CENTRAL EUROPEAN UNIVERSITY

COPYRIGHT PROTECTION VERSUS ACCESS TO KNOWLEDGE: A CRITICAL ANALYSIS OF BRAZILIAN AND U.S.COPYRIGHT LAWS

by Hugo Cavalcanti Vaz Mendes

LL.M. SHORT THESIS
COURSE: International and Comparative Intellectual Property Law
PROFESSOR: Caterina Sganga
Central European University
1051 Budapest, Nador utca 9.
Hungary

Abstract

This thesis aims at examining the evolution of copyright protection provisions and how the Access to Knowledge (A2K) movement emerged as a response to the authors' overprotection by the law. The examination is made under the laws of two different countries: a common law country and the main exporter of intellectual property (the United States) and a civil law country and developing country (Brazil). Firstly, the research focuses on the development of the bodies of law regulating the Copyright Protection, namely the International Agreement, U.S. Copyright Law and Brazilian Copyright Law. In the second chapter, the research analyses how the A2K Movement emerged as a response to the overprotection granted by the national and international rules and what its main critiques and arguments are. Finally, the research suggests some improvement to the Brazilian and U.S. Copyright laws in order to enhance society's right to access knowledge.

DEDICATION

To my parents that had been with me during this whole journey and, specially, to my beloved sister, Ana Rute, that inspired me to research about this fascinating topic.

Table of Contents

Introduction

Since the emergence of the "knowledge economy" after the Second World War, the global community has witnessed an increasing expansion in copyright restrictions. This phenomenon is explained by the fact that the "right-holders have had a theoretically and practically disproportionate influence on IP lawmaking"[1]. Although Governments have justified the enhancement of intellectual property monopoly as being the best manner to avoid the danger of sub production of knowledge, critiques to this position are increasingly getting more widespread and have been presented under different movements as well as proposed different solutions to the current problem, aiming at strengthening nonowners' right to have access to knowledge and information. Scholarship about the concerns related to the copyright protection enhancement and, consequently, the movements opposing to it has increased in the last few years.

The main objective of this thesis is to examine the evolution of copyright law, how the access to knowledge movement originated and what concerns and suggestions for change to the current system are. Two contrasting copyright systems were selected to help explore the subject of the present study: the U.S. and Brazilian ones. The differences between those intellectual property laws rely, mainly, on their origin, evolution and structure. Until the nineteenth century the United States, belonging to a common law system, was considered a pirate country, this position changed when this country switched from being an importer of intellectual property to an intellectual property exporter. This change was reflected in the country's regulations that expanded right-holders' protection and monopoly. On the other hand, during the negotiations of international agreements on intellectual property, Brazil, a civil law and developing country, was part of the group of countries that promoted

[1]Amy Kapczynski, *The access to knowledge mobilization and the new politics of intellectual property*, Yale Law Journal 117, 804 (2008), 839

the idea that the knowledge and information should be exchanged between the countries with less restrictions in order to support the wealth and technological improvement of the not developed/developing countries. However, despite this political position, its current copyright law is far from being considered favorable to the nonowners and, similarly to U.S. legislation, also supports the expansion of authors' monopoly over their works.

The first chapter of this thesis will briefly illustrate the evolution of the copyright law of both countries as well of the international agreements, which play a crucial role in the internal copyright systems. The study of the evolution of these bodies of law is necessary to understand how the current copyright protection standard was originated as well as how the differences between the two countries with different social knowledge demand and social development became less and less sharp, by the adoption of international agreements.

The second chapter will focus on the definition of the access to knowledge movement that emerged as a response to the copyright restrictions explored in the previous chapter. This phase of the research will indicate how this movement has been manifested, what its main concerns are and what measures have been suggested and adopted in order to reduce the imbalance between owners' exclusive rights and nonowners' rights to access to knowledge, information and culture.

Finally, after the analysis of the evolution of the current copyright laws as well of the criticism brought to it by the A2K movement, the third chapter aims at identifying which main changes and improvements could be adopted by the legislators of Brazil and the United States in order to better adjust their national laws to the demand to knowledge. This thesis highlights the main suggestions and ideas of prominent scholars and applies them to the U.S. and Brazilian legal contexts.

Chapter 1: Evolution of the Copyright Law

The Intellectual property rights protection is the main tool for controlling and regulating the production of the knowledge and information[2]. The protection provisions are found at the national regulations, international agreements and regional treaties and conventions[3]. Therefore, it is crucial to understand how these bodies of regulations and law were developed and what the current level of protection granted to copyright-holders is.

1.1 Origin of the International Copyright Law

The Copyright law has its origin in England during the 15th century and had distinct objectives when compared to the modern laws and treaties. The copyright protection started to be discussed during the Tudors reign, when the printing press was invented and a middle class requested an emphasis on education[4]. At that moment, since only aristocracy members were the consumers of intellectual works, authors were not duly awarded by their works. However, the revolution brought by the printing press technologies allowed large-scale reproduction of written works for the first time[5]as well as reduced their reproduction costs, which, at the same time, raised publishers and book vendors profits and induced piracy[6].

This revolution in the way how information was spread was seen as a threat by the monarchy that believed that it could motivate political and religious rebellion[7]. As a response to this concern, in 1534, the government determined that any work should be approved by the official censor before being published, in 1557 the Stationer's Company was created as the responsible for granting said

[2]Gaëlle Krikorian*, Access to knowledge in the age of intellectual property* (New York: Zone Books, 2010), 58
[3] Ibid.
[4] Ibid
[5]Craige Joyce et al, *Copyright Law*(New York, LEXIS Publishing, 1998), 15
[6]Gretchen McCord Hoffmann, *Copyright in Cyberspace: Questions and answers for librarians* (New York, Neal-Schuman Publishers, Inc., 2001), 5
[7]Ibid.

approval[8]. At the same time, the members of the Stationer's Company had the exclusively and perpetual right to publish the approved works[9]. Therefore, the first Copyright protection did not aim at protecting any right of the respective authors but it was originally conceived as an aristocracy's censor tool responding "to the challenge posed by new technologies for the reproduction and distribution of human expression"[10], controlling the activity of selling and making book[11].

This first license to control publishing expired in 1964 and was not renewed[12]. It was followed by the first copyright Act, the Statute of Anne, dated of 1710[13]. This Act brought some changes to the concept of copyright, some of them are reflected in modern copyright laws. For example, its instrumentalist approach is present at the Constitution's Copyright Clause and was expressed at the Statute of Anne's title: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned"[14]. The Statute of Anne's protection was limited to writing works[15] since it covered only rights of printing, reprinting or selling the books[16], this right was further extended to other artistic works by the Engraver's Act of 1735[17].

By reading its title, one may conclude that the Statute of Anne had a clear purpose, object and protection policy. Regarding the former element, its title said that the act aimed at the "encouragement of learning", in addition, its language said that its main purpose was "the Encouragement of Learned Men to Compose and Write useful books"[18]. Secondly, its protection was directed to the authors or

[8] Supra, Note 6. 5
[9] Ibid.
[10] Supra, Note 5. 15
[11] Supra, Note 6. 5
[12] Ibid. 5
[13] Supra, note 5. 16
[14] Supra, Note 6.5
[15] Ibid. 6
[16] Supra, note 5. 18
[17] Supra, Note 6. 6
[18] Supra, note 5. 18

purchasers of the works, therefore, it broke "with the stationers' historic monopoly"[19]. Finally, the Statute brought a limitation on the term of protection that was perpetual for the Stationers until this moment, after the expiration date the work would fall, for the first time[20], to the "public domain". As we are going to explore in the Chapter Two, the public domain is one of the main legal tools available to the society to support its educational, cultural and technological development.

Another legal feature inserted in the Statute of Anne was the formality requirement. Chapter Three of this thesis will explore the importance of the formalities on the set of a balance between authors and public's rights. The Statute required that the work should be registered with the Stationer's Company before its publication[21]. The Statute also brought the notion of "first sale" that gave to the purchaser of a work the right to print, publish and sell[22] limiting, consequently, the exclusive rights of the original authors over their works.

Therefore, it is possible to conclude that the Statute of Anne at the same time that it recognized the rights of the authors over their work, the Statute ended with the perpetual protection term of protection that was granted to the publishers. By setting a protection period, the statute unprecedentedly regulated the creation of public domain that, nowadays, together with the frame of "information commons" "are the heart of the A2K (access to knowledge) mobilization"[23]. It also brought the notion of the formalities that are pointed out as the best solution for the authors' overprotection.

[19]Supra, note 5. 16
[20]Supra, Note 6. 6
[21]Supra, note 5. 18
[22]Supra, Note 6. 6
[23]Supra, Note 1. 855

1.2 Development of International Copyright Treaties and Conventions

The concept of copyright and the way under which their respective protection measures are justified and applied are not uniform between the countries. The discrepancies are clear even when comparing the civil and common law systems. While the common law system adopts the term "copyright", countries from the civil law world adopts expressions derived from "authors' rights", e.g. "droitd'auteur" (France), "derecho del autor" (Spain), "Urheberrecht" (Germany) and "direito autoral" (Brasil). This language disparity "suggests a fundamentally different emphasis between the two traditions in their attitudes about works of authorship"[24].

Firstly, in civil law countries the protection to the intellectual property is "justified predominantly in terms of authors' inherent entitlements – indeed as an extension of their personality"[25] so far as its legislations emphasize the personal and unique aspects of the work[26]. Moreover, under the civil law system, the author has the moral right to control and exploit its works, including to prevent other from distort author's artistic vision[27], its norms "justify rights broad enough to make authors the master of their self-expression" and lead to recognize "inalienable moral rights that authors may assert in the face of contracts to contrary effect"[28].

On the other hand, in common law countries, copyrights protection measures, are seen as an economic incentive to creators and, consequently as a way to achieve general welfare[29]. According to this system the copyright is seen "as an objective … consisting in the exclusive right to reproduce a

[24]Supra, Note 5. 29
[25]Ibid.
[26]Denis Borges Barbosa, *Direito de Autor: questões fundamentais de direito de autor* (Rio de Janeiro, Lumen Juris, 2013) 115
[27]Supra, Note 5. 29
[28]Paul Geller, "toward an Overriding Norm in Copyright: Sign Wealth Revue Internationale du Droitd'Auteur", Revue Internationale du Droitd'Auteur (RIDA), no. 159 (1994), 3 cited in Denis Borges Barbosa,*Direito de Autor: Questões fundamentais de direito de autor*(Rio de Janeiro, 2013, Lumen Juris), 70
[29]Supra, Note 5. 29

work"[30]. In order words, the marketplace (common law system) norms' strength is limited to the necessary for inducing the making and marketing of the works[31].

However, the laws from the two different systems are converging specially through the development of the law in international copyright that sets the minimum standards to be followed by the national laws[32]. Notwithstanding never having an "universal" copyright system, in order to overcome the territorial restrictions a series of agreements set "conditions under which countries must give recognition under their domestic laws to works of foreign origin"[33] based, mainly, on a reciprocal protection according to which the works originated within the territory of a contracting state would receive the same treatment as those created by nationals of another signatory member.[34] According to this rational, the Berne Convention conciliated the main differences between the common and civil law systems.[35]

There are innumerous international agreements and treaties covering distinct aspects of intellectual property subject. Hereunder we are going to focus on the two main international agreements on copyright law that had been enacted by United States and Brazil: Berne Convention dated of 1886 and TRIPS Agreement dated of 1994. The WIPO Copyright Treaty dated of 1996 is also relevant to our study, however it is going to be studied together with the development of U.S. Copyright law in the Chapter Two.

1.2.1 The Berne Convention

The first multinational treaty on copyright was the Berne Convention dated of 1885 and that was administered by the World Intellectual Property Organization ("WIPO"). Since its first draft, the

[30]Supra, Note 26. 115
[31]Supra, Note 28. 70
[32]Supra, Note 5. 31
[33]Ibid. 33
[34]Ibid. 33
[35]Supra, Note 26. 115

Convention suffered a series of revisions, the most recent one occurred in 1971. It has been in force in Brazil since February 9, 1922 and in United States on March 1, 1989. In addition, a considerable number of European countries are also Contracting members[36].

