

**THE INTERFACE OF COPYRIGHT AND HUMAN RIGHTS: ACCESS
TO COPYRIGHT WORKS FOR THE VISUALLY IMPAIRED**

BY

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A thesis

submitted to the Victoria University of Wellington

in fulfilment of the requirements for the degree of

Doctor of Philosophy

Victoria University of Wellington

2015

ABSTRACT

Reproduction of copyright protected material in formats that are accessible to the blind and visually impaired persons constitutes a copyright infringement unless there are specific limitations and exceptions in place. Most countries do not have copyright limitations and exceptions for the benefit of the visually impaired in their copyright laws. This has contributed to the issue of book famine, meaning the unsatisfactory access to copyright protected material for the blind and visually impaired.

This thesis examines the claims of the visually impaired for improved access to copyright protected works in the context of the interface of human rights and intellectual property rights. This research demonstrates that insufficient access to copyright protected material is discriminatory against the visually impaired and negatively affects their human rights such as the right to education, information, health, employment, culture, and science. Moreover, the thesis analyses the international and domestic copyright law's impact on the needs of the visually impaired. In analysing the international copyright law, the thesis evaluates the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.

Highlighting the insufficient consideration for the rights of the visually impaired in domestic and international copyright laws including the Marrakesh Treaty, the thesis proposes adoption of a human rights framework for copyright law to the extent that it affects the human rights of the visually impaired. Such framework requires copyright law to accommodate those human rights of the visually impaired that are dependent on access to copyright protected material.

The thesis offers two categories of measures for creation of a human rights framework for copyright to the extent that it affects the human rights of the visually impaired. The measures include optimisation of already available options and adoption of new mechanisms. The first category discusses minimum mandatory copyright limitations and exceptions and the possibility to harmonise them. The second category covers extra measures such as clarifying the implications of different human rights and copyrights in the context of the book famine; ensuring compatibility of human rights and copyright when adopting policy and law; and, regular monitoring of the impact of copyright law on human rights.

ACKNOWLEDGEMENTS

I would like to express my deepest gratitude to my supervisors, Professor Graeme Austin and Professor Susy Frankel, who have challenged and supported me throughout my PhD study. I am also immensely thankful to Professor Tony Angelo, the Director of the PhD studies, for generously offering his advice and guidance.

Besides my supervisors, I would like to thank my examination committee, particularly Associate Professor Susan Corbett, for their insightful comments, questions, and encouragement. I am also thankful to the Victoria University of Wellington for offering me a Doctoral Scholarship that enabled me to undertake my research.

The PhD is a journey and completing mine would have been impossible without the support of my family. I am immeasurably grateful to my parents, my sister, and my brothers for their unconditional love and for having faith in me.

I am lucky enough to have amazing friends both in New Zealand and overseas, who have all helped me in different ways. I would like to especially thank Michela Gasparini, Elizabeth Heeg, Samin Salehi, Helen Taylor, and Mona Yaghoubi for always being there when I needed them.

Finally, many thanks go out to my fellow PhD candidates who made my time at the VUW Faculty of Law a memorable experience. Kia ora!

Preface

I ōrea te tuātara ka patu ki waho.

A problem is solved by continuing to find solutions.

-Māori proverb

When I first learned about the low number of books available to the blind and visually impaired in 2009, and how it was partly because of the copyright law, I was shocked. As an avid reader who grew up surrounded by books, I simply could not imagine not being able to freely choose and have access to reading material. I was also outraged by how little I, and apparently most other people, knew about this situation. I was already interested in human rights, and I became fascinated by the idea of the interaction of human rights with copyright, two seemingly unrelated areas of law. So I focused my research on access to copyright protected works for the visually impaired.

Ever since, I have come across many heart-warming stories about inspirational individuals who cannot read normal print; scientists, artists, political activists, educators, and lawyers, to name a few. It was not, however, until I met a fellow PhD student at VUW that I truly realised what difference the ability to read and have access to books can make in one's life. Murray, an undiagnosed dyslexic, only learned to read when he was twenty-one years old and in prison. He used that newfound skill to rebuild his life and is now helping others with a similar background to him. Living in New Zealand, he has been able to receive the support that he needs. Many others in different parts of the world are not as fortunate, and their countries' copyright laws do not accommodate their rights.

In the light of the many factors, such as financial resources, infrastructure, and technological advances that need to come together for production of accessible works, properly framed copyright laws may appear insignificant. However, it is not hard to envision that Murray and others like him would have not been able to enjoy the same level of access, had it not been for the flexibilities in the copyright law, even if all the other factors were in their favour.

For Mum and Dad

For always encouraging, never questioning.

نه عادلانه نه زیبا بود

جهان

پیش از آنکه ما به صحنه بر آییم.

به عدل دست نایافته اندیشیدیم

و زیبایی

در وجود آمد.

- احمد شاملو

CONTENTS

ABSTRACT	I
ACKNOWLEDGEMENTS	III
LIST OF ABBREVIATIONS	XVII
CHAPTER 1	1
INTRODUCTION	1
I BOOK FAMINE, HUMAN RIGHTS, AND COPYRIGHT LAW	1
A WHAT IS BOOK FAMINE?	1
B WHO IS AFFECTED BY THE BOOK FAMINE?	3
1 <i>The blind and visually impaired</i>	3
2 <i>Others with reading disabilities</i>	4
C DEFINITION OF AFFECTED WORKS	5
D DEFINITION OF ACCESSIBLE FORMATS	6
3 <i>Braille and Moon</i>	7
4 <i>Large and giant print</i>	7
5 <i>Audio books</i>	7
II BOOK FAMINE AND THE HUMAN RIGHTS OF THE VISUALLY IMPAIRED	8
III BOOK FAMINE AND COPYRIGHT	10
A OVERVIEW	10
B COPYRIGHT LAW AND ACCESS FOR THE VISUALLY IMPAIRED	11
1 <i>Lack of limitations and exceptions</i>	12
2 <i>Problems with existing limitations and exceptions</i>	13
(a) End beneficiaries	14
(b) Copyright protected works	14
(c) Accessible formats	15
(d) Authorised persons and entities	15
(e) Commercial availability	16
(f) Remuneration	16
(g) Digital Rights Managements and contracts	18
3 <i>International exchange of accessible works</i>	19
C THE ROAD TO MARRAKESH	20
IV A HUMAN RIGHTS FRAMEWORK FOR COPYRIGHT AND ACCESS FOR THE VISUALLY IMPAIRED	23
V SIGNIFICANCE OF THE RESEARCH	25

VI	SCOPE AND DELIMITATIONS	27
VII	SUMMARY	28
	CHAPTER 2	31
	BOOK FAMINE AND HUMAN RIGHTS OF THE VISUALLY IMPAIRED	31
I	INTRODUCTION	31
II	NON-DISCRIMINATION AND ACCESS FOR THE VISUALLY IMPAIRED	32
A	NORMATIVE FRAMEWORK OF NON-DISCRIMINATION	32
B	BOOK FAMINE AND NON-DISCRIMINATION	35
1	<i>Formal and substantive equality</i>	35
2	<i>De jure and de facto equality</i>	40
3	<i>Direct and indirect equality</i>	40
III	HUMAN RIGHTS OF THE VISUALLY IMPAIRED	42
A	INTERRELATEDNESS, INTERDEPENDENCY, AND INDIVISIBILITY OF HUMAN RIGHTS	42
B	RIGHT TO EDUCATION	43
1	<i>Significance of the right to education</i>	43
2	<i>Normative framework of the right to education</i>	44
3	<i>Book famine and the right to education</i>	48
(a)	Equality of access to education v quality of education	48
(b)	Formal and informal education	50
4	<i>Obligations of states</i>	51
(a)	Obligation to respect	51
(b)	Obligation to protect	51
(c)	Obligation to fulfil	52
(i)	Obligation to facilitate	52
(ii)	Obligation to provide	52
C	THE RIGHT TO CULTURE AND SCIENCE	55
1	<i>The normative framework of the right to culture and science</i>	56
2	<i>The book famine and the right to culture</i>	57
(a)	Participation	58
(b)	Access	59
(c)	Contribution	60
3	<i>Obligations of states regarding right to culture</i>	61
(a)	Obligation to respect	62
(b)	Obligation to protect	62
(c)	Obligation to fulfil	63
(i)	Obligation to facilitate and promote	63
(ii)	Obligation to provide	63

4	<i>Book famine and the right to science</i>	64
5	<i>Obligations of states regarding the right to science</i>	66
D	RIGHT TO ACCESS TO INFORMATION	67
1	<i>Normative framework of the right to access to information</i>	67
2	<i>Book famine and the right to access to information</i>	68
3	<i>Obligations of states</i>	68
E	RIGHT TO HEALTH	70
1	<i>Normative framework of the right to health</i>	70
2	<i>Obligations of states</i>	70
F	RIGHT TO WORK	71
1	<i>Normative framework of the right to work</i>	71
2	<i>Book famine and the right to work</i>	72
3	<i>Obligations of states</i>	72
IV	CONCLUSION	73
	CHAPTER 3	75
	NATIONAL COPYRIGHT LAWS AND ACCESS FOR THE VISUALLY IMPAIRED	75
I	INTRODUCTION	75
II	THE EUROPEAN UNION	76
A	EUROPEAN COPYRIGHT LAW AND ACCESS FOR THE VISUALLY IMPAIRED	76
B	PROBLEMS OF ACCESS TO COPYRIGHT WORKS FOR THE VISUALLY IMPAIRED	81
1	<i>Optional nature of limitations and exceptions</i>	82
2	<i>Restrictions on type of works</i>	83
3	<i>Restrictions on accessible formats</i>	83
4	<i>Restrictions on purposes of use</i>	84
5	<i>Restrictions on copyrights</i>	84
6	<i>Restrictions on beneficiaries</i>	85
7	<i>Discrepancies in balancing digital rights management and contracts with access</i>	85
8	<i>Remunerating right holders</i>	87
9	<i>Commercial availability</i>	87
10	<i>Cross-border exchange of works</i>	87
11	<i>Harmonisation, equality, and the visually impaired</i>	87
III	ANGLO-AMERICAN COPYRIGHT SYSTEM	89
A	NEW ZEALAND (NZ)	89
1	<i>Copyright Law in NZ and Access for Visually Impaired</i>	89
2	<i>Problems of access to copyright works for the visually impaired</i>	92

(a)	Commercial availability	94
(b)	Cross-border exchange of works	94
B	THE UNITED STATES OF AMERICA (US)	94
1	<i>Copyright law in the US and access for the visually impaired</i>	94
(a)	Fair use	94
(b)	Limitations and exceptions for the Blind: the Chafee Amendment	96
2	<i>Problems of access to copyright works for the visually impaired</i>	97
(a)	Digital rights management and access	97
(b)	Restrictions on accessible formats	98
(c)	Restrictions on authorised entities	99
(d)	Restrictions on authorised works	100
(e)	Cross-border exchange of works	100
IV	CHILE	101
A	COPYRIGHT LAW IN CHILE AND ACCESS FOR THE VISUALLY IMPAIRED	101
B	PROBLEMS OF ACCESS TO PRINT MATERIAL FOR THE VISUALLY IMPAIRED	103
1	<i>Digital rights management and access</i>	103
2	<i>Cross-border exchange of works</i>	103
V	SOUTH AFRICA	103
A	SOUTH AFRICAN COPYRIGHT LAW AND ACCESS FOR THE VISUALLY IMPAIRED TO WORKS	103
B	PROBLEMS OF ACCESS TO PRINT MATERIAL FOR THE VISUALLY IMPAIRED	104
1	<i>Lack of limitations and exceptions for the blind</i>	104
2	<i>Lack of compatibility with new technologies</i>	107
3	<i>Digital rights management and access</i>	108
4	<i>Translation and cross-border exchange of works</i>	108
VI	INDIA	109
A	INDIAN COPYRIGHT LAW AND ACCESS FOR THE VISUALLY IMPAIRED TO COPYRIGHT WORKS	109
B	PROBLEMS OF ACCESS TO PRINT MATERIAL FOR THE VISUALLY IMPAIRED	111
1	<i>Restrictions on copyrights</i>	111
2	<i>Digital rights management and access</i>	111
3	<i>Cross-border exchange of works</i>	111
VII	CONCLUSION	112
	CHAPTER 4	123
	INTERNATIONAL COPYRIGHT LAW AND ACCESS FOR THE VISUALLY IMPAIRED	123
I	INTRODUCTION	123
II	EXCLUSIVE RIGHTS UNDER COPYRIGHT AND THE BOOK FAMINE	124

A	THE MORAL RIGHTS OF THE AUTHOR	125
B	THE RIGHT TO REPRODUCTION	126
C	THE RIGHT TO DISTRIBUTION, COMMUNICATION, AND MAKING AVAILABLE TO THE PUBLIC	127
III	COPYRIGHT FLEXIBILITIES TO FACILITATE ACCESS FOR THE VISUALLY IMPAIRED	128
A	THE BALANCE BETWEEN PROTECTION AND ACCESS	128
B	THE THREE-STEP TEST AND ACCESS FOR THE VISUALLY IMPAIRED	130
1	<i>The voluntary nature of the Test</i>	131
2	<i>Creating limitation and exceptions for the visually impaired</i>	133
(a)	Step one	135
(b)	Step two	137
(i)	A market that can be empirically measured (empirical market)	137
(ii)	Normative market	138
(c)	Step three	141
(i)	Compulsory licensing	143
3	<i>International exchange of accessible works</i>	145
IV	CONCLUSION	146
	CHAPTER 5	147
	THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED	147
I	INTRODUCTION	147
II	MARRAKESH TREATY AND THE BOOK FAMINE	148
A	BACKGROUND TO THE TREATY	148
B	RECOGNITION OF HUMAN RIGHTS OF THE VISUALLY IMPAIRED	151
C	COPYRIGHT FLEXIBILITIES FOR THE VISUALLY IMPAIRED	153
1	<i>Minimum mandatory limitations and exceptions</i>	153
(a)	Beneficiaries	156
(b)	Copyright works	156
(c)	Copyrights	157
(d)	Authorised entities	157
(e)	Accessible formats	158
(f)	Commercial availability of accessible formats	159
(g)	Remuneration of right holders	160
(h)	Digital rights management and access	160
2	<i>Connection to the three-step tests</i>	161
3	<i>Cross-border exchange of accessible works</i>	162
III	CONCLUSION	164

CHAPTER 6	167
A HUMAN RIGHTS FRAMEWORK FOR COPYRIGHT AND ACCESS FOR THE VISUALLY IMPAIRED	167
I INTRODUCTION	167
II COPYRIGHT AND HUMAN RIGHTS OF THE VISUALLY IMPAIRED: THE NEED FOR BALANCE	169
A THE INTERFACE OF INTELLECTUAL PROPERTY AND HUMAN RIGHTS	169
1 <i>Conflict</i>	169
2 <i>Coexistence</i>	170
3 <i>Beyond conflict and coexistence</i>	171
B THE INTERFACE OF COPYRIGHT AND HUMAN RIGHTS OF THE VISUALLY IMPAIRED	173
1 <i>Finding common ground between copyright and human rights</i>	173
2 <i>Copyright flexibilities and the common objectives of copyright and human rights</i>	177
III A HUMAN RIGHTS FRAMEWORK FOR COPYRIGHT AND HUMAN RIGHTS OF THE VISUALLY IMPAIRED: RE-STRIKING THE BALANCE	180
A THE PROTECTIVE DIMENSION OF A HUMAN RIGHTS FRAMEWORK	181
B THE RESTRICTIVE DIMENSION OF A HUMAN RIGHTS FRAMEWORK	182
1 <i>Limitations and exceptions</i>	183
(a) Minimum mandatory limitations and exceptions	184
(b) Accessible formats	188
(c) Commercial availability	190
(d) Technological Protection Measures (TPMs)	192
(e) Remuneration	193
(f) Implications of the Marrakesh Treaty for a human rights framework	194
2 <i>International coherence in adoption of minimum mandatory limitations and exceptions</i>	198
C FURTHER DIRECTIONS FOR BUILDING A HUMAN RIGHTS FRAMEWORK	199
1 <i>Clarifying implications of copyright and human rights</i>	199
2 <i>Ensuring compatibility of copyright and human rights</i>	201
(a) Adopting compatible policy and law	201
(b) Ensuring compatibility when implementing policy and law	206
(c) Monitoring compatibility	208
IV CONCLUSION	212
CHAPTER 7	215
CONCLUSION	215
I THE MIRACLE IN MARRAKESH	215

II	A HUMAN RIGHTS FRAMEWORK FOR ACCESS TO COPYRIGHT WORKS FOR THE VISUALLY IMPAIRED	216
A	RESTRIKING THE BALANCE OF PROTECTION AND ACCESS	216
B	FILLING THE GAPS IN THE INTERFACE OF COPYRIGHT AND HUMAN RIGHTS	217
C	ENSURING DE FACTO EQUALITY FOR THE VISUALLY IMPAIRED	217
	BIBLIOGRAPHY	219
A	CASES	219
B	LEGISLATION	219
C	TREATIES	221
D	UNITED NATION DOCUMENTS	223
E	WIPO DOCUMENTS	225
F	EUROPEAN UNION DOCUMENTS	226
G	BOOKS AND CHAPTERS IN BOOKS	227
H	JOURNAL ARTICLES	234
I	PARLIAMENTARY AND GOVERNMENT MATERIALS	240
J	REPORTS	240
K	PRESENTATIONS	240
L	DISSERTATIONS	240
M	INTERNET RESOURCES	240
N	SPEECHES	243
O	OTHER RESOURCES	244

LIST OF ABBREVIATIONS

AAP	Association of American Publishers
AC2AK	African Copyright and Access to Knowledge
ADA	Americans with Disabilities Act
CEDAW	Convention on the Eradication of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Convention on the Protection of the Rights of All Migrant Workers and their Families
CRC	Convention of the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DAISY	Digital Accessible Information SYstem
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
EBU	European Blind Union
EC	European Commission
EU	European Union
GRULAC	The Latin American and Caribbean Group
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEA	Individuals with Disabilities Education Improvement Act
MoU	Memorandum of Understanding
NIMAC	National Instructional Material Access Center

NZ	New Zealand
OAU	Organization of African Unity
ONCE	National Organization of Spanish Blind People
PAIA	The Promotion of Access to Information Act
PASA	Publishers Association of South Africa
RNIB	Royal National Institute of the Blind People
SCCR	Standing Committee on Copyright and Related Rights
TIGAR	Trusted Intermediary Global Accessible Resources
TPMs	Technological Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UDHR	Universal Declaration of Human Rights
UK	The United Kingdom
UN	United Nations
UNESCO	United Nations Economic, Social and Cultural Organization
US	The United States
WBU	World Blind Union
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

CHAPTER 1

INTRODUCTION

“I have always imagined that Paradise will be a kind of library.”¹

- Jorge Luis Borges

I Book Famine, Human Rights, and Copyright Law

A What is Book Famine?

According to the World Health Organization (WHO), as of 2014, there are around 285 million blind and visually impaired persons in the world. The WHO estimates that 39 million of them are blind and the remaining 246 million have low vision.² Individuals with blindness, visual impairments or other reading disabilities need accessible copies of copyright protected material in order to be able to read them.

The blind and visually impaired persons have had a long journey for finding ways to read and write. In the early 19th century, Laura Bridgman learned to communicate words using her sense of touch. She later managed to read by running her fingers over raised type.³ In 1829, Louis Braille invented the system of six raised dots to help the blind read and write. It was, however, not until the mid-19th century that the braille alphabet was widely used.⁴ Some 50 years later, Helen Keller, the first deafblind person to receive a Bachelor of Arts degree, used the braille system to read and later write 12 books and many articles.⁵

Initially, most braille books were produced by volunteers. As Emeritus Professor Ronald McCallum, an Australian legal academic and the incumbent chair of the United Nations Committee on the Rights of Persons with Disabilities recalls:⁶

¹ Stephen Tapscott *Twentieth-Century Latin American Poetry: A Bilingual Anthology* (University of Texas Press, Austin, 1996).

² World Health Organization (WHO), Visual impairment and blindness, Fact Sheet N° 282 <www.who.int>.

³ See Ernest Freeberg *The Education of Laura Bridgman* (Harvard University Press, Cambridge, 2001).

⁴ See Russell Freedman and Kate Kiesler *Out of Darkness: the Story of Louis Braille* (Clarion Books, New York, 1997).

⁵ American Foundation for the Blind “Helen Keller Biography” <www.afb.org/>.

⁶ Ronald McCallum, Chair of the United Nations Committee on the Rights of Persons with Disabilities “How technology allowed me to read” (speech to TEDxSydney, Sydney, 4 May 2013).

When I was at school, the books were transcribed by transcribers, voluntary people who punched one dot at a time so I had volumes to read and that had been going on mainly by women since the late 19th century in [Australia], but it was the only way I could read.

Since mid-20th century, many technological developments including the invention of tape-recorders, personal computers, refreshable braille displays, and other adaptive technologies have improved the access for the blind and visually impaired to reading material.

However, the statistics that different organisations offer show a low level of access to copyright protected works for the visually impaired. In 2007, a study by the World Intellectual Property (WIPO) on copyright limitations and exceptions for the visually impaired estimated an availability rate of no more than 5 percent.⁷ In 2013, the World Blind Union (WBU) claimed that only some 7 percent of published books in richest countries and less than 1 percent in poorer areas becomes accessible to the visually impaired.⁸ In 2014, the WBU repeated its estimate that over 90 percent of all published material is inaccessible to the visually impaired persons.⁹

Even in developed countries, like the United States, the United Kingdom and the Netherlands, the numbers of accessible works are no more than 5 percent,¹⁰ 7 percent,¹¹ and 5 percent respectively.¹² These numbers show a rather slow growth in Europe from the claimed 1 percent of all the published information that was available to the visually impaired in 1995.¹³ However, considering that around 90 percent of the world's blind and visually impaired live in developing countries, the WBU's claim that less than 1 percent of works are accessible in such countries becomes important.¹⁴

⁷ World Intellectual Property Organization (WIPO), Standing Committee on Copyright and Related Rights (SCCR), Study on Copyright Limitations and Exceptions for the visually impaired, prepared by Judith Sullivan, SCCR/15/7, 20 February 2007, at 14.

⁸ World Blind Union (WBU) "June 17 Press Release for WIPO Book Treaty" (17 June 2013) World Blind Union <www.worldblindunion.org>.

⁹ World Blind Union (WBU) 2014 Brochure <www.worldblindunion.org>.

¹⁰ Janice T Pilch "Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons" (12 October 2010) Library Copyright Alliance <www.librarycopyrightalliance.org> at 2.

¹¹ Royal National Institute of Blind People (RNIB) "Availability of accessible publications 2011 update". The numbers of accessible books in the United Kingdom are significantly higher when it comes to top titles each year. See the reports on "Accessibility of top 1,000 titles" of years 2010-2012 for more details <www.rnib.org.uk>.

¹² World Blind Union "Paper on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons" (7 October 2010) <www2.ohchr.org>.

¹³ Francisco Javier Martinez Calvo "The EXLIB Project: expansion of European library systems for the visually disadvantaged" (1995) 23(2) *Interlending and Document Supply* 17.

¹⁴ Maryanne Diamond, Chair of the International Disability Alliance "WIPO Opening Remarks" (WIPO Diplomatic Conference, Marrakesh, 18 June 2013) <www.worldblindunion.org>.

In early 2000s, the UK Royal National Institute of Blind People (RNIB) coined the phrase “global book famine” as part of its Right to Read campaign.¹⁵ The book famine represents the low number of books and other copyright protected material that are accessible to the blind, visually impaired, and others with reading disabilities around the world.

B Who is Affected by the Book Famine?

Different groups of individuals with visual or other disabilities cannot read normal copies of copyright works. Various terms are used to describe these individuals. To avoid confusion and repetition throughout this thesis, the terms visually impaired or reading disabled are used interchangeably to refer to all individuals who need accessible copies.

1 The blind and visually impaired

There are different definitions of blindness and visual impairment. The World Health Organization (WHO) uses the definitions of the International Classification of Diseases 10 (ICD-10). The WHO Study Group on the Prevention of Blindness recommended these definitions that include four levels of sight.

The four categories of vision according to the ICD-10 are normal vision, moderate visual impairment, severe visual impairment, and blindness. Moderate visual impairment combined with severe visual impairment is grouped under the term “low vision”; low vision taken together with blindness represents all visual impairments.¹⁶

The International Council of Ophthalmology defines blindness as total vision loss, and a condition where individuals have to rely predominantly on vision substitution skills; low vision represents lesser degrees of vision loss, where vision enhancement aids and devices can help

¹⁵ The Royal National Institute of Blind People (RNIB) is part of the Right to Read Alliance that was established in 2002 to improve the blind and visually impaired persons’ right to read. The organisations involved are: The Blind Centre for Northern Ireland, British Dyslexia Association, Calibre Cassette Library, ClearVision, Confederation of Transcribed Information Services (COTIS), Listening Books, LOOK (the National Federation of Families with Visually Impaired Children), National Association of Local Societies for Visually Impaired People (NALSVI), National Blind Children’s Society, National Federation of the Blind, National League of the Blind and Disabled, National Library for the Blind (NLB), Royal National Institute of the Blind (RNIB), Scottish Braille Press, Scottish National Federation for the Welfare of the Blind, Share the Vision, Talking Newspaper Association of the UK (TNAUK), Torch Trust for the Blind, UK Association of Braille Producers <www.altformat.org>.

¹⁶ The ICD is the international standard diagnostic classification for all general epidemiological, many health management purposes and clinical use. ICD-10 was endorsed by the Forty-third World Health Assembly in May 1990 and came into use in WHO Member States from 1994. See the World Health Organization website for more details <www.who.int>.

individuals significantly; and, visual impairment is the condition of vision loss characterised by a loss of visual functions (such as visual acuity or visual field) at the organ level.¹⁷

In 2013, WIPO adopted the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh Treaty).¹⁸ This Treaty covers persons who are blind or have a visual impairment. The Treaty does not define blindness, but considers visual impairment as being “unable to read printed works to substantially the same degree as a person without impairment”.¹⁹

2 Others with reading disabilities

As highlighted by the Marrakesh Treaty, normal copies of copyright protected material are not merely inaccessible to those with visual impairments. Individuals with other disabilities may also need accessible copies of copyright works to be able to read.

A number of behaviours and presumed cognitive irregularities may cause reading disabilities that stop individuals from reading normal copies of books and other copyright protected works.²⁰ For instance, Dyslexia is a brain-based type of learning disability that specifically impairs a person’s ability to read. According to the National Institute of Neurological Disorder and Stroke, Dyslexia is “difficulty with spelling, phonological processing (the manipulation of sounds), or rapid visual-verbal responding” and it can occur due to heredity reasons or as a result of brain injury.²¹

Old age or loss of body parts that are necessary for reading can lead to physical disability to hold or manipulate a book or to focus or move the eyes.

The Marrakesh Treaty covers those with visual and other disabilities that hinder reading of normal print. Article 3 of the Marrakesh Treaty recognises the rights of an individual that:²²

¹⁷ “International Standards: Visual Standards, Aspects and Ranges of Vision Loss with Emphasis on Population Surveys”, Report prepared for the International Council of Ophthalmology at the 29th International Congress of Ophthalmology, Sydney, Australia, April 2002, <www.icoph.org> at 6.

¹⁸ WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, [Marrakesh Treaty] adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on 27 June 2013.

¹⁹ Marrakesh Treaty, art 3(a) and (b).

²⁰ Steven L Strauss “Neuroscience and Dyslexia” in Anne McGill-Franzen and Richard Allington (eds) *Handbook of Reading Disability Research* (Routledge, New York, 2011) at 79.

²¹ See National Institute of Health, National Institute of Neurological Disorder and Stroke Website for more information on Dyslexia <www.ninds.nih.gov>.

²² Marrakesh Treaty, above n 18, art 3 (b) and (c).

(b) has ... a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading.

C Definition of Affected Works

The disabilities discussed above make reading of normal versions of a range of copyright protected works, such as books, journals, magazines, newspapers, websites, and manuals difficult or impossible. In other words, any representation of text or a combination of text and numbers, symbols, tables, charts, whether in print or digital format, which falls under the copyright protection, is of interest to the visually impaired.

The term book famine was coined by the RNIB to represent the lack of access to copyright material for the visually impaired. This term was then widely used by the governments, NGOs, blind institutions, scholars and the international community. Therefore, the focus of the Right to Read movement was initially on the unsatisfactory number of books that are accessible to the visually impaired.

However, the Right to Read advocates did not limit the issue of access for the blind to books. The 2009 WBU treaty proposal to the WIPO, which formed the foundation for the Marrakesh Treaty, referred to publication and distribution of “copyrighted works”.²³

The signatories to the Marrakesh Treaty chose the term “published works” to refer to copyright protected works to which the visually impaired should have access.²⁴ The Marrakesh Treaty defines published works as “literary and artistic works within the meaning of Article 2(1) of the Berne Convention ... in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media”.²⁵

²³ WIPO Standing Committee on Copyright and Related Rights (SCCR), Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU) [Proposal by Brazil, Ecuador and Paraguay], SCCR/18/5, 25 May 2009, Annex, at 3.

²⁴ Marrakesh Treaty, above n 18, title.

²⁵ Marrakesh Treaty, above n 18, art 2 (a).

In this thesis the terms copyright protected works, copyright protected material, and copyright works are used interchangeably to refer to the content that is currently inaccessible to the blind.

D Definition of Accessible Formats

An accessible format is a copy of a copyright protected work that a visually impaired person can read. An accessible format does not change the content of a copyright work but merely its presentation.

The Convention on the Rights of Persons with Disabilities (CRPD) requires its member states to provide the persons with disabilities with information in accessible formats.²⁶ Similarly, art 30(a) of the Convention refers to accessible formats of cultural materials.²⁷ Although the Convention does not explicitly defines an accessible format, its art 2 refers to braille, large print, audio, and human-reader as means of communicating content to persons with disabilities.²⁸

The Marrakesh Treaty defines an accessible format copy as:²⁹

... a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

The visually impaired persons use different versions of accessible formats. The reasons for choosing an accessible format over the other may include age of the visually impaired person, convenience, price and availability of a format, and the required technology. The following is a brief description of the most common accessible formats currently available to the visually impaired.

²⁶ United Nations Convention on the Rights of Persons with Disabilities [CRPD] 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 March 2008) art 21(a).

²⁷ CRPD, art 30(a).

²⁸ CRPD, art 2.

²⁹ Marrakesh Treaty, above n 18, art 2(b).

3 *Braille and Moon*

As mentioned earlier, Louis Braille invented the braille system for the French alphabet. Nowadays, there are unified braille codes for different languages, for example English.³⁰ Braille is a tactile system of reading and writing that uses small raised dots, arranged in a specific order, to represent letters of alphabet, digits, or even musical notes.

The visually impaired run their fingers over the raised dots to read. Writing in braille is done by punching out dots on paper using a stale and stylus, a braille typewriter, or a braille embosser. A refreshable braille display featuring raised pins that are controlled by a keyboard does not require the use of paper.³¹

The Moon code is similar to braille in that it is also a tactile alphabet. However, it is considered easier to read and therefore more suitable for people who lose their sight at an older age or who have a “less keen sense of touch”.³²

4 *Large and giant print*

In 1964, Fredrick Thorpe, a retired publisher and printer, established a business for reprinting normal books in large print mainly for the benefit of the elderly.³³ A large print format is a reproduction of a copyright work in a large font not commonly used by sighted persons.

According to the RNIB, while the font size in normal print is usually 10 or 12, the large print uses 16 or 18, and anything larger than that is considered giant print.³⁴ The United States Library of Congress Guides states that “large-print materials are most commonly available in 16- to 18-point type. The minimum size for large-print materials is 14-point type.”³⁵ E-books offer more flexibility than print by allowing the reader to adjust the size of the font.

5 *Audio books*

An audio book is an accessible copy of normal print in the form of a sound recording. Audio books or talking books are voice recordings of print by volunteer or professional readers. Some eBooks can be turned into audio books through the text-to-speech feature available on a number

³⁰ The International Council on English Braille (ICEB) oversees the use of Unified English Braille in Australia, Canada, Ireland, Nigeria, New Zealand, South Africa, United Kingdom and the United States <www.iceb.org>.

³¹ See the World Braille Foundation website <worldbraillefoundation.com>, and the RNIB website <www.rnib.org.uk> for more information on braille.

³² See the RNIB webpage on Moon <www.rnib.org.uk>.

³³ See the Ulverscroft Foundation website <www.foundation.ulverscroft.com>.

³⁴ See the RNIB webpage on large print <www.rnib.org.uk>.

³⁵ See the Library of Congress Guides on Materials in Large Print <www.loc.gov>.

of eBook readers or other devices, such as Kindle or iPad. The text-to-speech technology uses synthetic voice. It can be used for making other digital copyright protected content besides books, such as newspapers, accessible to the visually impaired.³⁶ Unlike braille books, audio books require no prior learning.³⁷ Moreover, they are easier to store and carry around, compared to print material, due to their size in either analogue or digital formats.

Traditional formats of audio books have been available on cassette tapes or Compact Discs (CDs). The more recent versions, such as the Digital Accessible Information System (DAISY) books, enable a visually impaired reader to “navigate by a hierarchy of headings, by pages, or by other significant constructs.”³⁸ DAISY books can be accessed on a DAISY player, a computer using the DAISY software, a MP3 player, or smartphone and tablets.³⁹

II Book Famine and the Human Rights of the Visually Impaired

The Right to Read advocates have emphasised the discriminatory nature of the book famine towards the visually impaired and its negative effects on the realisation of their human rights. In 2008, the WBU advocated provision of access for the visually impaired to “the same book at the same time and at the same price”.⁴⁰

Chapter 2 investigates the basis for the human rights-related claims of the visually impaired regarding their right to have better access to copyright protected material. The principle of non-discrimination in international human rights law requires that all individuals should equally enjoy the human rights to which they are entitled.⁴¹ Therefore, the legal framework of the non-

³⁶ See the RNIB webpage on audio books <www.rnib.org.uk>.

³⁷ See Francisco Javier Martinez Calvo “Technological Advances Benefiting Visually Impaired People”, World Intellectual Property Organization (WIPO) Information Meeting on Digital Content for the Visually Impaired, Geneva, 3 November 2003, at 3 stating that “sound recordings are unquestionably the most accessible format for people with impaired vision, because they, unlike braille, call for no prior learning process. This is the ideal medium for people who lose their sight late in life, a community which nearly invariably accounts for the largest share of our users the world over”.

³⁸ George Kerscher “DAISY is” (presentation to the United Nations, Bangkok, 2002, <www.digitaltalkingbook.com>).

³⁹ See the DAISY Consortium website <www.daisy.org>.

⁴⁰ William Rowland WBU President (speech on the occasion of WBU’s Press Conference launching its Global Right to Read Campaign, Amsterdam, 23 April 2008).

⁴¹ See for example the United Nations General Assembly Universal Declaration of Human Rights [UDHR], adopted by General Assembly Resolution 217 A(III) of 10 December 1948, art 1; United Nations International Covenant on Civil and Political Rights [ICCPR] 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) art 2(1); United Nations International Covenant on Economic, Social and Cultural Rights [ICESCR] 999 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) art 2(2); United Nations International Convention on Elimination of All Forms of Racial Discrimination [CERD] 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) art 1; United Nations

discrimination principle and its connection to the book famine and the human rights of the visually impaired are also discussed in chapter 2.

For instance, there is no discrimination when a visually impaired individual cannot afford an accessible copy of a work that has the same price and physical availability of the normal copy. Similarly, if there is no translation of a foreign work on the market in a normal version, lack of access for the visually impaired to an accessible translated copy is not a case of inequality. This is because a visually impaired person is unable to use a normal copy of a foreign work, not due to the visual disability, but rather because of the language barriers that the sighted people face as well. Therefore, copyright law is only discriminatory if it stands in the way of access to works for the visually impaired.

However, not all situations are easily determinable as discriminatory or not. Some questions are harder to answer, such as: is it discriminatory if a copyright work is only available in braille; or, is copyright discriminating against the visually impaired students if they only have access to accessible copies of their textbooks? The analysis in chapter 2 informs the discussion of what constitutes discrimination against the visually impaired in terms of access to copyright protected works and what the states' obligations are under international human rights law.

Furthermore, the connection between access to copyright protected works and the realisation of a number of internationally recognised human rights are explored. For instance, the connection between access to textbooks and the right to education, access to literary works and the right to culture, and access to informative and scientific works for the fulfilment of the rights to information and scientific progress are analysed.

Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 December 1981) arts 1-5; United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) art 1; United Nations Convention on the Rights of the Child [CRC] 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) art 2; United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families [CMW] 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003) art 1; and, CRPD, above n 26, Preamble.

III Book Famine and Copyright

A Overview

Providing the visually impaired with accessible formats may infringe the copyright holder's right to reproduction, adaptation, distribution, and communication to the public (including communication through public performance, by wire or wireless means, and making available) of copyright works.

Chapter 3 discusses the definition and scope of these rights and their effects on the access for the visually impaired in a number of jurisdictions. The European Union, New Zealand, the United States of America, South Africa, Chile, and India are discussed to cover a range of developed and developing countries and different legal systems.⁴²

Chapter 4 addresses the same issue on an international level by discussing the international copyright law instruments that are relevant to the issue of book famine.⁴³ Due to the type of works and uses that are relevant in the context of the book famine, only the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),⁴⁴ the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement),⁴⁵ and the WIPO Copyright Treaty (WCT)⁴⁶ are analysed in detail.

The Marrakesh Treaty is not discussed as part of the international copyright law system. It is instead analysed separately in chapter 5. The reason for this is that the Marrakesh Treaty is different from the other international copyright instruments because it specifically provides mandatory limitations and exceptions for the benefit of the visually impaired. However, it has

⁴² See chapter 4.

⁴³ See chapter 5.

⁴⁴ See Berne Convention for the Protection of Literary and Artistic Works [Berne Convention] 1161 UNTS 31 (opened for signature 9 September 1886, entered into force 5 December 1887), art 9(1) for the right to reproduction; arts 12 and 14 for the right to adaptation; art 14(1) for distribution of cinematographic adaptations of literary and artistic works; art 11(1)(i) for the right to public performance of dramatic and musical works; art 11ter(1)(i) for the right to public recitation of literary works; art 14(1)(ii) for the right to public performance of cinematographic adaptation of literary works; arts 11(1)(ii), 11bis(1), 11ter(1)(ii), and 14(1)(ii) for the right to communication to the public of a performance (live or not) by wire or wireless means.

⁴⁵ See Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS] 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1996), art 9 for the rights to reproduction and distribution, and arts 14(1) and (2) for the right to communication to the public of a performance (live or not) by wire or wireless means.

⁴⁶ See WIPO Copyright Treaty [WCT] 36 ILM 65(1997) (opened for signature 20 December 1996, entered into force 6 March 2002), art 1 for the rights to reproduction and distribution; art 8 for the right to communication to the public; and, art 6 for the right to making available of a work to the public.

not yet entered into force and shaped the national copyright law of countries, in the same way that the Berne Convention, TRIPS Agreement, and other international copyright treaties have.

Moreover, the main international copyright treaties that have shaped the national laws of many states were adopted prior to the existence of the affirmative model of approaching disabilities. Therefore, it is essential to evaluate their impact on the access for the visually impaired and the realisation of their human rights.

Analysing the international copyright law system, without considering the Marrakesh Treaty, informs the discussion of (1) why adoption of the Marrakesh Treaty was necessary, and why countries should sign and ratify it; and, (2) the challenges, created by the international copyright law, for the visually impaired that the Marrakesh Treaty failed to address (chapter 5).

B Copyright Law and access for the visually impaired

Many countries have not included limitations and exceptions for the benefit of the visually impaired in their copyright laws. This issue was initially highlighted in reports of a WIPO and United Nations Economic, Social and Cultural Organization (UNESCO) Working Group⁴⁷ and a 1985 WIPO Study.⁴⁸ Later, the 2007 WIPO Study suggested that 57 countries, significantly fewer than half of WIPO Member States, “have been found to have specific provisions that would permit activity to assist visually impaired people unable to access the written word.”⁴⁹ In the last few years, a number of countries such as India,⁵⁰ Colombia,⁵¹ and Mauritius⁵² have introduced copyright exceptions for the visually impaired. However, the numbers of countries with copyright exceptions have not changed significantly since 2007. The Study also highlighted that “in countries with fairly comprehensive provision regarding the making of accessible copies under exceptions to copyright, there may still be problems where it is desired to move accessible copies between countries”.⁵³

⁴⁷ Report of the Working Group on Access by Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, UNESCO/WIPO/WGH/I/3, Paris, 3 January 1983.

⁴⁸ Wanda Noel “Copyright Problems Raised by the Access by Handicapped Persons to Protected Works” report to the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union, Paris, 1985, IGC(1971)/VI/11 – B/EC/XXIV/10 ANNEXII <<http://keionline.org/>>.

⁴⁹ Sullivan, above n 7, at 9 and 28.

⁵⁰ See Copyright Amendment Act No. 27 of 2012 (India).

⁵¹ See Law No. 1680 of 2013 (Colombia).

⁵² See Copyright Act No. 2 of 2014 (Mauritius).

⁵³ Sullivan, above n 7, at 10.

1 Lack of limitations and exceptions

Chapter 4 shows that lack of copyright exceptions for the visually impaired in national copyright laws is partly due to the voluntary nature of the copyright flexibilities offered in international copyright law system. Countries that join the major international copyright law instruments have an obligation to provide minimum standards of protection for copyright works.⁵⁴ However, adoption of copyright limitations and exceptions is always optional, with the exception of reproducing quotations, as stated in the Berne Convention.⁵⁵

Adoption of flexibilities that could benefit the visually impaired is permitted, but not required, by international copyright treaties. The Berne Convention offers a test, against which, limitations of and exceptions to the reproduction right should be evaluated. Article 9(2) of the Berne Convention states that:⁵⁶

It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

A similar version of this provision in the TRIPS Agreement became known as the three-step test,⁵⁷ and was then included in all subsequent copyright treaties.⁵⁸ The provision in the TRIPS Agreement applies to all of the rights of copyright owners set forth in TRIPS.

On a national level, the visually impaired can benefit from other specific copyright flexibilities that allow reproduction of accessible formats for private copying or educational purposes.

⁵⁴ See chapter 4 for countries' obligations under international copyright instruments.

⁵⁵ Berne Convention, above n 44, art 10(1).

⁵⁶ Art 9(2).

⁵⁷ See TRIPS, above n 45, art 13 stating that "members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

⁵⁸ See WCT, above n 46, art 10; WIPO Performances and Phonograms Treaty [WPPT] 36 ILM 76 (1997) (opened for signature 20 December 1996, entered into force 20 May 2002), art 16(2); WIPO Beijing Treaty on Audiovisual Performances, adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing [Beijing Treaty], WIPO DOC AVP/DC/20 (opened for signature 24 June 2012), art 13(2); and, Marrakesh Treaty, above n 18, art 11.

However, such exceptions to copyright cannot meaningfully facilitate the access for the visually impaired.⁵⁹

This is partly because the process of conversion of a copyright work to an accessible format is complicated and costly. Therefore, it is not feasible for individuals to undertake such a task and so far mainly non-profit organisations have been in charge of doing so.⁶⁰ This means that entities that undertake the reproduction cannot enjoy from the private exceptions designed for individuals.

To produce an accessible format without a copyright exception, one needs to gain the permission of the author or the copyright holder and, in some instances, remunerate them. Seeking the right holder's permission prolongs the already time-consuming process of producing accessible formats.⁶¹ Right holders are not always accessible, and without the instruction of the law, they are under no obligation to grant permission and may choose to reject a request or respond after long delays.⁶² Moreover, in the case of orphan copyright works, identifying and contacting the correct right holder is even more challenging.

2 Problems with existing limitations and exceptions

A number of jurisdictions have provided for special limitations and exceptions to copyright for the benefit of the visually impaired.⁶³ Under such limitations and exceptions, reproduction and

⁵⁹ See Sullivan, above n 7, at 29 stating that “it is, however, extremely unlikely that exceptions that do not specifically provide for the needs of the blind or other visually impaired people would provide a comprehensive solution to the needs of those facing a print disability”.

⁶⁰ For instance, Bookshare that offers the world's largest collection of accessible titles is a non-profit platform. Similarly, the RNIB in the United Kingdom, and the Blind Foundation in New Zealand, that are non-profit, are the biggest producers of braille formats in these two countries. See Bookshare <www.bookshare.org>, RNIB <www.rnib.org.uk>, and the Blind Foundation <www.blindfoundation.org.nz>.

⁶¹ See Tuck Tinsley, President of the American Printing House for the Blind, Statement to the NIICopyright Protection Act of 1995: Hearing on HR 2441 and S 1284 Before the Subcommittee On Courts and Intellectual Property, 104th Cong, at 171 stating that “editing and translating a visual textbook ... can take up to a year to get it in understandable braille format”.

