 million a year, the Canadian International Development Research Centre started to fund multi-year research projects with a budget of C$900,000. Google was the main corporate sponsor of copyright reform efforts, although it is worth noting that most of our core grantees within the portfolio rejected Google funding because they thought it would weaken their advocacy position vis-a-vis rights holders.

Balkanization of fora: Another big picture change in the environment worth noting is the fact that as a result of civil society's effective engagement with WIPO, the IP industries became increasingly frustrated with WIPO as they could no longer dictate their priorities and expect swift progress. As a result, they decided to seek out other, less transparent fora for pushing their agenda. It is likely that the Anti-Counterfeit Trade Agreement concluded in 2011 (and rejected by the European Parliament in 2012) was a result of this strategy of forum-shifting employed by the IP industries. This raises the question whether progress at WIPO is in effect an illusion of success.

Balkanization of policy: Finally, because of changes in technology and business models, rights holders are increasingly pursuing their interests through a wide spectrum of laws apart from intellectual property rights. These for example include contract law, which is increasingly governing access to knowledge for example in the library context. This raises the question of whether current A2K strategies need to be revisited and civil society needs retool and perhaps even expand staff capacity in related fields of policy in order to protect A2K through for example consumer and competition law as well as telecommunications and net neutrality rules.

IV. Our work

Have we and our grantees and collaborators achieved the progress towards our goals that we had hoped for at this point? I would argue that with the adoption of the Marrakesh Treaty we have partly achieved our goal of strengthening public interest protections in international copyright law. The Treaty is an important contribution, both because it is the first IP treaty to mandate the protection of user rights and it will, once ratified and implemented, make a tangible difference to the blinds' access to copyright material. Our grantees have also successfully defeated harmful proposals advanced at WIPO including the Broadcast Treaty, at least so far, and they have managed to slow down certain aspects of the IP enforcement agenda, with the European Parliament for example voting against ACTA in 2012. That said, the work to rebalance IP rules is far from done.

Have the grants and activities gone as planned? The grants and operational engagement targeting WIPO have mostly worked very well, in great part because I was well integrated into the advocacy community and was hence able to quickly spot gaps and opportunities. That said, there are one or two project grants that in hindsight I would not make. For example, in 2012 I've commissioned papers on policy options for an international instrument on exceptions and limitations for education. The time was not ripe for advancing the education agenda at WIPO.

Importantly, while I think I have selected the right group of NGOs as grantees to advance the reform effort in a strategic manner, I have failed to strengthen them as institutions. After three major funders had exited the field, most of our core grantees have largely failed to secure new funding. These grantees include KEI, Innovarte, TACD, IP-Watch, EIFL-IP all of which are currently above the 1/3 threshold for OSF funding with clear indication by the OSF President that OSF will have to reduce its contribution. We have recognised this challenge early on and invest, in partnership with the Public Health Program which is co-funding several of those core grantees, in efforts to diversify our grantees' funding by, for example, ear-marking part of our financial support for fund-raising including expert help from consultants. This effort has so far not born fruit.

My biggest worry is the fragile state of the A2K movement, and hence the major challenge we face in continuing the work on the unfinished copyright reform project. Why is this movement so fragile, and could we have done more to strengthen it?

- *Lack of funding*: One certainly not unimportant reason for fragility is the lack of funding. OSF is currently the only non-corporate source of funding for international advocacy work. This means that grantees had to down-size and at the same time invest major energies in fund-raising. Also, the pool of active NGOs could not grow. Important events for the movement such as Yale's A2K conference and its successor the Global Congress on IP and the Public Interest are continuing but with a strained budget.
- *Glacial pace of reform:* Bluntly put, while one could speak of an A2K movement several years ago, today we are left with a dispersed movement. Some of the players have moved on to other issues (such as privacy or access to medicines), mainly because progress is incredibly slow, in particular in a national context where bills are re-introduced after every change in government and one or two advocates are mostly up against a permanent army of rights holder lobbyists. Advocates, for good reasons, prefer to focus on opportunities as opposed to long drawn out fights.
- *Lack of field leadership*: It is worth noting that while OSF focussed a lot of its energies on WIPO, no other reform effort emerged. The only exception is Peter Jaszi and Michael Carroll's project to advance fair use globally. The challenge for this project is that fair use is a concept that works very well in common as opposed to continental law countries; also, fair use is widely perceived as an American concept and hence received push-back even in the

A2K community. Also, I feel that while KEI in principle is a player with authority to convene the movement and provide strategic leadership, they had to downsize and more heavily focussed on access to medicines in the recent years. As a result, there is no common project that the core A2K players are currently working on. In fact, it is sort of ironic that as I review this portfolio I've received an email from one of our core grantees (Innovarte) asking the following: "I think it would be useful to know what OSF's view of the situation of the movement is including of where we are and what we are up to. Are you planning another strategy meeting like you hosted in Geneva several years ago?"

- *Lack of strong allies*: Google is the most powerful corporate ally for the A2K movement. However, there are two challenges: Google has lots of irons in the fire and copyright is not the most important of them. It is hence not willing to alienate other forces over this issue. Parts of the A2K movement, in particular those also working on privacy, are highly critical of Google and unwilling to enter into an issue coalition with the company.