The Berne Convention was developed in accordance with the "standards and requirements of the industrialized countries in Europe"[37] (WIPO 2004, 265), what explains the clear association of the Convention to the author's right[38] in its First Article: "The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic work". The Convention is based on two main principles the "national treatment" and the "baseline protection"[39]. While the former determines that the protection given by the Contracting members to their nationals should be extended to foreign authors, the latter refers to the obligations assumed by the Contracting Members in applying the minimum protection standards set by the Convention[40].

According to the baseline protection set by the Convention, the works of foreign authors should be protected within the member states territory without the need of any formality, however, in order to seek protection in the country where the work originated the national law of the member state would prevail, as per language of Article 5(2) and 5(3) of the Convention. Albeit it is not defined by the Convention, the term "formality" should be understood as "an administrative obligation set out in a national law that imposes a condition necessary for a copyright to exist, or for the right to continue or to be practically available"[41].

[36] Berne Convention Contracting members list:
http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15
[37] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (2004) 265.
http://www.wipo.int/about-ip/en/iprm/
[38]Supra, Note 5. 35
[39]Christopher Sprigman, *Reform(aliz)ing Copyright*, Stanford Law Review, Vol. 57, 2004, 539
[40]Ibid. 540
[41]Supra, Note 39. 541

The main objective of the Berne convention with the prohibition of formalities relies on the argument that if diverse formality requirements were imposed by different national laws the compliance with them by a foreign author would be "difficult, expensive, and often result in unintentional noncompliance and the loss off valuable rights"[42]. However, as it is going to be clarified in Chapters Two and Three, the lack of formalities is pointed by some scholars as one of the reasons for expanding authors' monopoly over their works and, consequently, blocking the increase of society's access to knowledge.

The Convention covered economic and moral rights. The former included the right to translate (Article 8(1)), to reproduce (Article 9(1)), to perform to the public (Article 11) and to adapt (Article 12). The moral rights have their concept "rooted in the civil law tradition"[43] and are listed at Article 6bis(1) and embrace the right to "claim authorship of the work" and to "object to any distortion, mutilation or other modification"[44] of the work. The term of protection, under Article 7(1) was limited and corresponds to "the life of the author and fifty years after his death"[45], however, it might be extended by the national laws of the member states (Article 7(6)).

The Berne Convention brings exceptions and limitations to the exclusive rights mentioned above. Article 9(2) regarding reproduction in special cases, Article 10(1) that recognizes the right to make quotation of a work that was been already released to the public, Article 10(2) containing the right to use literary or artistic works by way of illustration for teaching, Article 10bis referring to the right of reproduction of newspaper or similar articles and use of works for the purpose of reporting

[42]Supra, Note 39. 546
[43]Supra, Note 5. 37
[44] See Berne Convention, Article 6(bis). http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P127_22000
[45] See Berne Convention, Article 7. http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P127_22000

current events, and, finally, Article 11bis(3) related to ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts.

All exceptions are subject to the three-step test, involving prior national law authorization, and, for the exceptions indicated at Articles 9(2), 10(1) and 10(2), the utilization of the copyrighted must be compatible with "fair practice", that is not defined by the Convention but should be aligned with the condition set by the exception in the Article 9(2), according to which the "reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author"[46].

Finally, the Berne Convention contains two cases of "compulsory licenses". The first one is contained at Article 11bis(2) and relates to the right to broadcast and communicate to the public by any other means of wireless diffusion of signs, sounds or images; of any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; to the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work[47]. The second compulsory license provision is contained at Article 13(1) and covers the right of recording of musical works.

As it is going to be clarified at subchapter 1.2.3. these minimum standards have been further extended by TRIPS agreement that also generalized the conditions of limitation and protection as well as created new protection obligations for technological protection measures. In addition, other treaties as the "The WIPO Copyright Treaty" and "The WIPO Performances and Phonograms Treaty" supplemented the Berne Convention.

[46] See Berne Convention
[47] Supra, Note 37. 264.

1.2.2 The Clash between the Interests of the Countries created after the Second World War and the Berne Convention Copyright Protection

After the Second World War, the political map of the world changed considerably and the newly independent countries when achieving to enter into the international system of copyright protection faced problems in gaining greater and easier access to copyrighted works for their technological and educational needs[48]. At the same time, there was the advance of technology that increased the importance of extending the territorial coverage of the international agreements, therefore it was not advantageous to the global community to have those new countries withdrawing from the Convention[49].

This clash of interests triggered the latest revision of the Berne Convention in Paris in 1971. This revision "was predominantly concerned with finding solutions in order to support the universal effect of the Convention and to establish an appropriate basis for its operation, particularly in relation to developing countries"[50]. At the end it provided special faculties open to developing countries regarding translation and reproduction of foreign works as well as it expanded the exceptions for author's exclusive rights[51].

According to this last revision newly developing countries could also depart from minimum standards of protections[52]. One of the innovations brought by Paris revision was the possibility of non-exclusive and non-transferable compulsory licenses for translation to be granted for languages spoken at the newly developing country[53] and it could occur "for the purpose of teaching, scholarship

[48] Supra, Note 37. 265
[49] Ibid.
[50] Ibid.
[51] Ibid. 266
[52] Ibid. 266
[53] Supra, Note 37. 268

or research"[54]. Compulsory licenses could also be granted for the "reproduction for use in connection with systematic instructional activities, of works protected under the Convention"[55].

This is our first example about how a body of law can adapt itself to increase society's possibility to access and enjoy knowledge. However, here, the newly-established countries had a valuable power of bargain, which permitted the revision of the law. Nowadays, as we are going to see in the Chapters Two and Three the clash is between the public, and the copyright-holders which have "theoretically and practically disproportionate influence on IP lawmaking"[56].

1.2.3 The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")

Another relevant international agreement covering *inter alia* copyright law is *The Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS").

The TRIPS agreement was adopted by 107 countries in 1994. Its development was part of the process to strengthen international protection for intellectual property in order to avoid international "piracy"[57]. The United States, developed countries of Europe and Japan were persuaded by the main players of multinational information industries whose business consisted on producing and processing information and informational goods, and who pursued stronger intellectual property protection[58]. Regarding the United States position, Peter Drahos explains this support by arguing that "by helping its multinational clientele to achieve dominium over the abstract objects of intellectual property, the

[54] Supra, Note 37. 267
[55] Ibid.
[56] Supra, Note 1. 839
[57] Supra, Note 5. 43-44
[58] Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*. In *Access to Knowledge in the age of intellectual property,* ed. Gaëlle Krikorian and Amy Kapczynski (New York, Zone Books, 2010), 25

U.S. goes a long way towards maintaining its imperium"[59] because "a global property regime offers the possibility that abstract objects come to be owned and controlled by a hegemonic state."[60]

During its negotiation debates three main positions emerged. The first one, argued by the United States, understood the Intellectual Property protection as a mean to favor innovation, inventions and technology transfer, regardless the country's development level.[61] The second position was assumed by the developing countries, including Brazil, which proposed that the "main objective of the negotiations would have to be to assure the diffusion of technology by means of formal and informal mechanisms of transference"[62], more important than protecting the holders of Intellectual Property rights, the main concern of this group of countries was to guarantee the access to modern technology[63]. The main arguments raised by this second group were that insertion of intellectual property laws into the WTO would restrict instead of promote the free trade, that the developed countries achieved their status of intellectual property exporters under low intellectual property restrictions and that the Agreement was a way to transfer wealth from the intellectual property importer countries to the exporter ones.[64] Finally, the third position was held by some developed countries that highlighted the importance of granting the Intellectual Property protection but, at the same time, believed that an extreme protection would not be favorable to the commerce.[65]

At the end, TRIPS enhanced international intellectual property protection. The Agreement maintained the "national treatment" principle and incorporated some standards of the Berne

[59] Supra, Note 58. 26
[60]Peter Drahos, *Global Property Rights in Information: The Story of the TRIPS at the GATT*. quoted in AmyKapzynski,*Access to Knowledge: A Conceptual Genealogy*. In *Access to Knowledge in the age of intellectual property*ed. GaëlleKrikorian and Amy Kapczynski (New York, Zone Books, 2010), 26
[61]Maristela Basso, *Os fundamentos atuais do Direito Internacional da propriedade Intelectual*. quoted In DENIS BORGES BARBOSA,Direito de autor: questões fundamentais de direito de autor (Rio de Janeiro, Lumen Juris, 2013) 112-113
[62]Ibid.
[63]Ibid.
[64]Supra, Note 58.25
[65]Supra, Note 61. 112-113

Convention (articles 1-21), however, attending to an US requirement, article 6bis regarding the moral rights was excluded[66]. In addition, some of TRIP's protection provisions go beyond BERNE ones, e.g. the computer software and database became copyrightable. At the same time, it limited the protection to expressions, excluding facts and ideas[67]. Another crucial difference from the Berne Convention is that TRIPS' discussion was managed by the WTO that made its provision automatically binding to all WTO members[68] and, more important, in case that any of these member countries fails to comply with any of the Conventions standards the infringing country could be subject to WTO dispute-settlement and consequential trade sanctions[69].

Finally, it is important to stress out that the rights covered by the TRIPS agreement are minimum, being able to be extended by the signatory members[70]. On the other hand, the exceptions are maximum, therefore, the signatory members cannot impose greater restrictions to the protections granted under the TRIPS Agreement[71].

1.3 Origin and Evolution of the U.S. Copyright Law

The United States of America always prioritized the maintenance of an internal structure leading for the society's welfare rather than compliance with international treaties and conventions[72]. During the nineteenth century, the country "was regarded as the world's leading pirate nation"[73] due to its IP importer position and, at the same time, lack of national provisions protection foreign works.

[66]Supra, Note 5. 45
[67] See TRIPS Agreement, Art. 9.2
[68]Supra, Note 26. 102
[69] Mira T. Sundara Rajan, *Copyright and creative freedom: A study of post-socialist law reform* (New York, Routledge, 2006) 13
[70] Ibid. 15
[71] Ibid.
[72]Supra, Note 26. 100
[73]John Tehranian, Infringement Nation: Copyright 2.0 and you (New York, Oxford, 2011) 14

The U.S. Copyright law started its development in 1787 with the U.S. Constitution's Copyright Clause[74]. It borrowed Statute of Anne's instrumentalist approach and vested in Congress the power to legislate patent and copyright laws to promote the progress of Science and useful Arts by granting, for a limited term, exclusive rights to the authors[75]. By limiting the intellectual property rights to a limited term and by being silent regarding any inviolability of said rights the Copyright Clause "eschews any embrace of a natural-law or labor theory of intellectual property"[76]. The natural-law and labor theory of intellectual property aims to protect the original authors considering the efforts and work performed by them when producing the work/good.

Consequently, the U.S. Constitution's Copyright Clause is a clear illustration of the utilitarian approach to intellectual property in the positive law[77] since it clearly sets the necessary link between the authors' exclusive rights and the objective to which they are directed: promotion of the public welfare. This position is aligned with the utilitarian approach according to which the law aims to encourage the generation of knowledge, technology and arts by incentivizing authors trough the grant of exclusive rights over their work[78].