⁶² See Sullivan, above n 7, at 79 stating that “[some] publishers take a very long time to respond or do not reply at all. To illustrate this point, in the 2005-2006 financial year that ended on 30 June 2006, the RNZFB selected 103 titles in the DAISY format that had been produced by the RNIB in the UK for conversion to 4-track cassette. (The RNZFB is still running a 4-track cassette library whilst finalizing circulation by post on CD Rom or internet delivery of its digital library collection.) The RNIB had already succeeded in obtaining worldwide rights for 65 of these titles leaving 38 titles for which copyright clearance for this activity was needed. After writing to copyright owners between January and March 2006 seeking permission, this was obtained reasonably promptly for 10 of the titles, six being from the same publisher. All of the remaining 28 copyright permission letters were still unanswered as of 26 October 2006”. See also John Roos “Libraries for the Blind as accessible Content Publishers: Copyright and Related Issues: (2007) 55(4) Library Trends 55(4) 879.

⁶³ See Sullivan, above n 7, for a list of countries with flexibilities for the visually impaired; Foundation for Information Property Research “Implementing the EU Copyright Directive” (2003) <www.fipr.org>; and, Harvard Digital Media Project “Implementing the EUCD” <www.cyber.law.harvard.edu> for a discussion of countries in Europe with flexibilities for the visually impaired.

distribution of an accessible format does not infringe the rights of the author or the right holder.⁶⁴ However, the existing copyright flexibilities in each country create different challenges for the visually impaired. Chapter 3 explores these challenges in the European Union, New Zealand, the United States, South Africa, Chile, and India. They are briefly discussed below.

(a) End beneficiaries

When thinking of an individual with a disability that stops them from reading normal print, blindness or visual impairment comes to mind. However, as discussed earlier, other disabilities could also affect the ability of an individual to enjoy normal copies of copyright works. Countries like Australia,⁶⁵ Canada,⁶⁶ Denmark,⁶⁷ and New Zealand⁶⁸ have provided for copyright exceptions and limitations that cover everyone that cannot use a normal copy due to visual or other impairments. However, other countries such as Belarus,⁶⁹ Cameroon,⁷⁰ Indonesia,⁷¹ and Peru⁷² have limited the end beneficiaries to blind persons or persons with visual impairment. Limiting the end beneficiaries to one specific group stops the others with print disabilities from benefiting from the copyright limitations and exceptions.

(b) Copyright protected works

Some countries, with specific limitations and exceptions for the print disabled, allow the use of all copyright works that are inaccessible to them due to their disability.⁷³ A number of countries, however, exclude certain works from being reproduced. For instance, the limitations and exceptions do not apply to computer programmes in Australia⁷⁴ and Bulgaria;⁷⁵ to

⁶⁴ See for example US Copyright Act, 17 USC, s 121; and, Copyright Act 1994 (NZ), s 69.

⁶⁵ See Copyright Act No. 63 Consolidated as of 24 June 2014 (Australia), s 47A.

⁶⁶ See Copyright Act (R.S., 1985, c. C-42) (Canada), s32.

⁶⁷ See Copyright Act Consolidated Act No. 1144 of 23 October 2014 (Denmark), s 17.

⁶⁸ See Copyright Act 1994 (NZ), s 69(1).

⁶⁹ See Law of the Republic of Belarus No. 262-3 of 17 May 2011 on Copyright and Related Rights, art 34.

⁷⁰ See Law No. 2000/011 of 19 December 2000 on Copyright and Neighbouring Rights (Cameroon), s 29(1)(g).

⁷¹ See Law of the Republic of Indonesia Number 19 Year 2002 Regarding Copyright, art 15d.

⁷² See Law No. 27861 of 24 October 2002 on the exemption from payment of copyright fees for the reproduction of works for the visually impaired (Colombia).

⁷³ See Sullivan, above n 7, at 32 stating that “in about half of the countries with exceptions, both countries with or without requirements about publication, activity under the exception regarding all types of copyright works seems to be possible”.

⁷⁴ See above n 65.

⁷⁵ See Law on Copyright and Neighboring Rights (as amended in 2011) (Bulgaria), art 24(2).

databases in the United Kingdom;⁷⁶ to dramatic works in the United States of America;⁷⁷ and, to cinematographic works in Canada.⁷⁸

(c) Accessible formats

Countries like China⁷⁹ and Ukraine⁸⁰ seem to only allow production of braille copies of copyright works. Other countries, like the Republic of Korea, limit the production of accessible formats to braille and sound recordings.⁸¹

Individuals with visual impairments have different conditions and needs. Differences in age, financial resources, and lifestyles can affect personal preferences for specific accessible formats. Therefore, limiting the scope of accessible formats can negatively affect the visually impaired.

(d) Authorised persons and entities

Under some copyright exceptions, accessible formats can be produced by visually impaired individuals, those acting on their behalf, and authorised institutions that are mostly non-profit (with the exception of Japan, Singapore, the United Kingdom, and the United States).⁸² Factors such as the type of accessible format can also determine the authorised entity. For instance, in Japan, Finland, Nigeria, and Sweden only specifically authorised institutions seem to be authorised to produce sound recordings.⁸³

Limiting the scope of copyright exceptions (that do not require remuneration of authors) to non-profit making activities of authorised entities is reasonable. However, copyright flexibilities that call for compulsory licensing of works for profit making purposes of commercial bodies can increase the number of accessible works while safeguarding the material interests of the right holders.

⁷⁶ See Copyright (Visually Impaired Persons) Act 2002 (UK), s 31A(2)(b).

⁷⁷ See US Copyright Law, 17 USC, ss 101 et seq and s 121(a).

⁷⁸ See above n 66.

⁷⁹ See Copyright Law of the People's Republic of China of February 26, 2010, art 22(12).

⁸⁰ See Law of 23 December 1993 No. 3792-XII on Copyright and Related Rights (as amended up to 05.12.2012) (Ukraine), art 21(6).

⁸¹ See Copyright Act of 1957 (Act No. 432 of January 28, 1957, as amended up to Act No. 9625 of April 22, 2009) (Republic of Korea), art 33.

⁸² See Sullivan, above n 7, at 32 and 35 stating that “in about half of the countries with exceptions, there does not appear to be any limitation on who may undertake the permitted activity under the exceptions” and “apart from the activity by educational establishments in Singapore and the United Kingdom mentioned above, Japan and the United States of America seem to be the only other countries that have any provision in exceptions that clearly could involve commercial entities undertaking activity”.

⁸³ See Sullivan, above n 7, at 35.

This is especially the case where there is no sign of interest from the right holders to offer accessible copies. However, in countries where publishers have a reasonable record of exploiting the market of accessible formats, compulsory licensing may interfere with their interests.

(e) Commercial availability

Reproduction of accessible copies under copyright exceptions in a number of countries is only permissible when an accessible copy is not already available.⁸⁴ The search for a commercial copy puts the visually impaired individuals or institutions under a burden and can delay their access. It may be easier to conduct a search in a country like New Zealand with a small market and advance technologies. This may not be the case in other countries where there is no database or list of publishers.

Moreover, it is not clear whether a copy of a work in any accessible format is considered an accessible copy or whether a copy is commercially available when it is in the format that is desired by the visually impaired.

Other countries have tried to provide more flexibility regarding the commercial availability criteria. For instance, in New Zealand,⁸⁵ Singapore,⁸⁶ and Australia,⁸⁷ exceptions are only applicable if a commercial accessible copy cannot be obtained after making reasonable efforts.

However, even this more flexible version of the commercial availability requirement raises a number of issues. The copyright law of the three mentioned countries does not define what “reasonable effort”, “reasonable investigation”, “reasonable time”, and “ordinary commercial price” mean. Second, even when there is a commercial copy on the market it may not be in the format that the visually impaired persons desire, or easily obtainable due to price or time-restraints.

(f) Remuneration

Similar to other copyright flexibilities, those for the benefit of the visually impaired fall into two categories: authorisation-free and authorisation plus remuneration-free. Remuneration can

⁸⁴ At 31 stating that some countries only require lack of an existing copy that was specifically published for the visually impaired, such as Azerbaijan, Georgia, Kazakhstan, and Kyrgyzstan. In other countries, like Germany and Slovenia, it is not important whether the copy was made for the visually impaired or not as long as it is accessible to them.

⁸⁵ See above n 68.

⁸⁶ Copyright Act (Chapter 63) 1987 (Singapore), art 35 (2) (e).

⁸⁷ See above n 65.

be the result of a statutory exception that defines the amount that needs to be paid, or it could be in the form of a compulsory license where the right holders negotiate the terms.⁸⁸

The 2007 WIPO Study found that the majority of the 57 countries with specific limitations and exceptions for the visually impaired do not provide for any remuneration to be paid to the right holders.⁸⁹ However, copyright law of a number of countries such as Austria, The Netherlands, and Slovenia requires remuneration of the right holders⁹⁰ for application of a copyright limitation or exception.⁹¹

Visually impaired individuals may not be able to afford to remunerate the right holders. Similarly, the organisations that work for the visually impaired are mostly non-profit and their financial resources are limited. According to the WBU, most accessible works are reproduced by specialist agencies that use charitable money, and in over 90 percent of cases rely on copyright exceptions for reproduction of accessible works, as opposed to using licensing agreements.⁹²

For instance, in the United Kingdom, production of accessible works was initially among the tasks of the publicly funded libraries founded from 1851 onwards. However, this task was then transferred to the National Library for the Blind in early 1920s.⁹³

Obliging the non-profit organisations to remunerate the right holders reduces the number of works that they can make accessible and consequently leads to unsatisfactory access for the visually impaired. Alternatively, some jurisdictions allow non-profit entities to charge the visually impaired for no more than the expenses raised in reproduction of the work. In such cases, remuneration of the right holders increases the reproduction cost and the end price of an accessible copy while lowering the ability of the visually impaired to afford it.

⁸⁸ Silke Von Lewinski *International Copyright Law and Policy* (Oxford University Press, Oxford, 2008) at 152.

⁸⁹ Sullivan, above n 7, at 9.

⁹⁰ See Sullivan, above n 7, at 40 stating that “only three countries, namely Austria, The Netherlands and Slovenia, appear to provide an exception that is in effect a compulsory licence with compensation for the right holders in respect of all the activity permitted under their exceptions for the benefit of visually impaired people”.

⁹¹ At 40, stating that Australia, Denmark, Germany, Japan, Norway, Portugal, and Sweden require remuneration for some of the permitted uses under their copyright limitations.

⁹² See Paper by the World Blind Union on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, Committee on the Rights of Persons with Disabilities Day of General Discussion on “The Right to Accessibility” 7 October 2010 <www2.ohchr.org> stating that “most accessible books are made by specialist agencies using charitable money. In over 90% of cases they use copyright exceptions to produce accessible books. Their resources are scarce even in high-income developed countries”.

⁹³ Bradley Guy Whitehouse “Access to books for the visually impaired: minimising charity and maximising choice” (Doctoral Thesis, Loughborough University, 2011) at 10.

Moreover, to use limitations and exceptions, a visually impaired individual or organisation should be in legal possession of a copyright work, which in most cases is purchased. Therefore, requiring remuneration means that they can end up paying twice for the same use as a sighted person or an institution that caters to the sighted.

(g) Digital Rights Managements and contracts

Technological developments and the growth of the Internet have led to widespread use of copyright works in digital and online formats. Copyright holders use digital rights management technology (DRMs) and contracts to safeguard their works from piracy. For instance, users of eBooks are required to adhere to terms and conditions that legally stop them from reproduction of that work. Additionally, technological protection measures (TPMs) make copying of works impossible, unless they are circumvented. The WIPO Copyright Treaty (WCT) ensures international recognition of TPMs in its article 11:⁹⁴

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

TPMs and contracts can interfere with reproduction of copyright works under copyright exceptions.⁹⁵ For instance, major e-book producers use TPMS that can stop adaptive technologies, such as text-to-speech or refreshable braille, from converting the text of the e-book to audio or tactile information accessible to the visually impaired.⁹⁶

In 2010, a WIPO Report on the Questionnaire on Limitations and Exceptions showed that laws of 17 Member States did not include any mechanisms to make sure that acts falling under limitations and exceptions may be performed despite the existence of TPMs.⁹⁷ In the European Union, where the EU Copyright Directive 2001/29 requires states to ensure compatibility of

⁹⁴ WCT, above n 46, art 11.

⁹⁵ See Manon Ress “Accessible Works, Standards” 22 April 2009, <www.copyright.gov>.stating that “the use of DRM/TPM technologies to protect accessible works leads to many concerns about the lack of interoperability between devices and countries, and presents barriers to the global sharing of works”.

⁹⁶ See American Foundation for the Blind and other, Long Form Comment Proposed Class 9: Literary Works Distributed Electronically - Assistive Technologies, before the U.S. Copyright Office, Library of Congress, <www.copyright.gov> for a discussion of how TPMS hinder application of copyright exceptions.

⁹⁷ WIPO SCCR, Report on the Questionnaire on Limitations and Exceptions, SCCR/20/7, 10 June 2012, at 12.

TPMs and copyright exceptions, the right holders generally ignore this requirement due to lack of specific regulations in this regard.⁹⁸

3 International exchange of accessible works

The majority of the world's visually impaired persons live in low-income settings where access to copyright works is significantly low.⁹⁹ Moreover, many countries have the same language and can potentially share their accessible copies of copyright works. For instance, the majority of the countries in the Americas region, with 26 million visually impaired persons, are Spanish speaking.¹⁰⁰ The ONCE library in Spain has more than 100,000 titles in accessible formats.¹⁰¹ Similarly, in 2013, it was estimated that Argentina had hundreds of thousands of accessible audio books that it could potentially share with the other countries in the region, including Uruguay, which has only 300 such works.¹⁰² There are approximately 60 million Arabic speakers who are print disabled¹⁰³ and can understand the standardised Arabic braille.¹⁰⁴ Another example is the widely quoted story of how visually impaired institutions in different English speaking countries had to produce 5 identical braille master files for the same Harry Potter book due to lack of exchange possibilities.¹⁰⁵ As the WBU and similar institutions suggest, possibilities offered by taking advantage of the digital age, further justify the cross-border exchange of accessible works.¹⁰⁶ Once a master file of a copyright work is produced, it

⁹⁸ Marcella Favale "Fine-tuning European copyright law to strike a balance between the rights of owners and users" (2008) 33(5) European Law Review 687 at 695. See generally Marcella Favale "Approximation and DRM: can digital locks respect copyright exception?" (2011) 19(4) International Journal of Law and Information Technology 306.

⁹⁹ See WHO website stating that "about 90% of the world's visually impaired live in low-income settings", <www.who.int>; and, WBU, above n 12.

¹⁰⁰ Jennifer Ortman and Hyon Shin "Language Projections: 2010 to 2020" Presented at the Annual Meetings of the American Sociological Association, Las Vegas, 20-23 August 2011, <www.census.gov> at 9.

¹⁰¹ WIPO, Limitations and Exceptions: Access to Books for the Visually Impaired – Background Brief <www.wipo.int>.

¹⁰² Mara Kardas-Nelson "The rich turn a blind eye to poor readers" (28 March 2013) Mail & Guardian <www.mg.co.za> at 3.

¹⁰³ Claudia Lux "Cross-border Exchange of Accessible Format Copies and the Role of Authorized Entities" presentation to the WIPO Regional Meeting for Heads of Copyright Offices in Arab Countries on the Beijing and Marrakesh Treaties, 14 April 2015, Muscat, Oman, WIPO/CR/MCT/15.

¹⁰⁴ Francisco Javier Martinez Calvo "Sharing accessible books in Arabic: How can the Marrakesh Treaty help?" (2014) Techshare Middle East <www.techshareme.org>.

¹⁰⁵ WIPO, Background Brief, above n 101. See also Fredric Schroeder "Literacy for the Blind without Borders Ending the Book Famine" (speech to the NFB convention, Orlando, Florida, 6 July 2013) referring to the sixty English speaking countries in the world and the Harry Potter and other popular books.

¹⁰⁶ See WIPO SCCR, Interventions by Non-Governmental Organizations, SCCR/21/13, 17 January 2010.

can be shared by virtually limitless number of entities, lowering copying and dissemination costs to close to zero.¹⁰⁷

Despite the benefits of cross-border exchange of accessible works, there is no such possibility in international copyright law. On the other hand, regulating the exhaustion of copyrights is left to national states.¹⁰⁸ Provisions on import and export of accessible copies do not appear to be common in national copyright laws due to the principle of territoriality of copyright.¹⁰⁹ Both the 1985 and the 2007 WIPO studies referred to lack of possibilities for cross-border exchange of accessible works as one of the difficulties that the visually impaired have to face.¹¹⁰

Some countries have arranged for distribution of accessible works to the visually impaired individuals. For instance, the Danish Library for the Blind can provide the visually impaired in the UK with accessible works except for those sent in electronic formats. Similarly, the Bookshare.org platform based in US can share around 4,000 to 43,000 of its accessible works globally.¹¹¹ However, there seems to be no country allowing export of accessible works to an organisation in another country that serves the visually impaired.

C The Road to Marrakesh

As mentioned, initiatives to improve the access for the visually impaired to copyright protected works dates back to 1980s. In 1981, WIPO and the United Nations Economic, Scientific and Cultural Organization (UNESCO) established a Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Produced by Copyright. In 1983, the Working Group produced a report on model exceptions to copyright law for national states.¹¹² The Working Group considered adoption of copyright flexibilities for the benefit of the visually impaired compatible with copyright protection, upon adhering to certain criteria. For instance,

¹⁰⁷ See Peter Osborne, Chief Braille Officer, Royal National Institute of Blind People, United Kingdom (Keynote speech to The Future of Braille: NLS Braille Summit, Watertown, Massachusetts, 19-21 June 2013) stating that “realized actual cost is in braille transcription, not in reproduction” < www.loc.gov>.

¹⁰⁸ See TRIPS, above n 45, art 6.

¹⁰⁹ See Sullivan, above n 7, at 47- 61 for a full analysis of export and import possibilities in international and some national copyright laws; and, at 10 stating that “in countries with fairly comprehensive provisions regarding the making of accessible copies under exceptions to copyright, there may still be problems where it is desired to move accessible copies between countries”.

¹¹⁰ See Noel, above n 88; and, Sullivan, above n 7.

¹¹¹ Whitehouse, above n 93, at 92.

¹¹² Report of the Working Group on Access by Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, above n 47.

the use shall be for non-commercial purposes and for the sole use of the visually impaired; and, production of accessible formats, beside braille, is to be decided by national lawmakers.¹¹³

The wording of the report is important for analysing the history of the interaction of the copyright and human rights of the visually impaired. The report stated that the proposed model flexibilities “should reflect a proper balance between the *needs* [emphasis added] of handicapped persons and the legitimate interests of copyright owners”.¹¹⁴ While the importance of states’ obligation under international copyright law and the exclusive rights of the authors are highlighted, there is no reference to states’ obligations under international human rights law and the rights of the visually impaired.¹¹⁵

In 1985, WIPO was presented with the result of a study it had commissioned on copyright problems raised by the access by handicapped persons to protected works.¹¹⁶ The study identified two main barriers to access for the visually impaired: (1) lack of copyright limitations and exceptions for the benefit of the visually impaired; and, (2) lack of possibilities for cross-border exchange of accessible works.¹¹⁷ The author of the study briefly mentioned the visually impaired persons’ right to participate in cultural life¹¹⁸ and concluded that:¹¹⁹

One possible way to solve both the production and distribution problems would be to create an entirely new international instrument addressing both matters. Such a “convention” would provide that the Contracting States permit the production of special media materials and services within their borders in accordance with the terms set out and, in addition, permit the free circulation of those materials and services amongst Contracting States.

Such a perspective on access for the visually impaired to copyright works was perhaps a result of the “social model” approach to disability that replaced the “medical model” from 1960s. The social model focused on the socially constructed environmental, economic and culture barrier for those with disabilities.¹²⁰ This approach was an advance on the medical model that viewed

¹¹³ At [17].

¹¹⁴ At [9].

¹¹⁵ At [17].

¹¹⁶ See Noel, above n 48.

¹¹⁷ At 25-26.

¹¹⁸ At 12, stating that “special provisions for the benefit of the handicapped would enable those who would not otherwise be able to participate in the cultural life of a community to do so. At the same time the moral and material interests of authors, although limited to some extent, would still be protected”.

¹¹⁹ At 25.

¹²⁰ See Colin Barnes and Mike Olivier “Disability Rights: Rhetoric and Reality in the UK” (1995) 10(1) *Disability and Society* 111; and, Tom Shakespeare “Disabled People’s Self-organisation: a new social movement?” (1993)

individuals with disabilities as subjects in need of medical treatment and institutionalisation.¹²¹ As apparent from the reference to the human right to culture in the 1985 WIPO Study, the disability agenda was reaching the international copyright policy making stage.¹²²

However, true recognition for the rights of the disabled arrived in mid-2000s with the “affirmative model” that focuses on empowering people with disabilities.¹²³ The consequences of the affirmative model are critical for access of the visually impaired to copyright works.

Many previous initiatives have discussed the human rights and needs of the visually impaired that are partly dependant on access to copyright works. However, adoption in 2006 of the UN Convention on the Rights of Persons with Disabilities (CRPD) gave new meaning to the previous non-binding disability related initiative.¹²⁴

In 2004, the WBU highlighted the connection between copyright and human rights of the visually impaired in a policy position by stating that:¹²⁵

The World Blind Union believes that in the information age access to information is a human right that must be enjoyed by all as a precondition for equal participation in society. This means that socially and economically disadvantaged people in general should be included and blind and partially sighted people in particular. The right to access to information is explicitly recognised by the international community in the UN standard rules on the Equalisation of Opportunities for Persons with Disabilities.

Developments in international copyright law that could benefit the visually impaired were happening concurrently with those in the international human rights arena. In 2005, the

8(3) Disability and Society 249. See generally Jerry Alan Winter “The Development of the Disability Rights Movement as a Social Problem Solver” in P Blanck (ed) *Disability Rights* (Ashgate Publishing, Aldershot, 2005).

¹²¹ See David Turner *Disability in Eighteenth-Century England. Imagining Physical Impairment* (Routledge, Oxford, 2012).

¹²² See Abbe Brown and Charlotte Waelde “Human rights, persons with disabilities and copyright” in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, Cheltenham, 2015) at 584.

¹²³ See John Swain and Sally French (eds) *Disability on Equal Terms* (Sage, London, 2008); J Swain and S French “Towards an Affirmative Model” (2000) 15(4) Disability and Society 569.

¹²⁴ CRPD, above n 26. See for example The Salamanca Statement and Framework for Action on Special Needs Education, adopted by the World Conference on Special Needs Education: Access and Equality, Salamanca, Spain, 7-10 June 1994; The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993; UNESCO World Declaration on Education for All, adopted by the Conference on Education for All on 9 March 1990; Sundberg Declaration, adopted by the World Conference on Actions and Strategies for Education, Prevention and Integration on 7 November 1981; UN Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975.

¹²⁵ The Policy Position agreed by the World Blind Union (WBU), the DAISY Consortium, and IFLA Libraries for the Blind Section (LBS) <www.euroblind.org>.

government of Chile requested the inclusion of copyright limitations “for the purposes of education, libraries and disabled persons” on the agenda of the WIPO Standing Committee on Copyright and Related Rights (SCCR).¹²⁶ Subsequently, a 2007 WIPO Study analysed the state of international and national copyright laws and their effects on the book famine.¹²⁷ Compared to the previous studies, the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired had a stronger human rights-based approach to access for the visually impaired. It referred to the UN human rights treaties and highlighted the rights to freedom of expression and opinion, access to information, and the right to participation in cultural life for the visually impaired.¹²⁸

Finally in 2009, Brazil, Ecuador and Paraguay together with the WBU presented the SCCR with a treaty proposal for facilitating access to copyright protected works for the visually impaired.¹²⁹ Following this proposal and after nearly 4 years of negotiations, WIPO Member States adopted the Marrakesh Treaty, which at the time of writing this thesis, has been signed by 82 states, 8 of which have also ratified the Treaty.¹³⁰ It will enter into force 3 months after twenty eligible countries ratify the Treaty.¹³¹

IV A Human Rights Framework for Copyright and Access for the Visually Impaired

The 2007 WIPO Study on copyright limitations and exceptions for the blind identified two areas that required further work. The study recommended that WIPO undertake further discussions on: (1) the relationship between copyright and the rights of the disabled people; and, (2) provision of advice about how to interpret the various international conventions and treaties.¹³²

¹²⁶ WIPO SCCR, Proposal by Chile on the Subject “Exceptions and Limitations to Copyright and Related Rights”, Document prepared by the Secretariat, Standing Committee on Copyright and Related Rights, SCR/12/3, 2 November 2004.

¹²⁷ See Sullivan, above n 7. See also two other older WIPO studies that also discussed access for the visually impaired: Nic Garnett, Automated Rights Management Systems and Copyright Limitations and Exceptions, SCCR/14/5, 27 April 2006; and, Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, 5 April 2003.

¹²⁸ Sullivan, above n 7, at 102-105.

¹²⁹ Proposal by Brazil, Ecuador and Paraguay, above n 23.

¹³⁰ As of 1 June 2015, Argentina, El Salvador, India, Mali, Paraguay, Singapore, United Arab Emirates, and Uruguay have ratified the Marrakesh Treaty <www.wipo.int/treaties>.

¹³¹ Marrakesh Treaty, above n 18, art 18.

¹³² Sullivan, above n 7, at 105-106.

This thesis argues that the copyright law is not in intrinsic conflict with the human rights of the visually impaired. Even advocates of the change to copyright, such as the WBU agree that “copyright is a legitimate form of moral and economic protection for creators of content and for those who add value to creative work”.¹³³

However, it can cause difficulties for the realisation of the human rights of the visually impaired that are dependent on access to copyright material. Due to the legal and financial constraints that the copyright law creates, the visually impaired have little say in what is made accessible. Therefore, they do not have a meaningful choice in exercising their right to information, culture, and science.

Prior to the adoption of the Marrakesh Treaty, the human rights implications of copyright flexibilities for the benefit of the visually impaired were neglected internationally. Until recently, it was assumed that the existing flexibilities in international copyright law instruments provided the national states with impetus and room to facilitate the access for the visually impaired. Therefore, little attention was given to whether the existing flexibilities sufficiently address the human rights responsibilities of states towards their visually impaired citizens.

This thesis explores how copyright law can optimise the realisation of human rights obligations of states towards the visually impaired. Having analysed the human rights claims of the visually impaired (chapter 2) and the role of copyright in their realisation (chapter 3 and 4), the thesis argues that adoption of the Marrakesh Treaty was necessary and a right step towards provision of access for the visually impaired and realisation of their human rights (chapter 5).

To address the shortcomings of the Marrakesh Treaty and improve the realisation of the human rights of the visually impaired, the thesis proposes adoption of a human rights framework for copyright to the extent it affects the access of the visually impaired (chapter 6). The thesis advocates the adoption of such a framework as the best answer to the question of how copyright law can better accommodate human rights claims of the visually impaired regarding access to copyright protected material.

The argument proceeds in 3 steps. First, the thesis establishes that the visually impaired have a legitimate human rights-based claim in requesting better access to copyright protected works. Chapter 2 illustrates the legitimacy of these claims.

¹³³ Presentation by the World Blind Union (WBU) to the WIPO SCCR Information Day, 3 November 2003, DIGVI/IM/03/DAVID MANN <www.wipo.int>.

Second, chapter 3 and 4 provide an analysis of the manner in which international and domestic copyright laws impact and address the issue of access for the visually impaired. Previous research has looked at the state of copyright limitations and exceptions for the visually impaired in on both national and international levels.¹³⁴ However, the analysis in chapters 3 and 4 is guided by the human rights nature of the claims of the visually impaired. Chapter 5 focuses on the Marrakesh Treaty as the most recent development in international copyright law that can improve the access for the visually impaired. In other words, chapters 2, 3, 4 and 5 develop the normative parameters of a human rights framework for copyright.

Third, chapter 6 proposes a human rights framework for addressing the access for the visually impaired that builds on the available options in domestic copyright law (chapter 3) and international copyright law (chapters 4 and 5). Chapter 6 also introduces a way forward in creating the aforementioned human rights framework.

Two main principles guide the adoption of a human rights framework for copyright law to the extent that it affects information-mediated human rights of the visually impaired: (1) optimisation of the existing options in order to address the difficulties that the visually impaired face in short term, and (2) rethinking the balance between copyright and human rights in the case of the visually impaired and the interaction of intellectual property law and human rights law more generally.

V *Significance of the Research*

The significance of this research is twofold. It contributes to the body of knowledge dedicated to resolving the problems that the blind and visually impaired people face in accessing copyright-protected works, as well as to the bigger study of interaction of intellectual property law and human rights law.

First, it contributes to improving the access of the visually impaired persons to copyright-protected works to the extent that it is affected by the copyright law. The research contributes to filling the gap in the knowledge regarding how copyright law can better accommodate the human rights of the visually impaired. As chapter 3 shows, many information-mediated human rights of the visually impaired are dependent on access to copyright protected material.

¹³⁴ See for example Sullivan, above n 7.

Therefore, better access to such material contributes to realisation of those human rights of the visually impaired. For instance, the visually impaired receive better education as a result of better access to textbooks and other educational material. This, in turn, improves their general and professional knowledge and their employment opportunities. They would also have better chances of accessing information and expressing their views, accessing culture and science and participating in the cultural and scientific life of their communities. Overall, the impact of better realisation of information-mediated human rights of the visually impaired is their stronger and more positive participation and involvement in society. Improved integration of the visually impaired in the society enriches their personal and professional lives and contributes towards development of their countries. In other words, addressing the role of copyright in book famine improves the human condition on an individual as well as societal and global level.

Second, this research is significant because it more generally sheds light on the interface of intellectual property law and human rights law, a topic that has been increasingly gaining importance. Although this study is focused on access of the blind and visually impaired to copyright protected material, it helps complete the puzzle that is the relationship between intellectual property rights and human rights. The structure of the thesis and the applied arguments can be helpful in addressing other areas of interaction between intellectual property rights and human rights.

The applied arguments, the analysis, and the reached conclusions can be used by other researchers to enrich the discussion of intellectual property and human rights particularly regarding user rights and what the Marrakesh Treaty and a human rights framework for copyright and access for the visually impaired could mean for the rights of other, possibly vulnerable, users. The final proposals (chapter 6) can also be used by decision makers in adopting policy or law that regulates intellectual property law and affects human rights. It would also help national governments in consolidating their potentially conflicting intellectual property and human rights responsibilities and make better decisions. The recommendations of the thesis can be used for reviewing and improving the existing or future intellectual property policy and law.

VI Scope and Delimitations

The normative sources of the thesis are international copyright law instruments, mainly the Berne Convention, the TRIPS Agreement, and WCT, in addition to copyright laws of a number of jurisdictions. International human rights instruments such as the UDHR, ICCPR, ICESCR, CRPD, and constitutional or other national fundamental norms regarding human rights of the visually impaired persons are also used.

In assessing the way in which countries have handled access of the visually impaired to copyright protected works in their domestic copyright law three copyright systems have been chosen consisting of the European Union, the Anglo-American system, and the developing countries. In total these groups cover 33 countries. These states and their copyright legislation represent different ways in which almost all countries in the world have addressed the needs of visually impaired regarding access to copyright protected works. Therefore, the thesis does not provide an account of all the countries in the world individually. Moreover, due to word constraints, the thesis does not engage with the underlying reasons for the different domestic approaches to provision of limitations and exceptions for the benefit of the visually impaired.

This thesis analyses the role of copyright law as a contributing factor to the book famine problem as well as the claims of the blind and visually impaired persons to copyright protected works. Therefore, it excludes the role of other factors such as infrastructure, financial resources, wealth, and development in creating the book famine.

Many other factors affect the access for the visually impaired and need to be addressed for equal and full realisation of human rights of the visually impaired. For instance, a visually impaired person may not be able to afford an accessible copy because of lack of financial resources caused by his disability. Similarly, a visually impaired individual may not be able to use available braille copies because they have lost their sight at an old age and are unable to learn braille. Visually impaired students may not be able to use electronic textbooks imported from another country because their school does not have the necessary resources to enable the use. These concerns relate to civil, political, economic, social, and cultural rights of the visually impaired. However, they are not discussed in this thesis because they are not directly related to copyright.

Access of the blind and others with visual impairments to literary and artistic works in formats rather than text also falls outside the scope of this thesis. For example, some museums and art galleries are now allowing the visually impaired to experience works of art such as paintings through reproduction of those works in 3D formats thanks to new technologies. The implications of these new developments both in the context of copyright law and human rights law could be the subject of further research in the future.

The other factor regarding the scope of the thesis worth noting is its focus on the interface of copyright law and human rights of the visually impaired that are affected by lack of access to copyright protected material. While this remains the main focus of the thesis, it occasionally refers to the bigger issue of interface between intellectual property law and human rights law in general. This is more prominent in chapter 6 that discusses adoption of a human rights framework for copyright law to the extent that it affects information-mediated human rights of the visually impaired. Many of the arguments provided throughout the thesis and the final recommendations in chapter 6 can be applied to the bigger discussion of intellectual property and human rights. However, as mentioned, the main focus of the thesis is limited to the relationship between copyright and the human rights of the visually impaired due to the complexity of the topic, time limitations and the imposed word limits.

VII Summary

Lack of access to books and other copyright protected material for the visually impaired has created a global book famine. Book famine is discriminatory against the visually impaired and negatively affects the realisation of their human rights that are dependent on access to copyright works. Advocates of the Right to Read movement consider copyright as one of the contributing factors to the book famine because of the difficulties that it creates for the visually impaired.

Since 1980s, WIPO and other international organisations have been exploring the role of copyright flexibilities that can facilitate the access for the visually impaired. In 2013, WIPO Member States adopted the Marrakesh Treaty to facilitate the access to published copyright works for the visually impaired.

This chapter provided the background to the research question, gave an outline of the thesis and an overview of the following chapters. The chapter highlighted the existing gap in the knowledge in the context of the relationship between copyright law and human rights of the

visually impaired for better access to copyright protected material. The significance of the research and its contribution to the body of knowledge on the interface of intellectual property law and human rights law as well as to the lives of visually impaired individuals were also mentioned. Finally, the scope and delimitations of the thesis were explained.

This thesis argues that the visually impaired have a legitimate human rights claim for demanding better access to copyright protected works; and, that copyright should better accommodate the access for the visually impaired and realisation of their human rights, which are also the main goals of the Marrakesh Treaty.

Therefore, the thesis aims to, first, analyse the interplay of the book famine, human rights, and copyright; second, propose a human rights framework for copyright to the extent it affects the access of the visually impaired; and, third, in accomplishing its first two goals, contribute to the bigger discussion of the interaction of intellectual property rights and human rights.

The next chapter gives a detailed account of the impact of the book famine on human rights of the visually impaired and its connection to copyright.

CHAPTER 2

BOOK FAMINE AND HUMAN RIGHTS OF THE VISUALLY IMPAIRED

“Access to communication in the widest sense is access to knowledge, and that is vitally important for us if we [the blind] are not to go on being despised or patronized by condescending sighted people. We do not need pity, nor do we need to be reminded we are vulnerable. We must be treated as equals - and communication is the way this can be brought about.”¹

-Louis Braille

I Introduction

This chapter discusses the impact of lack of access to copyright material on human rights of the visually impaired and its connection with copyright law. The chapter argues that access to copyright works is essential for realisation of many human rights of the visually impaired, and lack of satisfactory access to those works negatively affects their rights and subjects them to discrimination.

Therefore, the chapter first addresses the question of how lack of access to books and other copyright material for the visually impaired violates the principle of non-discrimination. The principle of non-discrimination is first discussed as a stand-alone issue and then referred to in relation to each human right affected by lack of access to copyright works.

To understand how lack of access to copyright protected works for the visually impaired leads to violation of the principle of non-discrimination, this chapter first outlines the legal status of the right to non-discrimination within the international human rights framework. The chapter then offers an overview of the different approaches to disability discrimination and equality and their impact on the claims of the visually impaired person regarding equal access to copyright works.

Part III of the chapter then discusses a number of human rights of the visually impaired that are affected by lack of access to copyright protected works. The right to education, culture and science, access to information, health, and employment are selected due to the significant impact of access to copyright works on these rights. Some of the rights are linked and there is

¹ Clifford Olstrom *Undaunted By Blindness* (Perkins School for the Blind, United States, 2011) at 161.

a degree of overlap between what they each cover. For instance, both the right to education and culture encompass access to knowledge.

In part III, the normative framework of the rights including their recognition in international and regional human rights instruments is outlined. The impact of lack of access to copyright works for the visually impaired on each right is analysed. Finally, considering the connection between access for the visually impaired and realisation of each right, states' obligations to respect, protect, and fulfil those rights are identified.

Having analysed non-discrimination and human rights of the visually impaired, the chapter concludes that copyright law and policy that stand in the way of access for the visually impaired and realisation of their human rights, are discriminatory and inconsistent with the human rights obligations of states.

II Non-discrimination and Access for the Visually Impaired

A Normative Framework of Non-Discrimination

The principle of non-discrimination in international human rights law requires that all human beings should be afforded the same rights and entitlements. This principle is present in the post-World War II documents that form the main body of international human rights law. Article 1 of the Universal Declaration of Human Rights (UDHR),² art 2(1) of the International Covenant on Civil and Political Rights (ICCPR),³ and art 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) require that their provisions should apply to all humans.⁴

... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The principle of non-discrimination is also recognised in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁵ the Convention on the

² United Nations General Assembly Universal Declaration of Human Rights [UDHR], adopted by General Assembly Resolution 217 A(III) of 10 December 1948, art 1.

³ United Nations International Covenant on Civil and Political Rights [ICCPR] 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) art 2 (1).

⁴ United Nations International Covenant on Economic, Social and Cultural Rights [ICESCR] 999 UNTC 3 (opened for signature 16 December 1966, entered into force 3 January 1976) art 2 (2).

⁵ United Nations International Convention on the Elimination of All Forms of Racial Discrimination [CERD] 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) art 1.

Elimination of All Forms of Discrimination Against Women (CEDAW),⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁷ the Convention on the Rights of the Child (CRC),⁸ and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).⁹

Later on, as a result of widespread disability-based inequalities, the international community deemed the adoption of a disabilities convention necessary. The United Nations General Assembly adopted the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2007 to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities”.¹⁰ Ensuring equality and non-discrimination for the disabled is present throughout the Convention in relation to all the discussed rights, and encompasses the right to reasonable accommodation.¹¹

The CRPD builds on already existing human rights and clarifies them; it emphasises and draws attention to the rights of the persons with disabilities in an environment where disabilities were institutionalised, and charity was the main tool for improving quality of life for persons with disabilities. By clarifying the rights of the persons with disabilities, the CRPD makes it easier for individuals and advocacy institutions to hold the Contracting Parties responsible for realisation of those rights. Finally, through its negotiation process as well as its content, the CRPD gave the persons with disabilities a voice to participate in decision making regarding their rights.¹²

The CRPD defines discrimination as:¹³

⁶ United Nations Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) arts 1-5.

⁷ United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) art 1.

⁸ United Nations Convention on the Rights of the Child [CRC] 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) art 2.

⁹ United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families [CMW] 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003) art 1.

¹⁰ United Nations Convention on the Rights of Persons with Disabilities [CRPD] 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 March 2008) at Preamble.

¹¹ Delia Ferri “The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective” in Gerard Quinn and Lisa Waddington (eds) *European Yearbook of Disability Law Volume 2* (Intersentia, Antwerp, 2010) 47 at 52.

¹² Paul Harpur “Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities” (2012) 27(1) *Disability & Society* 1 at 2.

¹³ CRPD, above n 10, art 2.

... any distinction, exclusion or restriction [on the basis of race, sex, or disability] which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The definitions of racial and gender-based discrimination in the CERD¹⁴ and the CEDAW¹⁵ are almost identical to that of the CRPD. The Committee on Economic, Social and Cultural Rights (hereinafter the CESCR or the Committee) uses similar wording to define “disability based discrimination” with regard to the rights in the ICESCR.¹⁶

Provisions against non-discrimination are also present in regional human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷ and its Protocol 12,¹⁸ the European Social Charter¹⁹ and its Additional Protocol,²⁰ the American Convention on Human Rights²¹ and its Additional Protocol in the Area of Economic, Social and Cultural Rights,²² and the African Charter on Human and People’s Rights.²³

The common elements of the non-discrimination principle in all human rights documents can be boiled down to three: (1) the non-discrimination principle prohibits a different treatment based on prohibited grounds; (2) such different treatment would hinder enjoyment of a number

¹⁴ CERD, above n 5, art 1.

¹⁵ CEDAW, above n 6, art 1.

¹⁶ Committee on Economic, Social and Cultural Rights [ESCR], General Comment No. 5: Persons with Disabilities, Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994 (Contained in Document E/1995/22) at [15] stating that “for the purposes of the Covenant, ‘disability-based discrimination’ may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.

¹⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 20 March 1952, entered into force 18 May 1954), art 14.

¹⁸ Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination ETS 177 (opened for signature 4 November 2000, entered into force 1 April 2005) art 1.

¹⁹ Council of Europe, the European Social Charter ETS 35 (opened for signature 18 October 1961, entered into force 26 February 1965).

²⁰ Council of Europe, Additional Protocol to the European Social Charter providing for a System of Collective Complaints (opened for signature 9 November 1995, entered into force 1 July 1998) art 1.

²¹ Organization of American States (OAS), American Convention on Human Rights “Pact of San Jose” (opened for signature 22 November 1969, entered into force 18 July 1978) art 1.

²² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” OASTS No. 69; 28 ILM 156 (opened for signature 17 November 1988, entered into force 16 November 1999).

²³ Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (opened for signature 27 June 1981, entered into force 21 October 1986) art 2.

of rights; and, (3) those rights need to be recognised human rights.²⁴ In other words, the non-discrimination principle prohibits a different treatment based on disability that would hinder enjoyment of recognised human rights.

There is arguably a case of differential treatment when a visually impaired individual cannot access a copyright work merely because of his or her disability. In such scenario, the visually impaired individual would be completely similar to a sighted person, who has access to the same work, except for lack of sight. This differential treatment is discriminatory because it hinders enjoyment of a number of human rights of that visually impaired person.

B Book Famine and Non-Discrimination

While wording of international human rights instruments promotes equality for all, difficulties with the notion of equality and its enforcement arise in practice. Commentators have defined the concepts of equality and non-discrimination in many different ways.²⁵ Moreover, there are different approaches to disability discrimination that were briefly discussed in chapter 1, including the social and medical models.²⁶ Discussing all these definitions and views is beyond the scope of this thesis. Therefore, the following sections only refer to approaches that help better understand the interaction of copyright protection, access for the visually impaired, and non-discrimination.

1 Formal and substantive equality

The concept of equality is one way of defining what discrimination means.²⁷ A formal approach to equality (formal justice) prescribes that equal treatment is achieved when individuals who are alike are treated alike.²⁸ According to the CESCR, “eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on

²⁴ Bruce Abramson *A Commentary on the United Nations Convention on the Rights of the Child: Article 2 The Right of Non-Discrimination* (Martinus Nijhoff Publishers, Leiden, 2008) at 18.

²⁵ See for example Aileen MacColgan *Discrimination, Equality and the Law* (Hart publishing, Oxford, 2014) for a detailed analysis of different views on the definition of equality and non-discrimination, mainly in the UK, the European Union, and the common law countries.

²⁶ See chapter 1(II) (A).

²⁷ MacColgan, above n 25, at 14.

²⁸ Patrick Shin “The Substantive Principle of Equal Treatment” (2009) 15 *Legal Theory* 149. See also Sandra Fredman “Equality: A New Generation?” (2001) 30(2) *Industrial Law Journal* 145 at 154-157; Gerard Quinn “The International Covenant on Civil and Political Rights and Disability: A conceptual framework” ; and, Aart Hendriks “The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons” in Theresia Degener and Yolan Koster-Dresse (eds) *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Martinus Nijhoff Publishers, London, 1995) 69 and 40 .

prohibited grounds.”²⁹ A formal approach to equality is compatible with equal recognition of human rights for everyone, including the visually impaired persons, in international human rights treaties. Therefore, as Shin argues, formal equality is necessary for a complete conception of equal treatment.³⁰

However, a formal view to equality calls for the assumption that everyone has the same ability to enjoy human rights. Therefore, this approach alone fails to provide meaningful equality because it overlooks the structural inequalities that exist in treatment of the persons with disabilities.³¹

A formal approach to equality may also prevent adoption of measures that could undo the effects of past disadvantages.³² The Constitution of South Africa has successfully addressed this risk by recognising formal equality while addressing the effects of past disadvantages. The Constitution provides that “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”³³

The CESCR in its General Comment 16 holds that for States parties to guarantee the exercise of the rights in the ICESCR, they must eliminate discrimination both formally and substantively.³⁴ Substantive equality includes equality of results, opportunities, and respect.³⁵ Fredman argues that substantive equality calls for positive action by the state and it encompasses the “equality of opportunity” and “equality of results” models.³⁶

²⁹ CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2), UN Doc E/C.12/GC/20, 2 July 2009, at [8(a)].