What would I have done differently? I am not sure but here are questions that I have:

- Should we have done more to attract other funders to the field? Interestingly, this is the challenge that the Open Access and Copyright Reform initiatives of the Information Program share.
- While we have decided to focus on WIPO because we felt we could make progress by concentrating resources, should we have focussed more on the periphery instead of the centre? The other week I had a conversation with the IP Coordinator of EIFL and she argued that after years of work at the country level, she has become very frustrated with the slow progress. She is more convinced than ever that what we need are structural interventions at WIPO or other international fora. Many delegates from the Global South have over the years stressed this point in conversations with me as well: the A2K forces are too week to win in a distributed manner, we need reform dictated by the centre.
- While almost all of our grantees have worked to advocate against secretive and overly restrictive copyright provisions in trade agreements, should we have done more to focus on those agreements? I feel that this is where a lot of our progress made at WIPO is being undermined. For example, a restrictive interpretation of the three-step test, which limits the scope of user rights in copyright, is proliferating in trade agreements. We have set up several travel funds for civil society to participate in the negotiations of trade agreements, but there is possibly more that could have been done.
- Finally, is copyright reform the wrong lens altogether for advancing inclusive access to knowledge? Are there other, better ways of advancing access to knowledge for constituencies OSF cares about?

IV. Going forward

My tentative conclusion is that for the access to knowledge movement to be mobilised again, this movement needs a project that gives it focus. Potentially, OSF can again play an important role in facilitating this conversation. See below for a list of potential projects that could be taken on. To be clear, it is not for OSF to decide about the project. Rather, OSF should facilitate a conversation that can build consensus around a new reform agenda and support this reform agenda through targeted grant-making. In addition to the below, the ratification and implementation of the Marrakesh Treaty will also need continued support over the coming two to three years.

An alternative scenario to the above is for OSF to award a set of general support grants to anchor groups in the A2K field. This is an option, but may be challenging. Mainly because the movement is not just dispersed but also fractured. For example, the library community is set to continue advocating for a comprehensive WIPO Treaty for Libraries and Archives. In my view, this project is both too broad and too narrow. To avoid deal breaking opposition, a focus on archives and preservation would make more sense. To generate more political support including from Global South governments, going for a bigger ask such as the A2K Treaty might be better than the middle ground library treaty which is consequential for publishers, but does not excite high level policy makers. A strategy meeting, hosted by a neutral player like OSF, aimed at facilitating consensus building around a reform project supported by OSF would be essential at this point in time.

List of potential A2K projects, in no particular order:

- WIPO model law on copyright: Advancing binding law in the international context is in my view increasingly difficult and, importantly, risky. We were lucky with the Marrakesh Treaty, mainly because we argued a strong moral case. An alternative to hard law is soft law. For example, focus on working with WIPO to update its model law strengthening public interest protections. WIPO is one of the biggest technical assistance providers on copyright for the Global South, and its model law is used as a template for every update of national copyright laws in those countries.
- Re-interpretation of the three-step-test: Article 13 of the TRIPS Agreement,[4] the so-called three-step-test, is ambiguous as to what it means but is currently mostly used by rightsholders to limit user rights in copyright. In fact, some commentators argue that few user rights would prevail if the test would be strictly applied and is now proliferating in trade agreements. In response to this problem, the reputable Max Planck Institute has published a "Declaration on the Balanced Interpretation of the three-step-test in copyright law". What is needed is a lobbying effort at WTO to create controversy about the currently one-sided interpretation of this test harming the public interest.
- Focus on the periphery as opposed to the centre: There is little momentum on the legislative front in most countries with a few exceptions such as the United States and Europe. For example, the European Union is planning a major overhaul of its copyright directive. One option is to focus on this reform project working to ensure that the new European copyright rules will include strong public interest provisions including some critical for the digital age such as user rights for text and data mining.
- Achieve legal recognition of users' rights in copyright: Another option is to present a bolder vision for change, i.e. work with our grantees to reframe the current work as a campaign for users' rights in copyright. The Supreme Court of Canada was the first to explicitly hold that the fair dealing exception, like all other exceptions in the Copyright Act, should be

[4] Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. (Source: http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm)

understood as 'user rights', namely, as an integral concept of copyright law.[5] This is because copyright law regulates creative practices and access to creative works, and therefore constitutes the rights of both authors and users. The underlying thesis for this shift is that it is wrong for the law to view rights and privileges of users from the narrow perspective of limitations and exceptions. This forces us into a defensive strategy, taking existing rightsholders' rights as the baseline and setting a high threshold for any new limitation and exception. More practically speaking, limits on users' rights are often set by private ordering (e.g. contracts through which we rent access to e-books) or neighbouring rights and these legal measures are often beyond the reach of limitations and exceptions. Users' rights will allow us to more meaningfully protect both authors and users. In order to achieve legal recognition of users' rights, we would need to (a) work to articulate users' rights and draft a Bill of Users' Rights; (b) promote legal reform that will recognize users' rights; and (c) following the ruling of the Supreme Court of Canada, support strategic litigation for setting judicial precedents that include legal recognition of users' right.

[5] See [*CCH Canadian Limited. V. Law Society of Upper Canada, 2004 SCC 13 [2004] 1 S.C.R. 339*]. This 2004 precedent, which marked a shift from simply treating copyright exceptions as legal defences, to considering it a user right was re-affirmed by the Canadian SC [*Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326.; and Alberta *(Education)* v. *Canadian* Copyright *Licensing Agency SCC 37 2012].*