The first Copyright Act approved on May 31st, 1790 kept the same legal position limiting the effective period of the exclusive copyright rights. It was stated in its first lines that it is "an Act for the encouragement of learning, by securing the copies of maps, Charts, and books, to the authors and proprietors of such copies, during the times therein mentioned"[79]. In addition to the time limitation, the author's monopoly was also restricted by the narrow interpretation of copyright infringement

[74]Supra, Note 73. 18
[75]Ibid.
[76]Ibid. 19
[77]Zohar Efroni, *Access-right* (New York, Oxford University Press, 2011) 120
[78]Ibid. 121
[79] See First Copyright Act of 1790. http://www.copyright.gov/history/1790act.pdf

given by case law.[80] In order words, until start of the 20th century the U.S. courts interpreted and applied copyright by focusing "on the transformative use made of the original work by the defendant rather than on the value of the material wrested from the original author."[81]

Moreover, the protection provided by the 1790 Copyright Act was limited for authors of works that had been printed within the United States, being a U.S citizen or resident. Therefore, no protection was extended to foreign authors as stated by Section 5 of the Act which allowed the importation and reproduction of foreign works without specifying or setting any sort of protection to them. Finally, the First Copyright Act imposed some requirements that should be met in order to grant copyright protection e.g. to publish (Section 3, 4), deposit (section 3) and file of copy before the Secretary of State (Section 4). These formalities can be understood as essential indicators of the utilitarian position for two main reasons, since, as it is going to be clarified in the Chapter Three of this thesis, they reflected in the number of works falling into the public domain and facilitated the location of authors in order to request license of use.

Hence, at this first moment, the U.S. copyright law clearly demonstrated the country's strong position aiming at maximizing the generation of knowledge, information and innovation for public consumption[82] by limiting the authors' monopoly over their work and by being silent regarding any protection to foreign works. If we compare with the current Copyright U.S., it is clear that, at this initial phase, the U.S. copyright law had also an instrumentalist approach, however, its final aim (society's welfare) was not achieved by expanding copyright-holder's entitlements but by limiting them towards society's access to the information and knowledge.

[80]Supra, Note 73. 21-22
[81]Ibid. 22
[82]Ibid. 20

The radical change of the U.S. copyright law, when it started to see the copyright as a natural-right, occurred with the *Folsom v. Marsh* decision in 1841. When deciding the case, the U.S. Supreme Court took in consideration the labor and efforts taken by the plaintiff, which, at the end, prevailed over the transformative use by the defendant disregarding any benefits that the new work could bring to the society[83]. By holding that the author owns the entirety of the copyright property, the court expanded the copyright protection thereby "frustrating utilitarian goals"[84]. Courts until this moment accepted the premise that "copyright was a statutory construct with an instrumentalist bent."[85] This approach was reflected in the case law which "focused on the transformative use made of the original work by the defendant rather than on the value of the material wrested from the original author."[86]

The change on courts position is clear, for example, regarding assessment of fair use claims which, according to *Folsom v. Marsh* was considered a copyright infringement regardless of any transformative aspect[87]. This restriction on courts' discretion got reflected in the Article 107 of the 1976 Copyright Act and it is currently effective. This article brings a four-part balancing test in order to assess a fair use case. According to this four-test the fair use would not be considered an infringement after the following aspects are assessed: (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount that was used; and (4) the effects of the use that may be generated over the copyrighted work.[88] However, under current U.S. case law it has been held that "Secondary users have succeeded in winning the first factor by reason of either (1) transformative (or productive) nonsuperseding use of the original, or (2) noncommercial use, generally for a socially beneficial or widely accepted purpose."[89] Moreover, for the sake of clarity, "transformative use" is understood as

[83]Supra, Note 73. 28-29
[84]Ibid. 31
[85]Ibid. 22
[86]Ibid.
[87]Ibid. 29
[88] See American Geophysical Union v. Texaco Inc., 802 F.Supp. 1 (S.D.N.Y.,1992) Westlaw
[89] Ibid.

the "secondary use that was productive in that it produced a new purpose or result, different from the original—in other words, a secondary use that transformed, rather than superseded, the original."[90]

The authors' monopoly over their works expanded with the following Copyright Acts after *Folsom v. Marsh* decision. The Copyright Act of 1870, for example, extended authors' exclusive derivative rights including the right to dramatize and translate the works, in addition to the exclusive rights to print, reprint, publish and vend which were already covered by the 1831 and 1790 Copyright Acts.[91] The Copyright Act of 1909 added the rights to novelize and musicalize and the 1976 Copyright Act granted the authors the exclusive right to prepare all derivative works.[92] Derivative rights are very consistent with the natural-law interpretation of copyright since they grant to the authors exclusive right over any work that could be developed and generated from authors' expression[93].

Until 1891 the U.S. had no international copyright relation[94] limiting its copyright protection to national works. Consequently, "the American publishing industry thrived during much of the 19th century on the basis of unauthorized, 'piratical' reprints of British 'bestsellers'"[95]. In 1891 the "Chace Act" amended the Copyright law and extended the copyright protection for some foreign countries provided that these countries also protected U.S. works under their territory[96]. Once the United States became a major exporter of copyrighted works during the 1950's, its position regarding international copyright regulations changed and got reflected, for example, by its participation in the Universal Copyright Convention in 1955.

[90] See American Geophysical Union v. Texaco Inc., 802 F.Supp. 1 (S.D.N.Y.,1992) Westlaw
[91]Supra, Note 73. 33
[92]Ibid.
[93]Ibid.
[94]Supra, Note 5. 33
[95]Ibid. 33
[96]Ibid. 34

Beginning in the early 1980s before the rise of the "knowledge economy" and the perception that U.S. firms were losing huge amount to foreign "piracy", the United States pushed the negotiation of international agreements regulating intellectual property[97], e.g. the North America Free Trade Agreement (NAFTA) and the TRIPS agreement. In 1989 the United States entered the Berne Convention, however it is not self-executing since under U.S. law they must be implemented in domestic legislation[98] and, on the other hand, the United States "did not amend the 1976 Copyright Act to provide for the rights of attribution and integrity guaranteed by the Berne Convention".[99]

Following the Berne enactment, the United States and some European countries led the negotiations and draft of two additional treaties on copyright law, supplementing the Berne Convention: "The WIPO Copyright Treaty" and "The WIPO Performances and Phonograms Treaty". The provisions of both treaties, including the anti-circumvention" policy contained at the former, were implemented in the U.S. legislation by the signature of the Digital Millennium Copyright Act ("DMCA") on October 28, 1998.

1.4 Origin and Evolution of Brazilian Copyright Law

In Brazil, the Copyright law[100] began its development in 1824, when the protection was provided personally and as a royal favor[101]. In 1830, the Brazilian criminal code inserted among its provisions the criminal sanctions for those that printed, recorded or modified any written work done or translated by a Brazilian author.

In 1891 the first Republican Constitution brought protection to authors' rights. Since this protection it has been replicated to all following Brazilian Constitutions with exception of the one, the

[97]Supra, Note 5. 34
[98]Ibid. 39
[99] Jane Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?,* The Journal of the Copyright Society of the United States (Columbia Law School), Millenium Volume (2000) 8
[100] the most accurate translation would be author's right which is the translation of "direito autoral"
[101]Supra, Note 26. 4

Constitution of 1937. The current Brazilian Constitution dated of 1988 brings the Copyright protection among the fundamental rights listed by its Article 5. Sections XXVII and XXVIII cover the authors' exclusive rights over their works:

> Art. 5. § XXVII – the authors own the exclusive rights of using, publishing or reproducing their works, being said rights transmissible to their heirs for the term to be defined by law;"[102]
>
> Art. 5. § XXVIII – it is ensured, according to the law:
>
> a) The protection to individual participation in public works and to the reproduction of human voice and image, including in sporting activities;
> b) The right of verifying the profits earned by the works created by them or in which the authors, performers and respective union or association[103]

Therefore, the Brazilian Constitution highlights the economic aspect of the copyrights by granting to the authors the rights of controlling and profiting from their works[104]. It does not make any express reference to the authors' moral right[105]. However, according to Brazilian doctrine the interpretation of the principle of "human dignity", indicated by Article 1 of the Constitution as one of the Republic's fundaments, should embrace all aspects of human personality, including the authors' personality rights[106].

Brazilian Constitution has no explicit finalistic provision unlike the one contained at the U.S. Constitution's Copyright Clause. Authors' reproduction rights are stated without any explanation of copyright's function in society. However, due to its property content, the Brazilian copyright

[102]Art. 5. § XXVII - Aos autores pertence o direito exclusivo de utilização, publicação ou reprodução de suas obras, transmissível aos herdeiros pelo tempo que a lei fixar;
[103]Art. 5. § XXVIII- São assegurados, nos termos da lei:
a) a proteção às participações individuais em obras coletivas e à reprodução da imagem e voz humanas, inclusive nas atividades desportivas;
b) o direito de fiscalização do aproveitamento econômico das obras que criarem ou de que participarem aos criadores, aos intérpretes e às respectivas representações sindicais e associativas
[104]Allan Rocha Souza, *A função social dos direitos autorais: uma interpretação civil-constitutional dos limites da proteção jurídica* (Campos dos Goytacazes, Faculdade de Direito de Campos, 2006), 137
[105]Ibid. 128
[106]Supra, Note 104. 131

protection is subject to Article 5, XXIII which determines that the "property shall achieve its social role"[107]. Therefore, at the end, by limiting the property to a social and public interest this interpretation of the Brazilian Constitution addresses to a utilitarian approach, similar to the one contained at the U.S. Constitution.

In 1912, the federal law number 2.577 extended the copyright protection to foreign authors. On February 19th, 1998 Brazil enacted the Law 9.610 which is in force until today, and it is the main national law on copyright protection. The Brazilian Copyright law of 1998 brings the moral rights in its Article 25 and, according to the language of its Article 27, the law confers to them the unwaivable and unassignable features. Differently, regarding the patrimonial rights, that are those related to the economic use of the works, those may be assigned by the author and are listed in the article 29 of the same legislation. The limitations to the copyright are listed in the Articles 46, 47 and 48 of the Law, nevertheless their interpretation is not restrictive[108]. In order words, the limitations are subject to the general principles of law[109]. More related to copyright law limitations are contained in the Brazilian Software Law (Law 9.609 of 1998) and, most importantly, according to the Brazilian Criminal Code of 1940, all copyright infringements are considered crimes subject to monetary penalty or jail for until 4 years.[110]

Finally, regarding the international treaties, Brazil entered into the Berne Convention in 1922. Although it did not enact any of Berne supplementary copyright treaties, their main provisions, are

[107] Art 5, XXIII - a propriedade atenderá a sua função social; Georgetown University Law Center and Georgetown Law Journal 287 (1988) 28

[108]José De Oliveira Ascensão, *A função social do direito autoral e as limitações legais.* In *Direito da propriedade intelectual: estudos em homenagem ao Pe. Bruno Jorge Hammes* ed. Luiz Gonzaga Silva Adolfo, Marcos Wachowicz (Curitiba, Juruá, 2006) 90

[109]Ibid. 90-91

110See Brazilian Criminal Code (1940) art. 184: "Violar direitos de autor e os que lhe são conexos"

contained in the language of the effective Brazilian regulation, e.g. the "non-circumvention policy" that is supported by the Article 107 of the Law 9.609. Brazil has also enacted the TRIPS agreement.

Chapter 2: The Rise of the Access to Knowledge (A2K) Movement

In the First Chapter we made an historic analysis of the evolution of the U.S. and Brazilian Copyright Laws as well as of the International Intellectual Property Agreements. With the beginning of the 20th century, these two national regulations started reducing the disparities between themselves and, more important, started to expand the copyright-holders' entitlements over their works. At this moment of this thesis we will explore the rationale behind the author's overprotection, how it triggered the origin of the Access to Knowledge (A2K) movement and what the private solutions and concerns related to the imbalance between authors and nonowners' rights are.