³⁰ Shin, above n 28, at 153, n 4.

³¹ Quinn, above n 28, at 72. See also McColgan, above n 25, at 14-15 for critique of the formal approach to equality.

³² McColgan, above n 25, at 21.

³³ Constitution of the Republic of South Africa 1996, s 9 (2).

³⁴ CESCR, General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), UN Doc E/C.12/2005/4, 11 August 2005, at [6]. See also CESCR, General Comment No. 20, above n 29, at [8] expressing the same view.

³⁵ Dagmar Schiek, Lisa Waddington, and Mark Bell *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, Portland, 2007) at 28.

³⁶ Sandra Fredman “Providing Equality: Substantive Equality and The Positive Duty to Provide” (2005) 21 South African Journal on Human Rights 613 at 167. This is in slight contrast with the categorisation of models of equality by Quinn, Rioux and Riddle, and Barnard and Hepple. They place “equality of opportunities” as a middle ground between “formal equality” and “equality of outcome”. Quinn, above n 28; Marcia Rioux and Christopher Riddle “Values in Disability Policy and Law: Equality” in Marcia Rioux, Lee Ann Bassar and Melinda Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, Leiden, 2011); Catherine Barnard and Bob Hepple “Substantive Equality” (2000) 59(3) Cambridge Law Journal 562.

According to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, equalization of opportunities “means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.”³⁷ Although documents such as the Standard Rules are not legally binding, they shape the policy and law-making at national levels.³⁸

Therefore, to avoid discrimination, countries need to pay attention to substantive inequalities that the visually impaired face, instead of merely comparing their formal treatment with other individuals in similar situations.³⁹ Structural equality goes hand in hand with the concept of accessibility accentuated through multiple articles of the CRPD.⁴⁰ In the context of structural equality, art 9 of the CRPD provides valuable guidelines on how countries can achieve pragmatic equality.⁴¹

Satz and Fineman's critique of the civil rights and social welfare approaches to disability discrimination overlaps with critique of the formal model of equality. Satz uses Fineman's theory of vulnerability in highlighting the deficiencies of both the civil rights approach and the social welfare approach to disability.⁴² According to Fineman, vulnerability is constant and universal.⁴³ One of the instances where vulnerability can be realised is in disability.⁴⁴ Therefore, disability as vulnerability is constant and universal. Based on that thesis, the government's response to vulnerability also needs to be universal and constant.

One of the deficiencies of the civil rights approach is fragmenting disability and having a situational approach to vulnerability.⁴⁵ A situational approach views disability as limited to discrete environment.⁴⁶ In the context of access for the visually impaired, this leads to limited provision of accessible books for the visually impaired through limited entities such as

³⁷ United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Resolution adopted by the General Assembly, A/ RES/ 48/96 of 4 March 1994, at 8.

³⁸ Rioux, Basser, and Jones, above n 36, at 419.

³⁹ See CESCR, General Comment No. 20, above n 209, at [8(b)].

⁴⁰ CRPD, above n 10, arts 9 and 19.

⁴¹ Ferri, above n 11, at 54.

⁴² Ani Satz “Disability, Vulnerability, and the Limits of Antidiscrimination” (2008) 83 Washington Law Rev 513 at 522.

⁴³ Martha Fineman “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20 Yale Journal of Law and Feminism 1.

⁴⁴ Satz, above n 42, At 522.

⁴⁵ At 541.

⁴⁶ Examples of a situational approach to disability in legislation are the American with Disabilities Act of 1990 (ADA), the US Rehabilitation Act of 1973, and the US Fair Housing Act of 1968.

educational institutions or libraries.⁴⁷ This view fails to recognise that the needs of the persons with disabilities for structural equality is constant and universal, and their vulnerability extends beyond specific spaces such as schools, libraries, or offices.

The implication of Fineman's view of disability discrimination is that the government cannot realise its obligations regarding equality and non-discrimination for example by merely providing students with accessible textbooks. While accessible textbooks or certain library titles may help fulfil a number of human rights of the visually impaired, this approach misses the bigger picture, which is providing access to and equality in all human rights. Therefore, this fragmented view of disability, which is also present in the treatment of the persons with disabilities in copyright law, is discriminatory.

As Satz points out, the identity approach to disability is another inherent deficiency of the civil rights approach to anti-discrimination.⁴⁸ The civil rights approach to disability discrimination identifies the disabled as belonging to different classes. Class membership "excludes some individuals with impairment from disability protection".⁴⁹

As chapter 1 highlighted, one of the shortcomings of the current system of copyright limitations and exceptions is lack of coverage for all the individuals with a disability that hinders reading of normal print. Many visually impaired individuals do not meet the requirements of the recognised classes of disability that would benefit from copyright limitations and exceptions. Therefore, when the copyright law (or other relevant legislation) has a limiting definition of print disability, and restricts the application of copyright limitations and exceptions to certain classes, it is discriminatory against those individuals who do not meet the criteria.⁵⁰

Moreover, Fineman's theory of vulnerability shows that the current legal system and its protection of disadvantaged groups fail to recognise the existing structural inequalities.⁵¹ The current legal system, according to Fineman, sees the needs of the disadvantaged groups like the disabled as exceptional. The same is true about treating the needs of the blind and visually

⁴⁷ See chapter 1 for a discussion of countries that confine the definition of authorised entities or the number and formats of accessible works.

⁴⁸ Satz, above n 42, at 535.

⁴⁹ At 535.

⁵⁰ See chapter 1 for a discussion of the definition of print disability. See also the WIPO, Standing Committee on Copyright and Related Rights (SCCR), Study on Copyright Limitations and Exceptions for the visually impaired, prepared by Judith Sullivan, SCCR/15/7, 20 February 2007 for a range of countries where print disability is limited to blindness, visual impairment, other disabilities or a combination thereof.

⁵¹ Satz, above n 42, at 525.

impaired for accessible formats as exceptional and not a manifestation of their human condition, as Fineman puts it.⁵²

The equivalent of substantive equality in the disability discrimination discussions seems to be the capabilities approach. The capabilities approach focuses on equality of opportunities.⁵³ Drawing on the capabilities approach, and emphasising the importance of differences between individuals, Rioux discusses a robust body of equality and disability rights literature:⁵⁴ the notion of “fetishism” by Sen that underlines the importance of background conditions of individuals for their interaction with goods;⁵⁵ the importance of differing social arrangements for persons with disabilities to live integrated and productive lives as advocated by Nussbaum;⁵⁶ and, Walzer’s notion of complex or positive equality that acknowledges the differences between individuals and the need for different treatment to arrive at a similar result or outcome.⁵⁷

To justify the need for a substantive principle for achieving equal treatment, Shin invokes the notion of right to “equal respect and concern”. He draws from the views of Rawls and Dworkin in arguing that equal treatment means equal respect and concern and not necessarily the sameness treatment.⁵⁸ Moreover, claims of equal treatment do not mean a request for unconditional entitlement.⁵⁹ A treatment that is disadvantageous to a group “relative to some appropriate comparison social group” is discriminatory.⁶⁰ Shin makes the same point by

⁵² At 526.

⁵³ For more on capabilities approach see Amartya Sen “Equality of What?” in Stephen Darwall (ed) *Equal Freedom: Selected Tanner Lectures on Human Values* (University of Michigan Press, Ann Arbor, 1995) 207; Amartya Sen *On Economic Inequality* (Clarendon, Oxford, 1997); Amartya Sen *Commodities and Capabilities* (Oxford University Press, New Delhi, 1999); Martha Nussbaum *Frontiers of Justice: Disability, Nationality Species Membership* (The Belknap University Press, Cambridge, Massachusetts, 2006); and, Jonathan Wolff and Avner De-Shalit *Disadvantage* (Oxford University Press, New York, 2007).

⁵⁴ Rioux and Riddle, above n 36, at 37.

⁵⁵ At 37; Sen describes “fetishism” as “tak[ing] primary goods as the embodiment of advantage, rather than taking advantage to be a relationship between persons and goods.” See Sen “Equality of What?”, above n 53, at 216.

⁵⁶ At 38.

⁵⁷ At 43.

⁵⁸ Shin refers to definition of Ronald Dworkin of equal treatment as the right “to be treated with the same respect and concerns as everyone else” and the right that one’s “interests be treated as fully and sympathetically as the interests of the others”. Shin, above n 28, at 155; see also John Rawls *A Theory of Justice* (Revised edition, Belknap Press, USA, 1999) at 447; Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, USA, 1978) at 180.

⁵⁹ At 149.

⁶⁰ Andrew Altman “Discrimination” in Edward Zalta *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition) available at <www.plato.stanford.edu>.

referring to a “comparative requirement of moral respect” that is necessary for ensuring equal treatment.⁶¹

Therefore, copyright laws that treat a sighted and a visually impaired individual (similar in every other aspect but for their ability to read normal print) the same are discriminatory. Visually impaired persons who cannot obtain accessible works because of their disability are in a disadvantaged position, compared to sighted individuals. Shin’s “comparative moral requirement” entails a copyright law that provides access for both visually impaired and sighted individuals for purposes of moral equality and equal treatment.

2 *De jure and de facto equality*

Another way of defining non-discrimination and equality is by categorising them as *de jure* or legal and *de facto* or in practice. *De jure* equality may seem identical to the idea of formal equality that refers to equal treatment of similarly situated individuals and requires equality before the law.⁶² Subsequently, *de facto* equality would be seen as substantive equality that is connected to equality of results.⁶³

Some commentators, however, argue that *de jure* equality encompasses formal and substantive equality as it relates to both equality before the law and in the law.⁶⁴ In this sense, *de jure* equality regarding the access for the visually impaired is achieved when their human rights, as well as their right to access to copyright works, are legally recognised. In this view, *de facto* equality does not equate substantive equality, but equality in practice. Therefore, while *de jure* equality ensures formal and substantive equality regarding the law, *de facto* equality is achieved through equal access to copyright works for the visually impaired in practice.

3 *Direct and indirect equality*

Article 2 of the CRPD prohibits direct and indirect discrimination.⁶⁵ For direct discrimination to occur there needs to be a less favourable treatment of an individual compared to others based

⁶¹ Shin, above n 28, at 164.

⁶² Katrina Frostell “Gender Difference and the Non-Discrimination Principle in the CCRP and the CEDAW” in Lauri Hannikainen and Eeva Nykänen (eds) *New Trends in Discrimination Law - International Perspectives* (Turku Law School, Turku, 1999) at 29.

⁶³ Frostell, above n 62, at 30. See also CESCR, General Comment No. 20, above n 29, at [8(b)] equating *de facto* equality to substantive equality.

⁶⁴ See Wouter Vandenhoele *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, Antwerp, 2005) at 35.

⁶⁵ CRPD, above n 10, art 2.

on a prohibited ground. However, direct discrimination can still happen “where there is no comparable similar situation.”⁶⁶

In its General Comment No. 20, the CESCR states that “indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.”⁶⁷ By this definition, indirect discrimination arguably does not require intent but applies to situations when certain measures lead to discriminatory treatment of the persons with disabilities.

Therefore, governments may not adopt certain copyright laws or policies with the intent of discriminating against the access of the visually impaired persons to books and realisation of their human rights. However, copyright laws and policies that limit the access for the visually impaired (less favourable treatment), because of their disability (prohibited ground), are indirectly discriminatory.⁶⁸

Moreover, the States Parties to the CRPD undertook to ensure and promote the full realisation of human rights of the persons with disabilities without any discrimination.⁶⁹ To that end, the Convention requires the States to take protection and promotion of the human rights of the persons with disabilities into account in all their policies and programmes.⁷⁰ In the context of access to copyright works, this translates into the need for the States Parties to consider access for the visually impaired, when enacting and implementing copyright policies. This would stop countries from enacting measures that may indirectly discriminate against the visually impaired persons. Also, by virtue of art 4 of the CRPD, parties need actively to take measures to abolish discrimination against persons with disabilities.⁷¹

The United Kingdom Equality Act of 2010 is an example of distinguishing between direct and indirect discrimination in national laws. This Act defines direct discrimination as a less favourable treatment because of a protected characteristic,⁷² such as disability. For direct discrimination to occur, because of disability, the less favourable treatment should not be a

⁶⁶ CESCR, General Comment No. 20, above n 29, at [10(a)]. See generally Mark Bell “Direct Discrimination” in Schiek, Waddington, and Bell, above n 35, at 185 for a detailed discussion of the direct discrimination in the laws of the European countries.

⁶⁷ CESCR, General Comment No. 20, above n 29, at [10(b)].

⁶⁸ See for a discussion of prohibited grounds above p 33.

⁶⁹ CRPD, above n 10, art 4 (1).

⁷⁰ Art 4 (1) (c).

⁷¹ Art 4 (1) (b).

⁷² Equality Act 2010 (UK), s 13(1).

proportionate means of achieving a legitimate aim.⁷³ Intent seems to be implied in the case of direct disability discrimination since s 15 of the Act does not apply if the perpetrator “did not know, and could not reasonably have been expected to know” about the disability.⁷⁴ Indirect discrimination, according to the Act, occurs when the less favourable treatment is in relation to, but not necessarily because of, a protected characteristic.⁷⁵

III Human Rights of the Visually Impaired

A Interrelatedness, Interdependency, and Indivisibility of Human Rights

The Vienna Declaration and Programme of Action defines the connection between different human rights as follows:⁷⁶

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Lack of access to books affects a number of human rights of the visually impaired persons. Some of those rights are discussed below in detail. However, interrelatedness, interdependency, and indivisibility of human rights mean that the realisation of and quality of access to these rights affect other rights of the visually impaired that are not mentioned in this chapter. Examples of such rights are the rights to religion,⁷⁷ to take part in the conduct of public affairs,⁷⁸ to vote,⁷⁹ and to an adequate standard of living.⁸⁰

⁷³ Ss 13(3) and 15(1).

⁷⁴ S15(2).

⁷⁵ S 19(1). See generally Dagmar Schiek “Indirect Discrimination” in Shiek, Waddington, and Bell, above n 35, at 323 for a detailed discussion of indirect discrimination in the laws of the European countries.

⁷⁶ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 25 June 1993, at Part I [5].

⁷⁷ ICCPR, above n 3, art 18

⁷⁸ Art 25 (a).

⁷⁹ Art 25 (b).

⁸⁰ ICESCR, above n 4, art 11. See also CESCR, General Comment No. 5, above n 16, at [33] stating that “in addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that ‘support services, including assistive devices’ are available ‘for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights’”. Use of some assistive devices for reading accessible formats is affected by the copyright protection.

B Right to Education

1 Significance of the right to education

Education is a right in itself and a means of promoting peace and respect for human rights generally.⁸¹ Human rights education is important as a means for increased awareness of and respect for human rights. Access to books for the visually impaired is, therefore, both necessary for realisation of their right to education, and for them to become familiar with their rights through human rights-focused education.

The right to education is also a precondition for the effective enjoyment and use of other human rights.⁸² This is in line with indivisibility and interdependence of all human rights.⁸³ For example, right to culture is “intrinsically linked to the right to education”, because effective education paves the way for access to culture.⁸⁴ Access to education is also important for the realisation of right to scientific freedom, since education enables an individual to undertake scientific endeavours.⁸⁵

The right to education as part of the economic, social and cultural category of human rights is indispensable for a human being’s dignity and the free development of his or her personality.⁸⁶ Education is even more crucial to realisation of human rights of the persons with disabilities, and their development. As highlighted in the preamble of the World Declaration on Education for All, “education is an indispensable key to, though not a sufficient condition for, personal and social improvement.”⁸⁷ The United Nations Children’s Fund (UNICEF) considers inclusion of children with disabilities in all aspects of society a matter of social justice and an essential investment in the future of that society.⁸⁸ More accessible material for children with

⁸¹ World Education Report, *The right to education: Towards education for all throughout life*, UNESCO, 2000, at 16.

⁸² Asbjørn Eide “Interdependence and Indivisibility of Human Rights” in Yvonne Donders and Vladimir Volodin (eds) *Human Rights in Education, Science and Culture* (UNESCO Publishing/Ashgate, Paris, 2007) 11 at 31.

⁸³ CESCR, General Comment No. 11, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Plans of action for primary education, UN Doc. E/C.12/1999/4, 10 May 1999.

⁸⁴ CESCR, General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009, at [2].

⁸⁵ Eide, above n 82, at 32.

⁸⁶ UDHR, above n 2, art 22.

⁸⁷ World Declaration on Education for All, adopted by the World Conference on Education for All, Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990.

⁸⁸ United Nations Children’s Fund (UNICEF), *Promoting the Rights of Children with Disabilities*, Innocenti Digest No. 13, 2007 at v.

disabilities means they will have a chance to study in normal schools and be better included in society.

Furthermore, access to education for the visually impaired persons benefits the states. If the “human person [is] the central subject of the development”, as stated in the Declaration on the Right to Development of 1986,⁸⁹ then education is crucial as a means for full development of the humans themselves.

In other words, personal and professional development of the persons with disabilities through education accelerates development of the states. Providing the visually impaired with educational opportunities through better access to print learning material helps them contribute to the development of their national states. It can also result in prevention and, consequently, a decrease in the number of future disabilities, since “a high percentage of disability is the direct result of lack of information, [as well as] poverty and low health standards.”⁹⁰ Reducing the incidence and prevalence of disabilities through education later reduces the demands on the limited financial and human resources of a country.⁹¹

2 Normative framework of the right to education

According to art 26 of the UDHR “everyone has the right to education”.⁹² To make the principles of the UDHR legally binding for the ratifying States, the same principle was reinstated in art 13 of the ICESCR.⁹³

The right to education was later recognised in the UN General Assembly’s Declaration of the Rights of the Child in 1959,⁹⁴ the UNESCO Convention against Discrimination in Education in 1960,⁹⁵ the UN General Assembly Declaration on the Rights of Disabled Persons in 1975,⁹⁶

⁸⁹ Declaration on the Right to Development adopted by the General Assembly of the United Nations, 1986, art 2.

⁹⁰ The Salamanca Statement and Framework for Action on Special Needs Education, adopted by the World Conference on Special Needs Education: Access and Equality, 7-10 June 1994, at 46.

⁹¹ At 46.

⁹² UDHR, above n 2, art 26.

⁹³ ICESCR, above n 4, art 13.

⁹⁴ United Nations Declaration of the Rights of the Child, Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959, principle 7.

⁹⁵ United Nations Economic, Social and Cultural Organization (UNESCO) Convention against Discrimination in Education 429 UNTS 93 (opened for signature 14 December 1960, entered into force 22 May 1962). Although disability is not mentioned as a prohibited ground for discrimination in education, the Convention is still of importance regarding general prohibition of discrimination in education. This Convention needs to be studied along with the Protocol Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of any Disputes which may arise between States Parties to the Convention against Discrimination in Education.

⁹⁶ United Nations Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975, principle 6.

the UNESCO Convention on Technical and Vocational Education in 1989,⁹⁷ the United Nations Convention on the Rights of the Child (CRC) in 1989,⁹⁸ and most recently, the Convention on the Rights of Persons with Disabilities (CRPD) in 2008.⁹⁹

The UN General Assembly provided an elaborate definition of the right to education in art 28 of the CRC. This article covers compulsory primary education, provision and accessibility of secondary and higher education, availability and accessibility of educational and vocational information and guidance, and encouragement of regular school attendance.¹⁰⁰ Article 29 of the CRC provides a list of goals that countries should aim for when providing child education.¹⁰¹

Similarly, art 24 of the CRPD “reflects a clear commitment to the principle of inclusive education as a goal. In this respect, it further advances the direction established in earlier documents.”¹⁰² The CRC and CRPD have mutually inclusive principles, which put together, clarify the importance of access to free and equal education especially for children with disabilities.

Other international instruments also focus on the right to education for marginalised or vulnerable groups. Examples of such documents include the Convention relating to the Status of Refugees,¹⁰³ the Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁰⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁰⁵ the International Convention on the Protection of the Rights of All Migrant Workers and Their Families,¹⁰⁶ and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹⁰⁷

⁹⁷ United Nations Economic, Social and Cultural Organization (UNESCO) Convention on Technical and Vocational Education 1649 UNTS 143 (opened for signature 10 November 1989, entered into force 21 August 1991).

⁹⁸ CRC, above n 8, art 23(3).

⁹⁹ CRPD, above n 10, art 24.

¹⁰⁰ CRC, above n 8, art 28.

¹⁰¹ Art 29.

¹⁰² UNICEF, Promoting the Rights of Children with Disabilities, above n 88, at 11.

¹⁰³ United Nations Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

¹⁰⁴ CERD, above n 5.

¹⁰⁵ CEDAW, above n 6.

¹⁰⁶ CMW, above n 9.

¹⁰⁷ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, adopted 3 February 1992.

The right to education is also present in many regional human rights treaties. Article 17 of the African Charter on Human and Peoples' Rights grants every individual the right to education.¹⁰⁸ Effective exercise of the right to education is highlighted in art 49 of the Charter of the Organization of American States.¹⁰⁹ Article 26 of the American Convention on Human Rights emphasises Member States' responsibility toward full realisation of rights set forth in that Convention.¹¹⁰ Other regional instruments with similar provisions are art XII of the American Declaration of the Rights and Duties of Man,¹¹¹ art 2 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹¹² art 13 of the Additional Protocol of San Salvador to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,¹¹³ art 11 of the African Charter on the Rights and Welfare of the Child,¹¹⁴ art 34 of the Arab Charter on Human Rights,¹¹⁵ art 17 of the European Social Charter,¹¹⁶ and art 14 of the EU Charter of Fundamental Rights.¹¹⁷

Following the rising concerns throughout the 1950-80s for the rights of the disabled persons, the 1990s saw the drafting of numerous instruments that indirectly addressed the right of everyone to education.¹¹⁸ Some of the events that marked the drafting of those documents are the World Summit for Children (1990), the United Nations Conference on Environment and Development (1992), the World Conference on Human Rights (1993), the World Conference on Special Needs Education: Access and Quality (1994), the International Conference on Population and Development (1994), the World Summit for Social Development (1995), the Fourth World Conference on Women (1995), the Mid-Term Meeting of the International

¹⁰⁸ African Charter on Human and Peoples' Rights, above n 23, art 17.

¹⁰⁹ Organization of American States (OAS), Charter of the Organization of American States (opened for signature 30 April 1948, entered into force 13 December 1951) art 24.

¹¹⁰ American Convention on Human Rights, above n 21, art 26.

¹¹¹ Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, 2 May 1948, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

¹¹² Council of Europe, Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 9 (opened for signature 20 March 1952, entered into force 18 May 1954).

¹¹³ Additional Protocol of San Salvador to the American Convention on Human Rights, above n 22.

¹¹⁴ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999).

¹¹⁵ League of Arab States, Arab Charter on Human Rights, adopted on 15 September 1994.

¹¹⁶ The European Social Charter, above n 19.

¹¹⁷ European Union, Charter of Fundamental Rights of the European Union 2012/C 326/02 (opened for signature 7 December 2000, entered into force 1 December 2009).

¹¹⁸ R van Laar and Claudia Tofan (eds) *Disabilities and Human Rights Documents* (International Courts Association Press, Oisterwijk (The Netherlands), 2008) vol 1 at 139-142.

Consultative Forum on Education for All (1996), the Fifth International Conference on Adult Education (1997), and the International Conference on Child Labour (1997).¹¹⁹

Other documents that were produced as a result of similar attempts to ensure the right to education for the persons with disabilities are the Standard Rules on the Equalization of Opportunities for Persons with Disabilities,¹²⁰ the Salamanca Statement and Framework for Action on Special Needs Education,¹²¹ the Dakar Framework for Action,¹²² the Jomtien Declaration and the Framework for Action as a result of the World Conference on Education for All,¹²³ and the Global Partnership on Children with Disabilities.¹²⁴ These documents “do not have the legally binding force of treaties, but in so far as their provisions substantially overlap with existing treaties and recommendations ... they provide an additional impulse to implementation of previous, formally agreed commitments.”¹²⁵

The right to education and the importance of equal access to education for persons with disabilities are also commonly mentioned in national education legislation.¹²⁶ Some examples include the United Kingdom’s Disability Discrimination Act 1995, which asks for an equal right to education for students with disabilities;¹²⁷ the United States’ No Child Left Behind Act 2001,¹²⁸ and the Individuals with Disabilities Education Improvement Act 2004;¹²⁹ the Canadian Human Rights Act 1977, which prohibits any discrimination including in relation to right to education on the ground of disability;¹³⁰ and the Australian Disability Discrimination Act 1992.¹³¹

¹¹⁹ The Dakar Framework for Action, Education for All: Meeting our Collective Commitments, adopted by the World Education Forum, Dakar, Senegal, 26-28 April 2000, UNESCO, 2000, ED-2000/WS/27, at 8.

¹²⁰ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, above n 37.

¹²¹ Salamanca Statement and Framework for Action on Special Needs Education, above n 90.

¹²² The Dakar Framework for Action, above n 119.

¹²³ World Declaration on Education For All and the Framework for Action to Meet Basic Learning Needs, adopted by the World Conference on Education for All, Jomtien, Thailand, 5-8 March 1990.

¹²⁴ United Nations Children’s Fund (UNICEF) Global Partnership on Children with Disabilities (GPc wd) is guided by the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC). The GPc wd provides a platform for collective action and advocacy to promote the rights of children with disabilities in both the child and the disability rights agenda at the global, regional, and country levels <www.gpcwd.org>.

¹²⁵ UNESCO “World Education Report 2000, The right to education: towards education for all throughout life” (UNESCO Publishing, 2000) at 23.

¹²⁶ Education Act 1989 (NZ), s 8 (1).

¹²⁷ The Disability Discrimination Act 1995 (UK).

¹²⁸ The No Child Left Behind Act of 2001 (US).

¹²⁹ Individuals with Disabilities Education Improvement Act 2004 (US).

¹³⁰ Human Rights Act 1977 (Canada).

¹³¹ Disability Discrimination Act 1992 (Australia).

3 *Book famine and the right to education*

The right to education, as recognised in international human rights law, is a complex right and has many elements. First is the distinction between a) access to education, and b) quality of education and the goals that it aims to achieve. Another way to analyse the right to education is with regard to its nature: formal and informal. Formal education is what is taught at an institution through a structured process. Informal education is what is available outside of formal institutions.¹³² Finally, the importance of accessible books for the realisation of the visually impaired persons' right to education can be evaluated by considering states' obligations under international human rights treaties.

(a) Equality of access to education v quality of education

As discussed, under international human rights law the blind and visually impaired have the right to enjoy equal access to education. However, a recent monitoring report of the Convention on the Rights of the Child acknowledged that “the challenges faced by children with disabilities in realizing their right to education remain profound” and that they are “one of the most marginalized and excluded groups in respect of education”.¹³³

A UNESCO Background Note prepared by the Task Force on inclusive education for the global Partnership on Children with Disabilities suggests that 98% of children with disabilities in developing countries do not attend school.¹³⁴ The degree to which lack of access to accessible learning material contributes to the low rate of access to education for children with disabilities in developing countries is unclear. However, it is, without a doubt, one of the key reasons since textbooks are one of the very first requirements of access to education. Moreover, availability as well as quality of the accessible textbooks and other learning material plays an important role for the educational performance of children with disabilities, even if they are present at school. Analytical work sponsored by the World Bank in 1970 suggested that textbook

¹³² L Cattrijsse “Children’s Rights and Education: The Right TO, IN and THROUGH Education: three interrelated imperatives” in E Verhellen (ed) *Understanding Children’s Rights 200- No. 6* (Children’s Rights Centre, Gent, 2001) at 621, and M Novak “The Right to Education- Its meaning, significance and limitations” (1991) 4 *Netherlands Quarterly of Human Rights* 418 at 423.

¹³³ United Nations General Assembly, Status of the Convention on the Rights of the Child, Report of the Secretary General, A/66/230, United Nations, New York, 3 August 2011, at 8.

¹³⁴ Background Note for the Global Partnership on Children with Disabilities, Task Force on the Global Partnership for Education (GPE), 2013, accessed on 26 December 2013 <www.unicef.org>.

availability was the single most consistent correlate of academic achievement in developing countries.¹³⁵

The CESCR suggests four standards for assessing the extent to which the right to education has been achieved. Those standards are the concepts of availability, accessibility, acceptability and adaptability.¹³⁶ Therefore, non-discrimination in education should also be in line with these four components.

These four standards are also in line with the criteria that the Secretariat of the Education for All Forum considers necessary for equitable education. The most relevant element to access of the visually impaired to copyright works is the requirement that “opportunities, facilities and programmes appropriate to specific needs and requirements of all people are available and used”.¹³⁷ The report goes on to argue that equitable education for all does not mean the same for all since “the same for all can mean greater inequity”.¹³⁸ This is the same argument that proponents of structural equality, as opposed to formal equality, put forward when discussing how to overcome disability based discrimination.¹³⁹

Access to education alone does not fulfil visually impaired people’s right to education. Articles 13 and 14 of the ICESCR are good examples for analysing this idea. According to art 13(1), States Parties agree that education shall contribute to “full development of the human personality and the sense of its dignity” and that it shall “enable all persons to participate effectively in a free society”.¹⁴⁰ This means that the quality of the education that the visually impaired receive is important in measuring a State Party’s success in realising the right to education for the visually impaired persons. Article 14 of the ICESCR requires countries to work out a plan within two years of signing the Covenant for progressive provision of free compulsory primary education, (if they do not already have a plan in place).¹⁴¹

¹³⁵ Stephen Heyneman “The Role of Textbooks in a Modern System of Education: Towards High Quality Education for All” in Cecilia Braslavsky (ed) *Textbooks and Quality learning for All: Some Lessons Learned from International Experience* (UNESCO: International Bureau of Education, Paris, 2006) 31 at 38.

¹³⁶ New Zealand Human Rights Commission “Disabled Children’s Right to Education” (2009), at 9. Original source in general comments.

¹³⁷ Malcom Skilbeck *Education for All, 2000 Assessment, Global Synthesis* (UNESCO, Paris, 2000) at 69.

¹³⁸ At 69.

¹³⁹ Shin, Quinn, and Hendriks, above n 28; Satz, above n 42.

¹⁴⁰ ICESCR, above n 4, art 13(1); See also CESCR, above n 84, at [27] stating that “educational programmes should also transmit the necessary knowledge to enable everyone to participate fully and on an equal footing in their own and in national communities”.

¹⁴¹ ICESCR, above n 4, art 14.

The views that the Standard Rules on the Equalization of Opportunities for Persons with Disabilities express in relation to equality are in line with the substantive equality approach discussed earlier. According to the definition of equalization of opportunities by the Standard Rules, visually impaired persons would not have the same opportunities as sighted persons if not provided with the same level of access to copyright protected material as the primary source of gaining information and the secondary means to access other aspects of the society.¹⁴²

When it comes to accessible educational material, technological advancements help the visually impaired through assistive technologies that facilitate overcoming obstacles to reading normal print. Access to assistive technologies, such as the text-to-speech feature, that “help a child read and process information in order to participate in the classroom” is particularly important for realising children with disabilities’ right to inclusive education.¹⁴³ Therefore, the interaction of technological protection measures (TPMs) imposed by copyright and the assistive technologies affects the access for the visually impaired students.¹⁴⁴

(b) Formal and informal education

From the point of view of access to formal and informal education, states’ responsibility with regard to right to education does not end with providing visually impaired students with accessible textbooks. First, sighted students have access to many print resources outside of the formal curriculum that are only available to the sighted. Therefore, to truly provide the visually impaired persons with an equal formal education, they should be offered the same chances in accessing books besides textbooks.

Furthermore, informal education happens outside of school and other educational institutions and, for this, visually impaired persons need accessible books other than their textbooks.

Some authors believe that the international obligation of countries regarding right to education is limited to formal education.¹⁴⁵ However, states’ responsibility in relation to informal education is more in line with the objectives and purposes of the right to education provisions that are holistic and hard to achieve solely through formal education. Moreover, the Committee

¹⁴² Standard Rules on the Equalization of Opportunities for Persons with Disabilities, above n 37, at 8.

¹⁴³ United Nations Children’s Fund (UNICEF), *The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education*, Position Paper, 2012, UNICEF/eMG/3358/McConnico, at 75.

¹⁴⁴ See chapter 1 for a discussion of TPMs and copyright limitations and exceptions.

¹⁴⁵ See G Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1998) at 233.

on the Rights of the Child (CRC) comments on State Parties' works regarding informal education in different documents.¹⁴⁶

4 Obligations of states

The Committee on Economic, Social, and Cultural Rights (CESCR) have recognised three main responsibilities for states in its general comments.¹⁴⁷ These responsibilities are the obligation to respect, protect, and fulfil. The implications of each of these responsibilities with regards to provision of access for the visually impaired to copyright works are discussed below.

(a) Obligation to respect

The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education.¹⁴⁸ According to the CESCR, States' failure to take measures which address de facto educational discrimination is a violation of art 13 of the ICESCR.¹⁴⁹

Copyright law has the potential to interfere with the visually impaired persons' right to education, through limiting their access to textbooks and other educational material under copyright protection. Copyright laws that make it impossible or unreasonably difficult for visually impaired individuals or educational institutions to produce or acquire accessible educational material are not compatible with the right to education. Therefore, to respect the right to education, countries need to ensure that their copyright law is compatible with the realisation of the right to education for the visually impaired.

(b) Obligation to protect

Under the obligation to protect, States need to stop third parties from interfering with rights.¹⁵⁰ By giving the copyright holders the possibility to unreasonably limit production and

¹⁴⁶ Some of the instances where the Committee has commented on informal education are: CRC Committee, Concluding Observations: Azerbaijan (UN Doc. CRC/C/66, 197) at [306]; Mozambique (UN Doc. CRC/C/114, 2002) at [306]; El Salvador (UN Doc. CRC/C/15/Add.232, 2004) at [58]; Japan (UN Doc. CRC/C/15/Add.231, 2004) at [50]; India (UN Doc. CRC/C/94, 2000) at [90]; Gabon (UN Doc. CRC/C/114, 2002) at [230]; Nigeria (UN Doc. CRC/C/50, 1996) at [91]; Burkina Faso (UN Doc. CRC/C/121, 2002) at [478]; and Madagascar (UN Doc. CRC/C/133, 2004) at [309].

¹⁴⁷ See for example CESCR, General Comment No. 5, above n 16; General Comment No. 11, above n 82; General Comment No. 16, above n 34; General Comment No. 20, above n 29; and, General Comment No. 21, above n 84.

¹⁴⁸ CESCR, General Comment No. 13, The right to education (article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, at [47].

¹⁴⁹ At [59].

¹⁵⁰ At [47].

distribution of accessible works, States are failing to protect the right to education for the visually impaired persons.

(c) Obligation to fulfil

The States' obligation to fulfil includes the elements of facilitation and provision of education.¹⁵¹

(i) Obligation to facilitate

The obligation to facilitate requires States to “take positive measures that enable and assist individuals and communities to enjoy the right to education.”¹⁵² Part of the responsibility to facilitate is taking positive measures to ensure that education is of good quality for all.¹⁵³ Therefore, provision of accessible educational material, as a factor that affects the quality of education for the visually impaired, is necessary for fulfilment of States' obligations.

Moreover, art 24 of the CRPD states that education of disabled students should be delivered in the most appropriate “modes and means of communication”.¹⁵⁴ The appropriateness of the modes and means is evaluated by their contribution to academic and social development. As far as the educational content is conveyed through copyright works, the most appropriate modes and means of communicating those materials for visually impaired persons is through accessible copies of those works.

(ii) Obligation to provide

Another aspect of the States' obligation to fulfil the right to education is with regards to provision of “teaching materials”.¹⁵⁵ Similar to the obligation to facilitate, this aspect of fulfilment of the right to education also underlines the importance of provision of accessible material for the visually impaired students.

Similarly, in the context of CRC, if articles 28 and 29 are read together, they show that access to education alone does not fulfil the right to education if the aims of education are not achieved.¹⁵⁶ The provision of accessible educational material for the visually impaired students

¹⁵¹ At [46].

¹⁵² At [47].

¹⁵³ At [50].

¹⁵⁴ CRPD, above n 10, art 24.

¹⁵⁵ CESCR, General Comment No. 13, above n 148, at [50].

¹⁵⁶ M Mehedi, *The Realisation of Economic, Social and Cultural Rights. The Realisation of the Right to Education, including Education in Human Rights - The Content of the Right to Education* (UN Doc. E/CN.4/Sub.2/1190/10, 1999) para 40.

is one of the measures that encourages regular school attendance,¹⁵⁷ and contributes to “development of the child's personality, talents and mental and physical abilities to their fullest potential.”¹⁵⁸

Moreover, in countries like the United States, textbooks are offered to students free of charge as part of the system of public education.¹⁵⁹ In such countries, the visually impaired students should also receive free copies of teaching material in a format accessible to them. Where students are asked to pay for their textbooks, the price of the accessible textbooks should be set at a standard that is comparable to the normal copies in terms of affordability for the majority of the visually impaired.

However, providing visually impaired students with free or affordable accessible formats of textbooks does not translate to equal enjoyment of the right to education. While accessible text books guarantee the bare minimum, they still leave students with visual impairments at a disadvantage due to their disability. Sighted students have access to a wide range of books and extracurricular material that can help and enhance their results and educational experience while, in most cases, a visually impaired student has to undertake the trouble and cost of converting a normal book to an accessible format on their own or turn to libraries or other organizations to provide them with this material.

Because of the progressive nature of the right to education, the ICESCR and the CRC focus on primary education.¹⁶⁰ However, higher education students face similar, if not bigger, difficulties regarding their right to education. In fact, the problems that tertiary students with visual disabilities face are more complex, than those encountered by primary and secondary students, due to the larger domain of books and other print material used in university level courses. In many cases, there are no set textbooks for courses and, even if there are such books, they only form part of the course resources along with other material that may change every year or so depending on the lecturer or new developments in that area of knowledge. Relevant

¹⁵⁷ CRC, above n 8, art 28 (1) (e).

¹⁵⁸ Art 29 (1) (a).

¹⁵⁹ See Margaret Chon “Copyright and capability for education: An approach ‘from below’” in Tzen Wong and Graham Dutfield (eds) *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge University Press, New York, 2011) 218 at 226 discussing the availability and shortage of textbooks internationally and in the United States.

¹⁶⁰ See CESCR, General Comment no. 13, above n 148, at [51] stating that “the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education. This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties”.

research done in Australia shows that, generally, students with disabilities receive less support from universities in obtaining recommended readings compared to essential readings, and in cases where students are offered the recommended material in accessible formats, it is not done in a timely manner.¹⁶¹

Free and compulsory education for all is a progressive obligation for the States. It should however progress on an equal basis for sighted and the visually impaired. While progressive realisation is designed to accommodate different levels of development and availability of resources, states have the obligation to move as expeditiously and effectively as possible towards the full realisation of such rights.¹⁶² Therefore, difficulties that lack of access to books creates for right to education of the visually impaired persons cannot be justified by reference to its progressive nature. States need to address lack of accessible books due to limitations caused by copyright “to the maximum extent of their available resources”.¹⁶³ Finally, by not taking legislative measures for bringing the copyright law in line with their human rights commitments States are also in violation of their obligation for progressive fulfilment.¹⁶⁴

In a position paper in 2012 on the right of children with disabilities to education, UNICEF argued that “a right-based approach to education requires more than ‘business as usual’”.¹⁶⁵ The Dakar Framework for Action acknowledged that “the learning needs of the disabled demand special attention. Steps need to be taken to provide equal access to education to every category of disabled persons as an integral part of the education system.”¹⁶⁶ Therefore, providing all children with the same teaching material does not lead to inclusive education.

Providing students with disabilities with affordable accessible textbooks and learning material can be considered, along with enrolment in normal schools and physical accommodation, as part of the inclusive approach to education that has “received numerous global endorsements, including at the 1994 World Conference on Special Needs Education¹⁶⁷ and, since 2002,

¹⁶¹ Paul Harpur and Rebecca Loudoun “The barrier of the written word: analysing universities’ policies to students with print disabilities” (2011) 33 *Journal of Higher Education Policy and Management* 153 at 160.

¹⁶² CESCR, General Comment No.17, The right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), UN Doc. E/C.12/GC/17, 12 January 2006, at [26], n 19.

¹⁶³ The Committee on Economic, Social and Cultural Rights, General Comment No. 3, the nature of States Parties Obligations, UN Doc E/1991/23, annex III at 86 (1991).

¹⁶⁴ CESCR, General Comment 21, above n 85, at [28], n 21.

¹⁶⁵ UNICEF, *The Right of Children with Disabilities to Education*, above n 144, at 30.

¹⁶⁶ The Dakar Framework for Action, above n 119, at 75.

¹⁶⁷ UNICEF, *Promoting the Rights of Children with Disabilities*, above n 88, at 27, box 5.1.

through the global Education for All initiative¹⁶⁸ on the right to education for persons with disabilities.”¹⁶⁹ The 2007 report of the UN Special Rapporteur on the right to education¹⁷⁰ requires States Parties to the CRPD to “ensure an inclusive education system.”¹⁷¹

Considering the provision of access to copyright material for the visually impaired students as part of the right to education is in line with the Vienna Convention rules for treaty interpretation that require attention to be paid to a treaty’s “object and purpose”.¹⁷² If the objects and purposes of the treaties that recognise the right to education are for everyone to access education and benefit from its results, then enforcement of this right calls for measures that would guarantee fulfilment of those goals and purposes. Furthermore, the implication of adhering to the principle of non-discrimination regarding right to education is that states should provide structural equality and not formal equality when providing equal and accessible education for visually impaired persons.¹⁷³

C The Right to Culture and Science

The right to culture accompanies the right to science in international and regional human rights documents and the right to access to information fall under the umbrella of access to knowledge.

Access to culture and participation in the cultural life of society is important for personal development of the individuals. The goal of inclusion of the visually impaired persons in society will not be fulfilled without them having access to culture and the chance to participate in cultural life. To participate in cultural life and enjoy the benefits of scientific progress, the visually impaired individuals need access to cultural and scientific material.

¹⁶⁸ UNICEF, *The Right of Children with Disabilities to Education*, above n 143, at 8; United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Bank, *The Education For All (EFA) flagship: the right to education for persons with disabilities, towards inclusion*, 2004.

¹⁶⁹ United Nations Children’s Fund (UNICEF), *The State of the World’s Children 2013, Children with Disabilities*, 2013, at 29.

¹⁷⁰ United Nations Human Rights Council, *The Right to Education for Persons with Disabilities: Report of the Special Rapporteur on the Right to Education*, Vernor Munor, A/HRC/4/29, 2007.

¹⁷¹ New Zealand Human Rights Commission, above n 136, at 22.

¹⁷² United Nations, *Vienna Convention on the Law of Treaties* [Vienna Convention] 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 31.

¹⁷³ See Mieke Verheyde “Article 28: The Right to Education” in A Alen and others (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2006) at 36 discussing how art 28(1) of the Convention on the Rights of the Child subjects art 2(1) of the convention (on right to education) to principle of non-discrimination and therefore “more explicitly obliges the States not only to ensure formal equality but also substantive equality which often requires affirmative action policies”.

Although cultural rights belong to the economic, social and cultural category of human rights they also cover parts of the civil and political rights. Individuals need a degree of civil and political freedoms along with fulfilment of their socio-economic rights to practice their cultural rights. Civil and political freedoms as well as a reasonable standard of living, education, and health are prerequisites of the right to culture.¹⁷⁴

Enjoying the culture and benefits of scientific progress and its application has many implications. This chapter only discuss those aspects of these rights that are relevant to the discussion of copyright and access to copyright protected material for the visually impaired.

1 The normative framework of the right to culture and science

The right to culture and science was first mentioned in art 27(1) of the UDHR¹⁷⁵ and later incorporated as a binding norm in art 15(1) (a) and (b) of the ICESCR.¹⁷⁶ The right of access to and participation in cultural life for minorities and indigenous people is mentioned in United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹⁷⁷, the International Covenant on Civil and Political Rights,¹⁷⁸ the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,¹⁷⁹ the United Nations Declaration on the Rights of Indigenous Peoples,¹⁸⁰ and the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in independent Countries.¹⁸¹

The CEDAW and the CERD address the equality in access to cultural rights in their art 13¹⁸² and 5(d) (e) respectively.¹⁸³ The CRC recognises the right to participation in cultural life for children.¹⁸⁴ The Convention does not, however, refer to the right to science.

¹⁷⁴ Boutros Boutros-Ghali “The right to culture and the Universal Declaration of Human Rights” in UNESCO Cultural Rights as Human Rights (UNESCO, Paris, 1970) at 73- 75.

¹⁷⁵ UDHR, above n 2, art 27(1).

¹⁷⁶ ICESCR, above n 4, art 15(1) (a) and (b).

¹⁷⁷ CMW, above n 9, art 43(1) (g).

¹⁷⁸ ICCPR, above n 3, art 27.

¹⁷⁹ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, above n 106, art 2(1) and (2).

¹⁸⁰ United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly, A/RES/61/295, 2 October 2007, arts 5, 8 and 10.

¹⁸¹ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in independent Countries (opened for signature 27 June 1989, entered into force 5 September 1991) 72 ILO Official Bull. 59; 28 ILM 1382 (1989), arts 2, 5, 7, and 8.

¹⁸² CEDAW, above n 6, art 13 (c).

¹⁸³ CERD, above n 5, art 5(d) (e).

¹⁸⁴ CRC, above n 8, art 31.

The latest international human rights document to recognise right to culture and science is the Convention on the Rights of Persons with Disabilities (CRPD). According to art 30(1) of the CRPD, the “States Parties recognise the right of persons with disabilities to take part on an equal basis with others in cultural life”.¹⁸⁵

At the regional level, these rights are mentioned in the American Declaration on the Rights and Duties of Man,¹⁸⁶ the Additional Protocol to the American Convention on Human Rights,¹⁸⁷ and the African Charter on Human and People’s Rights.¹⁸⁸ The importance of culture is also present in the United Nations Charter¹⁸⁹ and the UNESCO Constitution.¹⁹⁰

2 *The book famine and the right to culture*

International law does not define the meaning of cultural rights despite the recognition afforded to the right to cultural life in international human rights law.¹⁹¹ Therefore, the right to culture is at best underdeveloped.¹⁹²

¹⁸⁵ CRPD, above n 10, art 30 (1).

¹⁸⁶ American Declaration of the Rights and Duties of Man, above n 111, art 13.

¹⁸⁷ Additional Protocol to the American Convention on Human Rights above n 22, art 14.

¹⁸⁸ African Charter on Human and Peoples’ Rights, above n 23, art 22. See also the European Court of Human Rights “Cultural rights in the case-law of the European Court of Human Rights” (Council of Europe, 2011) at 3 stating that “although neither the Convention nor the Court explicitly recognise the ‘right to culture’ or the right to take part in cultural life, unlike other international treaties, the Court’s case-law provides interesting examples of how some rights falling under the notion of ‘cultural rights’ in a broad sense can be protected under core civil rights, such as the right to respect for private and family life (Article 8 of the Convention), the right to freedom of expression (Article 10) and the right to education (Article 2 of Protocol No. 1)”.

¹⁸⁹ United Nations, Charter of the United Nations, 1 UNTS XVI, 24 October 1945, arts 13 and 55.

¹⁹⁰ UN Educational, Scientific and Cultural Organisation (UNESCO), Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), adopted in London in 16 November 1945, art 1.

¹⁹¹ See Donders, above n 81, at 234; See also Lyndel Prott “Cultural Rights as Peoples’ Rights in International Law” in James Crawford (ed) *The Rights of People* (Clarendon Press, Oxford, 1998) 93.

¹⁹² For more on the underdevelopment of the right to culture see Yvonne Donders “Towards a right to cultural identity in international human rights law” paper presented at International Forum on Diversity and Cultural Rights, Sao Paulo, Brazil, 31 March- 2 April 2004, at [43-45]; Stephen Hansen “The right to take part in cultural life: Toward defining minimum core obligations related to Article 15(1) (a) of the International Convention on Economic, Social and Cultural Rights” in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, Antwerp, 2002) at 282-283; Janusz Symonides “Cultural Rights” in Janusz Symonides (ed) *Human Rights, Concept and Standards* (UNESCO, Paris, 2000) at 175- 227; Commission on Human Rights “The Realization of Economic, Social and Cultural Rights: Final Report submitted by Mr. Danilo Türk, Special Rapporteur” UN Doc. E/CN.4/Sub.2/1992/16, 3 July 1992.

A common proposition regarding the definition of culture is that it has many dimensions.¹⁹³ The CESCR summarises the different approaches to conceptualising culture in its General Comment No. 21.¹⁹⁴

The Committee considers that culture, for the purposes of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief system, 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.

Based on this definition and in the context of art 15 of the ICESCR, the Committee enumerates three components for the right to participate in cultural life: (a) participation, (b) access to, and (c) contribution to cultural life.¹⁹⁵

(a) Participation

The interrelatedness of the right to culture and the right to access to information manifests itself in the definition of the CESCR of the participation element that covers everyone's right to seek and develop cultural knowledge and expressions.¹⁹⁶

¹⁹³ Culture has been defined as: "the set of distinctive spiritual, material, intellectual and emotional features of a society or social group, [that] encompasses, in addition to art and literature, lifestyle, ways of living together, value systems, traditions and beliefs." UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001; "a social phenomenon resulting from individuals joining and cooperating in creative activities ... not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate" UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, at [5][a] and [c] of the Preamble; "[covering] those values, beliefs, convictions, languages, knowledge and the arts, tradition, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development" Fribourg Declaration on Cultural Rights, adopted in Fribourg, 7 May 2007, art 2(a); "the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life" Rodolfo Stavenhagen "Cultural Rights: A social science perspective" in Halina Niec (ed) *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights* Check citation format (UNESCO Publishing and Institute of Art and Law, Paris and Leicester, 1998) at 4- 5.

¹⁹⁴ CESCR, General Comment No. 21, above n 84, at [13].

¹⁹⁵ At [15].

¹⁹⁶ At [15(a)].

(b) Access

The access element is the component that best resonates with the importance of accessible cultural goods for the visually impaired. The access element of the right to cultural life links it to the right to education and information that are essential for knowing and understanding one's culture and that of the others.¹⁹⁷ The CESCR also defines access as the right to "benefit from the cultural heritage and the creation of other individuals and communities".¹⁹⁸

Shaver and Sganga argue that the right to culture requires the ability for the individual to consume as well as to create.¹⁹⁹ Their view is in line with the perceived definition of culture in the post-World War II discussions of cultural rights.²⁰⁰ Therefore, the access element not only encompasses access to cultural products but also to creative opportunities.²⁰¹

Accommodation of disability is among the many dimensions of access to culture.²⁰² In General Comment No. 21, the Committee emphasises the importance of provision and facilitation of access to culture for persons with disabilities.²⁰³

Arguably access to culture encompasses access to knowledge.²⁰⁴ Therefore, access to culture is not limited to access to works of literature and art. Access to culture includes access to any copyright protected material that may not fall under the classic definition of culture but contains knowledge. Therefore, focusing on lack of access to books or other print material for the visually impaired persons is not conducive to their right to culture. An access to knowledge-informed approach to access to culture requires providing the visually impaired with accessible copyright protected material.

Moreover, access to cultural norms and values available through copyright protected material is of special importance to cultural, lingual or religious minorities in a society that are in greater danger of losing their identity. Achieving and preserving a cultural identity is important to human dignity.²⁰⁵ Article 27 of the ICCPR recognises the right of minorities to "enjoy their

¹⁹⁷ At [15 (b)].

¹⁹⁸ At [15 (b)].

¹⁹⁹ For more on the discussion of consumption and creation of culture see Yvonne Donders "The Legal Framework of the Right to Take Part in Cultural Life" in Donders and Volodin, above n 82, at 233.

²⁰⁰ UNESCO Cultural Rights as Human Rights (UNESCO, Paris, 1970) at 11.

²⁰¹ Lea Shaver and Caterina Sganga "The Right to Take Part in Cultural Life: On Copyright and Human Rights" (2010) 27 Wisconsin International Law Journal 637 at 9.

²⁰² Lea Shaver "The Right to Science and Culture" (2009) 1 Wisconsin Law Review 121 at 171.

²⁰³ CESCR, General Comment No. 21, above n 84, at [16 (b)].

²⁰⁴ See above n 193.

²⁰⁵ Donders, above n 82, at 231; CESCR, General Comment No. 21, above n 84, at 1.

own culture, to profess and practise their own religion, or to use their own language.”²⁰⁶ The same right is highlighted in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities²⁰⁷ in 1992 as well as the UNESCO Universal Declaration on Cultural Diversity.²⁰⁸

(c) Contribution

According to the CESC, contribution to cultural life means creating cultural expressions as well as participating in the “definition, elaboration and implementation of policies and decisions that have an impact on the existence of a person’s cultural rights.”²⁰⁹ Therefore, accessible copyright protected cultural material are primarily important for access to culture and, consequently, enable the visually impaired to contribute to the cultural life of the society.

Moreover, this interpretation of the CESC of contribution to cultural life signals the right of the visually impaired persons to have a say about the policies that affect their right to culture, meaning the copyright protection of cultural goods in the present discussion.

However, it is worth noting that creation is not possible without consumption. One cannot contribute to culture and science without first familiarising oneself with what has previously been produced, culturally and scientifically. The visually impaired persons may not need accessible books to participate in certain cultural activities or to enjoy the benefits of scientific progress. However, availability of accessible books is necessary for the visually impaired to fully access culture and science, whether to merely achieve self-development or to make a meaningful cultural or scientific contribution to their society.

The creation-consumption dichotomy fits well with the model that adopts two separate approaches to culture: process-oriented and system-oriented. The former sees the individual as producer of culture and the latter as a product of culture and one that reproduces the culture.²¹⁰ Moreover, the system-oriented approach to culture conceptualise it as a “coherent, self-contained set of values and symbols that a specific cultural group reproduces over time and

²⁰⁶ ICCPR, above n 3, art 27.

²⁰⁷ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, above n 107.

²⁰⁸ The UNESCO Universal Declaration on Cultural Diversity, above n 193.

²⁰⁹ At [15 (c)].

²¹⁰ Eide, above n 82, at 22.

which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.”²¹¹

The copyright protected materials cover both sides of culture: the cultural creations of individuals, and the works that contain cultural values and symbols. Visually impaired persons have a right to access both these groups of materials that sometimes overlap. To successfully participate in and become part of the society, the visually impaired should be able to access and engage with cultural norms and values present in copyright protected material.²¹² Moreover, to be able to contribute to culture and science (as mentioned before) the visually impaired persons need access to the cultural products as perceived by the process-oriented approach to culture.

3 Obligations of states regarding right to culture

In its General Comment No. 21, the CESCR refers to recognition of the rights of persons with disabilities, as a group that needs special protection, for the realisation of their right to culture.²¹³ States’ specific obligations towards the visually impaired can be deduced from Committee’s interpretation of States’ general obligation regarding the right to culture.

The CESCR suggests that full realisation of the right to cultural life requires the states to (a) exercise it without discrimination,²¹⁴ (b) take deliberate and concrete measures aimed at its full implementation,²¹⁵ (c) abstain from taking regressive measures,²¹⁶ and (d) take account of the interrelationship between different parts of the art 15 of the ICESCR.²¹⁷

Deliberate and concrete measures aimed at full implementation of the right to take part in cultural life is in line with Committee’s previous remarks in its General Comment No. 3 on ensuring satisfaction of minimum essential levels of each of the rights in the ICESCR.²¹⁸ This, again, is a confirmation that progressive nature of economic, social, and cultural rights is not an excuse for ignoring States’ core obligations regarding these rights. This approach is also compatible with the limited resources that some countries have at their disposal.²¹⁹

²¹¹ Stavenhagen, above n 193, at 4-5.

²¹² CESCR, General Comment No. 21, above n 84, at [30].

²¹³ At [31].

²¹⁴ At [44].

²¹⁵ At [45].

²¹⁶ At [46].

²¹⁷ At [47].

²¹⁸ CESCR, General Comment No. 3, above n 163, at [10].

²¹⁹ CESCR, General Comment No.21, above n 84, at [23].

In addition to these general obligations, the CESCR requires States to respect, protect, and fulfil the right to take part in cultural life.²²⁰ These three levels of obligations mean that states have both a negative and positive obligation regarding the right to culture.

(a) Obligation to respect

First, they need to “refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life.”²²¹ Abstention from interfering with the visually impaired persons’ right to culture is connected to equal and non-discriminatory recognition of their right. Therefore, by recognising a right to culture for the persons with disabilities, countries partially fulfil their obligation to abstain from interference. General Comment No. 21 also defines abstention as non-interference with access to cultural goods and services.²²² Therefore, even if States do not directly interfere with the visually impaired persons’ right to culture, passing of copyright laws that are discriminatory and limit the access for the visually impaired is an example of interference.

(b) Obligation to protect

The obligation to protect extends the non-interference requirement to third parties.²²³ According to the Committee, States should understand the obligation to protect as a duty to prevent third parties from interfering with everyone’s right to take part in cultural life.²²⁴ Violations of the right to culture can occur as a result of actions by insufficiently regulated private parties in addition to states’ actions.²²⁵

In the case of visually impaired persons, this translates into states’ obligation to monitor copyright owners’ potential interference with the visually impaired persons’ access to copyright-protected material, that are essential for implementation of the visually impaired persons’ right to culture.

Moreover, the Committee refers to the importance of preserving cultural rights as part of the States’ obligation to protect.²²⁶ Producing accessible copies of copyright protected goods is not merely about provision of access for the visually impaired at the present time; it also contributes

²²⁰ At [48].

²²¹ At [48].

²²² At [6].

²²³ At [48].

²²⁴ At [50].

²²⁵ At [62].

²²⁶ At [50 (a)].

to preservation of culture in a way that is accessible to all the members of future generations including the visually impaired persons.

(c) Obligation to fulfil

Finally, the obligation to fulfil particularly imposes a positive obligation on states to facilitate, promote and provide for everyone's right to take part in cultural life.²²⁷

(i) Obligation to facilitate and promote

There is no clear guideline in international human rights law regarding what facilitation and promotion of cultural life through copyright protected material mean. Countries have different policies and practices that are shaped mainly by their resources, social and political norm and historical backgrounds.

However, arguably what every country does in terms of facilitation and promotion of cultural life through copyrighted protected content, that is available to the sighted, can be used as a frame of reference for assessing visually impaired person's entitlements. This is also compatible with the progressive realisation of economic, social and cultural rights. The copyright protected cultural material, available to the sighted for purposes of facilitation and promotion of cultural life, should also be made available to the visually impaired.

Under the obligation to facilitate, the Committee refers to erasing structural forms of discrimination.²²⁸ Remedying structural forms of discrimination against the visually impaired persons' right to culture requires taking appropriate measures that guarantee equal access for the blind to copyright protected cultural materials. In its General Comment No. 5, the Committee states that "the right to full participation in cultural and recreational life for persons with disabilities requires that communication barriers be eliminated to the greatest extent possible."²²⁹

(ii) Obligation to provide

The CESCR argues that States have the obligation to "provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realise this right for themselves."²³⁰ The Committee

²²⁷ At [51].

²²⁸ At [52 (g)].

²²⁹ CESCR, General Comment No. 5, above n 16, at [37] stating that useful measures for elimination of communication barriers "might include 'the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons'".

²³⁰ CESCR, General Comment No. 21, above n 84, at [54].

provides some examples of how States can realise this obligation. The most relevant and significant example for the visually impaired persons is the states' obligation to provide all necessary measures to "guarantee access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events."²³¹

The Committee does not use the term "cultural goods" when discussing the obligation to fulfil. However, guaranteed access to copyright protected cultural goods that are unavailable to the visually impaired persons due to their disability is implied from the reference to libraries. Moreover, the Committee refers to preventing access to cultural goods as an example of the violation of the right to culture.²³² Finally, the Committee defines positive action required by states as "facilitation and promotion of cultural life, and access to and preservation of cultural goods."²³³

4 Book famine and the right to science

Compared to the right to culture, there is even less clarity on the meaning and scope of right to science. As Chapman explains, the right to science:²³⁴

... is so obscure and its interpretation so neglected that the overwhelming majority of human rights advocates, governments, and international human rights bodies appear to be oblivious to its existence.

The 2012 report of the UN Special Rapporteur in the field of cultural rights on the right to enjoy the benefit of scientific progress and its application further clarifies this underdeveloped right.²³⁵

According to this report, the right to science connotes a right of access to scientific knowledge.²³⁶ Chapman also argues that first element of this right is "access to beneficial

²³¹ At [54 (d)].

²³² At [62].

²³³ At [6].

²³⁴ Audrey Chapman "Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Application" (2009) 8 Journal of Human Rights 1 at 1. See also William Schabas "Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Application" in Donders and Volodin, above n 81, at 274 stating that this right not only "suffers from the more general marginalization of economic, social and cultural rights" but also "within that category of human rights it has received little attention".

²³⁵ Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, Farida Shaeed, The right to enjoy the benefits of scientific progress and its applications, A/HRC/20/26, 14 May 2012.

²³⁶ Shaheed, at 9.

scientific and technological developments”.²³⁷ In this sense, access arguably means access to information about scientific and technological advancements as well as the results or potential products of such advancements.

Chapman also refers to the United Nations Development Programme (UNDP) 2001 on Making New Technologies Work for Human Development in arguing that benefits of scientific progress can contribute to human development in two ways. One is through improving the living standards of human beings and enabling them to participate more actively in the life of their community.²³⁸

A recent development in defining the definition of scope of the right to science lead to adoption of the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Venice Statement) by a group of experts. The Venice Statement notes that science should be used for the “benefit of all humanity without discrimination, particularly with regard to disadvantaged and marginalized persons and communities.”²³⁹ Moreover, the Statement regards states as responsible for ensuring “support for scientific inquiry and dissemination of scientific knowledge”.²⁴⁰ Article 15 (2) of the ICESCR requires States to take the necessary measures for “diffusion of science” for realisation of the right to science.²⁴¹

Since the principle of non-discrimination applies to all the rights recognised in international human rights instruments, “dissemination of scientific knowledge” should cover visually impaired persons.²⁴² Such dissemination partly happens through publication of books, journals,

²³⁷ Audrey Chapman “A human rights perspective on intellectual property, scientific progress, and access to the benefits of science” in *Intellectual Property and Human Rights* (World Intellectual property Organization, Geneva, 1999) at 247- 277.

²³⁸ Chapman, above n 234, at 9.

²³⁹ UNESCO, Experts’ Meeting on the Right to Enjoy the Benefits of Scientific Progress and Its Application, Venice, Italy, 16-17 July 2009, Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications [Venice Statement] at [6] available at <www.unesdoc.unesco.org>.

²⁴⁰ Venice Statement, at [9].

²⁴¹ ICESCR, above n 4, art 15 (2).

²⁴² See the Venice Statement, above n 239, this footnote reference is wrong; I think it should be 239 at [12 (b)] stating that “a human rights-based approach requires that science and its applications are consistent with fundamental human rights principles such as non-discrimination, ... and that particular attention should be paid to the needs of disadvantaged and marginalized groups”, and at [13 (a)] referring to “equal access and participation of all public and private actors”. See also Richard Pierre Claude “Scientists’ Rights and the Human Right to the Benefits of Science” in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentina, Antwerp, 2002) Check the format of this footnote 247 at 259 stating that “the egalitarian phrasing of the provision reinforces the proposition that the human right to the benefit of the science is not only for scientists”.

and other copyright protected material. This highlights the importance of accessible copyright works for realisation of the visually impaired persons' right to science.²⁴³

5 Obligations of states regarding the right to science

The Committee on Economic, Social, and Cultural Rights have not yet adopted a General Comment on the right to science. However, the Venice Statement, the UN Special Rapporteur, and other scholars follows the practice of the CESCR and in identifying the obligations of states regarding the right to science as the obligation to respect, protect, and fulfil.

Donders proposes that under the obligation to respect, "states should respect access and participation in science, including access to important sources such as libraries and the internet" and refrain from obstructing the "free flow of information and dissemination of scientific results".²⁴⁴

According to the Venice Statement, countries should have an obligation to respect the freedom to "seek, receive, and impart" scientific information.²⁴⁵ By this definition, the obligations of states in this regard are similar to their obligation to respect the right of the visually impaired to access to information.

Under the obligation to fulfil, the Statement requires states to "promote access to the benefits of science and its applications on a non-discriminatory basis."²⁴⁶ Shaheed also holds the view that "scientific knowledge, information and advances must be made accessible to all".²⁴⁷ States need to eliminate de jure and de facto barriers that stand in the way of access for the persons with disabilities to scientific information, processes, and products.²⁴⁸

As mentioned before, new technologies have made reproduction and distribution of accessible copyright material easier and cheaper. Therefore, the visually impaired have a right to enjoy these new technologies as a product of scientific progress to access copyright protected content more easily.²⁴⁹ For example, a new technology can enable a visually impaired individual to

²⁴³ See the Venice Statement, above n 239, at [10] stating that in case of a potential tension between the right to science and intellectual property rights "prioritization of profit for some over benefit for all" is unacceptable.

²⁴⁴ Yvonne Donders "The Right to Enjoy the Benefits of Scientific Progress: in Search of State Obligations in Relation to Health" (2011) 14 Med Health Care and Philos 371 at 377.

²⁴⁵ Venice Statement, above n 239, at [14 (a)].

²⁴⁶ Venice Statement, at [16 (b)]. See also Donders, above n 244, at 377 stating that "states should further ensure access to scientific and technological knowledge, including through access to the Internet" and "provide information on scientific progress".

²⁴⁷ Shaheed, above n 235, at 9.

²⁴⁸ At 10.

²⁴⁹ See Venice Statement, above n 239, at [13 (b)].

reproduce various accessible formats of the same title to be used via different devices for extra convenience. Therefore, copyright law and technological protection measures (TPMs) that stand in the way of access for the visually impaired could be incompatible with their right to enjoyment of scientific progress.²⁵⁰

D Right to Access to Information

Right to access to information accompanies the right to freedom of expression and opinion. Similar to the right to education, right to access information is at the core of realisation of other human rights. The visually impaired individuals would be more successful in claiming their human rights once they are aware of their rights. Second, access to relevant information facilitates realisation of other human rights.²⁵¹

1 Normative framework of the right to access to information

The right to “freedom of opinion and expression” and to “seek, receive and impart information and ideas” was first recognised in art 18 of the UDHR²⁵² and later reiterated, almost word for word, in art 19 (2) of the ICCPR.²⁵³

The same wording was later used in art 13 of the CRC²⁵⁴ and art 9 (1) (b) and 21 of the CRPD.²⁵⁵ While there are no articles in the CEDAW that specifically recognise the right to information, multiple articles refer to access to information that is necessary for realisation of different rights, such as the right to education,²⁵⁶ family,²⁵⁷ and child birth.²⁵⁸ The CERD refers to the right to “freedom of opinion and expression” that arguably implies the right to information.²⁵⁹

²⁵⁰ See chapters 1, 4 and 5 for a discussion of TPMs and access for the visually impaired.

²⁵¹ See the Human Rights Committee, General Comment No. 34 on Article 19: Freedom of opinion and expression, CCPR/C/GC/34, 12 September 2011, at [1] stating that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society”. See also Laurence Helfer and Graeme Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, Cambridge, 2011) at 221-227 for a full discussion of the rationale and importance of the right to freedom of expression.

²⁵² UDHR, above n 2, Art 18.

²⁵³ ICCPR, above n 3, Art 19 (2).

²⁵⁴ CRC, above n 8, art 13.

²⁵⁵ CRPD, above n 10, arts 9 (1) (b) and 21.

²⁵⁶ CEDAW, above n 6, art 10 (h).

²⁵⁷ Art 14 (2) (b).

²⁵⁸ Art 16 (1) (E).

²⁵⁹ CERD, above n 5, art 5 (d) (viii).

Right to access to information is present in the European Social Charter,²⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms²⁶¹ the American Convention on Human Rights,²⁶² and the African Charter on Human and People's Rights.²⁶³

2 *Book famine and the right to access to information*

Visually impaired persons do not necessarily need accessible books to enjoy their right to freedom of expression and opinion. However, access to information is crucial for forming of opinions which then can be freely expressed. Therefore, the visually impaired need accessible informative content to form ideas and opinions that they can choose to express if they wish. The importance of access to information to freedom of expression and opinion is apparent from the categorisation of the two rights together.

Moreover, accessible informative content would increase awareness of the visually impaired to their very right to access to information and freedom of expression in the first place. This point ties into the importance of accessible content for human rights education. Human rights education need not be through formal and traditional education. It can be achieved through other venues of dispersing information.

The claim of the persons with disabilities for access to information for health reasons is backed by art 12 of the ICESCR that recognises everyone's right to the enjoyment of the highest attainable standard of physical and mental health.²⁶⁴

3 *Obligations of states*

The approach of the CRPD to the right to freedom of expression and access to information is unique in two ways. First, the Convention discusses equality for the disabled in accessing information. Second, it places the right to information in the context of disability accessibility.²⁶⁵ Article 9 (1) requires States Parties to take appropriate measures to ensure

²⁶⁰ European Social Charter, above n 19, art 21.

²⁶¹ Convention for the Protection of Human Rights and Fundamental Freedoms, above n 17, art 10. See also the European Court of Human Rights (ECtHR), *Youth Initiative for Human Rights v Serbia*, no. 48135/06, 25 June 2013, unreported, at [20] and [24] where the Court stated that "the notion of 'freedom to receive information' embraces a right of access to information".

²⁶² American Convention on Human Rights, above n 21, art 13.

²⁶³ African Charter on Human and Peoples' Rights, above n 23, art 9.

²⁶⁴ UDHR, above n 2, art 23.

²⁶⁵ CRPD, above n 10, arts 9(1) and 21 (a).

access to information for the persons with disabilities on an equal basis with others.²⁶⁶ It goes on to require States to eliminate obstacles and barriers to accessibility of information.²⁶⁷

The Convention provides more detailed instructions on how States can ensure equality and accessibility for persons with disabilities in enjoying their right to information. Article 9 (2) suggests measures such as providing training for stakeholders on accessibility,²⁶⁸ and promoting “other appropriate forms of assistance and support to persons with disabilities to ensure their access to information”.²⁶⁹

Similarly, art 21 of the CRPD calls for measures that enable the disabled persons to “seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice”.²⁷⁰ Article 2 of the Convention defines communication as “[b]raille, tactile communication, large print, accessible multimedia as well as written, audio, ... human-reader and augmentative and alternative modes, means and formats ... and accessible information and communication technology”.²⁷¹ If read together, art 2 and 21 justify the claim that States have an obligation to provide the visually impaired persons with the accessible copyright content that they need for realisation of their right to freedom of expression and to information.

The right to access to information is interconnected with right to health. For example, art 17 of the CRC addresses the importance of access of the child to information and material that is aimed at the promotion of his or her physical and mental health.²⁷² To that end, the Convention urges States to encourage “international co-operation in the production, exchange and dissemination” of such information and “production and dissemination of children’s books”.²⁷³

Based on the principle of non-discrimination, countries need to make sure that the visually impaired children are included in sharing the results of the measures required by art 17 of the CRPD. In other words, countries need to encourage international co-operation in the production, exchange and dissemination of accessible information and production and dissemination of accessible children’s books. Article 24 of the Convention makes a more direct

²⁶⁶ Art 9 (1).

²⁶⁷ Art 9 (1) (b).

²⁶⁸ Art 9 (2) (c).

²⁶⁹ Art 9 (2) (f).

²⁷⁰ Art 21.

²⁷¹ Art 2.

²⁷² CRC, above n 8, art 17.

²⁷³ Art 17 (b) and (c).

reference to the connection of access to information and right to health. It requires States Parties to take appropriate measures to “ensure that parents and children are informed” of different issues that affect child health.²⁷⁴ Therefore, providing accessible health related information is a requisite of both right to information and right to health.

E Right to health

1 Normative framework of the right to health

Before appearing in international human rights instruments, the right to health was recognised in the Constitution of the World Health Organization (WHO). The Preamble of the WHO Constitution states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.”²⁷⁵ Later, art 25(1) of the UDHR, and art 12 of the ICESCR also recognised the right for everyone to “a standard of living adequate for the health of himself and his family”,²⁷⁶ and “to the enjoyment of the highest attainable standard of physical and mental health.”²⁷⁷

Regional human rights instruments such as the European Social Charter of 1961,²⁷⁸ the African Charter on Human and People’s Rights,²⁷⁹ the African Charter on the Rights and Welfare of the Child,²⁸⁰ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights have also included provisions on the right to health.²⁸¹

2 Obligations of states

The CESCR has commented on the right to health as incorporated in art 12 of the ICESCR. The Committee considered the right to health as closely related to and dependant on other

²⁷⁴ Art 24 (2) (e).

²⁷⁵ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

²⁷⁶ UDHR, above n 2, art 25(1).

²⁷⁷ ICESCR, above n 4, art 12.

²⁷⁸ European Social Charter, above n 19, art 11.

²⁷⁹ African Charter on Human and Peoples’ Rights, above n 23, art 16.

²⁸⁰ African Charter on the Rights and Welfare of the Child, above n 114, art 14.

²⁸¹ Additional Protocol to the American Convention on Human, above n 22, art 10.

human rights such as the right to education, access to information and work.²⁸² The Committee interpreted the right to health:²⁸³

as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as ... access to health-related education and information, including on sexual and reproductive health.

Furthermore, the right to “seek, receive and impart information and ideas concerning health issues” is part of the accessibility requirement regarding the right to health.²⁸⁴ Therefore, the connection between the access to copyright works and the right to health is similar to that of access and the right to information.

To fully respect, protect, and fulfil the right to health for the visually impaired requires provision of equal access to health-related information. As highlighted by the Committee, such access is indirectly satisfied upon realisation of other human rights of the visually impaired. On the other hand, access to health-related information that improves a visually impaired individual’s health can potentially have a positive effect on realisation of his or her other human rights.²⁸⁵

F Right to work

1 Normative framework of the right to work

Article 23 of the UDHR recognises everyone’s right to work, free choice of employment, just and favourable conditions of work, and protection against unemployment.²⁸⁶ In connection to right to work, art 26 (1) of UDHR requires that technical and professional education should be made generally available.²⁸⁷ The ICESCR puts the wording of art 23 and 26 of the UDHR a single article. Article 6 (1) addresses the recognition of the right to work for everyone and art

²⁸² CESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, at [3]. See also Audrey Chapman “The Interrelationship between the Human Right to the Benefit of Scientific Progress and the Human Right to Health”, Study for UNESCO’s Sector of Social and Human Sciences, Division of Human Rights, Human Security and Philosophy, Paris, August 2007.

²⁸³ CESCR, General Comment No. 14, above n 282, at [11].

²⁸⁴ At [12(b)].

²⁸⁵ See Stephen Marks “The emergence and scope of the human right to health” in José Zuniga, Stephen Marks, and Lawrence Gostin *Advancing the Human Right to Health* (Oxford University Press, Oxford, 2013) 3 at 11-17 for a full discussion of the connection between the right to health and other human rights.

²⁸⁶ UDHR, above n 2, art 23.

²⁸⁷ ICESCR, above n 4, art 6 (1) and (2).

6 (2) considers provision of “technical and vocational guidance and training programmes” as one of the steps that States Parties can take for full realisation of right to work.

The recognition of the right to work in the CERD²⁸⁸ and the CEDAW is with regards to elimination of discrimination field of employment.²⁸⁹ Article 27 of the CRPD recognises the right of persons with disabilities to work, on an equal basis with others.²⁹⁰

A number of regional instruments such as the European Social Charter,²⁹¹ the African Charter on Human and People’s Rights,²⁹² and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights also recognise the right to work.²⁹³

2 Book famine and the right to work

According to the RNIB, as of 2014, two-thirds of registered blind and partially sighted people of working age in the UK are not in paid employment.²⁹⁴ While many factors affect the employment of visually impaired persons, it is essential to provide them with the same chances as sighted persons to access employment. Access to copyright protected material can improve their chances by providing them with education and training and access to general knowledge and work-related information.

3 Obligations of states

The CRPD requires the States to “enable persons with disabilities to have effective access to general technical and vocational guidance programmes ... and vocational and continuing training.”²⁹⁵ Accessible books are an important part of a technical or professional education. Moreover, books and other copyright content, even outside of an educational framework, are important for gaining professional information to seek employment or to improve one's working condition. Professional information gives individuals more options when choosing his or her employment. Provision of professional education and information is also part of realising

²⁸⁸ CERD, above n 5, art 5 (e) (i).

²⁸⁹ CEDAW, above n 6, art 11.

²⁹⁰ CRPD, above n 10, art 27 (1).

²⁹¹ European Social Charter, above n 19, art 1.

²⁹² African Charter on Human and Peoples’ Rights, above n 23, art 15.

²⁹³ Additional Protocol to the American Convention on Human Rights, above n 22, art 6.

²⁹⁴ RNIB, Key facts about sight loss, March 2014, available at < www.rnib.org.uk >.

²⁹⁵ CRPD, above n 10, art 27 (1) (d).

everyone's right "to the opportunity to gain his living by work which he freely chooses or accepts."²⁹⁶

General Comment No. 5 of the CESCR states that to provide equal opportunities for enjoyment of the right to work "it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed."²⁹⁷ The CRPD also states that State should "ensure that reasonable accommodation is provided to persons with disabilities in the workplace."²⁹⁸ Lack of access to information under copyright protection, as an artificial barrier, can be just as problematic as physical barriers in society and in the workplace.

IV Conclusion

This chapter assessed the interaction of copyright law and access to copyright protected works with the human rights of the visually impaired and the principle of non-discrimination. The chapter demonstrated that access for the visually impaired persons to accessible copies of copyright protected works affect the realisation of a number of their human rights, such as the right to education, culture and science, information, health, and work.

Moreover, it explained that under the principle of non-discrimination in international human rights law, states are required to respect, protect, and fulfil rights of all individuals, including the visually impaired, without any discrimination.

Therefore, copyright law and policy would be discriminatory against the visually impaired, to the extent that they act as an impediment to provision of accessible works for the visually impaired, and realisation of their human rights. Such copyright law and policy is discriminatory because it robs the visually impaired of equal enjoyment of human rights that are dependent on access to copyright works.

In conclusion, in order to fully meet their obligations to respect, protect, and fulfil the human rights of the visually impaired, states need to take negative and positive actions to (a) equally recognise the human rights of the visually impaired that are dependent on access to copyright works, and their right to access such works before the law (formal equality); (b) ensure that the law (both human rights and copyright) considers the substantive inequalities that can arise from treating the visually impaired in the same way that sighted people are treated regarding access

²⁹⁶ Art 6(1).

²⁹⁷ CESCR, General Comment No. 5, above n 16, at 22.

²⁹⁸ CRPD, above n 10, art 27 (1) (i).

to copyright works; and, (c) ensure that copyright law does not stop provision of de facto equality of access to copyright works for the visually impaired in practice. These obligations provide a normative foundation for the proposed human rights framework for copyright law that will be discussed in more detail in chapter 6. The human rights framework draws on states' human rights responsibilities regarding provision of access to copyright works in order to recalibrate the balance between copyright and human rights of the visually impaired.

CHAPTER 3

NATIONAL COPYRIGHT LAWS AND ACCESS FOR THE VISUALLY IMPAIRED

“Until the great mass of the people shall be filled with the sense of responsibility for each other's welfare, social justice can never be attained.”¹

- Helen Keller

I Introduction

The previous chapters provided a background to the issue of lack of access to copyright protected works for the visually impaired (chapter 1), and its negative affect on the countries' obligation towards non-discriminatory realisation of human rights of the visually impaired, that are dependent on access to copyright works (chapter 2). This chapter discusses the impact of copyright law on access for the visually impaired to copyright works in a number of jurisdictions.

As chapter 1 highlighted, it is argued that the visually impaired face a number of access-related difficulties even in countries with copyright limitations and exceptions.² Therefore, this chapter aims to evaluate the state of accommodation for access of the visually impaired in national copyright laws of a number of selected countries.

The covered jurisdictions are: the European Union (EU), New Zealand (NZ) and the United States of America (the US) as representatives of the Anglo-American tradition, and finally a number of developing countries, including Chile, South Africa, and India. These jurisdictions are indicative examples of the range of approaches countries with copyright flexibilities have adopted, that could facilitate the access for the visually impaired.

The chapter analyses both the positive law of these countries, as well as the initiatives that they have taken to support their positive law, or to improve the access for the visually impaired. First, general and disability-specific flexibilities in national copyright laws are identified. Then, these flexibilities are evaluated in light of the common difficulties that exist for the visually impaired. The scope of flexibilities regarding the exempted acts, the end beneficiaries, the

¹ Helen Keller *Helen Keller, Her Socialist Years* (International Publishers, New York, 1967) at 96.

² See chapter 1 for a discussion of these issues.

authorised entities, the accessible formats, the cross-border exchange of accessible works and other relevant issues is examined. In countries where the copyright law includes specific limitations and exceptions for the benefit of the visually impaired, any existing fair dealing or fair use provisions are not discussed in detail, with the exception of the United States. Part III of the chapter discusses the fair use provisions of the US Copyright Law since the US courts recently decided two cases that involve fair use and reproduction of copyright works from which the visually impaired could enjoy.

Analysing the copyright laws of these jurisdictions informs the discussion of further, potentially international, measures that would facilitate and improve the access for the visually impaired.

II The European Union

A European Copyright Law and Access for the Visually Impaired

Member states of the European Union (EU) are among the developed countries with the highest levels of availability of accessible works.³ The vigorous attempts to harmonise the copyright law across the EU makes it a good option for investigating the effects of harmonisation of copyright flexibilities.

One of the main goals of founders of the European Community, which adopted the Treaty Establishing the European Community (Treaty of Rome) in 1957, was to establish a common market.⁴ The common market would facilitate free movement of goods and services.⁵ However, enacting and implementing intellectual property rights, on the national level, affect the commercial activities of the states within the common market. It is perhaps understandable that in the 1950s the drafters of the Treaty of Rome should have failed to appreciate the full extent of the problems, which intellectual property potentially posed, for the ideas to which they were endeavouring to bring practical expression.⁶ Since 1950s, intellectual property rights,

³ See chapter 1, n 11.

⁴ See European Union, Treaty Establishing the European Community [Treaty of Rome], 298 UNTS 1 1, 25 March 1957, art 2 stating that “the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it”.

⁵ See Treaty of Rome, art 3.

⁶ Terence William *European Intellectual Property Law* (Ashgate, Great Britain, 2000) at 5.

and particularly copyright, gained more importance due to rapid technological developments. Therefore, member states of the European Union have produced extensive legislation and jurisprudence on intellectual property rights.⁷

The first wave of harmonisation of copyright law in Europe happened through adoption of the Green Paper on Copyright and the Challenge of Technology in 1988.⁸ Following this green paper, a number of directives were adopted⁹ to address the four “fundamental concerns” identified in the Green Paper.¹⁰

Later on, to address the rising importance of the Internet and to further harmonise the copyright in Europe, the Commission published the Green Paper on Copyright and Related Rights in the Information Society in 1995.¹¹ In 2001, the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) was adopted to deal with the concerns raised in the Green Paper on Copyright and Related Rights in the Information Society.¹²

A number of EU Directives harmonise various aspects of copyright and related rights for better functioning of the internal market and improvement of the competitiveness of the European economy.¹³ However, the Infosoc Directive remains the main piece of legislation harmonising copyright in the EU.

⁷ See Agnès Lucas-Schloetter “Is There a Concept of European Copyright Law? History, Evolution, Policies and Politics and the *Acquis Communautaire*” in Irini Stamatoudi and Paul Torremans (eds) *EU Copyright Law: A Commentary* (Edward Elgar, Cheltenham, 2014) 7 at 7-12 for a summary of the evolution of copyright law in the EU.

⁸ Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology, COM (88) 172 Final, Brussels, 7 June 1988.

⁹ The directives were: The Computer Programs Directive 1991, The Rental Rights Directive 1992, The Satellite and Cable Directive 1993, The Term Directive 1993, The Database Directive 1996, Information Society Directive, Resale Right Directive 2001, The Enforcement Directive 2004.

¹⁰ Those concerns were: creating a single Community market for copyright goods and services (1.3.2), improving competitiveness in the intellectual property goods and services market (1.3.3), protecting the Community members’ intellectual property rights in non-member states (1.3.4), and avoiding anti-competitive practices that may result from broad protection of copyright (1.3.5), Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology, COM (88) 172 Final, Brussels, 7 June 1988.

¹¹ Commission of the European Communities, Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 Final, Brussels, 19 July 1995.

¹² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [Infosoc Directive], Official Journal L 167, 22/06/2001 P. 0010- 0019.

¹³ Directive on collective management of copyright – 04.02.2014, Directive 2001/29/EC--- Green Paper on copyright in the knowledge economy (16.07.2008), Directive 2012/28/EU--- Public Hearing on Orphan Works (26.10.2009) follow up to Green Paper on copyright in the knowledge economy (16.07.2008), Rental and lending rights Directive 92/100/EEC repealed and replaced by Directive 2006/115/EC, Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights repealed and replaced by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of

The Infosoc Directive is important to the discussion of access for the visually impaired because it allowed the EU member states to include limitations and exceptions to copyright for the benefit of people with disabilities in their copyright law. Article 5 of the Infosoc Directive addresses copyright limitations and exceptions. Among the permissible exceptions are reproduction of copies for transient and incidental use, private use, non-commercial library, archive or educational use, criticism, review, political speeches, ephemeral recording for broadcasting purposes and similar situations.¹⁴

Article 5 (3) (b) of the Infosoc Directive gives Member States permission to provide for exceptions or limitations to copyright for “the benefit of people with a disability”.¹⁵ Such limitations and exceptions would be to the rights of reproduction, communication, and making available to the public¹⁶ as well as the right of distribution “to the extent justified by the purpose of the authorised act of reproduction.”¹⁷ Application of limitations and exceptions for the benefit of people with disabilities is limited to uses that are “directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”.¹⁸

Finally, Member States are required to comply with criteria of the three-step tests, as set out in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), when regulating limitations and exceptions.¹⁹ The Berne three-step test, and its similar versions in other international intellectual property instruments,²⁰ state that:²¹

protection of copyright and certain related rights (codified version) amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, Satellite and Cable Directive (93/83/EEC), Resale Right Directive 2001/84/EC – 19.07.2001, Protection of Computer Programmes Directive 91/250 EEC repealed by Directive 2009/24/EC, Protection of Databases Directive 96/9/EC, Council Directive 87/54/EC of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ L24 of 27.01.1987, p. 36), Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004).

¹⁴ See Infosoc Directive, above n 12, art 5.

¹⁵ Art 5 (3) (b).

¹⁶ Art 5 (3).

¹⁷ Art 5 (4).

¹⁸ Art 5 (3) (b).

¹⁹ See art 5 (5) that limits the application of limitations and exceptions to “certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder”.

²⁰ See chapter 4 for a full discussion of the three-step tests in different international copyright law instruments.

²¹ Berne Convention for the Protection of Literary and Artistic Works [Berne Convention] 1161 UNTS 31 (opened for signature 9 September 1886, entered into force 5 December 1887) art 9 (2).

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The coexistence of the Infosoc Directive with previous directives of the EU could be problematic. The limitations listed in the Infosoc Directive do not extend to rights that have been harmonised through previous directives²² or have yet to be harmonised at the European level.²³ This causes legal inconsistencies in harmonising copyright in the EU that could affect the visually impaired.²⁴ For instance, exceptions to the databases rights are regulated in the Databases Directive of 1996. This Directive grants exceptions for teaching, scientific research, and private use, but does not mention uses by the print disabled.²⁵

Although the Infosoc Directive offered optional limitations and exceptions, Recital 43 of the Directive considered it: ²⁶

... in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

Some blind institutions tried to use the opportunity provided by the Infosoc Directive to bring the copyright legislation in Europe in line with visually impaired persons' needs. For instance, the European Blind Union (EBU), the European branch of the World Blind Union, formed a Copyright Working Group that adopted a set of criteria in one of its meetings in 2001.²⁷ The criteria were to be used by EBU "as a means of judging proposals for legislation in relation to copyright and visually impaired people." The criteria included a list of requirements for future legislation such as ensuring equitable access for the visually impaired, format-neutrality, and wide range of beneficiaries.²⁸

²² Infosoc Directive, above n 12, art 1 (2).

²³ Mireille Eechoud *Harmonizing European Copyright Law: The Challenges of Better Law Making* (Kluwer Law International, Alphen aan den Rijn, 2009) at 100.

²⁴ See Eechoud, at 101 for a discussion of coexistence of Infosoc Directive with directives before it.

²⁵ Infosoc Directive, above n 12, at 20-28.

²⁶ Infosoc Directive, above n 12, Recital 43.

²⁷ The European Blind Union (EBU) is a non-governmental and non-profit making organisation and one of the six regional bodies of the World Blind Union. It currently operates within a network of 44 national members including organisations from all 28 European Union member states, candidate nations and other major countries in geographical Europe < www.euroblind.org >.