2.1 The Enhancement of Copyright Protection Measures

Copyright law is one of the legal branches of intellectual property law that secures immaterial objects[111]. At the same time, intellectual property subject matter is described as public goods, which, differently from physical resources, are non-excludable and, regarding its consumption, non-rivalrous.[112] The former aspect refers to fact that it is impossible to control the access to the work once it is provided to one person.[113] A public good is also non-rivalrous because the consumption of the goods by one person does not limit the consumption by others, different from a material object, such as food, which may have its substance diminished or its use exhausted by its consumption.[114] This kind of goods "are likely to be produced at socially suboptimal level"[115] since potential suppliers do not believe that they could recover from the consumers the costs

[111]Supra, Note 77. 85
[112]Ibid. 86
[113]Ibid.
[114]Ibid.
[115]William W. Fisher, Promises to keep: technology, law and the future of entertainment (Stanford, Stanford University Press, 2004) 200

assumed for the production of the goods[116]. According to Lewis Hyde "public goods belong to the public domain, that great and ancient storehouse of human innovation".[117]

The classification of IP works as being, originally, non-excludable and non-rivalrous, are two of the main reasons yielding divergent approaches regarding statutory solutions and intellectual property protection measures[118] since they put, for example, copyrightable works in a similar condition as public goods. Governments have adopted five forms to minimize the danger that public goods are unproduced: (1) supplying the goods themselves; (2) paying private actors to produce the goods, e.g. providing grants to research institutions, (3) adopting a reward system by giving, as an incentive, post-hoc prizes or rewards to persons that had provided public goods, (4) shielding public goods suppliers from the competition by granting exclusive rights on the availability of their products and, finally, (5) by assisting the suppliers with legal fencing in order to increase the excludability of their products by allowing them to charge the access to them.[119]

The first three options vest government with power to fund, invest and reward creators, therefore, they are seen as being dangerous since the use of such power by government might not be wise or might be repressive.[120] For the copyright realm, worldwide governments have been adopting the fourth form. As we verified in the prior Chapter, the copyright laws, due to their utilitarian approach, tend to grant exclusive rights to the authors in order to foster the production of intellectual works. As an example copyright law has "protected composers, performers, and filmmakers against competition in the reproduction, adaptation, distribution, and performance of their creations … enabling them to raise the prices they charge to consumers and licensees"[121].

[116]Supra, Note 115. 200
[117]Lewis Hyde, *Common as air: Revolution, Art and Ownership* (New York, Union Books, 2012) 47
[118]Supra, Note 77. 88
[119]Supra, Note 115. 201
[120] Ibid.
[121] Ibid.

However, at the "Digital Age" the rapidly increasing of digital recordings, storage systems, compression technologies, internet communication features (as peer-to-peer sharing system) gave to the public unprecedented ways of copying and disseminating copyright –protected materials[122]. These new features made harder to copyright holders to control and enforce their rights under the law[123] since from the material, slow, and local realm the new technologies brought a new, fast and global way of communicating, sharing and processing ideas and information.[124]

Allied to the technological improvement, other two historical events contributed to the enhancement of an "intellectual property" protection culture. The first one consists in the fact that the knowledge became "increasingly" important to countries' economy.[125] The importance and wealth of the knowledge generated by the laboratories and studios became clear since at least the Second World War[126] when the so-called developed economies had their "most productive component … shifted from industrial sectors to information-processing sectors such as financial services, marketing, biotechnology and software."[127] Consequently, the more important the knowledge, ideas and information became to the economy the higher became the level of protection required by their suppliers, including copyright holders.[128]

The second historic event pointed out by Lewis Hyde as being one of the reasons justifying the fortification of "intellectual property" position was the fall of the Soviet Union in 1991 which represented the last obstacle to the free-market capitalism. Without this traditional-political opponent, lots of things that made part of the common "were removed from the public sphere and made subject to the exclusive rights of private ownership."[129]

[122]Supra, Note 69. 32
[123]Supra, Note 115. 202
[124]Supra, Note 117. 12
[125]Supra, Note 58. 20
[126]Supra, Note 117. 10
[127]Supra, Note 58.19
[128]Supra, Note 117. 11
[129]Ibid. 16

As a response to these historic events, the copyright holders start taking "desperate measures, lobbying for the recognition of ever higher copyright standards and harsher mechanisms for their enforcement."[130] Consequently, governments started to adopt the fifth strategy by recognizing and granting protection to private access-control systems adopted by the copyright holders.

Technological Protection Measures (TPMs), Digital Rights Management Systems (DRMs) and the anticircumvention laws are three of the main results from this phenomenon of expansion of copyright exclusivity by the lawmakers. The TPMs consist on technological means that are adopted by the copyright holders in order to control, supervise and/or prohibit unauthorized communication-conducts[131] by the user of the copyrighted work. On the other hand, DRMs aim at securing trade at the digital realm involving "mass distribution, licensing contracts between end users and content providers, and technology licensing between DRMs developers and manufacturers of devices in which DRMs are embedded."[132] The TPMs grant the access and use of information in accordance with the terms and conditions set by DRMs.[133] The crucial element here is that these technological restrictions may not be confused with intellectual property rights since they "do not always enforce recognized intellectual property rights in information"[134], they go beyond the legal restrictions.

With the WIPO treaties of 1996 ("WIPO Copyright Treaty" and "WIPO Performances and Phonograms Treaty") TPMs infringements that up to this moment did not justify copyright infringement liability were inserted together with the concept of "access" in the copyright law[135]. The anticircumvention policy entered in the high priority list of WIPO at the moment that its officials became persuaded that the easiness of sampling, converting and copying copyrighted

[130]Supra, Note 69. 32
[131]Supra, Note 77. 192
[132]Ibid. 193
[133]Ibid.
[134]Ibid. 194
[135]Supra, Note 77. 287

works increased with the new technologies. Therefore, the WIPO Copyright Treaty seeks to "encourage right-holders to use digital formats in disseminating works via computer networks by legally securing their technological 'self-help' measures against circumvention."[136]

At the end, in order to "solve the potentially 'market-breaking' problem of goods that are expensive to make and cheap to copy"[137], the enhancement of copyright protection by the states and by the copyright holders allows copyright holders to shield their works, however, it limits the "fair use" performance turning copyright law into a restriction to public's freedom of expression including the right to have access to works and to use them as a source for new works and ideas.[138]

2.2 The Access to Knowledge Movement (A2K) and its Main Arguments

The access to Knowledge (A2K) movement emerges as a response to the "development of new and/or increasingly exclusive intellectual property rights."[139] The movement started on late 1990s and discusses and proposes changes to the way ideas, goods and services are being provided under the current "knowledge economy".[140]

The movement follows the rational that the knowledge and information are the main sources to the generation of new ideas and technology and that, at the same time, the access to them has been prevented by the increasing expansion of the exclusive intellectual property rights and related private protection measures. According to the A2K movement, this restrictive intellectual property regime controls the existing amount of knowledge and, consequently, development of innovations that could be generated by them[141] it "places the concept of democracy at the center … and opposes it to the despotic dominion conception of intellectual property."[142]

[136]Supra, Note 77. 302
[137]James Boyle, *The public domain. Enclosing the commons of the mind* (London, Yale University Press, 2008) 4
[138]Supra, Note 69. 32
[139]Supra, note 2. 57
[140]Ibid.
[141]Supra, Note 2. 58
[142]Supra, Note 58. 39

In order to destabilize the existing monopoly generated by the intellectual property law, the Access to Knowledge movement explores a series of alternatives and arguments. Hereunder I develop some of them: "public domain", "the commons", "sharing and openness", "Right-of-access", "right of free speech" and "human rights".

2.2.1 Public Domain

A2K movement uses the term "public domain" "positively, to bring into focus the negative space of intellectual property law and to articulate its importance for innovation and creativity."[143] Borrowing James Boyle's definition, public domain "is material that is not covered by intellectual property rights … because it was never capable of being owned (or) because rights have expired"[144], having no exclusive owner. Therefore, anyone can use, sample, borrow part or the totality of the work, idea or information that belongs to the public domain without having the obligation to request any license or pay any value for it.

According to the Article 45 of the Brazilian Law 9.610, the work whose protection term expired, whose authors without any heirs died and those created by unknown authors belong to the public domain[145], however, public domain should also embrace the not copyrightable subject matters as ideas and facts. In the United States, originally, public domain was a term used to describe public lands, it started being used for the intellectual property realm by the French system and had this concept inserted in the United States Intellectual Property law after the enactment of the Berne Convention.[146]

However, according to James Boyle "we are in the middle of a second enclosure movement"[147] because "things that were formerly thought of as either common property or

[143]Supra, Note 58. 30
[144]Supra, Note 137. 38
[145] See Brazilian Law 9.610, Article 45
[146]James Boyle, *The second Enclosure Movement and the construction of the public domain,* Duke Law School Journal Law and Contemporary Problems, Vol. 66, pp. 33-74, (2003) 58
[147]Ibid. 37

uncommodifiable are being covered with new, or newly extended, property rights"[148]. Originally, the intellectual property restrictions were created to be an exception to the rule that ideas and facts must always remain in the public domain and be available for common use.[149] In such manner, copyright should be understood as a system created in order to feed the public domain through the imposition of limited and not permanent exclusive rights, with the final objective to promote free access.[150]

However, with the expansion of intellectual property rights, "the old limits to intellectual property rights – the anti-erosion walls around the public domain – are also under attack."[151] An example to this phenomenon is the European Database Directive and the proposed bills in United States that give protection to databases even though they are a compilation of facts that, on the other hand, should not be enclosed and remain free for all to build upon.[152]

The evolution of United States Law is a clear example of how the enhancement of copyright monopoly went beyond the limits of the public domain. Since the 1970 Copyright Statute until the Copyright Act of 1976, the U.S. copyright law contained a system of procedural mechanisms that imposed copyright formalities, which should be respected in order to have a copyright protection. Authors were obliged to register, notify (by marking their works with the © symbol) and renew the protection after a certain term. In case that those formalities were not met, protection was not granted/renewed. This process assisted those that wanted to request license to use a copyrighted work and "helped to maintain copyright's traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw."[153]

[148]Supra, Note 146. 38
[149]Ibid. 39
[150]Ibid. 60
[151]Ibid. 38
[152]Ibid. 39
[153]Supra, Note 39.487

This scenario changed with the 1976 Copyright Act and with the following legislation including the Berne Convention, the Copyright Renewal Act and the Copyright Term Extension Act.[154] This legislation reduced the need of formalities (registration and notice) since according to them the copyright protection is granted at "the moment an original piece of expression is fixed in a tangible medium of expression"[155]. Consequently, all fixed works are copyrighted "even if its creators do not know that and would prefer it to be in the public domain."[156]

The absence of any required copyright formality is also present at the Brazilian copyright law whose Article 18 sets that the protection is granted independently of any registration[157]. It is possible waiving the copyright protection trough private licenses, e.g. through the creative commons ones, however not all authors are aware nor do so.

This tendency to extend the intellectual property rights disrespecting the public domain limits goes against the A2K movement policy that defend the maintenance and protection of the public domain and the ability to use freely (without individual permission or the need to pay an additional fee) their components as essential ones for the society's creativity and informational environment.[158] Therefore, shrinking the public domain stock might be very risky to the society as a whole since, as James Boyle clearly points out, the public domain "is the basis for our art, our science, and our self-understanding … because it is the raw material from which we make new inventions and create new cultural works"[159].

2.2.2 The Commons: Free Software and Free Culture Movements

The term "commons" is another relevant concept explored by the A2K movement however, when compared to "public domain" it has a distinct and more diversified meaning.

[154]Supra, Note 39. 487
[155]Ibid. 488.
[156]Supra, Note 137. 14
[157] Brazilian Copyright law (Law 9.610 of 1998) Art. 18. A proteção aos direitos de que trata esta Lei independe de registro.
[158]Supra, Note 58.31
[159]Supra, Note 137. 39

Generally, it refers to a "source over which some group has access and use rights"[160] and, different from the works under public domain regime, it may be subject to some restrictions.[161] Another difference between public domain and commons is that while the former is independent from the intellectual property law provisions, the latter is subject to it, what explains the possibility of setting permissions and price.[162] Finally, the creators establish the rules of the commons, while those surrounding the "public domain" are set by the law[163].