²⁸ Ruth Hammerschmid, Klaus Miesenberger and Bernhard Stöger "Harmonisation of the Copyright Law throughout the European Union - A Challenge for All Print Disabled People" in Klaus Miesenberger, Joachim

Under the private copying limitation offered by art 5(2) (b) of the Infosoc Directive, individuals with visual impairment can make private accessible copies of copyright protected works.²⁹ Other limitations and exceptions in the Directive, such as those for research and education institutions or libraries, could also potentially benefit the visually impaired people.³⁰

As a follow up to the Infosoc Directive, The Green Paper on Copyright in the Knowledge Economy was adopted in 2008. This Green Paper also dealt with limitations and exceptions to a significant extent.³¹ The Green Paper discussed the way in which the Infosoc Directive dealt with limitations and exceptions. For instance, it asked questions related to the non-mandatory nature of the exceptions introduced in the Infosoc Directive, their compatibility with the “evolving Internet technologies”, and whether certain exceptions should become mandatory.³²

The Green Paper focused on four categories of exceptions among which were the exceptions for the visually impaired. According to the Green Paper, as of 2008, all Member States have implemented the exception for the benefit of visually impaired as stipulated in the Infosoc Directive.³³ The Green Paper also asked a number of questions regarding how to change the exception to copyright for the benefit of persons with disabilities in the European Union.³⁴

The Green Paper on Copyright in Knowledge Economy received a significant number of responses from a range of individuals and organisations.³⁵ In 2010, the European Commission established the Stakeholder Dialogue forum, as the next step in responding to the questions that the Green Paper raised regarding remuneration, licensing, categories of people with disabilities as beneficiaries, and the relationship between exceptions and databases.³⁶

A Memorandum of Understanding (MoU) was adopted as the first outcome of the Stakeholder Dialogue.³⁷ The purpose of the MoU was “to increase the access to works for people with print disabilities and ... ensure that works converted into braille or another accessible format, are

Klaus and Wolfgang Zagler (eds) *Computers Helping People with Special Needs: 8th International Conference Proceedings* (Springer, Verlag Berlin Heidelberg, 2002) at 323.

²⁹ Infosoc Directive, above n 12, art 5(2) (b).

³⁰ See for example the Infosoc Directive, arts 5 (2) (c), 5 (3) (a), and 5 (3) (n).

³¹ Commission of the European Communities, Green Paper on Copyright in the Knowledge Economy, COM (2008) 466/3, Brussels, 16 July 2008.

³² Green Paper on Copyright in the Knowledge Economy, at 6.

³³ At 13.

³⁴ At 12.

³⁵ The Consultation yielded 372 responses. Commission of the European Communities, Communication from the Commission on Copyright in the Knowledge Economy COM (2009) 532 final, Brussels, 19 October 2009, at 3.

³⁶ Green Paper on Copyright in Knowledge Economy, above n 31, at 12-15.

³⁷ EU Stakeholders Dialogue Memorandum of Understanding (MOU) on access to works by people with print disabilities, 14 September 2010 <www.ec.europa.eu>.

available in other EU Member States through a network of Trusted Intermediaries.”³⁸ Therefore, the stakeholders, with the support of the European Commission, created the European Network of Trusted Intermediaries (ETIN) representing both trusted intermediaries and the right holders in Europe. It complements the TIGAR project³⁹ with a pan-European focus.⁴⁰ The ETIN officially started its activities by recognising Trusted Intermediaries once its by-laws were adopted in 2012.

In its IPR Strategy Report in 2011, the European Commission made a commitment to continue its work with the Member States to “develop viable solutions to tackle the ‘book famine’ faced by millions of visually-impaired people”.⁴¹

Limitations and exceptions for the benefit of the visually impaired are present in the current agenda of copyright reform in EU and are discussed in public consultation of 2013.⁴² The Consultation highlights adoption of the Marrakesh Treaty by EU and the possible need for “adoption of certain provisions at EU level.” The focus of the Consultation is on cross-border exchange of works across the EU.⁴³ The possibility to exchange accessible works between European countries is still dependent on national legislation and not addressed in any of the EU’s harmonising directives. To bring the EU copyright law in conformity with the Marrakesh Treaty, member states should allow for cross-border exchange of accessible works with countries inside and outside of the EU.⁴⁴

B Problems of Access to Copyright Works for the Visually Impaired

In its response to the Public Consultation on the review of the EU copyright rules, the EBU summarised the difficulties that current copyright laws across Europe have been causing for the visually impaired. The issues mentioned were: the non-mandatory nature of limitations and exceptions that hinders harmonisation,⁴⁵ the territoriality of limitations and exceptions that

³⁸ EU Stakeholders Dialogue Memorandum of Understanding (MOU), at 1.

³⁹ ETIN / TIGAR Information Note, “Similarities, Differences and Complementary Relationship”, Prepared by the ETIN and TIGAR Steering Committee, November 20102 <www.ec.europa.eu> at 2.

⁴⁰ ETIN / TIGAR Information Note, at 1.

⁴¹ European Commission, A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM(2011)287 final, Brussels, 24 May 2011, at 13.

⁴² Public Consultation on the review of the EU copyright rules <www.ec.europa.eu> at 25.

⁴³ At 26.

⁴⁴ World Intellectual Property Organization (WIPO), The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled [Marrakesh Treaty] WIPO Doc VIP/DC/8 (opened for signature 27 June 2013) art 5.

⁴⁵ Response from the European Blind Union (EBU) to the Public Consultation on the review of the EU copyright rules, February 2014 <www.euroblind.org > at 2.

stops⁴⁶ or complicates cross-border exchange of accessible works,⁴⁷ and lack of provisions requiring Member States to ensure non-interference of anti-circumvention measures with access for those with disabilities to online interactive material.⁴⁸ The EBU also reiterated its view that accessible works should be available to persons with disabilities at the same time and price as to non-disabled persons.⁴⁹ These issues along with other challenges of provision of accessible formats to the visually impaired under the EU copyright law are discussed below.

1 Optional nature of limitations and exceptions

Lack of clear guidelines on how to incorporate available limitations and exceptions in the domestic laws of member states, together with the voluntary nature of limitations and exceptions, can cause inconsistencies. For instance, the differences in regulation of limitations and exceptions by states are not compatible with harmonisation purposes. Even in the case of adoption the same set of limitations and exceptions, due to lack of clear guidelines, the jurisprudence produced by the courts can differ greatly from one state to the other. Finally, it could lead to breach of principles of national treatment and equal treatment of citizens of the EU.⁵⁰

Reflecting on the success of the Infosoc Directive, the Green Paper on Copyright in Knowledge Economy stated that all the EU Member States have implemented limitations and exceptions for the benefit of the visually impaired. However, the adopted limitations and exceptions are different regarding the rights they cover, the accessible formats they allow for, the uses they sanction, and the compensation they require for right holders.⁵¹ In its evaluation report, the Institute for Information Law found the limitations and exceptions to be inadequate, partly due to their optional nature.⁵²

⁴⁶ See Response from the European Blind Union (EBU), above n 45, at 4 stating that “it is still illegal or legally questionable, even within the EU, to send accessible format books transcribed using national copyright exceptions to disabled people or their organisations across international borders- whether those borders be within the EU or outside the EU”.

⁴⁷ See at 4, stating that “to send accessible books from one country to another, we have to fall back on licences from right holders, which are often not forthcoming, can be costly, and take time to obtain, or else decline requests we receive from print disabled people in other countries for accessible books from our collection”.

⁴⁸ At 5-6.

⁴⁹ At 6.

⁵⁰ See Eechoud, above n 23, at 105-106.

⁵¹ See Green Paper on Copyright in Knowledge Economy, above n 31, at 13.

⁵² L Guibault and others, “Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Report to the European Commission, DG Internal Market, February 2007.

Moreover, the voluntary nature of limitations and exceptions provided by the Infosoc Directive “leaves open the worrying possibility that any Member State could legally remove its disability exception if it chose to do so.”⁵³

2 Restrictions on type of works

The InfoSoc Directive does not restrict the type of works that can be subject to limitations and exceptions in favour of the visually impaired. It does not, however, require the Member States to allow the application of limitations and exceptions to all types of copyright works either. Some countries like Denmark⁵⁴ and Poland⁵⁵ only allow for application of limitations or exceptions to published works but this does not seem to affect the access for the visually impaired.

3 Restrictions on accessible formats

Formats compatible with adaptive or assistive technologies are necessary for the use of different adaptive devices such as an e-reader. Limiting the type of accessible formats that can be produced under exceptions decreases the visually impaired people’s chances of using new technologies for better access to print material.

The Infosoc Directive does not directly refer to accessible formats, but requires that uses should be “to the extent required by the specific disability.”⁵⁶ The Copyright Act of the Czech Republic repeats the wording of the Directive.⁵⁷ While the wording of the Directive does not seem to be restrictive, determining the “extent required by disability” can be problematic. It may prove easier to justify reproduction of a copyright work in braille as required by visual impairment, than to justify simultaneous reproduction of multiple braille and audio versions that can also be shared and accessed online and on different digital devices.

⁵³ Response from the European Blind Union (EBU) to the Public Consultation, above n 45, at 2. See also Bernt Hugenholtz and Ruth Okediji “Conceiving an International Instrument on Limitations and Exceptions to Copyright” Study Sponsored by Open Society Institute (OSI) March 6, 2008, <www.soros.org> at 27 stating that “the Directive’s chapter on limitations and exceptions is ... proof of the draw-back of an optional approach towards limitations and exceptions. Of the 27 Member States of the European Union, not a single one has seen fit to implement all the limitations and exceptions permitted under the Directive”.

⁵⁴ Consolidated Act on Copyright 2010 (Consolidated Act No. 202 of February 27, 2010) (Denmark), art 17.

⁵⁵ Act of 4 February 1994 on Copyright and Related Rights (Poland), art 23.

⁵⁶ Infosoc Directive, above n 12, art 5 (3) (b).

⁵⁷ See Copyright Act, Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright (Czech Republic), art 38.

4 *Restrictions on purposes of use*

The Infosoc Directive requires that the use should be directly related to the disability, to the extent required by the disability, and of a non-commercial nature.⁵⁸ A number of countries follow the criteria of the Directive.⁵⁹ Belgian, Luxemburgish, and Polish law have added the requirements of the Berne and TRIPS Three-step Test to the conditions of the Directive.⁶⁰

The Infosoc Directive does not clarify what “directly related to disability” mean. This requirement, arguably in line with the first limb of the Berne three-step test that only sanctions exceptions for “certain special cases”, could imply the use should be directly related to a print disability.⁶¹ The non-commercial purpose of use is also tied in with the third limb of the three-step test that will be discussed in detail in the next chapters.⁶²

5 *Restrictions on copyrights*

The Infosoc Directive allows for exceptions and limitations to rights of reproduction, communication and making available to the public, as well as distribution rights to the extent necessary for enjoyment of the other rights.⁶³ However, due to the optional nature of the permissible acts the EU Member States have regulated permissible acts differently. Some Member States do not specify the type of permissible acts. While Hungary allows application of exceptions to all the relevant rights, a number of countries only cover reproduction, communication and making available to the public rights.⁶⁴ Under German law, the works may be reproduced and distributed but not communicated to the public.⁶⁵

Confining the application of limitations and exceptions to certain rights can affect the efficiency of authorised entities in providing the visually impaired with accessible copyright works. For instance, accessing works online could be faster and more convenient for some individuals with visual impairment (making available right). Restrictions on the rights to distribution, communication to public, and making available can also hinder cross-border exchange of accessible works that will be discussed later. Moreover, the lack of clarity on what

⁵⁸ Infosoc Directive, above n 12, art 5 (3) (b).

⁵⁹ Hungary, Italy and The Netherlands. See Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The Infosoc Directive), De Wolf & Partners, at 423.

⁶⁰ At 423.

⁶¹ Berne Convention, above n 21, art 9 (2).

⁶² See chapters 4 and 5 for a full discussion of the three-step tests.

⁶³ Infosoc Directive, above n 12, art 5 (3) and 5 (4).

⁶⁴ See De Wolf & Partners, above n 60, at 421.

⁶⁵ At 421.

is permitted regarding distribution of accessible works can indirectly discourage exchange of works.⁶⁶

6 Restrictions on beneficiaries

The Infosoc Directive does not restrict the beneficiaries of the accessible works produced under limitations and exceptions, or the actors who can conduct the permissible acts. Some Member States have followed the Infosoc Directive in this regard, including Belgium, Germany, Hungary, Italy, Luxemburg, The Netherlands, Poland, and Spain. Other States have placed restrictions on the beneficiaries, producers or distributors of accessible works.⁶⁷ Furthermore, it is not entirely clear from national provisions whether the exception is addressed to legal organisations and entities or rather to physical persons.⁶⁸

The focus of this thesis is on measures that benefit the blind, visually impaired, and other reading disabled persons in accessing print material. However, it is worth noting that one of the issues identified by the Green Paper was differences in the national laws of Member States in relation to the categories of persons with disabilities that could benefit from the exceptions. The Directive provided for exceptions for the benefit of disabled persons in general but some states chose to restrict the beneficiaries to certain categories of disabled persons.⁶⁹

7 Discrepancies in balancing digital rights management and contracts with access

The vague wording of art 6 of the Infosoc Directive leads to legal uncertainties regarding the interaction of technological protection measures (TPMs) and copyright flexibilities for the benefit of the visually impaired. Article 6 (4) requires States to ensure that legal protection of technological protection measures does not interfere with uses under exceptions and limitations for persons with disabilities.⁷⁰ However, the article leaves it to the Member States to decide how to ensure lack of interference.

⁶⁶ See WIPO, Standing Committee on Copyright and Related Rights (SCCR), Study on Copyright Limitations and Exceptions for the visually impaired, prepared by Judith Sullivan, SCCR/15/7, 20 February 2007, Annex 3 identifying a number of countries including Azerbaijan, Belarus, Canada, Finland, and Indonesia, where permitted distribution methods are not clear.

⁶⁷ See De Wolf & Partners, above n 60, at 422.

⁶⁸ At 417.

⁶⁹ For example, in 2008 when the Green Paper was adopted, in UK and Bulgaria the exceptions only applied to visually impaired, in Latvia, Lithuania, and Greece it applied to visually impaired and hearing impaired persons. See Green Paper on Copyright in Knowledge Economy, above n 31, at 13.

⁷⁰ Infosoc Directive, above n 12, art 6 (4).

The European Blind Union has raised the issue of difficulties that Digital Rights Management (DRM) systems create when using works under licensing agreements. DRMs in licensing agreements sometimes “restrict uses that are otherwise allowed under copyright exceptions.”⁷¹

The EBU also underlined the different approaches that the EU Member States have taken in implementing anti-circumvention measures, which may prevent access of visually impaired to digital content. According to the EBU, there were as many as 27 different solutions to the problems posed by TPMs that showed discrepancies in national legislation across Europe.⁷² Therefore, the EBU welcomed guidelines that would clarify how exceptions should be implemented, and it was of the view that implementation of exceptions for the benefit of the visually impaired “is too crucial to be left to contract negotiations.”⁷³

Moreover, the Infosoc Directive states that the application of copyright exceptions cannot be overridden by contract.⁷⁴ However, art 6(4) exempts the on-demand works provided by the right holders through contractual agreements.⁷⁵

According to a study on the Infosoc Directive, as of 2013, no Member States, except for Belgium and the UK, have any provisions on the relationship between the limitations and exceptions and contracts.⁷⁶ Belgium prohibits overriding any exceptions with contracts,⁷⁷ while the UK permits contractual restrictions.⁷⁸

⁷¹ European Blind Union response to the Green Paper on Copyright in the Knowledge Economy COM, above n 45.

⁷² At [24].

⁷³ This was an answer to one of the questions in the Green Paper on Copyright in Knowledge Economy that asked “Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?” See the European Blind Union response to the Green Paper on Copyright in the Knowledge Economy COM (2008). Should this be a cross-reference – to n 44?

⁷⁴ See De Wolf & Partners, above n 60, at 426.

⁷⁵ See Response from the European Blind Union (EBU) to the Public Consultation, above n 45, at 5 stating that “article 6 (4) of the Infosoc ensures enjoyment of exceptions or limitations for the benefit of people with disabilities when technological protection measures are at place; paragraph 4 of art 6 (4), however, says that this principle does not apply to “works or other subject matter made available to the public on agreed contractual terms”. Recital 53 of the Directive states that non-interactive forms of online use should remain subject to first and second paragraphs of art 6 (4).

⁷⁶ See De Wolf & Partners, above n 60, at 426.

⁷⁷ See Law on Copyright and Neighboring Rights (Belgium), art 23bis stating that “an author may not prohibit the lending of literary works, the scores of musical works, sound and audiovisual works where lending is carried out with an educational and cultural intention by institutions that are approved or officially established for that purpose by the public authorities”.

⁷⁸ See UK Copyright Act 2002, s 28(1) stating that “the provisions of this Chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright; they relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts”.

8 *Remunerating right holders*

A number of countries, including Denmark,⁷⁹ Germany,⁸⁰ and the Netherlands, only allow the application of limitations and exceptions upon remunerating the right holders.⁸¹ This is not an infringement of their obligations under the Infosoc Directive; it does, however, reduce the number of accessible works that libraries and similar institutions can produce using their limited financial resources.

9 *Commercial availability*

Germany and the United Kingdom only allow for application of limitations or exceptions when a commercial accessible version of a work is not already available or that the available version is not suited for the intended purpose.⁸²

10 *Cross-border exchange of works*

The EBU highlighted the need to address the difficulties with cross-border exchange of accessible works in its response to the Green Paper on Copyright in the Knowledge Economy. Import or export of accessible works is impossible unless there is specific national legal provision to that effect.⁸³

11 *Harmonisation, equality, and the visually impaired*

One important effect of EC primary law is that a Member State may not, in its copyright law, discriminate against citizens of other EU countries.⁸⁴ This principle seems to be mainly aimed at offering equal and comprehensive protection to copyright holders throughout the European Community. The harmonising EU directives also contribute to this goal by ensuring minimum protection of fundamental rights of copyright holders.

However, equality for copyright holders begs the question of whether the EU Member States are also obliged to treat the rights of users of copyright works in an equal manner. If

⁷⁹ Consolidated Act on Copyright 2010, above n 45.

⁸⁰ Law on Copyright and Neighboring Rights (as amended July 16, 1998) (Germany), art 53.

⁸¹ Act of September 23, 1912 Containing New Regulation for Copyright (Copyright Act 1912, as last amended by the Law of October 27, 1972) (The Netherlands), Art 16 (a) (iv).

⁸² German Copyright Act, above n 80, art 45a and UK Copyright Act 2002, above n 78, s 31 (A) (3).

⁸³ EBU response to the Green Paper on Copyright in the Knowledge Economy COM, above n 45.

⁸⁴ See Treaty of Rome, above n 4, art 7 prohibiting “any discrimination on grounds of nationality” regarding the scope of application of the Treaty. See also the European Union, Consolidated versions of the Treaty establishing the European Community C 325/33 (24 December 2002) art 12, and the Lisbon Treaty on the Functioning of the European Union (TFEU) 2007/C 306/01 (opened for signature 13 December 2007, entered into force 1 December 2009), art 18 that state the same norm.

guaranteeing equal rights for copyright holders and users is to be seen as one of the objectives of harmonising copyright in Europe, then the success of the process is connected to satisfactory access for the visually impaired.

Moreover, the European Commission highlighted the importance of free movement of knowledge and innovation in its review of the Single Market.⁸⁵ While the directives have generally had a positive effect on harmonisation of copyright law in Europe, they have mainly increased protection of the intellectual property rights. As Hugenholtz argues, the upwards approximation of intellectual property rights by directives is deterrent to establishment of an internal market due to territorial nature of copyright.⁸⁶ An internal market is important for free flow of accessible knowledge goods for the visually impaired. Moreover, this trend of maximising standards seems to only apply to protection of intellectual property rights and not the flexibilities, for example limitations and exceptions to copyright.

Two extensive studies on the implementation of limitations and exceptions in the EU Member States following the InfoSoc Directive show discrepancies in the harmonisation process. In 2007 the IViR report found that:⁸⁷

... divergences in the national legislation are not likely to be conducive to the development of viable business models aimed at the production and distribution of digital content that can cater to the needs of the physically impaired, for neither the right owners nor the beneficiaries know where they stand regarding the boundaries set by [the] limitation[s].

The second and more recent study discusses the different approaches that a number of the EU Member States have taken in implementing art 5 (3) (b) of the Directive. It, however, concludes that “in the framework of the current Study, it is impossible to assess precisely to which extent the lack of complete harmonisation presents an actual problem” for access to copyright-protected works of people with disabilities.⁸⁸

Lack of coherent, even if not fully harmonised, limitations and exceptions for the visually impaired together with territoriality of copyright creates legal uncertainties for making available of accessible works online. When an accessible work is made available online in a

⁸⁵ European Commission, A single market for 21st century Europe, COM 2007 724 final of 20.11.2007.

⁸⁶ P Bernt Hugenholtz, “Harmonisation or Unification of European Union Copyright Law”, (2012) 38(1) Monash University Law Review 4 at 7.

⁸⁷ Guibault, above n 52, at 52.

⁸⁸ See De Wolf & Partners, above n 60, at 428.

number of countries, the law applicable to the work is that of each of the recipient countries.⁸⁹ Although exceptions for the persons with disabilities were sought to be harmonised through the Infosoc Directive, countries vary in their enactment of the exceptions. Moreover, territoriality of copyright means that each country treats application of exceptions according to its national law. Therefore, there is no guarantee that an accessible work produced under the law of country A would still be covered by copyright exceptions once made available to users in country B.

III Anglo-American Copyright System

A New Zealand (NZ)

1 Copyright Law in NZ and Access for Visually Impaired

Under the fair dealing provisions of the New Zealand Copyright Act, certain uses of a copyright work are permitted.⁹⁰ Under s 43 of the Act, fair dealing with a copyright work for the purposes of research or private study does not infringe copyright in the work.⁹¹ In order to determine a case of fair dealing, s 43 instructs the courts to consider four factors meaning the purpose of copying, the nature of the work, whether the work could have been obtained within a reasonable time at an ordinary commercial price, and the amount and substantiality of the part copied taken in relation to the whole work.⁹²

This provision could assist the visually impaired or blind institutions to produce accessible works for purposes of research or private study, upon meeting the above mentioned criteria. However, similar to fair use or fair dealing principles in other jurisdictions, a number of difficulties could arise regarding production of accessible copies for the visually impaired. For instance, section 43 (4) states that on any one occasion, only one copy of the same work, or same part of a work can be made.⁹³ This would specifically prove problematic for libraries or blind institutions that may wish to make multiple copies of popular works.

The fair dealing principle in the NZ Copyright Act will not be discussed in further detail since the Copyright Act has specific limitations and exceptions for the benefit of the visually

⁸⁹ Hugenholtz, above n 86, at 8.

⁹⁰ See Copyright Act 1994, ss 40-43A.

⁹¹ S 43 (1).

⁹² S 43 (3).

⁹³ S 43 (4)

impaired persons. Section 69 of the Copyright Act 1994 is the main provision for production of accessible formats in New Zealand. Authorised bodies can “make or communicate copies or adaptations” of works under copyright protection.⁹⁴ Section 69 (1) defines works as “published literary or dramatic works”.⁹⁵ The section provides a broad definition of end beneficiaries by stating that accessible copies are for access by “persons who have a print disability”⁹⁶ and later provides what seems to be an exhaustive list of print disabilities.⁹⁷

In terms of accessible copies, the wording of the section seems to allow for production of multiple formats by sanctioning “braille” or copies “otherwise modified” for special needs of persons with print disabilities.⁹⁸

The Copyright Regulations prescribe the authorised bodies that can reproduce and distribute accessible works in New Zealand. Regulation 5 declares four entities as prescribed bodies: (1) the Christian Ministries with Disabled Trust, (2) the Correspondence School Te Kura ā-Tuhi, (3) New Zealand Radio for the Print Disabled Incorporated, (4) the Royal New Zealand Foundation of the Blind, (5) the University of Auckland, and (6) the Wellington Braille Club Incorporated.⁹⁹ Prescribed bodies to produce accessible format need to be “established or conducted” on a non-profit basis.¹⁰⁰

Under s 69 (2), anybody in NZ in charge of producing or distributing a copy or adaptation should ensure that (a) the work is not already commercially available in accessible format;¹⁰¹ (b) the work only caters to persons with print disability;¹⁰² (c) the copyright holder is informed;¹⁰³ and (d) no payments greater than the production costs and a reasonable contribution to the general expenses are received.¹⁰⁴ Authorised bodies to produce accessible

⁹⁴ S 69 (1).

⁹⁵ S 69 (1).

⁹⁶ S 69 (1).

⁹⁷ See s 69 (4) states that “for the purposes of this section, a person has a print disability if he or she— (a) is blind; or (b) suffers severe impairment of his or her sight; or (c) is unable to hold or manipulate books; or (d) is unable to focus or move his or her eyes; or (e) suffers a handicap with respect to visual perception”.

⁹⁸ S 69 (1).

⁹⁹ Copyright (General Matters) Regulations 1995, reg 5.

¹⁰⁰ Copyright Act 1994, s 69 (3).

¹⁰¹ S 69 (2) (a).

¹⁰² S 69 (2) (b).

¹⁰³ S 69 (2) (c).

¹⁰⁴ S 69 (2) (d).

format also need to be “established or conducted” on a non-profit basis.¹⁰⁵ Section 69 also requires the authorised bodies to notify the copyright holder.¹⁰⁶

The New Zealand Foundation for the Blind is the biggest provider of accessible works to blind and low vision people in New Zealand. The formats produced include braille, large print, electronic text and audio books. The following remarks regarding s 69 were obtained through e-mail communications with the Blind Foundation.¹⁰⁷

The Foundation sees s 69 of the Copyright Act as a very helpful legislative provision since it allows the Foundation to meet its requirements in a timely way, and it does not face too many issues over copyright because of the exemption under the Copyright Act.

The Foundation mostly produces accessible works on behalf of primary and secondary school students. The Blind Foundation is contracted by the New Zealand Ministry of Education to do this work, and gives priority to these requests. If the Foundation is asked to produce a copyright work on behalf of a school child, it will do so unless there is a practical reason against it. These reasons might include not having sufficient manpower (such as braille producers) to take on the job, or not being able to obtain high enough quality image files if the request is for a work in large print.

The Blind Foundation is occasionally asked to produce works on behalf of tertiary students, but these requests are usually declined. This is because tertiary institutions are funded to provide accessible works for their students. If the institution is unable to do so, the Foundation might step in and produce the work on a cost-recovery basis.

The Foundation also responds to one-off requests on behalf of adult members. Often this material is the type of works that would not be made available otherwise, such as family trees or bespoke recipe books. These requests are usually accepted but members can wait some time to receive the work due to limited number of staff assigned to this task. This work is funded from charitable donations.

¹⁰⁵ S 69 (3).

¹⁰⁶ S 69 (2) (c).

¹⁰⁷ E-mails from Jennifer Ashton (Pre-Production Co-ordinator, Accessible Format Production, the Blind Foundation) to Lida Ayoubi regarding the application of the s 69 exception (9 July to 12 August 2013).

Finally, the Blind Foundation produces books for its own adult lending library. These requests come from the Foundation's librarian and are usually New Zealand titles that will not be produced elsewhere.

2 Problems of access to copyright works for the visually impaired

The rights of people with disabilities have been widely discussed in New Zealand in different forums. However, lack of access to accessible works for print disabled people is not mentioned in those discussions.¹⁰⁸ There are references to access for the disabled people to information, and how government agencies specifically need to improve accessibility of their information to the disabled public.¹⁰⁹ In addition, the rights of disabled students to primary and tertiary education are identified, but accessible textbooks and other educational material are not discussed.¹¹⁰ It is unclear whether the lack of discussion on accessible print material for educational purposes is due to an already satisfactory state of availability of such material, lack of awareness or interest of responsible bodies or lack of request from the users. In any case, availability of accessible educational material should be on the agenda when discussing disability rights and rights of the disabled to an equal and inclusive education.

The New Zealand Disability Strategy created under the New Zealand Public Health and Disability Act 2000 recognises provision of the best education for disabled people as one of its objectives. Objective 3.4 requires that "disabled students ... have equitable access to the resources available to meet their needs."¹¹¹ The NZ Human Rights Commission refers to the Disability Strategy in one of its Discussion Papers when addressing access of disabled persons

¹⁰⁸ See for example the First New Zealand Report on Implementing the United Nations Convention on the Rights of Persons with Disabilities, March 2011 that briefly mentions that Ministry of Social Development funds RNZFB "to provide a talking books service to people who are blind or vision-impaired"; the Human Rights Commission, Disabled Children's Right to Education, 2009 that discusses inclusive education but does not mention accessible print material; the New Zealand Human Rights Commission, Discussion Paper The Wider Journey: The Rights of Disabled People, March 2012 that discusses access to information but does not mention accessible print material.

¹⁰⁹ Association of Blind Citizens of New Zealand (ABCNZ), The Great Barrier Brief: Register of Issues, 22 July 2008, at 3.

¹¹⁰ See for example ABCNZ, The Great Barrier Brief, at 7 calling upon the Government to "fund and resource the education of blind children to a level that enables them to access and receive a quality education equivalent to that received by their non-disabled peers". See also ABCNZ, "As We See It: Accessing New Zealand via Non-visual Means", July 2003, at 35 that recommend adoption of legislation for promotion of "a mechanism by which uniform standards for electronic data storage can be managed and circulated thus facilitating rapid production of Braille for students enrolled in both compulsory and tertiary study".

¹¹¹ The New Zealand Disability Strategy, Minister for Disability Issues, April 2001, at 16

to information.¹¹² However, according to the ABCNZ's submission in response to the Discussion Paper, the Disability Strategy is out of date and requires amendment.¹¹³

According to the Blind Foundation, the biggest issue they have in providing copyright material is probably cost. Most of the Foundation's time and effort in-house goes into producing primary and secondary school material, so other requests can be slow to process as a result.¹¹⁴ Therefore, since the Foundation is the only source of braille and some large print and audio in New Zealand, its members can be disadvantaged when it comes to accessing copyright material that it cannot provide owing to resource restrictions.

Moreover, the production costs affect the range of beneficiaries that the Foundation can cover. Under s 69, accessible works can be offered to persons who are legally blind, have vision problems or have other print disabilities such as dyslexia. However, the Foundation has limited its services to beneficiaries who meet the legal definition of blindness since "the cost of extending service beyond the legally blind would be prohibitively high." In other words, the law allows the Foundation to produce copyright material, but its ability to produce large amounts of material for a wide range of people is limited.

To overcome its limited funds and manpower, the Foundation has been building a consultancy function to spread the word about accessibility to larger, particularly public, organisations so that they build accessibility into their own document production systems. The Foundation has been working with some government departments and councils, such as Auckland Council, to make public consultation documents, bus timetables, and signage accessible.

One solution to the limited resources of the authorised entities in New Zealand is willingness of publishers to produce accessible formats or provide the authorised entities with digital files of print works. A study on the role of DAISY books in improving access of students to print material in New Zealand identified difficulty of obtaining electronic files from publishers as a deterring factor to production of books in DAISY format.¹¹⁵

¹¹² New Zealand Human Rights Commission, Discussion Paper, *The Wider Journey: The Rights of Disabled People*, March 2012.

¹¹³ Association of Blind Citizens of New Zealand, Submission to Human Rights Commission, in response to Discussion Paper *The Wider Journey: The Rights of Disabled People*, March 2012, at 4.

¹¹⁴ E-mails, above n 107.

¹¹⁵ See Sue Spooner "What page, Miss? Enhancing Text Accessibility with DAISY (Digital Accessible Information System)" (2014) 108 (3) JVB 201 at 208 suggesting that problem of producing DAISY books in a timely manner "can be compounded further by the amount of time involved in obtaining electronic files from publishers from which DAISY books are produced. The production team reported that in one instance it took six months for requested files to arrive from the publisher".

(a) Commercial availability

The requirement to check the commercial availability of an accessible format of a work can potentially create difficulties for the authorised bodies, but it does not seem to be a matter of concern for the Blind Foundation.

(b) Cross-border exchange of works

One of the solutions to the low number of books produced locally can be the import of accessible works from other countries. The Copyright Act, however, does not offer any insight on the cross-border exchange of accessible works. Import and export of accessible works between New Zealand and other countries is done through contract.

The Blind Foundation, for example, receives accessible works from Blackstone (audio books), Ulverscroft (audio books and some large print), Royal National Institute of the Blind in the UK (audio books and braille), Vision Australia (audio books and braille), and TIGAR. Accessible copies are purchased from Blackstone, Ulverscroft, and RNIB; although RNIB provides the Foundation with a reduced rate. The Blind Foundation also has an exchange agreement with Vision Australia that allows the two countries to exchange accessible works. As a member of the TIGAR, the Foundation can access its database of accessible works. However, the selection of works available through TIGAR is limited.

B The United States of America (US)

The factors that make the US a significant jurisdiction are its large population, strong copyright protection, its hugely profitable cultural industry, and numerous legal and non-legal initiatives to improve access of the blind. Moreover, the most relevant case law that partially covers the issue of lack of access for the blind - *Authors Guild v Google*¹¹⁶ and *Authors Guild v HathiTrust*¹¹⁷ comes from the US.

1 Copyright law in the US and access for the visually impaired

(a) Fair use

Fair use in s 107 of the Copyright Law of the United States applies to reproduction of works under copyright protection.¹¹⁸ Four factors need to be considered when determining the application of a fair use exception: 1) the purpose and character of the use, including whether

¹¹⁶ *The Authors Guild Inc et al v Google Inc* No. 12-3200 (2d Cir. 2013).

¹¹⁷ *Authors Guild Inc v HathiTrust* 12-4547 (2d Cir. 2014).

¹¹⁸ Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code, December 2011, s 107.

such use is of a commercial nature or is for non-profit purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

It may appear that one or more of these restrictions would be problematic for reproduction and distribution of accessible works. However, as noted in the case of *Authors Guild v HathiTrust*, “a defendant need not prevail with respect to each of the four enumerated fair-use factors to succeed on a fair-use defence. Rather the factors are ‘explored and weighed together, in light of copyright’s purpose.’”¹¹⁹ The same principle was reaffirmed in the decision of the US Court of Appeals by saying that s 107 requires a court to consider the four factors “which are to be weighed together”.¹²⁰

Fair use doctrine can be used for reproduction of accessible works for the blind and other reading disabled. To meet the first criteria of s 107, the use should be of transformative nature. A use is transformative if it adds something new and alters the expression, meaning or message of the first work.¹²¹ An accessible version of a copyright work is not the same as the work in that it is transformed to a new version that is accessible to the reading disabled. The Court in *Authors Guild v HathiTrust* held that transformative use does not necessarily need to change the work but could only be a use that “serves an entirely different purpose.”¹²²

Commercial nature of an act is not an absolute obstacle to application of fair use and it needs to be considered together with the other circumstances.¹²³ Amount and substantiality of the portion of a copyrighted work that is used also depends on the circumstances. In *Campbell v Acuff-Rose Music*, the Supreme Court argued that the extent of permissible copying should be evaluated in light of purpose and character of the use. Although the quantity of the work used in this case was not substantial it was the “heart” of the work and of qualitative value.¹²⁴ Using a work as a whole for reproduction of an accessible format falls under the doctrine of fair use. The Supreme Court expressed this opinion in *Sony Corp of America v Universal City Studios* decision. According to the Supreme Court, the House Committee Report identifies making a

¹¹⁹ *Authors Guild v HathiTrust*, above n 117, at 458. This cross reference is wrong.

¹²⁰ At 16.

¹²¹ *Campbell v Acuff-Rose Music* (92-1292) 510 U.S. 569 (1994).

¹²² *Authors Guild v HathiTrust*, above n 117, citing *Bill Graham Archives v Dorling Kindersley Ltd* 448 F.3d 605, 609 (2d Cir 2006).

¹²³ See *Campbell v Acuff-Rose Music*, above n 121.

¹²⁴ See *Campbell v Acuff-Rose Music*, above n 121, at 586.

copy of a copyrighted work for the convenience of a blind person an example of fair use “with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.”¹²⁵ In the *HathiTrust* case, the Court deemed the copying of entire works necessary to the purpose of fulfilling access for print disabled persons.¹²⁶

The fourth requirement for fair use under s 107 is about harm to the potential market for a copyrighted work or its value. In response to the argument that digital reproduction of a copyright work equals lost sales, the Court responded that purchase of the work would not have allowed access for the visually impaired.¹²⁷ In other words, if the copyright work was not made accessible to the visually impaired through fair use, they would have not purchased the normal copy since it is not accessible to them. The Court went on to argue that even if harm to potential market is to be considered it should be regarding harm to a potential “transformative market”, since providing access for the blind is a transformative use.¹²⁸

However, fair use alone cannot be relied on for provision of accessible versions of copyrighted works. Application of the fair use doctrine should be established on a case-by-case basis; therefore, it would prove too difficult for the visually impaired to use.

(b) Limitations and exceptions for the Blind: the Chafee Amendment

In addition to exceptions under the fair use principle and uses by the libraries and archives,¹²⁹ the Copyright Law of the United State also has specific limitations and exceptions for the benefit of the blind and visually impaired. As of 1996, s 121 of the Copyright Law allows for reproduction and distribution of accessible format to the blind and other persons with disabilities (Chafee Amendment).¹³⁰

The acts of reproduction and/or distribution can be done by an “authorized entity”¹³¹ meaning “a non-profit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities”.¹³²

¹²⁵ *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984), at n.40.

¹²⁶ *Authors Guild v HathiTrust*, above n 117, at 462.

¹²⁷ At 462.

¹²⁸ At 463 citing *Graham* 448 F.3d at 614. This needs a full citation.

¹²⁹ Copyright Law of the United States, above n 118, s 107.

¹³⁰ S 121.

¹³¹ S 121 (a).

¹³² S 121 (d) (1).

Beneficiaries of the s 121 exceptions are the blind or other persons with disabilities.¹³³ To define the blind or other persons with disabilities, s 121 (d) (2) refers to the Act entitled An Act to provide books for the adult blind (Pratt-Smoot Act).¹³⁴ This Act mainly establishes the eligibility of blind or otherwise print disabled students to receive instructional materials in specialised formats under the Individuals with Disabilities Education Act (IDEA).¹³⁵ The Pratt-Smoot Act recognises four groups of individuals with the following conditions as eligible: blindness, visual disability, physical limitation, reading disability resulting from organic dysfunction.¹³⁶

The accessible formats to which copyright works can be converted are limited to braille, audio, and digital text which is exclusively for use by blind or other persons with disabilities.¹³⁷ Large print as a specialized format could only be used for reproduction of print instructional material.¹³⁸

2 Problems of access to copyright works for the visually impaired

(a) Digital rights management and access

The Chafee Amendment does not cover the issue of circumvention of TPMs for application of exceptions for the benefit of the blind. The Digital Millennium Copyright Act 1998 (DMCA), that prohibits circumventing technological protection measures, allows for a number of exceptions.¹³⁹ However, since the exceptions are narrowly defined, the blind institutions in the United States have had to apply to be exempted under a rule making procedure every three years.¹⁴⁰ The last exemption to prohibition of circumventing TPMs for the benefit of the visually impaired was granted in 2012. Therefore, the American Foundation for the Blind has requested a renewed exemption last year.¹⁴¹ Due to the cumbersome procedure of applying for

¹³³ S 121 (a).

¹³⁴ S 121 (d) (2).

¹³⁵ Timeline and Overview of “an Act to provide books for the adult blind” (or “Pratt-Smoot Act”), Prepared for the National Center on Accessible Instructional Materials, by Joanne Karger, June 12, 2012 <www.aim.cast.org>.

¹³⁶ An Act to provide books for the adult blind, approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487).

¹³⁷ Copyright Law of the United States, above n 118, s 121 (d) (4) (A).

¹³⁸ S 121 (d) (4) (B).

¹³⁹ The Digital Millennium Copyright Act of 1998, s 1201.

¹⁴⁰ See Krista Cox “Marrakesh Note 4: The 2012 U.S. Copyright Office decision regarding Technological Protection Measures, including discussion of Commercial Availability of accessible works” 7 June 2013 <www.keionline.org> at 1.

¹⁴¹ See The American Foundation for the Blind (AFB) “Reply Comment on Proposed Class 9: Literary Works Distributed Electronically – Assistive Technologies”, in the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Federal Register Volume 79, Number 239 (Friday, December 12, 2014) <www.gpo.gov>.

the exemption, some have advocated for the adoption of a more efficient rule making process.¹⁴²

In addition, the Individuals with Disabilities Education Improvement Act of 2004 requires publishers to provide digital master files of print textbooks to National Instructional Materials Access Center (NIMAC) for reproduction of accessible formats.¹⁴³ This requirement does not, however, apply to textbooks that are in digital formats from the beginning and are usually published with TPMs.¹⁴⁴

(b) Restrictions on accessible formats

The types of accessible formats that can be produced under the Chafee Amendment are ambiguous. Section 121 defines a “specialized format” as “braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.”¹⁴⁵ It is unclear whether “exclusively for use by blind” means that the format is only accessible to the print disabled in a way that a sighted person would not benefit from it or that the accessible work is reproduced with the intent to be used by the blind and others with reading disabilities.

The Association of American Publishers (AAP) has expressed the view that this clause is meant to restrict production of accessible works that could be used by those without a print disability. Similarly, APA argues that the Amendment would not apply to new technologies such as modern audio books different than those available in 1996 (when the Chafee Amendment was passed) or text-to-speech features.¹⁴⁶

By contrast, in *Sony v Universal Studios*, the Supreme Court opined that “when technological change has rendered its logical terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose of ‘stimulat[ing] artistic creativity for the general public good’”.¹⁴⁷ In the

¹⁴² See for example Association of American Publishers (AAP) “Statement Submitted for the Hearing Record, House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet” 12 November 2014 <www.publishers.org> at 6 stating that AAP does not object to renewal of the exemption for the benefit of the visually impaired and it supports the suggestion “put forward at the hearing by ESA and ACT to replace the de novo evidentiary burden for certain proposed exemptions with a presumption in favor of renewal under particular conditions, including: (1) the exemption has previously been granted; (2) the factual circumstances have not changed in any material way; and (3) the exemption remains unopposed”.

¹⁴³ Individuals with Disabilities Education Act 2004 (US), s 674(e).

¹⁴⁴ See Jim Fruchterman “Technological Protection Measures and the Blind: Why Circumvention for the Purposes of Access is Crucial”, A Bookshare Briefing Paper Prepared for the Diplomatic Conference for Visually Impaired Persons, 22 June 2013, <www.benetech.blogspot.co.nz>.

¹⁴⁵ Copyright Law of the United States, above n 118, s 121 (d) (4) (A).

¹⁴⁶ AAP, Background and Current Issues (AAP Position Paper Presented at AHEAD 2004), 18 April 2004, <www.ahead.org>.

¹⁴⁷ *Sony Corp of America v. Universal City Studios*, above n 125, at n 10 citing *Twentieth Century Music Corp v. Aiken* 422 US 151, 156 (1975).

more recent case of *Authors Guild v HathiTrust*, the Court granted a fair use defence to University of Michigan that provided the reading disabled with copyrighted content through text-to-speech facilities. Moreover, in the same decision, the Court concluded that accessible works in the *HathiTrust* project, which were produced according to requirements of s 121, “fit squarely within the Chafee Amendment”.¹⁴⁸ Considering that the University of Michigan made the works accessible to the blind through text-to-speech, the Court’s view seems to signal permissibility of the use of new technologies under the Chafee Amendment.

(c) Restrictions on authorised entities

The Chafee Amendment restricts reproduction and distribution of accessible formats to authorised entities.¹⁴⁹ Therefore, people who are not associated with such entities would not be able to benefit from the exception. This means that guardians, friends or other people interested in helping the visually impaired are not authorised to use this exception.

The AAP suggests that a typical educational institution that accommodates students with disabilities, only by virtue of its legal responsibility, is not an authorised entity as intended by the Chafee amendment. The “primary mission” element in the definition of an authorised entity is part of AAP’s argument regarding non-specialised institutions.¹⁵⁰

Fair use can complement the Chafee Amendment in this case too. As the Court held in *Sony v Universal City*, fair use applies to reproduction of a copyright protected work for the blind even with the sole purpose of entertaining or informing.¹⁵¹ In the case of *Authors Guild v HathiTrust*, the Supreme Court reiterated this view by upholding the District Court’s decision that educational institutions are acting within the meaning of s 107 when providing the reading disabled with accessible content.¹⁵²

Moreover, the Court in the *HathiTrust* case recognised the University of Michigan as an “authorised entity” with a “primary mission” to improve access for individuals with print disabilities.¹⁵³ This recognition is justified by the Court because of the duty that the Americans with Disabilities Act (ADA) of 1990 and the Rehabilitation Act of 1976 impose on libraries of educational institutions. The imposed duty requires such entities to have provision of accessible

¹⁴⁸ *Authors Guild v HathiTrust*, above n 117, at 465.

¹⁴⁹ Copyright Law of the United States, above n 118, s 121 (a). You need to cite this properly.

¹⁵⁰ AAP, above n 146.

¹⁵¹ *Sony Corp of America v. Universal City Studios*, above n 125, at [40].

¹⁵² *Authors Guild v HathiTrust*, above n 117.

¹⁵³ At 465.

works to the print-disabled as a primary mission. This reading of the ADA, the Rehabilitation Act, and the Chafee Amendment by the Court is, therefore, against the argument that “primary mission” should be the sole purpose of an organisation for it to qualify as an “authorised entity”.

(d) Restrictions on authorised works

Section 121 covers published non-dramatic literary works;¹⁵⁴ therefore, it would not allow reproduction of accessible works from unpublished works, dramatic works such as a script of a play, or non-literary works.