Free software movement is an example of informational commons. Richard Stallman started it in 1984 after he asked a printer machine supplier the copy of the source code of the product for technical purposes. The supplier refused to send the source what was interpreted by Sttalman as "moral offense (since) the knowledge built into that driver had been produced by many people, not all of whom had been employed by the company."[164] Then, Stallman founded the Free Software Foundation that aimed to "encourage the development of software that carried its source with it (and) to assure that the knowledge built into software was not captured and kept from others."[165]

A free software is created and written by volunteers without any labor or governmental relationship[166] and by employees of IBM and Google whose softwares are released into the commons.[167] With the free-software users may run the software for any purpose, modify it, redistribute copies.[168] At the end, the open software "are more modular, participatory, collaborative, and open than equivalent projects organized in proprietary firms."[169] James Boyle describes the open softwares as a "widespread, continued, high-quality innovation" since it

[160]Supra, Note 137. 39
[161]Ibid.
[162]Supra, Note 58. 41
[163]Supra, Note 58. 42
[164]Lawrence Lessig, *The future of ideas: the fate of the commons in a connected world*(New York, Random House, 2001) 53
[165]Ibid.
[166]Supra, Note 58. 32
[167]Supra, Note 137. 187
[168]Supra, Note 164. 59
[169]Supra, Note 58. 33

"produces high-quality products capable of competing in the market with proprietary alternatives".[170]

One of the main example of a free software/open-code project is the GNU/Linux that is a platform that comes with its source and, therefore, anyone can build upon it and make it better.[171] GNU/Linux has been considered by Lawrence Lessig as the "fastest-growing operating system in the world."[172]

The collaborative aspect of the free software and open code projects brings a good example of how this tool creates a commons, that is free and accessible, and how these commons contribute with the social welfare and knowledge. As Lawrence Lessig clearly points out:

> This free code builds a commons. This commons in turn lowers the cost of innovation. New projects get to draw upon this common code; every project need not reinvent the wheel. The resource thus fuels a wide range of innovation that otherwise could not exist.
>
> Free code also builds a commons in knowledge. This commons is made possible by the nature of information. My learning how a Web page is built does not reduce the knowledge of how a Web page is built. Knowledge, as we've seen, is nonrivalrous; your knowing something does not lessen the amount that I can know[173]

According to the copyright law, its protection granted to any creative work at the moment that it is fixed in tangible form. In order to waive or assign all or some of his exclusive rights, the author may enter into contracts, specifically named as "copyleft" licenses (in contrast with the copyright law provisions)[174]. For the free softwares the most important of this type of licenses is the General Public License (GPL).

Therefore, licenses are, in many ways, considered in many aspects the "most important political documents of communities built around the production of information over the

[170]Supra, Note 137. 195
[171]Supra, Note 164. 54
[172]Ibid.
[173]Ibid. 57
[174]Ibid. 59

internet"[175] they are responsible for setting the rules related to the development and maintenance of the collaborative creation.[176] The GPL specifically sets that the software may be copied by anyone "provided the license remains attached and the source code for the software always remains available."[177]

Following the same essence of the free software movement but expanding it to culture, another concept was developed: the "**free culture**". The main example of this movement is the "Creative Commons" that is a non-profit corporation established in Massachusetts[178] and created by Lawrence Lessig, Hal Abelson and Eric Eldred. The corporation was developed "as a response to the increasing control effected through law and technology"[179] and were "conceived as a private 'hack' to produce a more fine-tuned copyright structure, to replace 'all rights reserved' with 'some rights reserved' for those who wished to do so."[180]

The concept of **"Creative Commons"** consists of a pre-defined group of licenses that should cover the work according to author's preferences. Therefore, the creator may choose preventing the reproduction, commercial exploitation, both, etc. According to Lawrence Lessig: "by developing a free set of licenses that people can attach to their content, Creative Commons aims to mark a range of content that can easily, and reliably, be built upon"[181]. The tags of the licenses are recognizable by human beings (since all works covered by the licenses are marked with "cc" together with the explanation of the freedoms) and by computers (due to the "metadata"

[175] Pedro Nicoletti Mizukami; Ronaldo Lemos, "*From Free Software to free culture: the emergence of open business"*. In *Access to Knowledge in Brazil. New research on intellectual property, innovation and development* ed. Lea Shaver (New Haven, Information Society Project, 2008) 53
[176] Ibid.
[177]Supra, Note 137. 186
[178]Supra, Note 164. 282
[179]Ibid.
[180]Supra, Note 137. 182
[181]Supra, Note 164. 282

attached to it).[182] These three elements together (legal license, human readable description and machine-readable tags) constitute the Creative Commons license.[183]

Hence, the freedom available to the author when designing his licenses goes beyond the default copyright law and the traditional fair use.[184] By granting this freedom to authors in choosing the licenses, according to Lawrence Lessig, the project's objective "is to build a movement of consumers and producers of content who help build the public domain and, by their work, demonstrate the importance of the public domain to other creativity."[185]

One could argue that by granting "copyleft" licenses the authors would have no incentive in supplying their works, due to the public good aspects that I explored in the start of this chapter. However, the digital copy that is made available, for free to the public, at the end becomes a way of publishing and attracting new consumers. For example, some real cases have proved that when comparing the number of people that would buy the book/song after taking knowledge of the copy in the internet with the number of people that would buy the physical copy of the work but do not do so because they opt for freely downloading the work, the former usually prevails over the latter[186]. Thus, the creative commons is a good way of spreading proprietary content.[187]

According to James Boyle, when referring to the overprotection of right-holders, the Creative Commons "was conceived of as a second-best solution created by private agreement."[188] In addition, the Creative Commons itself positioned clarifying that the change at the copyright law is still necessary and that its license should not be seen as definite solution for the imbalance created by the excessive copyright law. According to the company:

[182]Supra, Note 137. 181
[183]Supra, Note 164. 283
[184]Ibid.
[185]Ibid. 283-284
[186]Ibid. 284
[187]Ibid.
[188]Supra, Note 137. 183

> CC licenses are a patch, not a fix, for the problems of the copyright system. They apply only to works whose creators make a conscious decision to affirmatively license the right for the public to exercise exclusive rights that the law automatically grants to them. The success of open licensing demonstrates the benefits that sharing and remixing can bring to individuals and society as a whole. However, CC operates within the frame of copyright law, and as a practical matter, only a small fraction of copyrighted works will ever be covered by our licenses.[189]

Therefore the creative commons do not intend to be a final but a transitory solution for the expansion of intellectual property restriction as well as for the current system of automatic copyright protection.

2.2.3 "Sharing" and "Openness"

From the analysis of the arguments related to the public domain as well as to the commons projects it is clear that "sharing" and "openness" are two big concepts promoted by the A2K movement. Both ideals are present at "share and share alike"" copyright licenses, "open-source software", "open standards" and "open-access publishing".[190]

The "share and share alike" licenses rely on the exclusive rights given to the authors by the copyright law and that allow them to subject their works to "copyleft" licenses which require future users/collaborators to share their modifications over the work with others. The free softwares, e.g. GDU/Linux, are subject to this type of licenses. On the other hand, open standards prevent that technical standards are owned by anyone based on intellectual property rights and, finally, "open-access publishing" relates to works that are made available for free (e.g. information generation by research sponsored by the government).[191]

Both concepts of sharing and openness are based on the A2K assumption that "the whole is greater than the sum of its parts"[192] and that, contrary to this logic, the intellectual property rights and restrictions prevent the creation of a network among the parts, "disrupting, rather than

[189] Creative Commons, *Creative Commons and Copyright Reform.* Accessed at March 20th, 2014. https://creativecommons.org/about/reform
[190] Supra, Note 58. 34
[191] Ibid. 35
[192] Supra, note 2. 35

generating creativity."[193] Finally, together with the concepts of public domain and commons, the ideals of openness and sharing play a role when assessing the autonomy of those persons that have contact with the works and technologies insofar as the proprietary works, for example softwares, make their users dependent from the original developer and copyright holders e.g. regarding any assistance, maintenance or improvement[194].

2.2.4 Right-of-access

All elements discussed so far are built upon the final objective to enhance the population access to the works and knowledge produced. The concept of access was initially related to the campaign moved by developing and under-developed countries claiming for cheaper and affordable AIDS medicines for pandemic and poor regions. Further, the concept got broader, covering other intellectual areas and today it is present even in the name of the "access to knowledge" movement.[195]

In the cultural realm, the term "access" may be defined as "the ability to experience or apprehend a work – in other words, to view, read or listen to it."[196] Zohar Efroni identifies three variations of rights derived from the access ability: (1) *access-right* which consists in the subjective-negative right of the copyright owner to exclude, control or prohibit the access to his work from nonowners; (2) *right-of-access in the strong form* that is the right that "imposes an affirmative legal duty on those possessors ordering them to enable access to information in their control upon the right-holder's demand"[197]; and (3) *right-of-access in the weak form* that consists in a privilege and, therefore, cannot demand neither enforce it against others[198].

[193]Supra, Note 58. 35
[194]Supra, Note 58. 34
[195]Supra, Note 58. 37
[196] June M. Bekek, Anti-Circumvention Laws and Copyright: A report from the Kernochan Center for Law, Media, and the Arts, 27 Colum. J. L. & Arts 385, 474 (2004) *quoted in* Zohar Efroni, Access-right: the future of digital copyright law (New York: Oxford University Press, 2011), 145
[197] Supra, Note 77. 128
[198]Ibid.

Regarding the first variation, it is an "exclusive right-claim" with the main objective to authorize, prevent and/or control how the public access, therefore, experience or apprehend the work. In addition it is a "legally enforceable in rem exclusive right to exclude other from achieving human-access, and to prevent others from further enabling human-access to third parties without permission."[199]

Regarding the U.S. legislation, the U.S. Copyright Act a person will be considered an infringer if he "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a)". Since the Law does not include the control to human-access among the exclusive rights, under the law "a person is completely free to pursue access so long as her behavior does not involve infringement"[200]. However, with the WIPO treaties and the DMCA enactment, the circumvention of any TPM constitutes an infringement action, consequently, the law expressly recognized the access-right. According to DMCA provision: "no person shall circumvent a technological measure that effectively controls access to a work protected under this title."[201]

The Brazilian regulation, the 9.610 Law of 1998 also identifies in its Article 107, paragraphs I and II the circumvention as an infringement to the authors' rights. The Article establishes that anyone that modifies, suppresses or circumvents any code or technical measure that had been used to prevent or control the reproduction or communication to the public of the work will be liable for the payment of damages.[202]

[199]Supra, Note 77. 146
[200]Ibid. 149
[201] See 17 U.S. Code § 1201 (a)(1)(A)
202 See Brazilian Copyright Law (9.610 Law of 1998) Art. 107. Independentemente da perda dos equipamentos utilizados, responderá por perdas e danos, nunca inferiores ao valor que resultaria da aplicação do disposto no art. 103 e seu parágrafo único, quem:
I - alterar, suprimir, modificar ou inutilizar, de qualquer maneira, dispositivos técnicos introduzidos nos exemplares das obras e produções protegidas para evitar ou restringir sua cópia;
II - alterar, suprimir ou inutilizar, de qualquer maneira, os sinais codificados destinados a restringir a comunicação ao público de obras, produções ou emissões protegidas ou a evitar a sua cópia;

On the other hand, the right-to-access aims at protecting nonowners against information 'holdouts' by the access-right holders.[203] It is a "legal entitlement against a person in possession of information, or a person who is otherwise in a position to restrict access to information, to compel that person to facilitate access."[204] Opposing to the access-right, the *right-of-access in the strong form* is not supported by neither explicit in the U.S. nor in the Brazilian legislations. As Zohar Efroni explains "copyright law focuses on defining specifically the rights of those right-holders; 'users'… have a residual status."[205]

Copyright exemptions and fair use doctrine are two legal tools that allow the user to enjoy and use the protected works, however they do not grant a *right-of-access in a strong form*. Copyright exemptions may not be understood as a type of right-of-access since they are applied only after a person has access to the work and claims it against the work's owner's exclusive rights. In addition, the difference on the approach with the access-rights and the exemptions is visible in both systems, the Brazilian and the North American one. While the U.S. Copyright Act[206] and the Brazilian Law 9.610[207] grant to authors positive and explicit rights ("author's exclusive right"/ "direito exclusivo do autor"), these two laws do not vest nonowners with similar positive rights, instead, they simply exempt them of liability in some specific cases of unauthorized uses. Therefore, unlike right-for-access the "exemptions are not a legal instrument imposing legal duties."[208]

Finally, the fair use doctrine is present in the U.S. legislation but absent in the Brazilian one. Nevertheless, similar to the exemptions it does not grant the *right-of-access in the strong form* purpose since they do not impose any duty to the copyright owner and, consequently, "no person is under an affirmative, general legal obligation ex ante to facilitate, assist, enable, or allow acts

[203]Supra, Note 77. 153
[204]Supra, Note 77. 153
[205]Ibid. 154
[206] See 17 U.S. Code § 106
[207]See Law 9610, art 28
[208]Supra, Note 77. 157

supposedly qualified under the fair use doctrine."[209] In addition, considering that the fair use doctrine is subject to the four-step assessment contained at §107 of the U.S. Copyright Act its application and acceptance is unpredictable, relying on courts' discretion.