The fair use principle makes the reproduction of unpublished works possible. Section 107 states that fair use applies to unpublished works upon consideration of all the four factors necessary for finding of fair use.¹⁵⁵ The type of copyright works that are subject to fair use are also not limited, therefore the doctrine can cover works that are not subject to the Chafee limitation. In general, the fair use is a great complement to the limitations and exceptions designed for the benefit of the visually impaired, especially when they are ambiguous.¹⁵⁶

(e) Cross-border exchange of works

Section 602 (a) (2) (b) of the US Copyright prohibits import or export of infringing copies of copyright works. Therefore, import and export of non-infringing copies, such as accessible copies made under s 121 exceptions, is arguably permissible.¹⁵⁷

Moreover, according to the American Bar Association, s 602 considers importation as distribution.¹⁵⁸ Therefore, considering the Chafee Amendment’s exception to the right to distribution, authorised entities would be able to import accessible works.¹⁵⁹ Finally, the fair use exception, and the exception for importation for personal use in s 602 (a) (3) enable the individuals with visual impairment to import accessible copies.¹⁶⁰

¹⁵⁴ Copyright Law of the United States, above n 118, s 121 (a).

¹⁵⁵ Copyright Law of the United States, above n 118, s 107.

¹⁵⁶ Krista L Cox, “US Fair Use versus the Chafee Amendment: How Do They Overlap?” 3 June 2013 <www.keionline.org> at 4.

¹⁵⁷ See American Bar Association, Resolution adopted by the House of Delegates, 11-12 August 2014, <www.americanbar.org>, at 5 stating that the requirement of the Marrakesh Treaty for authorisation of import and export of accessible works “is fully in accord with existing U.S. law”.

¹⁵⁸ American Bar Association, at 8.

¹⁵⁹ Copyright Law of the United States, above n 118, s 121 (a).

¹⁶⁰ S 602 (a) (3).

IV Chile

A Copyright Law in Chile and Access for the Visually Impaired

In addition to being a developing country, Chile serves as an example of the approach of Latin American countries toward the issue of access for the visually impaired. Chile has played an important role in the international discussion of copyright limitations and exceptions at WIPO. It requested inclusion of the issue of limitations and exceptions in SCCR's agenda.¹⁶¹ Moreover, it recently introduced new legislation to allow for limitations and exceptions to copyright for the benefit of the visually impaired.

There are no clear figures on the number of disabled persons in general and visually impaired in particular in Latin America. The estimated numbers vary greatly due to the differing methodologies applied.¹⁶² Regarding the visually impaired in Latin America - as is the case with persons with disabilities in general, 90 percent of this segment of the population lives in developing countries and has inadequate access to nutrition, health and education.¹⁶³

There is no explicit reference to the disabled and their rights in the Constitution of Chile. However, the Constitution states that everyone is "equal in dignity and rights"¹⁶⁴ and guarantees to everyone "equality before the law" and "equal protection under the law in the exercise of their rights" affirming the principle of non-discrimination.¹⁶⁵ According to art 19(8) of the Constitution, "basic education is mandatory" and the State should ensure access to it by "the entire population". Access to higher education for all is not mandatory according to the law. However, the State is still required to promote access to higher education for everyone.¹⁶⁶ The other common fundamental rights that may be affected by lack of access to books are not mentioned in the Chilean Constitution. The only reference to information is regarding "freedom

¹⁶¹ WIPO SCCR, Proposal by Chile on the Subject "Exceptions and Limitations to Copyright and Related Rights", SCCR/12/3, 2 November 2004.

¹⁶² See the International Disability Rights Monitor (IDRM), Chile 2004 IDRM Country Report <www.ideanet.org> stating that in 2002 the last official census in Chile estimated that 2.2 percent of the population are disabled while the 2000 National Social and Economic survey (CASEN) had an estimation of 5.3 percent. Meanwhile, the Quality of Life and Health survey (ENCAVI) in 2000 suggested 21.7 percent of the population has at least one disability.

¹⁶³ Dean Lermen Gonzalez "Report on the educational inclusion of visually impaired children and young persons in Latin America" 1 May 2014 <<http://www.risalc.org>> at 4.

¹⁶⁴ Constitution of the Republic of Chile, (adopted on September 11, 1980 and entered into force on March 11, 1981), art 1.

¹⁶⁵ Arts 19 (2) and 19 (3).

¹⁶⁶ Art 19 (10).

to express opinion and to inform;”¹⁶⁷ and, access to culture is only recognised in the form of “free exercise of all cults”.¹⁶⁸ Law 19284 on the Social Integration of Persons with Disabilities, however, obligates the state to provide programs in the area of access to culture, information and education.¹⁶⁹

Prior to 2010, the Chilean Copyright Act of 1970 and its amendments were “characterized by almost exclusively catering to the interests of copyright owners.”¹⁷⁰ In 2007, Chile’s Ministry of Culture put forward a draft Bill containing a set of limitations and exceptions to copyright. After extensive negotiations on the draft Bill, Law No. 20.435 on Intellectual Property came into force in 2010 approving exceptions for the benefit of visually and otherwise disabled persons to access copyright works.¹⁷¹

The exception in Law 20.435, that facilitates access of the visually impaired, is rather broad and inclusive. Article 71C of the Law permits “reproduction, adaptation, distribution or communication to the public, of a lawfully published work.” These acts are permissible “without paying or obtaining the consent of the copyright holder”. The exception applies as long as the mentioned acts are done for the benefit of “persons with visual, hearing or other impairments that prevent them from accessing the work normally”.¹⁷²

The exception is not limited to any accessible format given that it is “carried out by means of an appropriate procedure or medium to overcome the impairment”.¹⁷³

As well as limiting reproduction of accessible copies to lawfully published works, there are a number of other restrictions in art 71C: production of accessible copies should be on a non-commercial basis only; use of the works should remain directly related to the impairment; and, the works are not allowed to be distributed or made available to those without the identified disabilities.¹⁷⁴

¹⁶⁷ Art 19 (12).

¹⁶⁸ Art 19 (6).

¹⁶⁹ Law 19284 of 1994 on the Social Integration of Persons with Disabilities (Chile).

¹⁷⁰ International Centre for Trade and Sustainable Development, Policy Brief 12 December 2011, Daniel Alvarez Valenzuela, *The Quest for a Normative Balance: The Recent Reforms to Chile’s Copyright Law*, at 2.

¹⁷¹ Law No. 20.435 amending Law No. 17.336 on Intellectual Property, 24 May 2010 (Chile).

¹⁷² Law No. 20.435 (Chile), art 71C.

¹⁷³ Art 71C.

¹⁷⁴ Art 71C.

B Problems of Access to Print Material for the Visually Impaired

1 Digital rights management and access

The Copyright Act has left the question of interaction of TPMs and assistive technologies unanswered. However, that may be due to the lack of a discussion on protection of TPMs in the Copyright Act.

2 Cross-border exchange of works

The law is also silent about cross-border exchange of accessible works, which means that to date visually impaired persons in Chile have been unable to access the resources of other Spanish speaking countries in the South America and elsewhere. The same difficulty exists in other countries of the region with similar copyright legislation. Chile is a signatory to the Marrakesh Treaty. Upon ratification of the Marrakesh Treaty and amending their copyright legislation, countries in the region can share their resources. As of 2010, there were an estimated 26 million visually impaired persons living in the 36 countries of the Americas region. The majority of these countries are Spanish speaking (in the United States, English is the dominant language but a large segment of the population (36.9 million in 2010) speaks Spanish as well).¹⁷⁵ For instance, it was estimated that in 2013 Uruguay had 3000 books on tape for the whole country whereas Argentina, just across the border, had hundreds of thousands.¹⁷⁶

V South Africa

A South African copyright law and access for the visually impaired to works

South Africa has a relatively large population of people with disabilities. As of 2009 there were nearly 2.1 million disabled children, with disabilities related to sight and hearing being the most common. Among other difficulties, evidence from surveys suggests that children with disabilities are substantially less likely to attend school than their non-disabled peers.¹⁷⁷ There

¹⁷⁵ Jennifer Ortman and Hyon Shin “Language Projections: 2010 to 2020”, Presented at the Annual Meetings of the American Sociological Association, Las Vegas, NV, August 20-23, 2011, <www.census.gov> at 9.

¹⁷⁶ Mail & Guardian, Mara Kardas-Nelson, “The rich turn a blind eye to poor readers”, at 3.

¹⁷⁷ UNICEF, Children with Disabilities in South Africa: A Situation Analysis 2001-2011, Executive Summary, at 7.

are many contributing factors. However, lack of accessible books, as one of the main elements of an inclusive educational system, plays an important role.¹⁷⁸

Right of the visually impaired to access copyright works is guaranteed in the Constitution of South Africa. The Bill of Rights that forms Chapter 2 of the Constitution enumerates a number of fundamental rights that cover everyone in South Africa.¹⁷⁹ Among the many fundamental rights are everyone's right to freedom of expression,¹⁸⁰ education,¹⁸¹ participation in the cultural life,¹⁸² and access to information.¹⁸³ The Bill of Rights also prohibits discrimination against the disabled.¹⁸⁴ The Bill of Rights calls upon the state to "respect, protect, promote and fulfil" the rights included in it.¹⁸⁵ Therefore, it imposes a "duty on every part of the State, the executive and the legislature, as well as the judiciary, a positive duty to promote the rights, rather than a simple negative duty to refrain from infringing the rights."¹⁸⁶

The Promotion of Access to Information Act 2 of 2000 (PAIA) reiterates the importance of right of access to information formerly recognised in the South African Constitution. Active promotion of "a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights" is among the goals of PAIA.¹⁸⁷

B Problems of Access to Print Material for the Visually Impaired

1 Lack of limitations and exceptions for the blind

In South Africa, s 12 of the Copyright Act No. 98 of 1978 sets out a number of limitations and exceptions to protection of literary works. There are, however, no limitations and exceptions for the benefit of the visually impaired in the Act. Section 12 (1) (a) allows for fair dealing with

¹⁷⁸ See chapter 1 on the right to education and impact of accessible educational material on its realisation.

¹⁷⁹ Constitution of the Republic of South Africa No. 108 of 1996 (Date of promulgation: 18 December, 1996, Date of commencement: 4 February, 1997), s 7.

¹⁸⁰ S 16.

¹⁸¹ S 29.

¹⁸² S 30.

¹⁸³ S 32.

¹⁸⁴ S 9 (3) reads that "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... disability".

¹⁸⁵ S 7 (2).

¹⁸⁶ Realising Human Rights in South African Copyright Legislation, Report on Fundamental Rights and Global Copyright Legislative Best Practise for Access to Knowledge in South Africa, prepared for the Association of Progressive communications by Andrew Rens, October 2010 <www.apc.org> at 6.

¹⁸⁷ Promotion of Access to Information Act 2 of 2000 [Assented to 2 February 2000, Date of commencement 9 March 2001], Preamble.

a copyright work for “purposes of research or private study by, or the personal or private use of, the person using the work”.¹⁸⁸

Since fair dealing with a copyright work for private use is permissible under s 12, visually impaired individuals in South Africa have the possibility to produce accessible copies. This section of the Act, however, does not address the situation for libraries or educational institutions. Use of copyright works for teaching purposes would not infringe the copyright but only “to the extent justified by the purpose”. Even this exception covers only “illustration” of the copyright work, and among the permissible methods, “sound record” is the only format that may be useful to the visually impaired.¹⁸⁹

In addition to the exceptions in s 12 of the Copyright Act, s 13 permits other exceptions to the reproduction rights provided that they are “not in conflict with a normal exploitation of the work and [are] not unreasonably prejudicial to the legitimate interests of the owner of the copyright.”¹⁹⁰ Such exceptions are prescribed in the Copyright Regulations 1978.¹⁹¹ Regulation 3 allows a library or archive depot to reproduce and distribute a copy if done on a non-commercial basis,¹⁹² the collection is open to public and available for research,¹⁹³ and “the reproduction of the work shall incorporate a copyright warning”.¹⁹⁴

This reproduction and distribution possibility is further limited. Regulation 2, which applies to provisions of reg 3, permits only the reproduction of a single copy of “a reasonable portion of the work”¹⁹⁵ that “does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.”¹⁹⁶ Reproduction of “the entire work” or “a substantial portion of it” upon request by a user is only possible if the library cannot find “an unused copy of the copyrighted work ... at a fair price” after “reasonable investigation”.¹⁹⁷ Despite the possibilities that the Copyright Regulations offer, they have some problems. For instance, terms such as “reasonable portion are often not

¹⁸⁸ Commercial Law Copyright Act No.98 of 1978 of South Africa, s12 (1) (a).

¹⁸⁹ S 12 (4)

¹⁹⁰ S 13.

¹⁹¹ Copyright Act 1978 Regulations as published in GN R1211 in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.

¹⁹² Reg 3 (a).

¹⁹³ Reg 3 (b).

¹⁹⁴ Reg3 (c).

¹⁹⁵ Reg 2 (a).

¹⁹⁶ Reg 2 (b).

¹⁹⁷ Reg 3 (h).

defined” and other requirements particularly regarding reproduction of an entire work “appear overly restrictive.”¹⁹⁸

Under the Copyright Act and its Regulations it is unclear whether conversion of works to accessible formats is treated as reproduction or adaptation. If considered reproduction, then libraries could make use of regs 2 and 3 and provide partial or full copies of copyright works in accessible formats for the blind. The African Copyright and Access to Knowledge (ACA2K) Project Country Report on South Africa suggests that under the Regulations “libraries may not translate, adapt or convert material into other formats.”¹⁹⁹

The Copyright Act appears to infringe a number of fundamental rights recognised in the Bill of Rights. Under the South African Constitution, “the role of lawmakers in copyright reform is to ... reform copyright law in order to respect, protect, promote and fulfil the rights in the Bill of Rights”.²⁰⁰ One of the areas that need reform is reproduction of accessible works for the visually impaired.

The South African Library for the Blind (SALB) was established to fulfil the right of the blind to freedom of expression. According to its founding Act, SALB is mandated to provide a national library and information service to serve blind and print-handicapped readers in South Africa.²⁰¹ Although SALB is able to produce accessible copies for its registered members under the available limitations, “the requirement that permission [of the copyright holder] must be obtained to convert text to braille or audio amounts to a burden on the library.”²⁰² Generally, obtaining the copyright holder’s permission means delayed production and consequently delayed provision of the accessible copies to the visually impaired.

In the absence of copyright exceptions and limitations for the blind, SALB “has had to rely on licensing agreements with the Publishers Association of South Africa (PASA) to make works, including government copyrighted works, accessible in alternative formats”.²⁰³ The situation

¹⁹⁸ Chris Armstrong, Jeremy de Beer, Dick Kawooya, and others (eds) “Access to Knowledge in Africa: The Role of Copyright” [ACA2K Country Report] (Juta Academic, South Africa, 2010) at 240.

¹⁹⁹ ACA2K Country Report, at 15.

²⁰⁰ Rens, above n 186, at 7.

²⁰¹ Act No. 91, The South African Library for the Blind Act 1998, art 3.

²⁰² Rens, above n 186, at 8.

²⁰³ Denise Rosemary Nicholson and Dick Kawooya “The Impact of Copyright on Access to Public Information in African Countries: a perspective from Uganda and South Africa” World Library and Information Congress: 74th IFLA General Conference and Council, 10-14 August 2008, Quebec, Canada <www.aca2k.org> at 14.

is the same for educational institutions and the process affects the performance of students with visual disabilities.²⁰⁴

Copyright licences are addressed under s 22 of the Copyright Act. The role of the Copyright Tribunal in settling disputes arising between those providing licenses and those who need them is explained in ss 29 to 26 of the Act. Therefore, if a copyright holder is unreasonably refusing to licence a work to a blind institution the Copyright Tribunal would grant the license. However, this would be a time consuming process and an extra burden for blind institutions.

2 Lack of compatibility with new technologies

The Copyright Act 1978 is not compatible with new technological developments and does not allow an optimised use of new technologies for better access of the visually impaired to books. According to the ACA2K Country Report on South Africa, “most [copyright] stakeholders interviewed lamented in one way or another the outdated and often vague state of the current South African Copyright Act.”²⁰⁵ South Africa’s Department of Trade and Industry’s Draft National Policy on Intellectual Property reaffirms the same point by stating that “digitally, the Copyright Act is outdated.”²⁰⁶ Considering that “only between 5 to 10% of the total blind population is braille literate” use of other modern technologies in production of accessible formats shows its significance.²⁰⁷

Digitised library collections are another resource that the visually impaired could benefit from through use of assistive technologies such as software that enlarges text or text-to-speech technologies. However, the Copyright Act does not address digitisation of library collections. Moreover, “libraries do not have the necessary clarity on whether they may distribute works in a digital format within the allowed reproduction and distribution rights purported in the Regulations.”²⁰⁸

²⁰⁴See Denise Rosemary Nicholson “Copyright- Are people with sensory-disabilities getting a fair deal?” Conference paper, 4th Pan-Commonwealth Conference, Ocho Rios, Jamaica, 2006 <www.pcf4.dec.uwi.edu>.

²⁰⁵ ACA2K Country Report, above n 198, at 46.

²⁰⁶ Department of Trade and Industry, Draft National Policy on Intellectual Property, Invitation for the Public to Comment on the National Policy on Intellectual Property, Government Gazette, 4 September 2013, at 16.

²⁰⁷ South African National Council for the Blind website <www.sancb.org.za>.

²⁰⁸ ACA2K Country Report, above n 198, at 15; and at 28 stating that “the Act also fails to adequately address fair dealing in the context of digitised works”.

3 *Digital rights management and access*

Section 86 of the Electronic Communications and Transactions Act of 2002 stipulates that overcoming anti-circumvention measures is illegal.²⁰⁹ “This protection of TPMs is remarkably comprehensive” and “can have the effect of undermining existing and well-established copyright exceptions and limitations”.²¹⁰ The Copyright Act does not address the balancing of anti-circumvention measures with access of the blind when using technologically protected works.

4 *Translation and cross-border exchange of works*

There are eleven officially recognised languages in South Africa.²¹¹ The right to language is also among the rights recognised by the Bill of Rights and the state is under obligation to “to elevate the status and advance the use of” indigenous languages.²¹² However, accessible works in South Africa are mainly in English or Afrikaans.²¹³ Currently the Copyright Act of 1978 prohibits making adaptations of a copyright work.²¹⁴

In countries like South Africa with great language diversities, the copyright exceptions for the visually impaired should also allow for translation of accessible copies in order to provide access for everyone with visual disabilities regardless of their language. “While the state may not always have the resources to translate or pay for the translation of various media into indigenous languages it should ensure that laws and administrative actions do not become barriers to the translation of media into indigenous languages.”²¹⁵ Moreover, many of these eleven languages are spoken in other parts of Africa. This makes the cross-border exchange of works in South Africa a vital solution to lack of accessible material.

²⁰⁹ See Electronic Communications and Transactions Act 25 of 2002, (Gazette No. 23708, No. 1046 dated 2 August 2002. Commencement date: 30 August 2002 [Proc. No. R.68, Gazette No. 23809]), s 86 stating that “(3) A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence. (4) A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence”.

²¹⁰ ACA2K Country Report, above n 198, at 22.

²¹¹ Constitution of the Republic of South Africa, above n 179, s 6 (1).

²¹² S 6 (2).

²¹³ Mara Kardas-Nelson, above n 176, at 4.

²¹⁴ Constitution of the Republic of South Africa, above n 179, s 6 (f).

²¹⁵ Rens, above n 186, at 41.

There have been a number of attempts to amend and update the Copyright Act of 1978.²¹⁶ While successful in some regards, (for example in relation to traditional knowledge) these attempts have had no results in terms of access of the disabled to copyright works. The most recent development in South Africa's intellectual property law is the Draft National Intellectual Property Policy.²¹⁷ The Policy document has no reference to copyright and access to copyright works for the visually impaired.

VI India

A Indian copyright law and access for the visually impaired to copyright works

According to the 2001 Census, there are around 22 million disabled persons in India of which 48.5 percent have visual disabilities.²¹⁸ According to a 2010 study by the World Health Organization, India has the second largest population of visually impaired people (21.9 percent of world's visually impaired) just after China.²¹⁹ As of 2011, persons with vision loss were able to get "no more than 0.5 percent of all books coming out of the country's publishing houses."²²⁰

Rights of the visually impaired Indians are guaranteed in a number of pieces of legislation. The Indian Constitution prohibits discrimination on some specific grounds but disability is not one of them.²²¹ However, other rights in Part III of the Constitution entitled Fundamental Rights are recognised for everyone. Among those rights is the right to education for everyone.²²² The right of the disabled to education is also recognised in the National Policy of Education, 1986,²²³ the Right to Education Act, 2009,²²⁴ and the Right to Information Act, 2005.²²⁵ Furthermore, the Person with Disabilities Act, 1995 and National Policy for Persons with

²¹⁶ South African Open Copyright Review, ACA2K, Copyright Amendment Act No. 9 of 2002, Intellectual Property Law Amendments Act of 2013.

²¹⁷ Draft National Policy on Intellectual Property, above n 206.

²¹⁸ Government of India, Ministry of Home Affairs, Census website <www.censusindia.gov.in>.

²¹⁹ World Health Organization, Global Data on Visual Impairments 2010, WHO/ NMH/ PBD/ 12.01, at 5.

²²⁰ Pubali Sinha Chowdhury "Right to Read: Time to Recognize Rights of Print Disabled Under Indian Copyright Law" (2011) 4 INJIPLaw 35 at 45.

²²¹ The Constitution of India, (Updated upto (Ninety-Eighth Amendment) Act, 2012), art 15 (1) prohibits discrimination on grounds of "religion, race, caste, sex or place of birth".

²²² The Constitution of India, art 21A.

²²³ Government of India, Department of Education, Ministry of Human Resource Development, National Policy on Education 1986 (as modified in 1992).

²²⁴ The Right of Children to Free and Compulsory Education No. 35 of 2009 (Assented on 26 August 2009).

²²⁵ The Right to Information Act No. 22 of 2005 (Assented on 15 June 2005).

Disabilities, 2006²²⁶ emphasise the importance of non-discrimination and access to education and employment for the disabled.²²⁷ It was adopted to “give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region.”²²⁸ This Act, however, “is not a mandatory Law and it is not specifying what all the educational institutions [need] to follow.”²²⁹ A Draft Rights of Persons with Disabilities Bill has also been in the Indian Parliament since 2009 in order to enact legislation in accordance with India’s obligation under the Convention on the Rights of Persons with Disabilities.

Prior to 2012, the Indian Copyright Act of 1957 did not contain any specific exceptions for the benefit of the visually impaired. However, the visually impaired could benefit from s 52 of the Act that sanctions “a fair dealing with a literary, dramatic, musical or artistic work” for “purposes of private use including research”.²³⁰

The change came with the Copyright (Amendment) Act of 2012 that allows for “adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format”.²³¹ Production and distribution of accessible formats can be done by “any person” facilitating access of the persons with disabilities or “any organisation working for the benefit of persons with disabilities”.²³²

India is a member of Berne Convention and the TRIPS Agreement, and amending the Copyright Act of 1957 was done to bring the Act into compliance with India’s international commitments. Therefore, production of accessible formats is only possible on a non-profit basis and after the person or institution in charge has taken “reasonable steps to prevent [accessible copies from] entry into ordinary channels of business.”²³³ The provision in the Amendment Act is among the most wide and inclusive exceptions of its kind. It is disability and format neutral, therefore all Indians with disabilities that impair reading can benefit from accessible copies in a format that suits their needs best.

²²⁶ Government of India, Ministry of Social Justice and Empowerment, National Policy for Persons with Disabilities, 2006 (10 February 2006).

²²⁷ The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (Assented on 1 January 1996) (India), Chs V, VI, and VIII.

²²⁸ The Persons with Disabilities Act 1995, Preamble.

²²⁹ Priya Pillai “Accessible Copies of Copyright Work for Visually Impaired Persons in India” (2012) 3 Creative Education 1060 at 1060.

²³⁰ The Copyright Act of 1957 (India), s 52 (1) (a) (i).

²³¹ The Copyright (Amendment) Act No. 27 of 2012, An Act further to amend the Copyright Act, 1957 (Assented on 7 June 2012), s 52 (1) (zb).

²³² The Copyright (Amendment) Act 2012, ss 52 (1) (zb) (i) and (ii).

²³³ S 52 (1) (zb) (ii).

The Amendment Act also addresses production of accessible formats on a for-profit basis. Under the amended s 31, “any person working for the benefit of persons with disability on a profit basis or for business” can apply for a compulsory licence.²³⁴ The Copyright Board needs to address the application within two months and grant a compulsory licence after a) establishing “the credentials of the applicant”, b) being assured of the “good faith” nature of the application,²³⁵ and c) giving the copyright owner “a reasonable opportunity of being heard.”²³⁶

B Problems of Access to Print Material for the Visually Impaired

1 Restrictions on copyrights

Section 52 (1) (zb) only mentions the right to “adaptation, reproduction, issue of copies, or communication to the public.”²³⁷ It is therefore not clear whether the exception applies to the right of making available, which is essential for online transfer and sharing of accessible works. If “issue of copies or communication to the public” is interpreted broadly, it could potentially cover export of works.

2 Digital rights management and access

The interaction of anti-circumvention measures with the copyright exception for the visually impaired is not addressed in the Copyright Act 1957 or its Amendment of 2012.

3 Cross-border exchange of works

Section 53 of the Copyright (Amendment) Act prohibits importation of works that, if made in India, would be infringing.²³⁸ Therefore, the visually impaired or their institutions could arguably import copies that meet the criteria of s 52 (1) (zb) and are not deemed infringing. Section further confirms the possibility of import by individuals with visual impairment by exempting “the import of one copy of any work for the private and domestic use of the importer from infringement”.²³⁹

²³⁴ S 31B (1).

²³⁵ S 31B (2).

²³⁶ S 31B (3).

²³⁷ S 52 (1) (zb).

²³⁸ S 53 (1).

²³⁹ S 51 (a) (4).

VII Conclusion

This chapter analysed the copyright flexibilities that could facilitate access for the visually impaired to copyright works in a number of countries. The chapter measured the efficiency of the existing flexibilities against the problems identified in chapter 1, and the human rights claims of the visually impaired in chapter 2.

In the European Union, different Directives have sought to harmonise the copyright law of the EU Member States. The Infosoc Directive has specifically provided for adoption of copyright limitations and exceptions for the benefit of the visually impaired. However, the analysis showed that adopted limitations and exceptions by countries vary to a significant degree.

Moreover, due to the territoriality of copyright and lack of uniform guidelines, the EU countries are not engaged in effective cross-border exchange of accessible works. The EU Directives, and national copyright laws of its Member States, are discriminatory, to the extent that they are not in line with the right of the visually impaired to equal access to copyright works.

The exception in the NZ Copyright Act seems to provide a satisfactory legal framework to produce accessible formats. There are, however, still difficulties with import and export of accessible works.

In the United States, exceptions for the visually impaired under the Chafee Amendment seem to be more restrictive than the fair use exception. The main difference is that the application of the fair use needs to be established on a case-by-case basis. By combining the Chafee Amendment and the fair use doctrine it seems that the United States has a robust system of limitations and exceptions for the benefit of the visually impaired. The cross-border exchange of accessible works, while arguably already possible, could be further facilitated.

Similar to New Zealand and the US, the exception for the visually impaired in the Chilean Copyright Act is rather comprehensive regarding the end beneficiaries, permitted acts, accessible formats, and authorised entities, but does not address international sharing of works.

The Copyright Act of South Africa, on the other hand, does not provide for limitations and exceptions for the benefit of the visually impaired. Production and distribution of accessible works is possible through more general exceptions to copyright. However, those exceptions lack clarity and require the visually impaired institutions to obtain the permission of the

copyright holder. Therefore, in the light of the fundamental rights recognised in the Constitution, the South African Copyright Act appears to be unconstitutional since it “in essence restricts the republication of published material in alternative formats” and this “affects [the disabled persons’] basic right to information which is freely available to sighted people.”²⁴⁰

Subject to some minor ambiguities, the Copyright Act in India authorises production and distribution of accessible formats for the visually impaired. However, similar to some of the other countries, the Indian Copyright Act does not address the interaction of TPMs and exceptions or the cross-border exchange of accessible works.

By analysing the above countries, this chapter showed that the mere presence of flexibilities in copyright law does not lead to non-discriminatory treatment of the access for the visually impaired. If copyright limitations and exceptions are not drafted with a view to provide equal access for the visually impaired, they create difficulties that were discussed in this chapter as well as chapter 1. While technical matters differ in different jurisdictions, a bigger policy dimension could help all of them solve their problems according to their national conditions. Therefore, the proposed human rights framework in chapter 6 engages with the problems that were identified in this chapter with regards to the accommodation of access for the visually impaired in national copyright laws.

While the focus of this chapter was on national copyright laws, the next chapter discusses the impact of international copyright law on access for the visually impaired. By shaping the copyright laws of their member states, international copyright instruments affect the way in which countries address the access for the visually impaired. Therefore, international copyright law’s contribution to alleviation or aggravation of the problems identified in this chapter will be discussed next.

²⁴⁰ South African Library for the Blind, Strategic Plan for the Period 2010/2011 to 2012/2013, 27 February 2010 <www.salb.org.za> at 8.

Country	Provision	Users	Copyright works	Permissible acts	Formats	Authorised entities	Other requirements	TPMs
European Union (EU)	art 5(3)(b) and 6(4) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive)	people with a disability	(a) works of authors; (b) fixations of performances; (c) phonograms; (d) first fixations of films, and their copies; (e) fixations of broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.	Member States may provide for exceptions or limitations for uses, for the benefit of people with a disability, to the rights of reproduction, communication, making available to the public, and distribution “to the extent justified by the purpose of the authorised act of reproduction” .	directly related to the disability, to the extent required by the specific disability	-----	uses which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability; exceptions and limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.	in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.
	All the EU Member States have implemented the exception for the benefit of the visually impaired as stipulated in the Infosoc Directive, with varying conditions.							

Country	Provision	Users	Copyright works	Permissible acts	Formats	Authorised entities	Other requirements	TPMs
New Zealand	S 69 of Copyright Act 1994	persons with a print disability S69(1) and (4)	published literary or dramatic works S69(1)	make or communicate copies or adaptations	copies that are in Braille or otherwise modified for the users' special needs S69(1)	a body prescribed by regulations made under this Act, not established or conducted for profit. S69(1) and (3)	no commercial availability, copies provided only to users, copyright holder is notified, payment for a copy not greater than the sum of the production cost and the general expenses S69(2)	no

Country	Provision	Users	Copyright works	Permissible acts	Form ats	Authorised entities	Other requirements	TPMs
United States of America (US)	S 110(8) of United States Code	blind or other handicapped persons who are unable to read normal printed material as a result of their handicap	nondramatic literary works	performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap	Performance and transmission	(i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization	if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of the authorised bodies	no
	s110(9) of United States Code	blind or other handicapped persons who are unable to read normal printed material as a result of their handicap	dramatic literary works	performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap	performance and transmission	a radio subcarrier authorization referred to in clause (8) (iii),	non-commercial basis, transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8) (iii), not applicable to more than one performance of the same work by the same performers or under the auspices of the same organization.	no

Country	Provision	Users	Copyright works	Permissible acts	Formats	Authorised entities	Other requirements	TPMs
United States of America	s121(a) of United States Code	blind or other handicapped persons	published, nondramatic literary works, except for standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.	reproduce or to distribute copies or phonorecords	specialized formats exclusively for use by blind or other persons with disabilities, ie braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities s121(d)(4)(A)	authorized entity, ie a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities s121(d)(1)	no reproduction or distribution in a format other than a specialized format exclusively for use by blind or other persons with disabilities, notice of infringement, notice identifying the copyright owner and the date of the original publication,	no

Country	Provision	Users	Copyright works	Permissible acts	Formats	Authorised entities	Other requirements	TPMS
United States of America	s121(c) of United States Code	blind people or other persons with disabilities in elementary or secondary schools	electronic files that contain the contents of print instructional materials using the National Instructional Material Accessibility Standard	create and distribute to the National Instructional Materials Access Center	large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities	publisher of print instructional materials for use in elementary or secondary schools	inclusion of the contents of such print instructional materials is required by any State educational agency or local educational agency, publisher has the right to publish such print instructional materials in print formats, such copies are used solely for reproduction or distribution of the contents of such print instructional materials in specialized formats.	no

Country	Provision	TPMs
United States of America	s1201 of United States Code- (TPMs)	<p>1201(a)</p> <p>(B) The prohibition shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).</p> <p>(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works.</p> <p>S1201(c)(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.</p>

Country	Provision	Users	Copyright works	Permissible acts	Formats	Authorised entities	Other requirements	TPMs
Chile	art 71C of Law No. 20.435 on Intellectual Property	persons with visual, hearing or other impairments that prevent them from accessing the work normally	lawfully published works	reproduction, adaptation, distribution or communication to the public is lawful	by means of an appropriate procedure or medium to overcome the impairment	-----	non-commercial basis, use of the works should remain directly related to the impairment, works are not allowed to be distributed or made available to those without identifiable disabilities	no

Country	
South Africa	<p>There are no limitations and exceptions for the benefit of the visually impaired in the South African Copyright Act of 1978.</p> <p>However,</p> <p>s12 of the Act states that:</p> <p>“(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-</p> <p style="padding-left: 40px;">(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;</p> <p>...</p> <p>(4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.”</p> <p>and,</p> <p>s13 of the Act states that:</p> <p>“In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.”</p> <p><i>* For an analysis of the Copyright Regulations related to s13 of the Act, see pages 103- 104.</i></p>

Country	Provision	Users	Copyright works	Permissible acts	Formats	Authorised entities	Other requirements	TPMs
India	s52 of the Copyright Act 1957 (as amended up to 2012)	persons with disabilities	any lawfully disclosed works	adaptation, reproduction, issue of copies, or communication to the public	any accessible format	any person facilitating access of the persons with disabilities, or any organisation working for the benefit of persons with disabilities	possible on a non-profit basis, after the authorised entity has taken reasonable steps to prevent accessible copies from entry into ordinary channels of business.	no

CHAPTER 4

INTERNATIONAL COPYRIGHT LAW AND ACCESS FOR THE VISUALLY IMPAIRED

“Everybody takes his own dreams seriously, but yawns at the breakfast-table when somebody else begins to tell the adventures of the night before.”¹

-Helen Keller

I Introduction

The previous chapter analysed the state of copyright flexibilities that facilitate the access for the visually impaired in a number of jurisdictions. Based on the analysis in chapter 2, it was argued that national copyright laws are discriminatory to the extent that they hinder equal access to copyright works for the visually impaired. By adopting such copyright laws, states are in violation of their obligations to respect, protect, and fulfil human rights of the visually impaired that are dependent on access to copyright works.

Domestic and international copyright laws have been mutually affecting one another. On the one hand, domestic copyright systems have inspired the international community for adoption of international copyright law.² On the other hand, countries’ obligations under international copyright law have shaped or further developed their domestic copyright regime.³ Therefore, this chapter evaluates the impact of international copyright law on provision of access to copyright protected works for the visually impaired.

This chapter explores the possibility of accommodating the access for the visually impaired under international copyright law. Following this introduction is an assessment of the scope of the copyrights in international copyright instruments that affect the access for the visually impaired. The chapter then looks into the different features of the international copyright law system that can serve the benefits of the visually impaired. Therefore, the third part of the

¹ Helen Keller *The World I Live In* (New York Review Books, New York, 2003) at 85.

² See Silke Von Lewinski *International Copyright Law and Policy* (Oxford University Press, Oxford, 2008) at 4 stating that “international [copyright] law has mostly developed on the basis of national laws”.

³ See Reto Hilty and Sylvie Nérissou “Overview of National Reports about “Balancing Copyright” Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-05, 2012, at 28- 32 for a discussion of how the three-step test have affected the national copyright law of states.

chapter is focused on analysing the three-step test as the main tool for adoption of flexibilities that can facilitate the access for the visually impaired.

The international copyright law regime consists of various instruments. However, not all are relevant to the discussion of the access for the visually impaired. The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty) specifically addresses the book famine.⁴ It requires⁵ its Member States to ensure that they comply with their obligations under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention, Berne),⁶ the Agreement on Trade-related Aspects of Intellectual Property (TRIPS Agreement, TRIPS),⁷ and the WIPO Copyright Treaty (WCT).⁸ This is because the copyright works that are the subject of the Marrakesh Treaty and in the centre of the book famine problem are governed by these three instruments. Therefore, this chapter also looks into these instruments when analysing the impact of the international copyright law on the access for the visually impaired. However, other international copyright instruments are occasionally mentioned when they make a point that may indirectly affect the visually impaired.

Having analysed the three-step test, the chapter argues that copyright limitations and exceptions for the benefit of the visually impaired are compatible with the criteria of the test. However, the way in which the test is currently adopted and interpreted by national states may not be fully conducive to provision of access to copyright works for the visually impaired.

II Exclusive Rights under Copyright and the Book Famine

Making copyright protected works such as books and other print material accessible to the visually impaired can potentially infringe a number of the exclusive rights of the author or copyright holder. These rights are recognised and protected by the international copyright law.

⁴ World Intellectual Property Organization [WIPO] Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled [Marrakesh Treaty] WIPO Doc VIP/DC/8 (opened for signature 27 June 2013).

⁵ Marrakesh Treaty, art 11.

⁶ Berne Convention for the Protection of Literary and Artistic Works [Berne Convention] 1161 UNTS 31 (opened for signature 9 September 1886, entered into force 5 December 1887).

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS Agreement] 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1996).

⁸ WIPO Copyright Treaty [WCT] 36 ILM 65(1997) (opened for signature 20 December 1996, entered into force 6 March 2002).

They include the author's moral rights as well as the author's or copyright holder's right to reproduction, distribution, communication to the public, and making available to the public.

A *The moral rights of the author*

When producing accessible copies, the visually impaired shall respect the moral rights of the author, recognised in international copyright treaties. Article 6^{bis} of the Berne Convention protects the moral right of the author by stating that:⁹

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

The TRIPS Agreement does not explicitly include the protection of the moral rights. Article 9 of the TRIPS requires its Member States to comply with arts 1 to 21 of the Berne convention while relieving them from compliance with art 6^{bis} of the Berne.¹⁰ However, the Preamble of the TRIPS Agreement acknowledges that states may have "underlying public policy objectives".¹¹ In many countries, protection of moral interests of authors is among the public policy objectives of offering them copyright protection. Moreover, TRIPS does not stop countries from recognizing of moral rights; it simply excludes protection of moral rights from the obligations they need to comply with under the Berne Convention.

The WIPO Copyright Treaty (WCT) requires its Contracting Parties to comply with arts 1 to 21 of the Berne Convention including art 6^{bis} that confers the moral rights.¹²

⁹ Berne Convention, above n 6, art 6^{bis}.

¹⁰ See TRIPS Agreement, above n 7, art 9 stating that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6^{bis} of that Convention or of the rights derived therefrom". See also Sam Ricketson and Jane Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, Oxford University Press, Oxford, 2006) vol 1 at 615-619 for a detailed discussion of the moral rights in the TRIPS and its connection with the Berne Convention, arguing that members of TRIPS still have an obligation towards some moral rights that fall outside the scope of art 6^{bis}, such as the right to disclosure or divulgation.

¹¹ TRIPS Agreement, above n 7, Preamble.

¹² WCT, above n 8, art 1(4). See also WIPO Performances and Phonograms Treaty [WPPT 36 ILM 76 (1997) (opened for signature 20 December 1996, entered into force 20 May 2002) art 5(1), and WIPO Beijing Treaty on Audiovisual Performances [Beijing Treaty] WIPO DOC AVP/DC/20 (opened for signature 24 June 2012) art 5.

Therefore, the visually impaired would infringe the rights of the author if they fail to acknowledge his or her authorship. The right to claim of authorship requires that the authorship of the author is clearly recognised and presented to the public.¹³ Moreover, any distortion, mutilation or other derogatory change, in the process of reproduction of accessible copies, that is prejudicial to the honor or reputation of the author, would be an infringement.¹⁴ This does not appear to apply to changes that enhance the quality and accessibility of a copyright work in the process of reproduction, as they would not normally harm the honor and reputation of the author. However, an infringement of the moral rights is imaginable if, for instance, the reproduced copy fails to correctly and clearly identify the author.

B The right to reproduction

The right to reproduction was first adopted on an international scale as part of the Berne Convention amendments in the 1967 Stockholm Conference.¹⁵ The Berne Convention gives “authors of literary and artistic works ... the exclusive right of authorising the reproduction of [their] works, in any manner or form”.¹⁶ Article 9(3) of the Berne Convention considers “any sound or visual recording” as a reproduction.¹⁷

Under art 9(1) of the TRIPS Agreement, Members shall comply with art 9 of the Berne and respect the authors’ exclusive right to reproduction.¹⁸ Therefore, copying of a book, for example to produce braille, large print, or audio versions, infringes the reproduction right of the authors.

Similarly, the WCT subjects its Members to the provisions of the Berne Convention.¹⁹ The agreed statement concerning art 1(4) of the WCT states that “the reproduction right, as set out in Article 9 of the Berne Convention... fully apply in the digital environment, in particular to the use of works in digital form”.²⁰ The second part of the agreed statement is directly relevant to reproduction of accessible formats for the visually impaired through digitising normal copies

¹³ Ricketson and Ginsburg, above n 10, at 600.

¹⁴ See Ricketson and Ginsburg, at 602-610 for a full discussion of the right to protect the integrity of the work.

¹⁵ See Ricketson and Ginsburg, at 120-132 for a detailed discussion of the 1967 Stockholm Conference. But see Christophe Geiger, Daniel Gervais, and Martin Senfleben “The Three-step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law” (2013) PIJIP Research Paper no. 2013-04, at 4 stating that “The right of reproduction was not added to the Berne Convention only at the Stockholm Conference; it was already there in various forms. It is true, however, that an “omnibus” right of reproduction was recognized at the Stockholm Conference”.

¹⁶ Berne Convention, above n 6, art 9(1).

¹⁷ Art 9(3).

¹⁸ TRIPS Agreement, above n 7, art 9(1).

¹⁹ WCT, above n 8, art 1.

²⁰ WCT, Agreed statement concerning Article 1(4).

of copyright work. It declares that “the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention”.²¹

C The right to distribution, communication, and making available to the public

International copyright law instruments have introduced different concepts for addressing the rights of the creators to dissemination of their works.

The Berne Convention recognises the authors’ exclusive right to distribution of copies of cinematographic adaptations and reproductions²² and “original works of art and original manuscripts of writers and composers”.²³ These rights do not directly affect the access for the visually impaired because of the subject matter that they protect, with the exception of reproducing film subtitles in audio format to make them accessible. Although Berne does not explicitly recognise a right to distribution of literary and artistic works for the authors, such right is implied. As Ricketson and Ginsburg argue, the right to distribute the copies has historically accompanied the right to make copies.²⁴

Both the TRIPS and WCT recognise the same distribution rights as those covered by the Berne Convention.²⁵

Another method of disseminating copyright protected works is through communication to the public. Communication can be through public performances,²⁶ or communication to the public of a performance (live or not) by wire or wireless means.²⁷ The difference between the two methods is that public performance implies a live audience.²⁸

The WCT took a big step regarding communication of the copyright protected works by introducing the right to making available of a work to the public. Article 6(1) of the WCT gives “authors of literary and artistic works ... the exclusive right of authorizing the making available

²¹ WCT, Agreed statement concerning Article 1(4). See also WPPT, above n 12, art 7, and the Beijing Treaty, above n 12, art 7.a

²² Berne, above n 6, art 14(1).

²³ Art 14^{ter}.

²⁴ Ricketson and Ginsburg, above n 10, at 656.

²⁵ TRIPS, above n 7, art 9, and WCT, above n 8, art 1.

²⁶ See Berne Convention, above n 6, art 11 (1) (i) regarding public performance of dramatic and musical works, art 11^{ter} (1) (i) regarding public recitation of literary works, art 14 (1) (ii) regarding public performance of cinematographic adaptation of literary works.

²⁷ See Berne, above n 6, arts 11 (1) (ii), 11^{bis} (1), 11^{ter} (1) (ii), 14 (1) (ii); TRIPS, above n 6, arts 14(1) and (2); WCT, above n 8, art 8; WPPT, above n 12, art 6; and, Beijing Treaty, above n 12, art 11.

²⁸ Ricketson and Ginsburg, above n 10, at [12.05] and [12.06].

to the public of the original and copies of their works through sale or other transfer of ownership.”²⁹ This article is titled “right of distribution”, meaning that the drafters considered making available to the public as a means of distribution of works.

The agreed statement concerning art 6 of the WCT clarifies that states are only required to recognise the right to distribution regarding “fixed copies that can be put into circulation as tangible objects”.³⁰ However, as Ricketson and Ginsburg argue, nothing in the convention stops them from extending the right to distribution to digital copies.³¹ Moreover, art 8 of the WCT covers digital copies by stating that:³²

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Therefore the importance of the WCT to the access for the visually impaired is in relation to distribution of accessible works, whether in physical or digital formats.³³ Under the WCT, distribution and exchange of hard copies and digital versions of accessible copyright works (for instance through the Internet) can be infringement to the rights of the author.

III Copyright Flexibilities to Facilitate Access for the Visually Impaired

A The Balance between protection and access

Protection of the public interest has been an integral part of the copyright regime since the adoption of the first formal copyright act, the Statute of Anne 1710.³⁴ The Berne Convention does not directly refer to the balance of rights or protection of the public interest. However,

²⁹ WCT, above n 8, art 6.

³⁰ WCT, above n 8, Agreed statement concerning Articles 6 and 7.

³¹ Ricketson and Ginsburg, above n 10, at [11.94].

³² WCT, above n 8, art 8.

³³ The “making available to the public” right is also present in the arts 10 and 14 of the WPPT. However, because of the subject matter of the WPPT (phonograms), it does not affect the book famine discussion.

³⁴ See the Statute of Anne 1710, 8 Anne, c.19, as the first formal copyright act that recognised the importance of encouragement of learning. The importance of public interest is also recognised in both utilitarian and droit d'auteur traditions. See for example the US Constitution, art I, sec 8, cl 8; and, the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, at [3].

some provisions of the Berne Convention and its negotiating history suggest that the countries of the Berne Union had the balance between the protection and access in mind.³⁵

The Preamble to the TRIPS Agreement refers to “developmental and technological objectives” as possible “underlying public policy objectives of national systems for the protection of intellectual property”.³⁶ Moreover, the TRIPS Agreement recognises the contribution of intellectual property protection to “social and economic welfare” of users as one of its objective³⁷ and allows its members to adopt necessary measures for promotion of public interest.³⁸

The Preambles of the WIPO Internet Treaties as well as the Beijing Treaty on Audiovisual performances highlight the necessary balance between copyright protection and the “larger public interest, particularly education, research and access to information”.³⁹

Finally, the Marrakesh Treaty reaffirms the importance of public interest in the balance of protection and access and relates it to the case of the visually impaired by stating that its Contracting Parties recognise:⁴⁰

the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities.

International copyright law instruments offer a range of flexibilities to copyright protection in order to safeguard the public interest and give effect to the objectives that they promote. These

³⁵ See Ruth L Okediji “The International Copyright System: Limitations, Exceptions, and Public Interest Consideration for Developing Countries” (2006) published by UNCTAD and ICTSD < www.unctad.org >, at 5 stating that in the context of the Berne Convention “minimum rights were developed internationally through consensus, while specific exceptions and limitations remained the domain of the state. As the Convention matured, it came to reflect and incorporate limitations and exceptions that had evolved over time in a large number of states”.

³⁶ Trips Agreement, above n 7, Preamble.

³⁷ See Art 7.

³⁸ See Art 8 (1) stating that “members may, in formulating or amending their laws and regulations, adopt measures necessary ... to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”.

³⁹ WCT, above n 8, Preamble; WPPT, above n 12, Preamble; and, the Beijing Treaty, above n 12, Preamble. The only difference between the clauses in the preambles of the WCT, the WPPT, and the Beijing Treaty is that they each refer to “authors”, “performers and producers of phonograms”, and “performers in respect of their performances fixed in audiovisual fixations” respectively.

⁴⁰ Marrakesh Treaty, above n 4, Preamble.

flexibilities can be divided into three categories. The first group is the exceptions that countries shall grant to cover certain uses such as quotation.⁴¹ The second group is the non-mandatory but permissible exceptions, such as exceptions for the purpose of teaching⁴² or reporting the current events.⁴³

These flexibilities are not directly in place for the benefit of the visually impaired. Nonetheless, as part of the bigger public, those with visual impairment can also benefit from these flexibilities. However, these flexibilities are not sufficient for solving the problem of book famine. Due to the technological and cost-related challenges, visually impaired individuals are not able to produce accessible formats of copyright works on a large scale. This task is mainly done by blind organisations, educational institutions and other entities who have the expertise and resources to do so. The mentioned copyright flexibilities, while useful to individuals, are of no real use to such organisations.

The third group of flexibilities are those that are not specifically named in international copyright law instruments, but are made possible through what is known as the three-step test [the Test].⁴⁴ The Test and its implications for the visually impaired are discussed in the following section.

B The three-step test and access for the visually impaired

The possibility of adoption of limitations and exceptions to the reproduction right was introduced in the 1967 Stockholm Conference for the Revision of the Berne Convention. Article 9(2) of the Berne Convention authorises its Member States “to permit the reproduction of [literary and artistic works] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”⁴⁵ Because of the three requirements that define the legitimacy of a limitation or exception, this provision has become known as the three-step test.

⁴¹ See Berne Convention, above n 6, art 10 (1) stating that “it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”.

⁴² See Art 10 (2) stating that “it shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice”.

⁴³ Art 10^{bis}.

⁴⁴ This is with the exception of the Marrakesh Treaty that specifically addresses copyright limitations and exceptions for the benefit of the visually impaired.

⁴⁵ Berne Convention, above n 6, art 9 (2).

Other versions of the Test were later included in international intellectual property law instruments.⁴⁶ Those regulating copyright include the TRIPS Agreement,⁴⁷ the WCT⁴⁸ and the WIPO Performances and Phonogram Treaty of 1996 (WPPT),⁴⁹ the Beijing Treaty on Audiovisual Performances of 2012 (Beijing Treaty)⁵⁰ and finally the Marrakesh Treaty.⁵¹ With the exception of the Beijing Treaty and the Marrakesh Treaty, the other four instruments that contain the Test are all in force. Because of its adoption in major intellectual property law instruments the Test has become the defining authority in adoption of copyright limitations and exceptions at the national level.⁵²

Article 10 of the WCT repeats the wording of the Berne Convention. Article 13 of the TRIPS Agreement, however, requires countries to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the *right holder* [emphasis added].”

1 The voluntary nature of the Test

The current international copyright regime impacts the access of the visually impaired persons to copyrighted works in two apparent ways. First, there is no mentioning of the rights of the visually impaired to accessible formats of copyrighted works in any international copyright or intellectual property related document other than the Marrakesh Treaty. This is not, however, limited to the visually impaired and is a common feature of the international copyright law system. Besides the rights of the copyright holders (such as authors, performers, producers of phonograms, broadcasters), international copyright law does not mention anyone else’s rights. The Berne Convention refers to the public but only when discussing public performances or communication to the public of copyright protected works.⁵³ Under the title “Objectives”, art 7 of the TRIPS Agreement requires that:⁵⁴

⁴⁶ See Andrew Christie and Robin Wright “A Comparative Analysis of the Three-Step Test in International Treaties” (2014) 45 International Review of Intellectual Property and Competition Law 409 for a detailed discussion of all the versions of the three-step test in international IP documents.

⁴⁷ TRIPS, above n 7, arts 9 and 13.

⁴⁸ WCT, above n 8, art 10.

⁴⁹ WPPT, above n 12, art 16(2).

⁵⁰ Beijing Treaty, above n 12, art 13(2).

⁵¹ Marrakesh Treaty, above n 4, art 11.

⁵² Geiger, Gervais, and Senfleben, above n 15, at 1.

⁵³ Despite a lack of direct reference to users or public interest, one example of subtle reference to the rights of the public is art 2^{bis} that defines published works as “works published with the consent of their authors ... provided that the availability of such copies has been such as to satisfy the *reasonable requirements of the public* [emphasis added]”. Berne, above n 6, art 2^{bis}.

⁵⁴ TRIPS, above n 7, art 7.

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 (1) of TRIPS states that “Members may, in formulating or amending their laws and regulations, adopt measures necessary ... to promote the public interest in sectors of vital importance to their socio-economic and technological development.”⁵⁵ The WCT refers to the “public interest” in its Preamble.⁵⁶

Second, the three-step test that makes adoption of limitations and exceptions for the visually impaired possible is a voluntary provision. The negotiating history of the Berne Convention suggests that in order to reach an agreement the decision as to where to strike the balance between protection and access was left to the national states.⁵⁷

Therefore, under the current international copyright regime national legislators are under no obligation to regulate limitations and exception for the benefit of the visually impaired. Consequently, in the absence of relevant provisions in national copyright laws, copyright holders are not required to provide the visually impaired or their advocacy organisations with permission to convert a copyright work to an accessible format.

The optional nature of the three-step test flexibilities stands out against the backdrop of the mandatory protection requirements in international copyright law. The provisions that deal with protection of the authors or other copyright holders’ rights are mandatory and binding.⁵⁸

The three-step test was adopted as a voluntary measure to give room to national states for regulation of flexibilities in their copyright laws. However, this approach has not proven conducive to provision of access for the visually impaired and the realisation of their human rights. As of 2007, fewer than half of the WIPO member states had limitations and exceptions

⁵⁵ Art 8.

⁵⁶ WCT, above n 8, Preamble.

⁵⁷ See P Bernt Hugenholtz and Ruth Okediji “Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report” (2008) <www.opensocietyfoundations.org>.

⁵⁸ See Daniel Gervais “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5(1&2) UOLTJ 1 at 12 stating that “while rights are generally well defined in the Berne Convention, exceptions other than those related to “public information” are unregulated internationally”.

for the benefit of the visually impaired in their national copyright laws.⁵⁹ Moreover, the vague and open-ended wording of the three-step test has created difficulties for the visually impaired even when countries have adopted limitations and exceptions.⁶⁰

2 *Creating limitation and exceptions for the visually impaired*

Article 9(2) of the Berne Convention refers only to limitations and exceptions to the right to reproduction.⁶¹ However, because distribution is linked to reproduction, limitations and exceptions may also allow distribution of reproduced accessible copies.⁶²

The TRIPS and the WCT explicitly permit adoption of limitations and exceptions to all the exclusive rights that they protect.⁶³ Therefore, limitations and exceptions for the benefit of the visually impaired could be potentially applied to the rights to reproduction, distribution, and making available to the public that are protected under the three abovementioned treaties.⁶⁴

The TRIPS agreement and WCT specifically mention “limitations and exceptions”.⁶⁵ These terms are not defined in any international copyright law instrument and there does not appear to be a consensus on their definition.⁶⁶ Commentators have provided various definitions that

⁵⁹ WIPO, Standing Committee on Copyright and Related Rights (SCCR), Study on Copyright Limitations and Exceptions for the visually impaired, prepared by Judith Sullivan, SCCR/15/7, 20 February 2007, at 28. This number has risen ever since where countries like Colombia have adopted limitations and exceptions for the benefit of the visually impaired. See Law No. 1680 of 2013 (Columbia). However, there is still a lack of minimum mandatory limitations and exceptions for the benefit of the visually impaired on an international level.

⁶⁰ See chapter 1 for a list of difficulties associated with the existing limitations and exceptions in different countries.

⁶¹ Berne, above n 6, art 9 (2).

⁶² Sullivan, above n 59, at 18 stating that “distribution, however, is linked to reproduction – when reproductions are authorised, distribution usually happens – so limitations on exceptions to the reproduction right may impliedly limit exceptions to distribution rights”. See also Sullivan, at 18-19 stating that *de minimis* exceptions are possible to the right of broadcasting by wireless means, other communication to the public by electronic transmission, and public performance.

⁶³ TRIPS, above n 7, art 13. WCT, above n 8, art 10(1).

⁶⁴ The Marrakesh Treaty refers to the Berne, TRIPS and the WCT but even if it had not done that the WTO 110(5) Panel rejected the argument that art 13 of TRIPS only applies to the new exclusive rights introduced in the TRIPS. Therefore, art 13 covers all copyrights including the reproduction right.

⁶⁵ TRIPS, above n 7, art 13. WCT, above n 8, art 10.

⁶⁶ See Annette Kur “Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three-Step Test?” (2008-2009) 8 Richmond Journal of Global Law and Business 287 at 290 stating that “no agreement or uniform practice seems to exist on the international level” regarding the definition of limitations and exceptions.

establish the differences between limitations and exceptions,⁶⁷ with the exception of Hugenholtz and Okediji, who regard them as synonymous.⁶⁸

One of the factors that some commentators regard as their main difference is the issue of remuneration. This means that countries can require payments when authorising the visually impaired to reproduce, distribute and make accessible works available. Different reasons can affect the decision of countries regarding remuneration. Some of the policy related reasons will be discussed in chapter 6.⁶⁹ However, countries' interpretation of the three-step test can also determine whether they would require remuneration from the visually impaired. The connection between the interpretation of the three-step test and remuneration is discussed in the following sections.

To further examine the adoption of limitations and exceptions for the visually impaired, each limb of the three-step test needs to be evaluated. The first time an international body interpreted the steps of the Test was by a Panel established by the WTO Dispute Settlement Body (DSB) to address the claims of the European Union regarding Section 110(5) of the US Copyright Act (WTO 110(5) case). The European Communities requested a consultation and then establishment of a panel to address the copyright exemptions in s 110 (5) (A) of the US Copyright Act.⁷⁰

⁶⁷ See Mihaly Fisor *The Law of Copyright and the Internet: The WIPO 1996 Treaties, their Interpretation and Implementation* (Oxford University Press, Oxford, 2002); L Guibault *Copyright Limitations and Contracts: an Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International, the Hague, 2002) at 20-21; J Reinbothe and Silke von Lewinski *The WIPO Treaties 1996* (Butterworths Lexis Nexis, London, 2002) at 128; and, Sam Ricketson "The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties" (1999) 1 *Intellectual Property Quarterly* 56 at 59 stating that exceptions are unremunerated and limitations are remunerated. However, Ricketson later expressed the view that exceptions are immunities while limitations are an act of excluding works from the copyright protection. See Sam Ricketson "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment" (WIPO, Geneva, 2003) at 3-4. See also Martin Senftleben *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, The Hague, 2004) at 22 stating that the difference is not regarding remuneration but rather exceptions referring to permitted uses in the civil law and limitation referring to permitted uses in the common law; Christophe Geiger "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law" (2010) 12(3) *Vanderbilt Journal of Entertainment and Technology Law* 515 at 521 stating that likens an exception to "a kind of island in a sea of exclusivity" and defines limitations as "legal techniques that determine the exact scope of copyright"; and, Andrew Christie "Maximising Permissible Exceptions to Intellectual Property Rights" in Annette Kur and Jan Rosen (eds) *The Structure of Intellectual Property Law: Can One Size Fit All?* (Edward Elgar, Cheltenham and Northampton, 2011) 121 at 123-125 stating that an exception is "a carve-out from the IP right-holder's right" while a limitation is "a boundary of the IP right-holder's right".

⁶⁸ Hugenholtz and Okediji, above n 57.

⁶⁹ See chapter 6.

⁷⁰ World Trade Organization (WTO), United States- Section 110(5) of the US Copyright Act WT/DS160/R, 15 June 2000 [Report of the Panel]. See for a general discussion of this decision Jane Ginsburg "Towards Supranational Copyright Law? The WTO Panel decision and the 'three-step test' for copyright exceptions" (2001) 187 *RIDA* 2; BC Goldman "Victory for Songwriters in WTO Music-Royalties Dispute Between US and EU-

Section 110 (5) (A) permits “communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes” (homestyle exemption).⁷¹ Section (5) (A) permits some establishments to publicly play “transmission or retransmission embodying a performance or display of a nondramatic musical”, upon meeting certain criteria regarding their size and transmission equipment (Business exemption).⁷² This section was claimed to be a violation of the US obligations under arts 9 (1) and 13 of the TRIPS Agreement, which requires Members to comply with Articles 1 to 21 of the Berne Convention.⁷³

The WTO Panel found that the business exemption in s 110 (5) (B) of the US Copyright Act is in violation of the three-step test as set up in art 13 of the TRIPS Agreement.⁷⁴ The Panel’s interpretation the scope and the three steps of the Test is used for evaluating limitations and exceptions for the benefit of the visually impaired.

(a) Step one

The first limb of the three-step test in the Berne,⁷⁵ TRIPS,⁷⁶ and WCT calls for limitations and exceptions to be for “certain special cases”.⁷⁷ As with the “most purpose-specific”⁷⁸ exceptions, those for the benefit of visually impaired seem not to face a challenge in meeting the first requirement of the.⁷⁹

Background of the Conflict Over the Extension of Copyright Homestyle Exemption” (2001) 32(4) International Review of Intellectual Property and Competition Law 412; Martin Senftleben “Towards a Horizontal standard for Limiting International Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law” (2006) 37 International Review of Intellectual Property and Competition Law 407; Mihaly Ficsor “How Much of What? The ‘Three-Step Test’ and Its Application in Two Recent WTO Dispute Settlement Cases” (2002) 192 RIDA 111; Christophe Geiger “Exploring the flexibilities of the TRIPS Agreement’s provisions on limitations and exceptions” in Annette Kur and Vytautas Mizaras (eds) *The Structure of Intellectual Property Law: Can One Size Fit All?* (Edward Elgar, Cheltenham, 2011) 287; and, Justin Oliver “Copyright in the WTO: The Panel Decision on the Three-Step Test” (2002) 25 Columbia Journal of Law & the Arts 119.

⁷¹ Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code [US Copyright Law], December 2011, s 110 (5) (A).

⁷² US Copyright Law, s 110 (5) (B).

⁷³ See Report of the Panel, above n 70, at 6.

⁷⁴ At 69.

⁷⁵ Berne, above n 6, art 9(2).

⁷⁶ TRIPS, above n 7, art 13.

⁷⁷ WCT, above n 8, art 10.

⁷⁸ Daniel Gervais “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5 (1&2) UOLTJ 1 at 27.

⁷⁹ See Daniel Gervais “Comment submitted in response to the Copyright Office Notice of inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities (74 Fed. Reg. 196 (13 October 2009))” US Copyright Office <www.copyright.gov> at 10, and Daniel Gervais, above n 78, at 27 stating that “one could argue that an exception limited to a class of users is similarly limited in scope”.

The WTO Panel in the 110(5) case interpreted the term “certain” as meaning “clearly defined”⁸⁰ and the term “special” as having “an individual or limited application or purpose”.⁸¹

Provision of access for the visually impaired to copyright works meets the definition of the Panel of the first step of the test by being “well-defined (“certain”) and narrowly limited (“special”).”⁸² Where the Panel asks for a limitation or exception to be “narrow in quantitative as well as a qualitative sense” the question arises regarding to what the narrowness should apply.⁸³ The Panel defined this requirement as having “a narrow scope as well as an exceptional or distinctive objective.”⁸⁴ Some authors argue that, considering its application of the first step to the section 110(5), the Panel targeted the “potential beneficiaries that must be sufficiently limited” when interpreting the quantitative restrictions.⁸⁵

Although not each and every instance of access for the visually impaired is identifiable, the case of access is defined clearly enough to create legal certainty.⁸⁶ They would serve a certain portion of the public. National copyright laws that have adopted limitations and exceptions for the visually impaired have usually provided clear definitions of beneficiaries who are unable to read normal copies because of visual or other impairments.⁸⁷ Moreover, limitations and exception for the visually impaired have the “limited application or purpose” of benefiting the visually impaired beneficiaries.

The Panel rejected the idea of using public policy purposes for evaluating limitations and exception.⁸⁸ Such purposes, however, can be useful for clarifying the scope and definition of intended limitations and exceptions.⁸⁹ Provision of access for the visually impaired as a policy

⁸⁰ Report of the Panel, above n 70, at [6.108].

⁸¹ At [6.109].

⁸² Jane Ginsburg “Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions” (2001) *Revue Internationale du Droit d’Auteur* 1 at 5.

⁸³ Report of the Panel, above n 70, at [6.109].

⁸⁴ At [6.109].

⁸⁵ Geiger, Gervais, and Senftleben, above n 15, at 14.

⁸⁶ Report of the Panel, above n 70, at [6.108] stating that “there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty”.

⁸⁷ See chapter 3.

⁸⁸ Report of the Panel, above n 70, at [6.112].

⁸⁹ See Ricketson and Ginsburg, above n 10, at 764-767 discussing the question whether the phrase “certain special cases” mean that limitations and exception should have a special purpose or justification including a policy purpose. The authors argue that, while interpretation of the Panel does not extend to the first step of the test in art 9(2) of the Berne Convention, which has different purposes and histories, considering the negotiating history of the Berne as well as the fact that any public policy reasons would be further tested under the second and third steps of the test, “certain special cases” does not appear to signal a need for special purposes.

purpose establishes the narrow scope and reach of the limitations and exceptions for the visually impaired.

(b) Step two

In commenting on the second step of the test, the Panel considered the “normal exploitation of a work” as having a both empirical and normative meaning. The Panel suggested that “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.”⁹⁰ The Panel went on to explain the likely forms of exploiting a work as those “with a certain degree of likelihood and plausibility”.⁹¹

According to the Panel for a limitation or exception to be in conflict with the normal exploitation of a work it needs to “enter into economic competition” with the normal exploitations defined above and rob the right holders of “significant or tangible commercial gains”.⁹²

To evaluate the impact of limitations and exceptions for the visually impaired on the author’s normal exploitation of a work, it would be helpful to identify all instances of normal exploitations on both national and international level (in case of cross-border exchange of works): (1) a market for normal copies that can be empirically measured, (2) a market for accessible copies that can be empirically measured, (3) a normative market of normal copies, and (4) a normative market of accessible copies.

(i) A market that can be empirically measured (empirical market)

Provision of accessible formats through limitations and exceptions does not interfere with the empirical definition of all forms of normal exploitation (the empirical markets for normal and accessible copies).

Currently there is no real empirical market of accessible works from which the right holders make “significant or tangible commercial gains”. Even if presumably an empirical market of accessible works exists, limitations and exceptions for the visually impaired will cause the publishers to lose “significant or tangible commercial gains” from the small percentage of the works they make accessible. This is because reproduction of accessible works through

⁹⁰ Report of the Panel, above n 70, at [6.179] quoting Document S/1: Berne Convention; Proposals for Revising the Substantive Copyright Provisions (Articles 1-20). Prepared by the Government of Sweden with the assistance of BIPRI, p. 42.

⁹¹ Report of the Panel, above n 70, at [6.180].

⁹² at [6.183].

limitations and exceptions is mainly on a non-profit basis; therefore, there is no real profit made which could have belonged to the right holder.

According to the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired “in at least two-thirds” of the national laws containing limitations and exceptions for the visually impaired “profit-making or commercial activity is ruled out.”⁹³ Limiting the type of actors that can use an exception is stricter in some countries like New Zealand where the law bans an entity that is “established or conducted for profit” from making copies.⁹⁴ The Copyright Act of the United Kingdom also defines an approved body as “an educational establishment or a body that is not conducted for profit.”⁹⁵ Other countries like US allow for a wider range of entities such as an educational organisation which may be profit-making in general to use the copyright limitations and exceptions as long as the conducted activity is not to gain profit. “Authorized entity” in the US Copyright Act is defined as “non-profit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.”⁹⁶

Moreover, as chapter 3 outlined, many countries, including the UK, Germany and New Zealand, only allow reproduction of accessible formats in the absence of a commercially available copy.⁹⁷

Finally, limitations and exceptions do not interfere with the empirical market of normal copies. In the absence of accessible works reproduced under limitations and exceptions, the visually impaired would not buy normal copies that normally have considerable economic or practical importance to the authors.

(ii) Normative market

Similar to the case of an empirical market of normal copies, limitations and exceptions would not interfere with a normative market of normal copies for reasons mentioned above.

⁹³ Sullivan, above n 59, at 32.

⁹⁴ Copyright Act 1994 (NZ), art 69 (3).

⁹⁵ Copyright, Designs and Patents Act 1988 (UK), s 31B (12).

⁹⁶ US Copyright Law, s 121 (d) 1. See also chapter 3 for more examples of countries that prohibit profit-making entities from using limitations and exceptions.

⁹⁷ See chapter 3.

It may, however, be more difficult to establish that reproduction of accessible formats under limitations and exception does not interfere with the normative markets of accessible copyright works.

The Panel's normative interpretation of exploitation of a work covers any plausible future market. Therefore, future exploitation is possible assuming that if the author decides to produce accessible formats there will be considerable demand from the visually impaired. In that scenario, limitations and exceptions could potentially interfere with a normative normal exploitation of a copyright work if they "enter into economic competition".

It is, however, harder to evaluate the possibility of "significant or tangible commercial loss" in a normative market because the Panel does not elaborate on the threshold that the revenue from a copyrighted work or loss thereof should reach to be considered significant or tangible. Perhaps establishing this issue was easier in the WTO 110(5) case. In that case, commercial establishments were using copies of works that they could have paid for, whether at the time of the decision or in future. In the case of the visually impaired, however, the alternative to stopping reproduction of accessible formats is not the purchase of normal copies of the works by the visually impaired, but purchase of formats that publishers may, or may not, produce.

Moreover, even if the author manages to establish a market for accessible books, it could coexist with the limitations and exceptions. As mentioned before, many countries confine the application of limitations and exceptions to lack of a commercial copy. Also, if the commercial copy is reasonably priced, the visually impaired may prefer to buy that copy which may be faster to obtain. Many authorised entities have arrangements with publishers to buy their accessible copies instead of producing them. Moreover, there would only be a future market if the works that the author produces are reasonably priced. Therefore, demand and production of accessible copies do not necessarily equate to a market.

In spite of these speculations, it is possible that works produced through limitations and exception may "enter into economic competition" and therefore interfere with a normative normal exploitation of a work by the author.

However, the approach of the WTO Panel in interpreting the three-step test has since been widely criticised. The Panel's interpretation of the second step of the test imposes the risk of preventing extension of limitations and exceptions to new situations that are currently

unforeseen but likely and restricting limitations and exceptions once new technologies make exploitation of previously uncontrollable uses possible.⁹⁸

Therefore, defining the normal exploitation of a work may require attention to non-economic normative considerations behind the exploitations of a right holder.⁹⁹ For instance, from a non-economic perspective, is it justified for the normal exploitation of a right holder to include both empirical and normative definitions? In other words, should economic interests of the authors govern normative markets that may hinder realisation of human rights of the visually impaired?

In the context of the Berne Convention, the answer to these questions may seem to be yes. The Preamble of the Berne states the purpose of the Convention as protecting, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.¹⁰⁰ However, considering the lack of clarity in the interpretation of the normal exploitation, the negotiating history of the Berne Convention, particularly the preparatory work for the Stockholm Conference, highlights the importance of non-economic considerations.¹⁰¹

In the context of the TRIPS, focusing on the economic aspects of the copyright law and not taking account of the other objectives that TRIPS Member States aim to achieve through copyright protection are major critiques to the Panel's decision.¹⁰² These critiques are supported by the objectives and principles of the TRIPS outlined in its Preamble that need to be taken into account when interpreting an instrument according to the Vienna Convention.¹⁰³

⁹⁸ Geiger, Gervais, Senftleben, above n 15, at 15.

⁹⁹ See Ricketson and Ginsburg, above n 10, at [13.20].

¹⁰⁰ Berne, above n 6, Preamble.

¹⁰¹ See Ricketson and Ginsburg, above n 10, at [13.21] for a discussion of non-economic normative consideration arguing that during the Stockholm Conference the three-step test was adopted with the view of accommodating already existing limitations and exceptions in the countries of the Union, many of which had public interest roots.

¹⁰² See Ginsburg, above n 70; Ricketson and Ginsburg, above n 10, at [13.21]; Geiger, above n 69; Christophe Geiger "The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP Law" in Graeme Dinwoodie (ed) *Methods and Perspectives in Intellectual Property* (Edward Elgar, Cheltenham, 2013) 153; Henning Grosse Ruse-Khan "Proportionality and Balancing within the Objectives for Intellectual Property Protection" in Paul Torremans (ed) *Intellectual Property and Human Rights* (Kluwer, Austin, 2008) 161; Peter Yu "The Objectives and Principles of the TRIPS Agreement" (2009) 46 *Houston Law Review* 979.

¹⁰³ See TRIPS, above n 7, Preamble where two of the objectives of the TRIPS outlined in the Preamble that can inform the interpretation of the three-step test are the recognition of "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;" and "also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base." Also see, TRIPS, arts 7 and 8 laying out the principles of importance of contribution of intellectual property right to "social and economic welfare, and to a balance of rights and obligations" and to "the public interest in sectors of vital importance to ... socio-economic and technological development."

Article 31(1) of the Vienna Convention on the Law of Treaties states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹⁰⁴

The need for interpretation of the TRIPS in light of its objectives and purposes is emphasised in the Doha Declaration on the TRIPS Agreement and Public Health. The Doha Declaration states that “in applying the customary rules of interpretation of international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.”¹⁰⁵

Regarding the WCT, non-economic normative considerations should protect and promote the public interest as highlighted in the Preamble of the Treaty.¹⁰⁶

Therefore, in the case of the visually impaired, the current inequality of access and its impact on human rights of the visually impaired should justify adoption of limitations and exception that could potentially interfere with an exploitation of copyright works that can be considered normal in the future (either because a market is formed or that new technologies make such exploitation easier or more attractive to the right holders).

Furthermore, by considering the three-step test as a guiding tool for adoption of limitations and exceptions, such non-economic incentives can be evaluated against the third step of the test.

(c) Step three

The third step of the test requires a limitation or exceptions not to “unreasonably prejudice legitimate interests of the author” in the Berne¹⁰⁷ and WCT¹⁰⁸ and those of the “right holder” in the TRIPS Agreement.¹⁰⁹ Therefore, this step has two elements to be considered. First, “legitimate interest” implies that not all interests of the author or right holder are legitimate. Second, “unreasonable prejudice” suggests that some prejudice to the legitimate interests of

¹⁰⁴ United Nations, Vienna Convention on the Law of Treaties [Vienna Convention] 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 31(1).

¹⁰⁵ World Trade Organization (WTO), Declaration on the TRIPS Agreement and Public Health, Ministerial Conference, WT/MIN(01)/DEC/1; 41 ILM 746 (2002) 4th Session, Doha, 14 November 2001, art 5 a. See also Susy Frankel “WTO Application of the ‘Customary Rules of Interpretation of Public International Law’ to Intellectual Property” (2006) 46 Virginia Journal of International Law 365.

¹⁰⁶ WCT, above n 8, Preamble.

¹⁰⁷ Berne, above n 6, art 9(2).

¹⁰⁸ WCT, above n 8, art 10.

¹⁰⁹ TRIPS, above n 7, art 13.

the author or right holder are justifiable or reasonable.¹¹⁰ These characteristics transform the third step into a “refined proportionality test” for contrasting copyright protection against public policy objectives.¹¹¹

The Panel in the 110(5) case stated that “the term [legitimate] relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective”.¹¹² Although the Panel focused on economic interests of the right holder, its reference to “a normative perspective” is useful for determining the legitimacy of the interests of the right holders in relation to limitations and exceptions for the benefit of the visually impaired.¹¹³

The WTO Panel argued that “a certain amount of prejudice has to be presumed justified as ‘not unreasonable’”¹¹⁴ and that unreasonable prejudice is caused by imposing or having the potential to impose “serious loss of profit” for the right holder.¹¹⁵

Therefore, the reproduction of accessible copies by a visually impaired individual for private use, by a non-profit organisation or by a profitable entity such as a library or educational institution for non-commercial purposes does not violate the third step of the test. This is because limitations and exceptions do not affect the author’s right to exploitation of the empirical markets; and, regarding their effect on exploitation of normative markets, some level of prejudice to the legitimate interests of the author or right holder is reasonable or justifiable.¹¹⁶ Therefore, the author’s potential loss of profit on sale of accessible copies can be viewed as

¹¹⁰ See Geiger, Gervais, and Senftleben, above n, at 15 stating that the French version of the Berne, that is also the official text of the Convention in case of discrepancy between linguistic versions, uses the phrase “*ne cause pas un prejudice injustifié*”; therefore, it could suggest a test of justifiability rather than reasonableness compared to the English version.

¹¹¹ Geiger, Gervais, and Senftleben, above n 15, at 15-16.

¹¹² Report of the Panel, above n 70, at [6.224].

¹¹³ See [6.227] stating that “one - albeit incomplete and thus conservative - way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders. It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights. That is not to say that legitimate interests are necessarily limited to this economic value”. In this paragraph the Panel refers to another decision regarding patents that took account of “public policies or other social norms” but at the same time highlights the difference between art 13 and 30 of the TRIPS (the later also referring to interests of the third parties). Although the mentioned difference is true, it does not justifies overlooking policy purposes when dealing with art 13 since limitations and exceptions to both patents and copyright are subject to the Preamble and the objectives and purposes (arts 7 and 8) of the TRIPS that underscore public interest.

¹¹⁴ At [6.229].

¹¹⁵ At [6.229].

¹¹⁶ At [6.229]. The existence of two concepts of reasonableness or justifiability is due to the slight discrepancy in the English and French texts of the Berne Convention. See Geiger, Gervais, and Senftleben, above n 15, at 5.

reasonable prejudice in light of the contribution of limitations and exceptions to the realisation of the human rights of the visually impaired.

The other issue that rises regarding the three-step test is whether the steps are sequential. The drafting history of the Berne Convention, where the test first appeared, seems to suggest that the steps are sequential.¹¹⁷ However, some authors argue that considering that the test is a “single analytical whole” that “serves the ultimate goal to strike an appropriate balance” it is possible to move to the third step even if the second step is not met.¹¹⁸ The balance-striking purpose of the test is also highlighted in the preambles of the WIPO Internet Treaties.¹¹⁹

If the steps of the Test are considered holistically rather than cumulatively or sequentially, a limitation or exception that does not meet the requirement of the second test could still be justified as a whole, by application of the third step.¹²⁰ In that case, reproduction of an accessible copy which may interfere with a normal exploitation of the work (most probably a potential future market) may still be justified.

(i) Compulsory licensing

In the case of visually impaired and their institutions, reproduction of accessible works could interfere with normal exploitation of the work by the author, in that those copies would enter into competition in a market that the author is supplying or is likely to supply. Such accessible

¹¹⁷ See WIPO, Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967, Geneva: WIPO 1971, Report on the Work of Main Committee I, at 1145-1146 stating that the sequential nature of the three steps is mainly understood from the following passage in the Stockholm Conference records: “The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use”.

¹¹⁸ Geiger, Gervais, and Senftleben, above n 15, at 6. See also Christophe Geiger “Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law (2010) 1(2) JIPITEC 119.

¹¹⁹ WCT, above n 8, Preamble stating that the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”; The Preamble of the WIPO Performances and Phonograms Treaty recognises the “the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information”.

¹²⁰ See Geiger, Gervais, and Senftleben, above n 15, at 8 arguing that “even if the drafting treaty history of Berne may support sequential steps such a reading of the test would be mandatory only in the context of the Berne three-step and not in the context of any of the subsequent versions in other Agreements which follow other rationales and have other histories”.

works, however, would not cost the author significant or tangible commercial loss either in an existing or normative market. Finally, even if there is interference and commercial loss, such reproduction can be justified under the third step of the Test.

In terms of commercial entities, interference with the right of the author to normal exploitation, both in an empirical and normative sense, is easier to establish because of the profit making nature of their activities.

The Panel considered remuneration of the right holders to be a viable solution to compensate for the unreasonable prejudice imposed on them.¹²¹ Therefore, states can introduce compulsory licensing for the commercial entities and require them to remunerate the author or the right holder.

While remunerating the author or the copyright holder compensates them for the unreasonable prejudice to their interests, compulsory licensing may still be seen as an interference with their rights. However, as the Panel argued, some level of prejudice is reasonable. Furthermore, the non-economic normative considerations that compulsory licensing facilitates the access for the visually impaired can perhaps further justify the adoption of compulsory licensing. To better safeguard the interests of the author or right holder, they can be given a certain amount of time by law after which they would have to license the work if they have not already provided an accessible copy of it.

If an individual does not own the resources or an organisation is not willing to produce an accessible copy due to various reasons, ranging from lack of sufficient financial resources to different prioritising of works than of an individual, it means that a visually impaired person would not be effectively provided by better access despite the existence of the limitations and exceptions. Therefore, compulsory licensing can complement the production of accessible formats by the visually impaired and other authorised entities (through limitations and exceptions) that are under time and resources related restraints.

However, adoption of compulsory licensing alone does not fully address the impact of copyright law on the book famine. Developing countries are offered the possibility to use compulsory licences for reproduction and translation of books. However, using this provision offered in the Appendix to the Berne Convention is not popular amongst member states and this seldom use “may be interpreted as showing that a complex, lengthy process to obtain

¹²¹ Report of the Panel, above n 70, at [6.210].

licences is a significant disincentive.”¹²² Therefore, in the absence of efficient licensing schemes, the high transaction costs and time delays associated with licenses are likely to conflict with “providing the blind with timely access to new works.”¹²³

3 *International exchange of accessible works*

As chapter 1 discussed, a restraint on access for the visually impaired is the restriction on method of international distribution of accessible works. The international copyright law does not address this issue.¹²⁴ Copyright regulations are territorial and thus mainly concerned with the issues existing within the borders of each country. As Sullivan highlighted, the need to consider both the jurisdiction of the importer and the exporter country complicates the international exchange of accessible works.¹²⁵ These complications have led to duplication in production of accessible formats.

This, in the case of the visually impaired, equals confusion over use of foreign works and no exchange possibilities, except in the case of special agreements between certain institutions. International exchange of accessible copyright works is critical in light of the significance of technology and resources in production of accessible formats and the number of countries in the world that share the same language.¹²⁶

Not only the international copyright law does not address international exchange of accessible works, but it also indirectly contributes to lack of exchange possibilities through offering voluntary flexibilities to copyright. Countries’ freedom to adopt flexibilities under the three-step test has led to a lack of limitations and exceptions or adoption of ones that are badly-crafted. At the same time, the territorial nature of copyright has not stopped the international community from adopting minimum standards of protection for copyright and related rights. Moreover, the principle of national treatment means that authors enjoy a minimum level of protection everywhere.¹²⁷

¹²² Gervais, above n 79, at 21.

¹²³ At 21.

¹²⁴ See Sullivan, above n 59, at 58.

¹²⁵ At 48-64.

¹²⁶ See chapters 1 and 3 for a discussion of cross-border exchange of accessible works.

¹²⁷ See Berne, above n 6, arts 5(1) and 5(3); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) (opened for signature 26 October 1961, entered into force 18 May 1964) 496 UNTS. 43, arts 2, 4, 5, and 6; TRIPS, above n 7, art 3; WCT, above n 8, art 3; WPPT, above n 12, art 4; and, Beijing Treaty, above n 12, art 4.

Regulating the possibility to import and export accessible formats more extensively on the international and consequently national level facilitates the flow of resources between the developed and developing countries and equals better access for the visually impaired people in the latter. It also prevents resources from going to waste by skipping repetition and reproduction of the same titles over and over again in various countries with the same language.

IV Conclusion

Adoption of the copyright flexibilities permitted by international copyright law is on a voluntary basis. The three-step test, as the main authority for adoption of limitations and exceptions, does not directly restrict the beneficiaries, authorised entities, accessible formats, and the nature of uses for the visually impaired. However, it leaves them open to interpretation and decision of the states that may regulate the aforementioned issues in a way that is discriminatory against the visually impaired and not conducive to their human rights. Moreover, this chapter argued that the WTO Panels interpretation of the Test in the 110(5) case is not consistent with the balance promoted by the Berne Convention, the TRIPS Agreement and other international intellectual property instruments. Therefore, this interpretation is not constructive for the access of the visually impaired and their human rights. Finally, due to the territorial nature of the copyright, lack of any guidelines on international exchange of accessible works has halted sharing of valuable resources between the visually impaired in different countries.

Despite these problems, flexibilities in international copyright law provide a foundation for provision and facilitation of access to copyright content for the visually impaired and are essentially consistent with the realisation of their human rights. However, they are insufficient for ensuring equal access for the visually impaired. In order to ensure equal access for the visually impaired, the issues associated with the international copyright regime that impact their human rights need to be addressed. The analysis offered in this chapter informs the proposed framework in chapter 6 that seeks to address equal access to copyright works for the visually impaired. The proposed framework complements the international community's response to the difficulties that international copyright law creates for access for the visually impaired.

CHAPTER 5

THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED

“When complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for.”¹

- John Milton

I Introduction

Chapter 4 concluded that lack of copyright exceptions for the benefit of the visually impaired in domestic copyright laws is mainly because adoption of copyright flexibilities under international copyright law is optional. Furthermore, the three-step test, as the authority on copyright flexibilities, does not provide countries with clear guidelines. As a result, countries have adopted limitations and exceptions that do not treat the access for the visually impaired on an equal basis with the sighted persons.² Moreover, there is no possibility of cross-border exchange of accessible works under international copyright law, and the legal uncertainties that exist because of incoherent limitations and exceptions make such exchange more complicated.³

In 2013, the Member States of the World Intellectual Property Organization (WIPO) adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty) to address these difficulties.⁴ It is the first international intellectual property instrument to focus solely on flexibilities.⁵

Therefore, this chapter analyses the Marrakesh Treaty and its role in improving the access for the visually impaired. Part II of the chapter identifies what is required of the Contracting

¹ John Milton *Areopagitica; a Speech for the Liberty of Unlicensed Printing to the Parliament of England* (London, 1644).

² See chapter 3.

³ See chapter 4.

⁴ World Intellectual Property Organization [WIPO] Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled [Marrakesh Treaty] WIPO Doc VIP/DC/8 (opened for signature 27 June 2013).

⁵ See Justin Hughes “The Marrakesh Treaty for the Blind – and the Future of Global Copyright” (5 August 2013) the Media Institute <www.mediainstitute.org>.

Parties, and evaluates how the Treaty addresses the problems that copyright has been creating for satisfactory access for the visually impaired, and consequently realisation of their human rights.⁶

This chapter argues that the Marrakesh Treaty does not add anything new to the system of limitations and exceptions that copyright offers for purposes of public interest and balancing protection and access. The possibility to include limitations and exceptions long existed in the copyright system. Moreover, as some commentators have mentioned, there have already been documents such as the WIPO-UNESCO Model Provisions that clarified the possibility of introduction of limitations and exceptions in national laws, as allowed by the Berne Convention.⁷

However, the Treaty's significance lies in obliging its Contracting Parties to adopt limitations and exceptions for the benefit of the visually impaired, and to make cross-border exchange of accessible works possible. Furthermore, by providing definitions and examples, it paves the way for adoption of coherent limitations and exceptions that further facilitates international sharing of accessible works. The implications of the Marrakesh Treaty for the question of better accommodation of human rights by copyright law are assessed in the next chapter.

II Marrakesh Treaty and the Book Famine

A Background to the Treaty

As chapter 1 showed, issue of access to copyright protected works for the visually impaired have long been on the agenda of international organisations.⁸ The 1985 WIPO Study on Copyright Problems Raised by the Access by Handicapped Persons to Protected Works recommended adoption of “an entirely new international instrument”.⁹ Such an instrument

⁶ See chapter 1 for problems, and chapter 2 for non-discrimination and human rights of the visually impaired that are affected by lack of access to copyright works.

⁷ Mihaly J Ficsor “Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired” (11 October 2013) Copyright See-Saw <www.copyrightseesaw.net>.

⁸ See chapter 1.

⁹ Wanda Noel “Copyright Problems Raised by the Access by Handicapped Persons to Protected Works” report to the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union, Paris, 1985, IGC(1971)/VI/11 – B/EC/XXIV/10 ANNEXII <www.keionline.org/>, at 25.

would address the lack of copyright limitations and exceptions for the benefit of the visually impaired, as well as the lack of possibilities for cross-border exchange of accessible works.¹⁰

In late 2004, the Delegation of Chile to WIPO requested the inclusion of “exceptions and limitations to copyright and related rights” in the agenda of the Standing Committee on Copyright and Related Rights (SCCR).¹¹ The request proved successful and the following sessions were partly dedicated to discussion of copyright limitations and exceptions for the purposes of “education, libraries and disabled persons”.¹² Following the proposal of Chile, the necessity to gather information on copyright limitations and exceptions, for better analysis and clarification of their status in different countries, was emphasised.¹³

Another WIPO-commissioned study in 2007 evaluated the state of copyright limitations and exceptions in a number of countries.¹⁴ This study confirmed the findings of previous research regarding lack of limitations and exceptions for the benefit of the visually impaired,¹⁵ and lack of international exchange possibilities, even in countries with copyright flexibilities.¹⁶

In 2009, Brazil, Ecuador, and Paraguay together with the WBU demanded that the WIPO Members address the issue of access for the visually impaired through adoption of a legally binding instrument. The WBU proposed a treaty for copyright limitations and exceptions for the benefit of the visually impaired persons.¹⁷ The proposed treaty was viewed as an example for addressing other issues presented at the initial proposal of Chile to the SCCR.¹⁸ That aspect

¹⁰ Noel, at 25-26.

¹¹ Proposal by Chile on the Subject “Exceptions and Limitations to Copyright and Related Rights”, Document prepared by the Secretariat, Standing Committee on Copyright and Related Rights, Twelfth Session, Geneva, November 17 to 19, 2004, SCCR/12/3, November 2, 2004.