Therefore, while both the U.S. and Brazilian legislations recognize and give power to the copyright holders to enforce private measures of control the access and use of their work (access right), they remain silent regarding the public's right of accessing the knowledge even when the person is not infringing any original author's exclusive right. By the imbalance on the treatment of both sides (access-right of the author versus right-of-access of the public) both systems instead of pursuing the progress and the society's welfare, recognized by the U.S.[210] and Brazilian[211] Constitutions, feed a reality where the knowledge remains under control and monopolized by the copyright owners.

2.2.5 Copyright and Free Speech Right

In the U.S. system, another right around which the discussion of access to knowledge is built upon is the right to receive information. Although this right is not explicit in the U.S. Constitution it derives from the right of freedom of speech protected by the First Amendment, that prevents Congress of making make any law "abridging the freedom of speech"[212].

The coverage of the right to receive information by the First Amendment relies on the understanding that it is fundamental and necessary to the right of speech. In the *Board of Education v. Pico* case from 1982 the Court stated that:

> this right (to receive information) is an inherent corollary of the rights of free speech and press … in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them, since the dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. More importantly, the

[209]Supra, Note 77. 158
[210]United States Constitution, Article I, Section 8
[211]Brazilian Constitution, Art. 3, II
[212] See U.S. Constitution First Amendment (Constitution n.d.)

> right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.[213]

Same interpretation was adopted in *Keindienst v. Mandel*: "the freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin … The First Amendment means that Government has no power to thwart the process of free discussion, to 'abridge' the freedoms necessary to make that process work."[214]

However, Zohar Efroni identifies a friction between the free speech law and the copyright law due to the exclusive rights imposed by the latter. According to the scholar it is possible a coexistence of copyright and free speech laws so long as the former "attaches only to original expression and not to the raw material of speech or ideas … because would not curtail the intellectual market"[215].

In other two opportunities the Court analyzed the friction between both laws (copyright and free speech). In *Harper & Row v. Nation*, when ruling over a copyright infringement action discussing the fair use of verbatim quotes from President Ford's memoirs, the Court has held that "copyright supplies the economic incentive to create and disseminate ideas"[216]as per objective set by the U.S. Constitution's Copyright Clause"[217]. In *Eldred v. Ashcroft*[218] the Court also classified the copyright law as "the engine of free expression"[219] and achieved the outcome that the it has two mechanisms that do not clash with the free speech rights: "the classic subject matter rule excluding 'negative' information categories (ideas, systems, methods, etc.) and an open mechanism of exceptions (fair use)."[220]

[213] See Board of Educ., Island Tress Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (S.C. U.S. 1982), Westlaw.
[214] See Kleindienst v. Mandel, 408 U.S. 753 (S.C. U.S. 1972), Westlaw.
[215]Supra, Note 77. 173
[216] See Harper & Row v. Nation, 471 U.S. 539 (S.C. U.S. 1985), Westlaw
[217] See United States Constitution, Article I, Section 8
[218] See Eldred v. Ashcroft, 537 U.S. 186 (S.C. U.S. 2003), Westlaw
[219] Ibid
[220]Supra, Note 77. 175

However, unlike the speech right, the right to receive information has not received the same attention when confronted with the copyright limitations.[221] In the U.S. case law, similar to what happens with the right-of-access, "nonowner personally challenges a copyright rule by forwarding the argument that copyright law violates her right to receive information"[222]. Nevertheless, none of these mechanisms "provide affirmative protection to a concrete claim to receive information"[223], it is, therefore, a "tacit right-of-access in the weak form"[224] since, according to case law interpretation, it is subject to the copyright limitations and to the unpredictability and/or non-affirmative protection of the mechanisms that are offered by it.

2.2.6 Human Rights and the Right to Take Part the Cultural Life

All arguments above relate to "public interest, liberty, creativity and economic development".[225] However it is also possible to question the expansion of copyright enforcement and discuss the right to access and spread knowledge from the perspective of the international human rights law. As it is going to see below, before the copyright overprotection expansion, human rights framework crystallized the position of the nonowners[226].

The Universal Declaration of Human Rights of 1948 (UDHR) was drafted to be:

> a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society … shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[227]

[221]Supra, Note 77. 177
[222]Ibid.
[223]Supra, Note 77. 178
[224]Ibid.
[225]Lea Shaver; Caterina Sganga, *The right to take part in cultural life: on copyright and human rights*, Wisconsin International Law Journal, Volume 27, No. 4 (2010) 638
[226]Supra, Note 77. 184
[227] See Universal Declaration of Human Rights (December 10, 1948)

According to its Article 27(1) "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[228] Therefore, this provision "promotes the ideal that culture should be accessible to every person."[229]

On 26 November 1976, UNESCO has emitted a "Recommendation on participation by the people at large in cultural life and their contribution to it"[230] in order to clarify the provision contained at Article 27 of the UDHR. At this document culture is defined as:

> not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.[231]

Hence, it is emphasized that the acquisition of knowledge is one of the mandatory elements of culture. In addition, the recommendation says that "access to culture and participation in cultural life are two complementary aspects of the same thing"[232] having, consequently, the same dual interconnection that we highlighted when analyzing the right of speech and the right to receive information.

When defining the access to culture right, the 1946 UNESCO recommendation says that it "meant the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property"[233].

Another international key source on human right is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. In 1992, Brazil ratified the ICESCR.[234]

[228] See Universal Declaration of Human Rights (December 10, 1948)
[229] Supra, Note 77. 180
[230] See UNESCO Recommendation on participation by the people at large in cultural life and their contribution to it available at http://portal.unesco.org/en/ev.php-URL_ID=13097&URL_DO=DO_TOPIC&URL_SECTION=201.html
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Brazilian 591 Decree (July 6, 1992)

The United States did not adhere to the treaty, however "its legal norms are ultimately influenced by international law and the legal reasoning practices of fellow democracies."[235] Article 15(1) of ICESCR, determines all countries adhering to it to recognize the right of everyone "to take part in cultural life"[236] and to "to enjoy the benefits of scientific progress and its applications."[237]

To support the interpretation of the obligation set by the Article 15.1 of the ICESCR the U.N. Expert Committee of Economic, Social and Cultural Rights (CESCR) published two nonbinding "general comments". The first one published in 2005 refers to the paragraph 1(c)[238] of the article and the most recent one published in 2009 refers to the paragraph 1(a)[239] of the Article 15.1. Considering that we are discussing of the access to information and to the culture we will explore the guidance and notions given by the last comment that brings definitions related to the right of everyone to take part in cultural life.

Accordingly, based on Committee's interpretation, the term "culture" should mean "all the ways in which human beings express creativity, seek beauty and truth, exchange ideas, and create shared meanings"[240], therefore, it broadly:

> encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.[241]

Secondly, when interpreting the right to "take part", it adopts the same rationale seen in the UNESCO's "Recommendation on participation by the people at large in cultural life and their contribution to it" of 1976. Here, said right is dual and comprises the "ability to consume and

[235]Supra, Note 225. 639
[236] See International Covenant on Economic, Social and Cultural Rights, 15(1)a (December 16, 1976)
[237] See International Covenant on Economic, Social and Cultural Rights, 15(1)b (December 16, 1976)
[238] See CESCR GENERAL COMMENT No. 17 (2005)
[239] See CESCR GENERAL COMMENT No. 21 (2009)
[240]Supra, Note 225. 643
[241] See CESCR GENERAL COMMENT No. 21 (2009) ¶13

create, individually and with others."[242] In order to consume and create the individual has the right to access cultural materials, tools and information as well as to change, transform, share, enjoy, perform, translate, extend remix, combine, critique, reinterpret.[243] Finally, the term "everyone" must be read as covering any member of the society with the elimination of any discriminatory barrier.[244]

When interpreting the Article 15.1.(c) of ICESCR, Committee, at its Comment n. 17, indicated "a certain vertical tension between intellectual property and human rights norms in which human rights generally rank higher."[245] This is because under human rights law, "intellectual property rights are not themselves human rights."[246]

In order to solve the friction between authors's exclusives rights and population human right of taking part in the culture, the Committee clearly stated that States parties (including Brazil) should promote a balance between the rights mentioned at 15.1(a) at 15.1.(c)[247]. When explaining how this balance should be drawn, according to the Committee:

> the private interests of authors should not be unduly favored and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to … education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications.[248]

Thus, one may conclude that, human rights law gives an "explicit normative basis for right-of-access"[249] that, as we clarified in the subchapter 2.2.4., refers to the right of one to access information and knowledge. Hence, before the increasing expansion of copyright law, the authors'

[242] Supra, Note 225. 646
[243]Ibid.
[244]Ibid. 647
[245]Supra, Note 77. 188
[246]Supra, Note 225. 650
[247]See International Covenant on Economic, Social and Cultural Rights, 15(1)c: "To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"
[248] See CESCR GENERAL COMMENT No. 17 (2005)¶35
[249]Supra, Note 77. 191

exclusive entitlements should not prevail over the fundamental rights of human right and, consequently "IP rules must be adjusted"[250]. In other words, the preferable way of solving the clash is by ratifying the "rights-of-access" trough an "affirmative-positive expression within copyright legislation"[251] what would give to the "the same standing as other copyright rules."[252] This solution will be explored in the following Chapter.

[250]Supra, Note 225. 651
[251]Supra, Note 77. 192
[252]Ibid.

Chapter 3: A Call for Reform: Improvements that Could Be Adopted by U.S. and Brazilian Laws in Order to Solve A2K Movement's Concerns

As has been demonstrated by the development of the International Intellectual Property Law and by the national copyright regulations of U.S. and Brazil, it is crystal clear the enhancement of authors' entitlements over the public's right to take part in culture and, consequently, access the generated knowledge and information. For example, the Brazilian copyright law is among the worst ones of the world as per report issued in 2012 by the Consumer's International IP Watchlist[253] that classified it as being outdated, restrictive, with insufficient provisions supporting access to knowledge. On the other hand the U.S. law is classified as one of the best[254] with less restrictions and more ways of limiting author's exclusive rights, when compared to Brazilian Copyright law.

As a response to the expansion of the IP monopoly, the access to knowledge, free-software, free-culture movements has risen and brought new concepts and alternatives to the current IP laws and practices. Among the representatives of these movements there are the so-called reformists.

The reformists "do not seek to abolish copyright regulation completely"[255] they believe a substantial reconstruction must taken place to achieve a better fit between copyright theory, its policy goals, and its actual effect on the information environment"[256]. Hereunder we will explore their main suggestions in order to adequate the bodies of law to the demand for knowledge.

[253] Consumers International's. *Consumer's International IP Watchlist 2012 report.* Accessed at March 14th, 2014. http://a2knetwork.org/reports/brazil
[254] Consumers International's. Consumer's International IP Watchlist 2012 report. Accessed at March 14th, 2014. http://a2knetwork.org/reports/usa
[255] Supra, Note 77. 449
[256] Ibid.

3.1 Introducing Liability Rules

Right-holders' entitlement to prevent unauthorized access and use of their work (veto right) relies on the right to exclude.[257] When someone overpass the limits imposed by the author this act will be considered unlawful unless an exception contained in the applicable law allows him to do so.[258] Some of these exceptions, herein named as liability rule exceptions, convert the obligation to request and have prior authorization in the duty to compensate right-holders for the use[259].

Therefore, the suggestion consists in a set of a non-voluntary licensing to noncommercial "copy-unrelated usage such as public performances, broadcasting, and other communications to the public"[260] converting the property rule into the liability rule[261]. They are seen as a way to strike the "overprotection by weakening the level of control rights-holders may exercise."[262] In order to optimize the circulation of information and reduce transaction costs, the payment of the fees originated from the liability rules would be done to intermediary actors as copyright collectives.[263]

One of the benefits of applying liability rules trough non-voluntary licensing would be the support in correcting "market distortion concerning the distribution of royalties between creative authors on the one hand and commercial exploiters on the other"[264] and that generates situations when the authors are under-compensated[265]. Since under the liability rules the money would be paid directly to the authors, the problems arisen by unfair negotiations between them and commercial exploiters would be reduced.

[257]Supra, Note 77. 449
[258]Ibid.
[259]Ibid. 450
[260]Ibid.
[261]Ibid.
[262]Ibid. 452
[263]Ibid. 450-451
[264]Ibid. 452
[265]Ibid. 453

There are three forms by which the liability rule proposal would be executed. According to the first one that is considered without general impact, the right-holders would voluntarily opt-in if they want.[266] The second pattern also relies on authors' voluntary action, however they should opt-out the regime if they do not want to waive their exclusive veto right. In other words, according to this second approach "liability becomes the general rule and property the 'exception"'.[267] The third approach is more radical and states that the conversion from property to liability rules would cover all copyright related communications and activities.[268]

Among the objections to the adoption of the liability rules it is the one that says that it would affect the social welfare since the market value of authors' work would drop since "everyone could use the information under non-voluntary licensing."[269] Therefore, according to this objection, the "proposals fails to provide satisfactory substitution to property rights as the engine of market efficiency in the exchange and trade of valuable information goods."[270] Another objection raises questions regarding the fairness of the criteria under which the money collected would be distributed to the authors.[271]

Similar system has been negotiated without success in Brazil for the reproduction of academic books. At the same time that the Brazilian copyright law prohibits any sort of reproduction of books, even for educational purposes, the relative price of a book (taking into account the purchasing power) is 270% higher than in Japan and 150% higher than the one in United States[272]. Regardless these factors, the Brazilian Association of Reprographic Rights – Associação Brasileira de Direitos

[266]Supra, Note 77. 453
[267]Ibid.
[268]Ibid. 454
[269]Ibid. 456
[270]Ibid. 457
[271]Ibid. 458-459
[272]Pedro Nicoletti Mizukami et al "Exceptions and limitations to copyright in Brazil: A call for reform", In *Access to Knowledge in Brazil. New research on intellectual property, innovation and development* ed. Lea Shaver (New Haven, Information Society Project, 2008) 89

Reprográficos (ABDR) - "refuses to establish a licensing system for academic copying."[273] Thus, at the end, although the legal and administrative prohibition and due to the difficulties in purchasing all materials necessary during the academic life, it is common finding students owning and practicing illegal reproduction of academic books.

3.2 Re-formalizing the Copyright

As has been clarified in the first chapter, the U.S. 1790 Copyright Act required authors to comply with some formalities (publish, notice and deposit) in order to get protection. The obligation to comply with formalities disappeared for foreign authors after the country adhered to the Berne Convention. In Brazil, the Copyright law of 1998 at its Article 18 grants automatic copyright protection for nationals and foreign authors without requiring the compliance with any formality.

According to James Boyle, the return (or the introduction in the case of Brazil) of the formality system would be the best solution for the overprotection reality created by the automatic grant of "all rights reserved" at the moment of fixation of the work.[274] According to the scholar, this re-formalization would allow that those who did not wish to have the legal monopoly could not comply with the formality, that should be at least the notice one (by inserting a statement or © symbol at the work), and, consequently, their "work would pass into the public domain, with a period of time during which the author could claim copyright retrospectively"[275] if the formality was not complied by accident. As a consequence, "the default position would become freedom and the dead weight losses caused by giving legal monopolies to those who had not asked for them, and did not want them,

[273]Supra, Note 272. 89-90
[274]Supra, Note 137. 184
[275]Ibid.

would disappear"[276] feeding the public domain with more works that would be available and accessible to the society that would be able to enjoy them and generate new works, knowledge and culture.

Another advantage of the formality system is that the formalities help nonowners to identify which are the restrictions over the work and who is the copyright holder[277], consequently, they "can reduce information and search costs and thereby contribute to a sharp reduction in the overall transaction costs and enhancement of efficiency"[278]. The control of the registrations could occur by "online registration, electronic databases, and telecommunication channels along with payment and coordination systems"[279].

The effects of the mandatory formalities system would be visible also with the renewal formalities that would allow the copyright holder to re-evaluate their predictions and assumptions regarding their exploitation over the work[280]. Studies indicate that, during the period when the compliance with formalities was required, about 15% of the authors opted for renewing their rights[281] what indicates that under this system a considerable amount of work would leave the statutory protection and belong to the public domain after their first expiration date. A final benefit is that for physical works, the obligation to register and or deposit them would grant their maintenance and preservation for the future of the population that would be able to access them once they enter to the public domain.[282]

For the U.S. system, Christopher Sprigman suggests the *new-style formalities* that would not affect copyright's enjoyment and exercise and would require changes only of the U.S. law, being in

[276]Supra, Note 137. 184
[277]Supra, Note 77. 469
[278]Ibid.
[279]Ibid. 473
[280]Ibid. 470
[281]Ibid.
[282]Supra, Note 104. 285

compliance with the international agreements.[283] Under this proposal the "solution would be to preserve formally voluntary registration, notice, and recordation of transfers … for all works, including works of foreign author, but then incent compliance by exposing the works of noncompliant rights-holders to a 'default' license that allows use for a predetermined fee."[284] The royalty (fee) to be paid by the users of works that had not met the formalities would be low and should correspond to the costs related to the registration, then those authors that expect to exceed these costs would prefer to register the works.

Therefore *new-formality system* "eases access to commercially valueless works for which protection (or the continuation of protection) serves no purpose and focuses the system on those works for which protection is needed to ensure that the right-holder is able to appropriate the commercial value of the expression"[285]. This system follows the same rational of the liability rules system analyzed in the previous subchapter, since it converts the authors exclusive rights into liability rules (payment of royalties). According to Sprigman, the provision of Article 5(2) of Berne Convention is not violated under by the *new-formality system* since the rights of the authors are not disregarded but simple converted to liability rules in case of incompliance with the formalities.

Among the critics to this solution is the one affirming that the rights granted under Berne Convention should be preserved. Another objection relies on the damages that would be caused to an author that did not comply with the formality but has, afterwards, his work becoming commercially attractive. Finally, a third contrary argument would be that in case that multiple countries insert a

[283]Supra, Note 39. 555
[284]Ibid.
[285]Ibid.

formalities system, the authors, when exporting their works, would have to develop distinct market analysis to conclude in which countries the compliance with the formalities would be reasonable[286].

However, even considering the concerns above, the implantation of a reasonable formality system together with the liability rules one is a possible and relevant solution against the effects of current overreaching copyright laws and enforcement practices, especially in the digital environment[287].

3.3 Modifying Copyright law

After the discussion of human rights at sub chapter 2.2.6 it was concluded that in order to solve the vertical friction between the right-of-access and the intellectual property monopoly, legislatures are required "to consolidate their copyright laws with the norms of public access rights and cultural participation."[288] In such manner, the intellectual property law should embrace the right-of-access rights, expanding access to knowledge and opportunities for participation, "emphasizing the participatory dimension of all people"[289]. One way of adapting the Intellectual Property law is by the adoptions of exceptions and limitations to copyright[290]. The United States follow the fair use approach and, therefore, define the limitation to the copyright monopoly when the work is used for educational purposes, for example.

In Brazil, the situation is distinct. Albeit the country is part of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, the Brazilian copyright law does not have a fair use doctrine allowing the reproduction of copyrighted works for educational purposes. The Brazilian legislation exclusively allows the educational use of theatrical and musical performances.[291]

[286]Supra, Note 77. 475
[287]Ibid.
[288]Ibid. 185
[289]Supra, Note 225. 652
[290]Ibid. 654
[291]Supra, Note 104. 288

This omission put students and professors in a vulnerable position as well as blocks the access the knowledge necessary during the academic life. Brazilian scholars also suggest the adoption of liability rules system, under which by the payment of fees to be set by the State, the academic members would allow the access and reproduction for educational and noncommercial purposes of graphic, written, musical, photographic and other expressive works.[292]

Another provision at the Brazilian Copyright law that should be change refers to its Article 29 that, except with author's prior authorization, prevents anyone to include a work in any database, computer backup, or any other electronic storage device.[293] This prohibition is a direct threat to the public domain since the electronic database and archives are the main means to grant the preservation and future access to the works.[294]

Another crucial element for the change on the copyright regulations "is the right of public participation in the decision-making process when laws are adopted that impact the right to take part in cultural life."[295] In Brazil, in 2010 the former Minister of Culture made public a draft bill to modify the Brazilian copyright law, simultaneously, it made such draft available to public consultation and received more than 8.000 contributions including aspects directed to public interest, limitation to TPM anticircumvention provisions, human rights, copyright and consumer protection, etc. Unfortunately, with the change of the minister, after the elections, the reform process was put on hold.[296]

[292]Supra, Note 104. 289

[293] See Brazilian Copyright Law (9.610 Law of 1998) Art. 29. Depende de autorização prévia e expressa do autor a utilização da obra, por quaisquer modalidades, tais como:
IX - a inclusão em base de dados, o armazenamento em computador, a microfilmagem e as demais formas de arquivamento do gênero;

[294]Supra, Note 104. 286

[295]Supra, Note 225. 655

[296]Mariana Giorgetti Valente; Pedro Nicoletti Mizukami, "Copyright Week: O que aconteceu com a reforma do direito autoral no Brasil?" Last modified January 18, 2014. http://creativecommons.org.br/blog/copyright-week-pt/

Another point to take into consideration is the adoption of reasonable penalties for copyright infringements. Severe penalties must be avoided since they "create a climate of fear and uncertainty that leads to self-censorship of cultural participation."[297]

Regarding anticircumvention regulations, to take part in cultural life requires "freedom from technological barriers."[298] Therefore, the law should prevent or impose penalties when there is abuse on the use of TPMs, e.g. do not allowing someone to lawfully use the work, e.g. for educational purposes.[299] Aligned with this position "rights-of-access may assume the form of statutory 'privileges to hack' or even a duty on rights-holders to provide or facilitate privileged access and use."[300]

[297]Supra, Note 225. 655
[298]Ibid. 657
[299]Ibid.
[300]Supra, Note 77. 476

Conclusion

Copyright restrictions have increasingly expanded in the last few years. Abolition of formalities, expansion of the copyright protection term, allowance of adoption of Technological Protection Measures (TPMs) and configuration of eventual circumvention as an infringement to the copyright law, even though it occurred in order to perform a lawful use, are examples of provisions that have been enacted by the U.S. and Brazilian legislations and that stress the imbalance between authors' exclusive rights and nonowners right-of-access to knowledge. As a response to this legally adverse position to the public's rights of access to information, the access to knowledge movement (A2K) was created and has questioned the current system, created alternative tools and proposed changes to the law. The main objective of this thesis was to explore the arguments and the manifestations of this movement and point out the changes that could be done to the Brazilian and U.S. legislations.

The first step of the research consisted in an historical analysis of the evolution of the copyright law in the United States, Brazil and of the international agreements. Firstly, regarding the United States, until the middle of the nineteenth century the country was characterized for its "pirate" culture since no protection was given to the foreign authors and there was an intense importation of foreign works. At this first phase of U.S. Copyright law, the utilitarian approach was set by the Constitution's Copyright Clause that prioritized the social welfare by providing low copyright protection. However, once the country became an international exporter of intellectual property its position changed, which was reflected in the development of national legislation expanding author's monopoly and justified country's adherence to international agreements.

On the other hand, Brazilian copyright law is more recent when compared to the U.S. one. However, when compared to the U.S. Copyright law, the Brazilian one is more restrictive since it contains less exemptions provisions, does not impose any formality requirement even to its nationals

and lacks the fair use doctrine which is a powerful tool disregard the illegality some unauthorized uses when they are practiced for noncommercial or educational purposes. Although International Agreements on Intellectual Property, mainly, Berne Convention and TRIPS Agreement, have reduced the disparities among the IP law of their State members, the differences highlighted above are still visible between Brazilian and U.S. legislation.

As a response to these restrictions the Access to Knowledge movement was developed and brought some measures in order to solve some of the social problems generated by the authors' overprotection. In this thesis the expression "access to knowledge movement" referred to all movements that somehow criticized the tendency of the law in overprotecting the right-holders. Among the features defended by the movement the "public domain" is seen as a crucial element on the development and public's access to information since it consists of works, information, ideas and expressions that are available to the public to build upon them without the need of any license or authorization. However, it has been concluded that the lack of formalities in the United States and Brazil and their prohibition under Article 5 of the Berne Convention are the main obstacles against the maintenance of a reasonable public domain, since they provide automatic and long term protection to all foreign works without taking into account the will of the respective authors.

Other two manifestations questioning the current copyright systems are the free-software and free-culture movements. While the former encourages the creation and sharing of open source software the latter applies the same ideology to culture and has originated what is considered by James Boyle the second best solution for the demand of knowledge, the Creative Commons.

Following, this thesis analyzed the right to free-speech, right-of-access and human rights that support the society's access to knowledge. It is clear that both U.S. and Brazilian legislations do not give support to any of these rights and lack any provision within the IP law giving the public an active

right to request right and access to the works. The problem with Brazilian law is even greater since it does not allow reproduction of written materials for educational purposes nor the archive of works in electronic databases which, consequently, constitutes a considerable obstacle to knowledge development and preservation, respectively.

Finally, the thesis indicated three main solutions for the reality described above. The first one refers to the introduction of liability rules that would replace the authors' exclusive rights. This solution could be adopted in both United States and Brazil. In Brazil a similar system based on the payment of fixed fee for reproduction of academic books was suggested, however the Brazilian Association of Reprographic Rights did not authorize its implantation. The second measure that should be adopted would be the insertion of formalities in Brazil and the reinforcement of them in the United States. Many scholars consider this as being the main solution for the imbalance between authors and non-owners rights. Sprigman goes further and suggests the creation of the so-called new-formalities that, taking the liability rules rationale, would convert the authors exclusive rights over the work into a monetary compensation right if its author do not comply with the formal requirements. Finally, the insertion of the public's right-of-access within the IP law was suggested; yet, currently, this right is implicit and cannot be enforced before the nonowner accesses the work. Taking the Brazilian case, for example, although the country has adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR) the 591 Decree that implemented it is considered a soft-law that does not prevail over the Brazilian Copyright law. Similar status is present in the United States that did not adopt the ICESCR and, consequently, the human right covered by it is not binding.

Therefore, the change of the law (e.g. by inserting formalities, recognizing of human rights, expanding exemptions to copyright protection, adopting free use doctrine) is the main way of solving the overprotection that has been granted to the authors. So far, the copyright protection has been

justified and enhanced as being the way to incentive the creation of works and knowledge and consequently achieve social welfare. However, as it has been illustrated during this thesis, the excessive protection to works prevents society to access and enjoy the protected information and consequently develop new ideas and knowledge from them. The public domain that is considered the main source of free access and information to the society has been considerably reduced by the absence of a formality system in Brazil and in the United States. In addition, the increasing use of technological protection measures and their recognition by the national laws and international agreements have given to the right-holders the power to exclude and limit the use of their works and, consequently, exposed nonusers to legal liability even though they lawfully acquired the work and intends to enjoy it for non-commercial purposes.

The protection to author's right is necessary and should be maintained. However, if the baseline of Intellectual Prospection keeps raising and, therefore, preventing the public to access, enjoy, sample, re-create, develop, use, adapt, archive, preserve works even of those that could belong to the public domain or be lawfully used by their users, this would block the generation of new ideas, technologies and, consequently, the development of the society as a whole.

Bibliography

Ascensão, José De Oliveira. "A função social do direito autoral e as limitações legais." In *Direito da propriedade intelectual: estudos em homenagem ao Pe. Bruno Jorge Hammes*, edited by LUIZ GONZAGA SILVA ADOLFO and MARCOS WACHOWICZ, 85-111. Curitiba: Juruá. 2006.

Barbosa, Denis Borges. *Direito de Autor: questões fundamentais de direito de autor.* Rio de Janeiro: Lumen Juris. 2013.

Basso, Maristela. "Os fundamentos atuais do Direito Internacional da propriedade Intelectual." In *Direito de autor: questões fundamentais de direito de autor*, by DENIS BORGES BARBOSA, 122, 113. Rio de Janeiro: Lumen Juris. 2013.

Boyle, James. *The public domain. Enclosing the commons of the mind.* London: Yale University Press. Accessed February 04, 2014. http://thepublicdomain.org/thepublicdomain1.pdf. 2008.

—."The second Enclosure Movement and the construction of the public domain." *Duke Law School Journal* 33-74. Accessed March 02, 2014. http://scholarship.law.duke.edu/lcp/vol66/iss1/2. 2003.

1988. "Brazilian Constitution." 1988, October 5. Accessed march 17, 2014. http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

1998. "Brazilian Law 9.610."

Commons, Creative. n.d. "Creative Commons and Copyright Reform." *Creative Commons.* Accessed march 23, 2014. https://creativecommons.org/about/reform.

Constitution, First Amendment to the U.S. n.d.

Consumer's International IP Watchlist 2012 report. Accessed march 12, 2014. http://a2knetwork.org/reports/brazil.

Drahos, Peter. "Global Property Rights in Information: the Story of the TRIPOS at the GATT." In *Access to Knowledge in the age of intellectual property*, edited by GAËLLE KRIKORIAN and AMY KAPCZYNSKI, 26. New York: Zone Books. 2010.

Efroni, Zohar. *Access-right.* New York: Oxford University Press. 2011.

1790. "First Copyright Act." May 31. Accessed March 14, 2014. http://www.copyright.gov/history/1790act.pdf.

Fisher, William W. *Promises to keep: technology, law and the future of entertainment.* Stanford: Stanford University Press. 2004.

Geller, Paul. "Revue Internationale du Droit d'Auteur." In *Direito de Autor: Questões fundamentais de direito de autor*, by DENIS BORGES BARBOSA, 70. Rio de Janeiro: Lumen Juris. 2013.

Ginsburg, Jane. "International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?" *The Journal of the Copyright Society of the United States (Columbia Law School), Millenium Volume*. 2000.

Hoffmann, Gretchen Mccord. *Copyright in Cuberspace: Questions and answers for librarians*. New York: Neal-Schuman Publisherds, Inc. 2001.

Hughes, Justin. "The Philosophy of Intellectual Property." *Georgetown University Law Center and Georgetown Law Journal 287*, December. 1988.

Hyde, Lewis. *Common as air: Revolution, Art and Ownership*. New York: Union Books. 2012.

Joyce, Craig, William Patry, Marshall Leaffer, and Peter Jaszi. *Copyright Law*. 5th. New York, New York: LEXIS Publishing. 1998.

Kapczynski, Amy. "The access to knowledge mobilization and the new politics of intellectual property." *117 Yale L. J. 804*. 2008.

Kapczynski, Amy. *Access to Knowledge in the age of intellectual property*. Edited by GAËLLE KRIKORIAN and AMY KAPCZYNSKI. New York: Zone Books. 2010.

Krikorian, Gaëlle. *Access to knowledge in the age of intellectual property*. Edited by GAËLLE KRIKORIAN and AMY KAPCZYNSKI. New York: Zone Books. 2010.

Lessig, Lawrence. *Free culture: how big media uses technology and the law to lock down culture and control creativity*. New York: The Penguin Press. 2004.

—.*The future of ideas: the fate of the commons in a connected world*. New York: Random House. 2001.

Mizukami, Pedro Nicoletti, and Ronaldo Lemos. "From Free Software to free culture: the emergence of open business." In *Access to Knowledge in Brazil. New research on intellectual property, innovation and development*, edited by LEA SHAVER. New Haven: Information Society Project. 2008.

Mizukami, Pedro Nicoletti, Ronaldo Lemos, Bruno Magrani, and Carlos Affonso Pereira Souza. "Exceptions and limitations to copyright in Brazil: A call for reform." In *Access to knowledge in Brazil*, edited by LEA SHAVER, 67-122. New Haven: Yale law school. 2008. Accessed March 22, 2014. http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/2674/Access%20to%20knowledge%20in%20Brazil.pdf?sequence=1.

Peukert, Alexander. "Territoriality and Extraterritoriality in Intellectual Property Law." *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*. 2011.

Pimenta, Eduardo. "Código de Direitos Autorais ante os Tribunais e Acordos Internacionais." In *A função social dos direitos autorais: uma interpretação civil-constitucional dos limites da proteção jurídica*, by ALLAN ROCHA SOUZA, 149. Campos dos Goytacazes: Faculdade de Direito de Campos. 2006.

Rajan, Mira T. Sundara. *Copyright and creative freedom: A study of post-socialist law reform.* New York: Routledge. 2006.

Shaver, Lea, and Caterina Sganga. "The right to take part in cultural life: on copyright and human rights." *Wisconsin International Law Journal* 27: 637-662. 2010.

Souza, Allan Rocha. *A função social dos direitos autorais: uma interpretação civil-constitutional dos limites da proteção jurídica.* Campos dos Goytacazes: Faculdade de Direito de Campos. 2006.

Sprigman, Christopher. "Reform(aliz)ing Copyright" 2004. Accessed March 05, 2014. http://law.scu.edu/wp-content/uploads/hightech/reform(aliz)ing%20Copyright%20by%20Christopher%20Sprigman.pdf.

Tehranian, John. *Infringement Nation: Copyright 2.0 and you.* New York: Oxford. 2011.

Valente, Mariana Giorgetti, and Pedro Nicoletti Mizukami. "Creative Commons Brasil." *Copyright Week: O que aconteceu com a reforma do direito autoral no Brasil?* . 2014. Accessed march 22, 2014. http://creativecommons.org.br/blog/copyright-week-pt/.

WIPO. 2004. *WIPO Intellectual Property Handbook: Policy, Law and Use.*

Court Decisions

American Geophysical Union v. Texaco Inc., 802 F.Supp. 1 (S.D.N.Y.,1992) Westlaw

Board of Educ., Island Tress Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (S.C. U.S. 1982), Westlaw.

Kleindienst v. Mandel, 408 U.S. 753 (S.C. U.S. 1972), Westlaw

Harper & Row v. Nation, 471 U.S. 539 (S.C. U.S. 1985), Westlaw

Eldred v. Ashcroft, 537 U.S. 186 (S.C. U.S. 2003), Westlaw