¹² SCCR/12/3.

¹³ See WIPO Standing Committee on Copyright and Related Rights [SCCR], Report, SCCR/17/5, 25 March 2009, at 54: in concluding the SCCR’s Seventeenth Session, the Chair stated that facilitating access of the visually impaired to protected works should include analysis of limitations and exceptions. The same point was later included in the Session’s conclusion with the addition of “application of limitations and exceptions to international exchange of materials in accessible formats” SCCR/17/5 Prov.

¹⁴ WIPO SCCR Study on Copyright Limitations and Exceptions for the visually impaired, prepared by Judith Sullivan, SCCR/15/7, 20 February 2007.

¹⁵ Sullivan, at 9 and 28.

¹⁶ Sullivan, at 10.

¹⁷ WIPO SCCR, Proposal by Brazil, Ecuador and Paraguay, relating to Limitations and Exceptions: Treaty proposed by the World Blind Union (WBU), Document prepared by the Secretariat, Standing Committee on Copyright and Related Rights, SCCR/18/5, 25 May 2009.

¹⁸ See WIPO SCCR, Interventions by Non-Governmental Institutions, SCCR/18/8, 1 October 2009, at 24 where Knowledge Ecology International recommended that the committee “should also pursue its work on the other elements of the limitations and exceptions agenda, including in particular, to examine the topics of limitations and exceptions in the areas of education, libraries, innovative services and access to out of print or orphan works”.

of the proposal is now on SCCR's agenda that could possibly lead to another document with a focus on users' rights.¹⁹

The legal nature of the instrument to be adopted was one of the main controversial issues that divided the stakeholders. The Latin American and Caribbean Group (GRULAC) and African group favoured a treaty or another binding document.²⁰

On the other hand, the European Union, the United States and other supporting delegations, such as Japan and Australia, were of the belief that there is no need for additional binding rules, and a set of recommendations would suffice to address the book famine.²¹

The outcome of WBU's proposed treaty and the negotiations that followed²² was adoption of the Marrakesh Treaty on 27 June 2013.²³ The Marrakesh Treaty is the international community's attempt to facilitate access of the visually impaired to print material in accessible formats. The Treaty addresses the lack of limitations and exceptions for the benefit of the visually impaired in national copyright laws of the States despite the possibility of adoption of such flexibilities in international copyright law treaties.²⁴ It also responds to the gap in international copyright law system that hindered exchange of accessible works between countries.

¹⁹ See WIPO SCCR, Study on Copyright Limitations and Exceptions for Libraries and Archives, SCCR/29/3, 5 November 2014; WIPO SCCR, Objectives and Principles for Exceptions and Limitations for Libraries and Archives, SCCR/26/8, 10 January 2014; and, WIPO SCCR, Working Document Containing Comments and Textual Suggestions Towards an Appropriate International Legal Instrument (in Whatever Form) on Exceptions and Limitations for Libraries and Archives, SCCR/26/3, 15 April 2013.

²⁰ See WIPO SCCR, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group, SCCR/20/11, 15 June 2010, Preamble "recognizing the need to introduce new international rules in order to provide adequate solutions to the needs of vulnerable persons and the challenges and opportunities presented by economic, social, cultural and technological developments".

²¹ See WIPO SCCR, Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability, Proposal by the Delegation of the European Union, SCCR/20/12, 17 June 2010, and WIPO SCCR, Draft Consensus Instrument, Proposal by the Delegation of the United States of America, SCCR/20/10, 10 June 2010.

²² See Justin Hughes "How the Marrakesh Treaty was Negotiated" (28 August 2013) Managing Intellectual Property <www.managingip.com> for a general account of the negotiating history of the Treaty. See Brook Baker "Challenges Facing a Proposed WIPO Treaty for Persons who are Blind or Print Disabled", Northeastern University School of Law Research Paper No. 142-2013 for an account of the final stages of negotiating the Treaty.

²³ Marrakesh Treaty, above n 4.

²⁴ See chapter 4 for a discussion of international copyright treaties that authorise the adoption of copyright flexibilities.

B Recognition of human rights of the visually impaired

The Treaty recognises the importance of striking a balance between the rights of authors and the public for ‘effective and timely’ access of the visually impaired to copyright works. The Marrakesh Treaty acknowledges that lack of access to copyright-protected works for the visually impaired is against the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in the society. The preamble of the Marrakesh Treaty also refers to the importance of visually impaired people’s right to freedom of expression, education, participation in the cultural life of the community, and to share scientific progress and its benefits.²⁵ These principles, together with human rights of the visually impaired that are dependent on access to copyright works, are recognised in international human rights instruments.²⁶ Adoption of the Marrakesh Treaty and its contribution to human rights is a positive step by international community towards fulfilling its obligations under international human rights law to the extent it is affected by copyright.

Referring to the Convention on the Rights of Persons with Disabilities (CRPD), a representative of the Electronic Information for Libraries (eIFL.net) stated that improving the access of the visually impaired was not merely about access but also a human rights issue because the CRPD required states to take all the appropriate measures to ensure that persons with disabilities enjoyed access to cultural material in accessible formats.²⁷ The representative of the Electronic Frontier Foundation (EFF) raised the same point regarding CRPD.²⁸

By recalling human rights principles in general and a number of human rights in particular, the Treaty shows that its purpose is not merely regulating copyright limitations and exceptions. Improving access of the visually impaired is intended to contribute to better realisation of their human rights that have been affected by the copyright law system.

In this sense, the Treaty follows and complements initiatives that preceded it, through providing an international normative framework that contributes to their objectives of inclusion of

²⁵ Marrakesh Treaty, above n 4, Preamble.

²⁶ See chapter 2 for a full discussion of the human rights of the visually impaired that are affected by lack of access to copyright works.

²⁷ WIPO SCCR, Report, SCCR/18/7, 1 December 2009, at 21.

²⁸ At 21.

integration of the people with disabilities in society, and equal realisation of their human rights such as the right to education.²⁹

Reference to human rights in the preamble of the Treaty shows the intention of its drafters to safeguard human rights of the visually impaired against potential violations caused by copyright protection. Therefore, this intention should be observed by signatories of the Treaty when incorporating its provisions into their domestic law. This is especially important in light of the provisions of the Treaty that leave the Member States with room for regulation. Instances of such provisions are discussed in the part C of the chapter.

In a number of jurisdictions, citizens are offered the possibility to bring an action to the court for breach of their fundamental or constitutional rights. An example of such action is the concept of *recurso de amparo* or *juicio de amparo*, which is common in Latin American countries. Therefore, in a country like Colombia, where international treaties are treated as part of the Constitution, direct reference to human rights in the text of a Treaty give the citizens the chance to demand action from the government for realisation of their rights.³⁰

The gradual but constant growth of copyright law in scope and duration together with the array of Courts' decisions in copyright cases has arguably placed the copyright protection above some aspects of the public interest.³¹ In a dissenting opinion in the *Princeton University Press v Michigan Document Services* case, Chief Judge Boyce F Martin Jr stated that "copyright protection ... is intended as a public service to both creator and the consumer of published works". He regarded the case as "one of the more obvious examples of how laudable societal

²⁹ Examples of such initiatives include the World Programme of Action concerning Disabled Persons, World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs, Sundberg Declaration on Action and Strategies for Education, Prevention and Integration, UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Salamanca Statement and the Framework for Action on Special Needs Education, Human Rights of Persons with Disabilities Commission on Human Rights Resolution (1998/31 and 2000/51), and UN General Assembly Resolution on the Rights of the Child.

³⁰ See Allan R. Brewer-Carías *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, Cambridge, 2014) for the definition of *amparo* and examples of relevant case law.

³¹ See John Braithwaite and Peter Drahos "Ratcheting Up and Driving Down Global Regulatory Standards" (1999) 42(4) Development 109; Helfer and Austin Human Rights and Intellectual Property: Mapping the Global Interface (Cambridge, New York, 2011) format at 18 defining "upward harmonisation" as "one important feature of the modern international intellectual property regime ... that seeks to achieve stronger intellectual property rights and more uniform intellectual property laws across nations with different histories and different levels of technological and economic development"; Amy Kapczynski "Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector" (2009) 97(6) California Law Review 1571 for a discussion of the role of the TRIPS Agreement in "upward harmonisation" of intellectual property; and, P Bernt Hugenholtz "Copyright in Europe: Twenty Years Ago, Today and What the Future Holds" (2013) 23 Fordham Intellectual Property, Media and Entertainment Law Journal 503 for a discussion of upward harmonisation agenda in the Europe.

objectives recognized by both the Constitution and statute, have been thwarted by a decided lack of judicial prudence”.³²

By focusing on the flexibilities in copyright law designed to soften and rationalise its monopoly nature, copyright law can shift towards a more inclusive and humane approach; one that is considerate of the society as a whole and not merely of the right holders. The importance of the Treaty to this point is that it is an example of the possibility to reconcile human rights and intellectual property. The Marrakesh Treaty and similar documents help shift the focus of copyright law from copyright holders’ rights to a more holistic approach wary of users’ rights. This facilitates the process of general reconciliation of intellectual property and human rights.

The Treaty shows a change in focus of the copyright law-making for economic purposes to human rights purposes. The economic rationale for copyright is constantly emphasised. The Marrakesh Treaty highlights the human rights rationale of copyright protection and its flexibilities. It presents the idea that copyright legislation should serve human rights purposes and not just economic ones.

C Copyright flexibilities for the visually impaired

The difficulties that the current copyright law system, specifically as it was prior to the Marrakesh Treaty, creates regarding access for the visually impaired was discussed in chapters 3, 4, and 5. The following sections analyse the extent to which the Marrakesh Treaty tackles those problems.

1 Minimum mandatory limitations and exceptions

The Preamble of the Marrakesh Treaty highlights the importance of an “enabling legal framework at the international level”.³³ Article 4 (1)(a) of the Treaty requires Contracting Parties to include a limitation or exception to copyrights in their national laws to facilitate access of the visually impaired and those with other print disabilities to accessible works.³⁴ The limitation or exception should make production of accessible works possible without the

³² *Princeton University Press, MacMillan, Inc, and St Martin’s Press, Inc v Michigan Document Services, Inc, and James M Smith* 99 F 3d 1381 (6th Cir 1996) at [64].

³³ Marrakesh Treaty, above n 4, Preamble.

³⁴ See art 4 (1) (a) stating that “contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.” Part (b) of art 4 (1) goes on to explain the possibility of including a limitation or exception to the right of public performance.

authorisation of the right holder.³⁵ Article 4 (2) provides an example of how such limitation or exception in a national law could look. Contracting Parties can fulfil their obligations under art 4(1) by adoption of a provision that states:³⁶

(a) Authorized entities shall be permitted, without the authorization of the copyright right holder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:

(i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work;

(ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;

(iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and

(iv) the activity is undertaken on a non-profit basis;

and

(b) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.

While art 4(2) provides an example of how to regulate a limitation or exception for the benefit of visually impaired, the Treaty allows the States to provide other limitations or exceptions that would lead to the same results.³⁷ The Treaty defines “other limitations and exceptions” as “judicial, administrative or regulatory determinations for the benefit of [visually impaired] as to fair practices, dealings or uses to meet their needs”.³⁸

³⁵ Art 4 (2) (a).

³⁶ Art 4 (2).

³⁷ See Art 4 (3). See also art 11 stating that any measures for application of the Marrakesh Treaty, including limitations and exceptions other than those in art 4, should be compatible with the three-step tests in the Berne Convention, the TRIPS Agreement, and the WCT.

³⁸ Art 10 (3).

As the WIPO study on limitations and exceptions for the blind suggested, the visually impaired can also benefit from limitations and exceptions for purposes such as education, research, or private use.³⁹

Although the Marrakesh Treaty does not create new copyright flexibilities, it clarifies flexibilities that countries are provided with, to realise their human rights obligations toward the visually impaired. For instance, the Delegation of Nigeria noted that despite the value of the three-step test, “there was an absence of certainty as to what was permitted”.⁴⁰ Similarly, in its proposal, the WBU asked for not only introduction of new international rules but also clarification of the interpretation of certain existing rules in order to provide adequate solutions to the problem of access.⁴¹

However, the Treaty fully succeeds in ensuring minimum mandatory limitations and exceptions internationally when the majority of the countries of the world decide to sign and ratify the Treaty. Therefore, inclusion of limitations and exceptions in national laws and the international harmonisation that would assist the visually impaired in accessing books is dependent upon States’ membership of the Treaty.

Entry into force of the Treaty will happen once 20 parties have deposited their instruments of ratification or accession.⁴² Close to two years after adoption of the Treaty, it has not yet entered into force despite the initial positive response of over 50 countries that signed the Treaty.⁴³ This can possibly be because the copyright law in the signatory countries, both those with and without exceptions, may need to undergo amendments. For instance, the European Union is now in the process of bringing its copyright law in line with the requirements of the Treaty, before ratifying it.⁴⁴ Another plausible reason, which may have also stopped some countries from signing the Treaty, is that access for the persons with disabilities is often associated with piracy risks. This is also why some right holders “have regularly locked people with print disabilities out of the electronic book market.”⁴⁵

³⁹ See Sullivan, above n 14. See also chapter 3 for a discussion of the relevant examples.

⁴⁰ WIPO SCCR, SCCR/17/5, above n 13, at 11.

⁴¹ WIPO SCCR, SCCR/18/5, above n 17.

⁴² Marrakesh Treaty, above n 4, art 18.

⁴³ A current list of the signatories of the Treaty can be seen at <www.wipo.int/treaties>.

⁴⁴ See Council of the European Union, Outcome of the Council Meeting, Brussels, 19 May 2015, 8967/15, a8 stating that “The Council adopted a decision requesting the Commission to submit a legislative proposal with a view to amending the EU’s legal framework so that it complies with the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled”.

⁴⁵ See Benetech’s Comments in response to the US Copyright Office’s Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons with Other

(a) Beneficiaries

The scope of end beneficiaries in the Marrakesh Treaty covers everyone with a disability that hinders reading of normal copies of copyright protected works.⁴⁶ Article 3 of the Treaty defines the beneficiaries of the authorised limitations and exceptions as a person who is:⁴⁷

(a) is blind;

(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;

regardless of any other disabilities.

The agreed statement regarding art 3(b) states that the phrase “cannot be improved” does not require “the use of all possible medical diagnostic procedures and treatments”.⁴⁸

(b) Copyright works

The copyright-protected works that are subject to limitations and exceptions under the Marrakesh Treaty include:⁴⁹

... literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.

It follows from this definition that the Treaty does not limit facilitation of access for the visually impaired to print material. The phrase “otherwise made publicly available in any media” suggests that works in digital form are also covered by the Treaty. Moreover, definition of works under the Treaty also includes audio formats of copyright content, such as audio books.⁵⁰

Disabilities, 20 April 2009 <www.copyright.gov/docs>. See also Paul Harpur and Nicolas Suzor “Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm” (2013) 36(3) UNSW Law Journal 745 at 761- 768 for a summary of resistance to adoption and implementation of the Marrakesh Treaty.

⁴⁶ See chapter 1 for a description of those with print disabilities.

⁴⁷ Marrakesh Treaty, above n 4, art 3.

⁴⁸ See agreed statement concerning Article 3.

⁴⁹ Art 2 (a).

⁵⁰ See agreed statement concerning Article 2 (a).

Computer programmes and databases were only added to the category of works required to be protected under international law following the adoption of the TRIPS Agreement. Article 10 of the TRIPS requires the programmes and “compilations of data or other material” as literary works, under the Berne Convention.⁵¹ The same protection is also provided by arts 4 and 5 of the WCT.⁵² Therefore, the Marrakesh Treaty also covers computer programmes and databases, even though it only refers to art 2(1) of the Berne Convention.

(c) Copyrights

Article 4(1) of the Marrakesh Treaty requires that countries provide limitations and exceptions for the benefit of the visually impaired to “the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT)”.⁵³ The provision of limitations and exception to the right of public performance is not required by the Treaty and is left to the discretion of the Contracting Parties.⁵⁴

The Marrakesh Treaty refers to the WCT regarding the right to making available of copyright works. However, some countries like New Zealand, which are not members of the WCT, recognise the right of making available in their national copyright law.⁵⁵ The second half of art 4 (1) (a) states that limitations and exceptions should “facilitate the availability of works in accessible format copies for beneficiary persons” and “should permit changes needed to make the work accessible in the alternative format”.⁵⁶ Therefore, it seems illogical to assume that a country does not have an obligation to provide limitations and exceptions to the right of making available, if it is not a member to the WCT. This is in line with provision of full and equal access for the visually impaired, considering the role of digital and online technologies for distribution of accessible works.

(d) Authorised entities

Article 2 (c) of the Treaty defines an authorised entity as:⁵⁷

⁵¹ World Trade Organization (WTO), Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS Agreement] 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1996), art 10.

⁵² WIPO Copyright Treaty [WCT] 36 ILM 65(1997) (opened for signature 20 December 1996, entered into force 6 March 2002) arts 4 and 5.

⁵³ Marrakesh Treaty, above n 4, art 4 (1) (a).

⁵⁴ Art 4 (1) (b).

⁵⁵ See the Copyright Act 1994 (NZ), s 2(1).

⁵⁶ Marrakesh, above n 4, art 4 (1) (a).

⁵⁷ Art 2 (c).

... an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

Entities receiving financial support from the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis are also within the definition of authorised entities.⁵⁸

The Treaty does not explicitly require the Contracting Parties to allow visually impaired individuals or others acting on their behalf to use the limitations and exceptions. However, art 4(2) of the Treaty includes such a possibility by stating that:⁵⁹

(b) A beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies.

As article 2 states, the basis of the authorised entities' activities must be non-profit.⁶⁰ The Treaty provides other examples of requirements that would authorise an entity to use imitations and exception. Those requirements include: lawful access to a copyright work or a copy of it;⁶¹ avoiding changes other than those needed to make the work accessible;⁶² supplying accessible works exclusively for use by the visually impaired.⁶³

(e) Accessible formats

An accessible format copy in the Treaty is defined as:⁶⁴

... a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of

⁵⁸ See Agreed statement concerning Article 2(c).

⁵⁹ Art 4 (2) (b).

⁶⁰ Art 2 (c), and 4 (2) (iv).

⁶¹ Art 4 (2) (i). See also art 4 (2) (b) that requires lawful access to copyright work by a beneficiary person, or someone acting on his or her behalf. Check the numbering of the articles in this footnote.

⁶² Art 4 (2) (ii).

⁶³ Art 4 (2) (iii).

⁶⁴ Art 2 (b).

the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

While the Treaty does not confine the use of limitations and exceptions to production of a certain format of accessible works, it does not require States to permit production of all accessible formats either. Therefore, the Treaty allows the Contracting Parties to limit the production of accessible works to certain formats.

The 2007 WIPO Study found that approximately half of the countries in the study with limitations and exceptions had some restrictions on the permitted formats of accessible works.⁶⁵

Each accessible format has its advantages and disadvantages. The visually impaired prefer different accessible formats due to factors such as age, financial resources, storage, and transportation purposes. Confining the scope of accessible formats can negatively affect the visually impaired. Therefore, Treaty should have required States to provide format-neutral limitations and exceptions.

(f) Commercial availability of accessible formats

Contracting Parties may choose to permit the application of a limitation or exception only in the absence of a commercially available accessible copy of a copyright work.⁶⁶ Article 4 (4) of the Treaty allows a Contracting Party to limit the application of copyright limitations or exceptions to cases where an accessible version of a work is not commercially available.

Imposing a requirement for lack of commercial availability can burden the visually impaired or authorised entities. It could require time and energy consuming efforts to search for a commercially available accessible version. This can delay the access and keep individuals or institutions in fear of infringement, especially in places where there is no comprehensive database of commercially available accessible works. Moreover, commercial availability can vary for different individuals or institutions based on their location, financial resources, and ability to inquire such availability. The difference is particularly prominent when comparing developed and developing or least developed countries.⁶⁷ By giving a clearer definition of

⁶⁵ See Sullivan, above n 14, at 36-39.

⁶⁶ Marrakesh Treaty, above n 4, art 4 (4).

⁶⁷ See chapters 1 and 3 for more on commercial availability.

commercial availability and fuller guidelines regarding its adoption, the Treaty could have ensured that it would not negatively affect the access for the visually impaired.

(g) Remuneration of right holders

Members of the Treaty can decide whether to subject use of limitations and exceptions to remuneration or not.⁶⁸ Adoption of this requirement does not appear to be conducive to equal access for the visually impaired. Visually impaired individuals may not be able to afford to remunerate the right holders. Similarly, the authorised entities would be non-profit and their financial resources are limited. Remunerating the right holders affects the number of works they can reproduce by imposing extra expenses to the already expensive reproduction process. In cases where the authorised entities charge the visually impaired for the expense, the added fee of remuneration can reduce the purchase power of the visually impaired. Moreover, both the individuals and the authorised entities should have lawful access to the work that is being reproduced.⁶⁹ Hence, in many cases they have already paid the price of the work and should not be charged extra simply for changing the format of the work to one that is accessible to the visually impaired.⁷⁰ Finally, in the context of cross-border exchange of works, there may be cases of conflicts of laws, when the importing and exporting countries have opted for different approaches to remuneration.⁷¹

(h) Digital rights management and access

The negative effects of DRM systems on use of limitations and exceptions for the benefit of the visually impaired were one of the main areas of concern when negotiating the Marrakesh Treaty.⁷² Article 7 of the Treaty requires the States to “take appropriate measures, as necessary” to make sure that legal protection of anti-circumvention measures “does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty”.⁷³

Ficsor, in his commentary to the Treaty, argues that the best way to ensure compatibility of TPMs with limitations and exceptions is to “leave the adoption of appropriate measures to the owners of rights and to only intervene through some procedures provided by legislation where

⁶⁸ Marrakesh Treaty, above n 4, art 4 (5).

⁶⁹ Art 4 (2) (a) (i).

⁷⁰ See chapters 1 and 3.

⁷¹ See Marketa Trimble “The Marrakesh Puzzle” (2014) 45 International Intellectual Property Review 768 at 782-792 for a discussion of the potential conflict of laws cases and approaches for addressing them.

⁷² See chapter 1 for the impact of DRMs on application of limitations and exceptions.

⁷³ Marrakesh Treaty, above n 4, art 7.

they do not take such measures.”⁷⁴ The Treaty obliges the Contracting Parties to ensure the compatibility of TPMs and application of limitations and exceptions,

However, in light of the difficulties that TPMs have been creating for use of limitations and exceptions, the Treaty could have offered more guidelines for States on ensuring compatibility of TPMs and limitations and exceptions.⁷⁵ As the WIPO study on limitation and exceptions for the visually impaired pointed out, few countries outside the European Union and the US appear to have made any provisions regarding the relationship between exception and use of TPMs.⁷⁶ However, even in the US, where circumvention of TPMs for application of exceptions can be authorised,⁷⁷ the process of receiving authorisation is complex and time consuming.⁷⁸ On the other hand, in the European Union, where many countries have adopted different solutions to interplay of TPMs and exceptions, the right holders generally ignore this requirement due to lack of specific regulations in this regard.⁷⁹

2 Connection to the three-step tests

While Contracting Parties are offered a degree of autonomy in regulating limitations or exceptions for the benefit of visually impaired, the importance of adhering to the criteria of the three-step tests is emphasised in multiple provisions.⁸⁰ Article 11 of the Treaty enunciates the requirements of the three-step tests, as set out in the Berne Convention, The TRIPS Agreement, and the WIPO Copyright Treaty.⁸¹

Adoption of the Marrakesh Treaty showed that limitations and exceptions for the visually impaired can be compatible with the three-step tests. However, as chapter 4 discussed, there are some ambiguities regarding different elements of the three-step test, such as the interpretation of the “normal exploitation” or whether the steps should be seen as cumulative

⁷⁴ Ficsor, above n 7, at 38.

⁷⁵ See WIPO SCCR, SCCR/17/5, above n 13, at 17-18: statement of the representative of EFF and IFLA, and WIPO SCCR, SCCR/18/8, above n 18, at 19: statements of IFLA and EIFL.

⁷⁶ Sullivan, above n 14, at 118.

⁷⁷ See the Digital Millennium Copyright Act 1998 [DMCA] (US), s 1201.

⁷⁸ See Krista Cox “Marrakesh Note 4: The 2012 U.S. Copyright Office decision regarding Technological Protection Measures, including discussion of Commercial Availability of accessible works” (7 June 2013) Knowledge Ecology International <www.keionline.org> at 1 stating that because the exemptions in s 1201 of the DMCA are narrowly defined the visually impaired have to go through a rule making process every three years.

⁷⁹ Marcella Favale “Fine-tuning European copyright law to strike a balance between the rights of owners and users” (2008) 33(5) European Law Review 687 at 695. See generally Marcella Favale “Approximation and DRM: can digital locks respect copyright exception?” (2011) 19(4) International Journal of Law and Information Technology 306.

⁸⁰ See Marrakesh Treaty, above n 4, art 11.

⁸¹ Art 11.

or holistic.⁸² During the Marrakesh Treaty negotiations, the Delegation of Nigeria also noted the strict limits in the provisions of the three-step test that contradicts its purpose to allow for flexibility. Future studies, according to the Delegation, “would show the limitations of the three-step test in preserving the necessary flexibilities.”⁸³ Therefore, a new interpretation of the three-step test is required to address the challenges it may cause.⁸⁴

3 Cross-border exchange of accessible works

As the 2007 WIPO study suggested, close to 60 countries had already provided for limitations and exceptions for the benefit of the visually impaired in their national laws.⁸⁵ Ever since, a number of countries, including India,⁸⁶ Colombia,⁸⁷ and Mauritius,⁸⁸ have also updated their copyright laws or introduced new legislation to include such limitations and exceptions. However, the numbers of accessible works are low in those countries similar to the remainder of the world.

The fact that lack of access to books exists despite the availability of copyright limitations and exceptions in many countries’ national laws is recognised in the Treaty’s preamble:⁸⁹

Recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.

Following this recognition, it is suggested that the need for “considerable resources” together with unavoidable “duplication of efforts” to produce accessible works are to blame for the persistence of the book famine.⁹⁰

Articles 5 and 6 of the Treaty address the exchange of accessible copies of copyright works internationally. Article 5 requires the Contracting Parties to allow for accessible works that are produced under copyright limitations and exceptions or other laws to be shared with another

⁸² See chapter 4.

⁸³ WIPO SCCR, SCCR/17/5, above n 13, at 11.

⁸⁴ See chapter 4 for new readings of the three-step test.

⁸⁵ Sullivan, above n 14, at 65.

⁸⁶ See Copyright Amendment Act No. 27 of 2012 (India).

⁸⁷ See Law No. 1680 of 2013 (Colombia).

⁸⁸ See Copyright Act No. 2 of 2014 (Mauritius).

⁸⁹ Marrakesh Treaty, above n 4, Preamble.

⁹⁰ Preamble.

country.⁹¹ Similar to production and use of accessible copies under art 4, such copies can only be shared with authorised entities or visually impaired individuals in another country.⁹² While art 5 (2) instructs the countries on how to regulate exchange of accessible copies, art 5 (3) recognises the Parties' right to provide for other limitations or exceptions for the same purpose.⁹³

The Treaty makes it possible for countries that are not members of the Berne Convention to receive copies of accessible works from other countries. However, to protect the interests of copyright holders, the Treaty requires the distribution or making available of accessible works to be limited to beneficiaries within the jurisdiction of those countries.⁹⁴

Still, authorised entities in countries that are not members of the Berne Convention, but parties to the WIPO Copyright Treaty, can distribute or make the works available to other jurisdictions, provided they have reproduced (and not received) the work themselves.⁹⁵ Alternatively, adherence to the principles of the three-step test in the national law has the same effect, in case the contracting party is neither a member of Berne Convention nor the WCT.⁹⁶ This provision successfully addressed what came to be known as the “Berne gap” in reference to application of the three-step test to the right to distribution in countries that are not members of the Berne Convention.⁹⁷

Therefore, countries like Iran who have joined the Marrakesh Treaty but not the Berne or the WCT, can still take part in international exchange of accessible works. Under the provisions of art 5, Iran can receive accessible copies from other authorised entities, but can only distribute those copies locally.⁹⁸ It is not, however, completely clear whether the authorised entities in Iran could distribute their works to other jurisdictions. The Copyright Law of Iran appears to protect the distribution right.⁹⁹ The law also holds that “public libraries, documentation centers,

⁹¹ Art 5 (1).

⁹² Art 5 (2) (a) and (b).

⁹³ Art 5 (3).

⁹⁴ Art 5 (4) (a).

⁹⁵ The European Union and Tuvalu appear to be the only countries member to the WCT and not the Berne Convention <www.wipo.int/treaties>.

⁹⁶ Marrakesh Treaty, above n 4, art 5 (4) (b).

⁹⁷ See WIPO, SCCR Draft Report of the Informal Session and Special Session, Geneva, 18-20 April 2013, SCCR/SS/GE/2/13/3 PROV.

⁹⁸ Marrakesh Treaty, above n 4, art 5 (4) (a). See generally Simonetta Vezzoso “The Marrakesh Spirit – A Ghost in Three Steps?” (2014) 45 International Review of Intellectual Property 796 at 806- 809 for a discussion of the “Berne gap”.

⁹⁹ Act for Protection of Authors, Composers and Artists Rights (Copyright Law) 1970, art 3 stating that “author’s rights include exclusive right to publish, broadcast, perform and publicize works”.

scientific institutions and educational establishments, which are non-commercial, may reproduce protected works by a photographic or similar process, in the numbers as is necessary for the purposes of their activities”.¹⁰⁰ Considering this provision as compatible with the three-step test, the entities that are authorised to reproduce works, under the Marrakesh Treaty, would be able to distribute them beyond the jurisdiction of Iran.

While art 5 is mainly dealing with export of accessible works to other countries, art 6 addresses the importation of such works. Therefore, visually impaired individuals, those acting on their behalf, and the authorised entities that can make an accessible copy of a work should be allowed to import accessible works as well.¹⁰¹

Finally, the Treaty asks the States to take necessary measures to facilitate the cross-border exchange of accessible works. Such measures could include encouraging the voluntary sharing of information between authorised entities to identify each other as well as communicating that information to the general public. To this end, WIPO would “establish an information access point” and share information “about the functioning” of the Treaty.¹⁰²

III Conclusion

Unlike previous international intellectual property documents, the Marrakesh Treaty requires its Contracting Parties to adopt limitations and exceptions for the benefit of the visually impaired in their national copyright laws. It also requires States to provide for cross-border exchange of accessible works to facilitate and improve access of the visually impaired to copyright works.

Inclusion of minimum mandatory limitations and exceptions in a harmonised international framework was one of the main concerns of the visually impaired and their institutions. The Treaty addresses this concern through obliging the States to provide for specific or general limitations or exceptions that facilitate the access of the visually impaired. By putting this obligation on the Contracting Parties, the Treaty ensures that countries make use of the flexibilities of the international copyright law system that have long been available to them.

¹⁰⁰ Art 8.

¹⁰¹ Art 6.

¹⁰² Art 9.

Upon ratification of the Treaty, the visually impaired and the authorised entities face fewer difficulties in reproducing and distributing accessible works. Lifting of bureaucratic burdens and time delays caused by seeking the right holder's permission accelerates reproduction of works. Reduced production costs (if no remuneration requirements are adopted) can contribute to an increase in the number of accessible works produced. Under the scheme of international exchange of works, initial reproduction costs would be significantly reduced (by avoiding duplication) and distribution of works would be made easier (both financially and legally).

The Treaty successfully addresses another gap in the regulatory framework of the international copyright law system, meaning lack of possibilities for exchange of accessible works between the countries. By requiring the States to allow for sharing of accessible works between individuals and authorised entities, the Treaty facilitates the flow of limited and valuable resources around the world. The Contracting Parties with lingual similarities can avoid duplication of producing popular titles. Moreover, developed countries can share their already available collections of accessible works with developing and least developed countries. Consequently, access of the visually impaired to already available accessible works will be improved both in terms of quantity and the time required to obtain a work.

While adoption of the Marrakesh Treaty is a great achievement for improved access for the visually impaired, it appears that its enforcement may face a number of difficulties. The potential challenges include the entering into force of the Treaty, and future complexities such as potential choice of law cases, that would arise for cross-border exchange of works, due to differences between countries' laws, despite the minimum harmonisation that the Treaty provides. Out of the 82 countries who have signed the Treaty so far, only ten have ratified it. We can only speculate as to why so few countries have adopted the Marrakesh Treaty. Some of the contributing factors might be the novelty of the Treaty, the fear of states regarding the responsibilities that it may place on them, and the lack of a driving force for adoption, for instance similar to what the TRIPS Agreement enjoys from. Further measures are required to ensure the achievement of the Treaty's objectives regarding provision of equal access for the visually impaired, which will then in turn improve the realisation of their human rights. The next chapter discussed those measures in the bigger context of the interface of copyright and human rights.

CHAPTER 6

A HUMAN RIGHTS FRAMEWORK FOR COPYRIGHT AND ACCESS FOR THE VISUALLY IMPAIRED

“The method for finding your way is much alike both for the blind and the sighted. In an unfamiliar place, it may be necessary to ask for directions. If the directions are correct and complete, this solves the problem. If not, a request for more information may be made. This is how all of us learn how to get where we want to go.”¹

-Marc Maurer

I Introduction

The previous chapters argued that the book famine is discriminatory against the visually impaired and has a negative impact on their human rights, such as their rights to education, access to information, culture and science.² Therefore, copyright law is discriminatory and a violation of human rights of the visually impaired, to the extent that it contributes to the book famine.

Copyright law is partly to blame for the book famine. Lack of comprehensive limitations and exceptions to copyright hinders reproduction and distribution of accessible copyright protected works for the benefit of the visually impaired. Furthermore, access is unsatisfactory even in countries with limitations and exceptions to copyright for the benefit of the visually impaired. The low number of accessible works in those countries is partly because of the way existing limitations and exceptions are designed. Limits on the permitted accessible formats, producers and distributors, and types of copyright protected works are some of the difficulties that existing flexibilities cause for the visually impaired.³ The optional nature of the flexibilities in international copyright law has contributed to lack or inefficiency of limitations and exceptions in national laws. Finally, territoriality of copyright and lack of relevant possibilities stop the majority of countries from cross-border exchange of accessible works.⁴

¹ Marc Maurer “The City and the Fear” in Kenneth Jernigan (ed) *Like Cats and Dogs* (National Federation of the Blind, Baltimore, 1997).

² See chapter 2 for a discussion of human rights of the visually impaired that are affected by lack of access to copyright works.

³ See chapter 3.

⁴ See chapter 4.

In 2013, the international community attempted to respond to the needs of the visually impaired through adoption of the Marrakesh Treaty.⁵ While it provides a good foundation, the Marrakesh Treaty has its flaws. For instance, the provision of minimum mandatory limitations and exceptions, that the Marrakesh Treaty aims to achieve, is only possible when countries ratify the Treaty. The decision on a number of issues such as the scope of accessible formats and the commercial availability criteria is left to states. Bearing in mind the strengths and weaknesses of the Marrakesh Treaty, this chapter answers the question of how the copyright law regime can better accommodate human rights of the blind and visually impaired that are affected by it.⁶

In order to answer this question, this chapter explores the nature of the relationship between copyright and human rights of the visually impaired. Following this introduction, part II locates the relationship of copyright and human rights of the visually impaired in the wider interface of intellectual property and human rights. It then proposes adoption of a human rights-based approach to the relationship of the two regimes that highlights their common objective of facilitating human welfare. This human rights-based approach highlights the idea that the balance between protection and access is an integral part of the copyright regime and necessary for achieving the common objective of copyright and human rights. Based on the identified problems that copyright creates for the access of the visually impaired, this chapter argues that the existing balance between copyright protection and access for the visually impaired is not conducive to realisation of their human rights.

Therefore, to restrike the balance between the two regimes, the chapter proposes a human rights framework for copyright to the extent it affects the human rights of the visually impaired. Until very recently, the domestic policy makers have not been given a framework for considering the human rights implications of copyright policy and law. This chapter seeks to complement the Marrakesh Treaty by offering a framework that can be further developed by policy makers based on different countries' national needs.

Two sets of options are analysed for the creation of such a framework that would restrike the balance between copyright and human rights of the visually impaired to facilitate their access

⁵ The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO Doc VIP/DC/8, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, 27 June 2013 [The Marrakesh Treaty].

⁶ See chapter 5 for a detailed discussion of the Marrakesh Treaty.

to copyright protected material and consequently the realisation of their human rights.⁷ The first section of Part III discusses the existing system of limitations and exceptions that have been adopted by the Marrakesh Treaty.⁸ Adoption of minimum mandatory limitations and exceptions that are consistent with the human rights of the visually impaired are evaluated.⁹ The second section is dedicated to exploring further measures that would enhance the outcomes of the proposed human rights framework. Those measures include ensuring compatibility of copyright and human rights when adopting, implementing, and monitoring copyright policy and law.

II Copyright and Human Rights of the Visually Impaired: The Need for Balance

A The Interface of Intellectual Property and Human Rights

Commentators have offered different approaches to conceptualise the relationship between intellectual property rights and human rights.¹⁰ The main proposed approaches are 1) conflict, 2) coexistence, and, 3) beyond conflict and coexistence.¹¹ Since many authors have already evaluated the merits and flaws of these approaches, this chapter discusses each approach very briefly before applying them to the case of the visually impaired and access to copyright protected works.

1 Conflict

The conflict approach views intellectual property rights and human rights as being in fundamental conflict.¹² Proponents of this approach, including the UN human rights system,

⁷ See chapter 2 regarding principle of non-discrimination and human rights of the visually impaired and the connection of the two to access to copyright works and copyright law.

⁸ See chapter 5 for limitations and exceptions in the Marrakesh Treaty.

⁹ See chapters 3 and 4 for a discussion of whether existing limitations and exceptions address the rights of the visually impaired.

¹⁰ See Laurence R Helfer “Mapping the interface between human rights and intellectual property” in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, Cheltenham, 2015) 6 at 9-10 for a discussion of why some commentators “argue in favor of fortifying the boundaries between [human rights and IP]”.

¹¹ See Laurence R Helfer and Graeme W Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, Cambridge, 2011) at 64-87 and the footnotes for a full discussion of these approaches and their proponents.

¹² Laurence R Helfer “Human Rights and intellectual Property: Conflict or Coexistence?” (2003) 5 *Minnesota Intellectual Property Review* 47 at 48. The conflict approach was mainly advocated by UN human rights treaty bodies. See for examples Panel discussion, 9 November 1998, *Intellectual Property and Human Rights*, WIPO, Geneva, Publication No. 762(E) 1999; Economic and Social Council (ECOSOC), Sub-Commission on Promotion

promote the supremacy of human rights and “primacy of human rights obligations over economic policies and agreements”.¹³

As Helfer and Austin argue, contrary to a narrow definition of conflict, human rights and intellectual property rights are not mutually inconsistent.¹⁴ Some of the human rights that are affected by intellectual property rights (such as the right to education or culture in the case of copyright and visually impaired) are vague and allow states to compromise them to the degree necessary for achieving other social goals.¹⁵ In this scenario, human rights cannot automatically take primacy over intellectual property rights.

2 Coexistence

Proponents of the coexistence of intellectual property and human rights see them as following the same goals. Hence, the problem they try to answer is how to strike and maintain a balance between the interests that they each protect.¹⁶

As Helfer argues, this approach gives greater weight to flexibility mechanisms in intellectual property law at the policy level, for instance by focusing on limitations and exceptions.

and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution 2000/7, UN Doc. E/CN.4/Sub.2/RES/2000/7, 17 August 2000 [Sub-Commission Res 2000/7] at [11] stating that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights.”; ECOSOC, Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human rights and intellectual property, Statement by the Committee on Economic Social and Cultural Rights UN Doc. E/C.12/2001/15, 14 December 2001 [Statement by the CESCR] at [12] stating that “any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party.” See also Lea Shaver “The Right to Science and Culture” (2009) 1 Wisconsin Law Review 121 at 124 and 158 stating that Intellectual property rights are fundamentally in tension with the right to culture and science through transforming cultural and scientific goods and manifestations from public to private goods.; See generally Jakob Cornides “Human Rights and Intellectual Property: Conflict or Convergence? (2004) 7(2) Journal of World Intellectual Property 135 at 135-136.

¹³ Sub-Commission Res 2000/7, above n 12, at [3]; See also Richard Elliott “TRIPS and Rights: International Human Rights Law, Access to Medicines, and the Interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights” (Canadian HIV/AIDS Legal Network & AIDS Law Project, South Africa, 2001); Robert Howse and Makau Mutua “Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization” in Hugo Stokke and Ann Tostensen (eds) *Human Rights in Development: Yearbook 1999/2000* (Kluwer Law International, Leiden, 2001) 51; Paul L C Torremans “Copyright (and Other Intellectual Property Rights) as a Human Right” in Paul L C Torremans (ed) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2008) 195 at 196; and, Peter Drahos “An Alternative Framework for the Global Regulation of Intellectual Property Rights (2005) 21(4) Journal für Entwicklungspolitik 44. See also Helfer and Austin, above n 11, at 68-71.

¹⁴ Helfer and Austin, above n 11, at 65-66.

¹⁵ See chapter 2 for a discussion of the right to education and other human rights of the visually impaired that are affected by copyright.

¹⁶ Helfer, above n 12, at 48-49. When the debate over the interface of human rights and intellectual property was heating the WTO supported the coexistence approach. See World Trade Organization, Protection of Intellectual Property under the TRIPS Agreement, E/C.12/2001/18, 27 November 2002.

However, it runs the risk of imposing undesirable human rights-inspired external limits on intellectual property rights, or ignoring the fact that “existing flexibilities were not designed with human rights in mind.”¹⁷ The flexibilities in the Marrakesh Treaty are to some extent an exception to this argument because they were adopted with the human rights of the visually impaired in mind.¹⁸ However, they are not completely distinct from the general system of copyright flexibilities since they are crafted in the framework of the Berne and TRIPS three-step test.¹⁹

Commentators have identified shortcomings of the conflict and coexistence approach.²⁰ They both, however, have positive elements that are useful for conceptualising the relationship between copyright and the human rights of the visually impaired.

3 Beyond conflict and coexistence

Those who support the third approach have argued that the interface between intellectual property rights and human rights cannot be viewed as conflict or coexistence.

Peter Yu views the problem with the conflict and coexistence approaches as ignoring the distinction between the human rights and non-human rights attributes of intellectual property rights.²¹ He divides the conflicts between intellectual property rights and human rights into: a) “external conflicts”, meaning conflicts between the non-human right attributes of intellectual property rights with other human rights. This can be resolved by giving human rights primacy over the non-human rights attributes of intellectual property rights;²² and, b) “internal conflicts”, meaning conflicts between the human rights attributes of intellectual property rights and other human rights. This second case of conflicts is more challenging to resolve. Yu summarises the available options for addressing the internal conflicts as: 1) the just remuneration approach that is present in the system of compulsory licensing; 2) the core

¹⁷ Helfer, above n 10, at 13.

¹⁸ See Marrakesh Treaty, above n 5, Preamble “recalling the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities”.

¹⁹ Art 11 that requires adherence of flexibilities adopted under the Marrakesh Treaty with the three-step tests in the Berne, TRIPS and the WIPO Copyright Treaty.

²⁰ See Helfer and Austin, above n 11, at 65-67 and 81-87.

²¹ Peter Yu “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 UC Davis Law Review 1039 at 1077.

²² Yu, at 1070-1093. See also Committee on Economic, Social and Cultural Rights General Comment No. 17 on The right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), UN Doc. E/C.12/GC/17, 12 January 2006 [CESCR General Comment No. 17] at [3] stating that not all intellectual property rights are human rights.

minimum approach that guarantees minimum protection of moral and material interests of the authors as well as the human rights of the users; and, 3) the progressive realisation approach that sees states using all their resources as they become available for maximum possible realisation of human rights affected by intellectual property.²³

Helfer proposes a human rights framework for intellectual property that goes beyond the concepts of conflict and coexistence.²⁴ The first step toward building a human rights framework is specifying the minimum human rights outcomes that countries need to achieve. Second, the role of intellectual property in reaching those outcomes needs to be identified. Where intellectual property law is conducive to those outcomes countries should embrace them. It is only where intellectual property law hinders those outcomes that countries should think about changing it.²⁵ Similarly, Okediji suggest that because human rights justify the objectives of intellectual property they can be used to impose a constraint on IP and its legitimacy.²⁶

Although these three commentators provide different frameworks for the interface of intellectual property and human rights, their views are complementary. Okediji's suggestion to use intellectual property as a means for achieving human rights aspirations is in line with Helfer's argument that a human rights framework embraces intellectual property when it helps achieve human rights goals.²⁷ Similarly, Yu's suggestion to change intellectual property in favour of human rights when the conflict is of external nature is compatible with Helfer's theory that countries only need to change intellectual property when it impedes the realisation of human rights.²⁸

²³ Yu, at 1094-1123.

²⁴ Laurence R Helfer "Towards a Human Rights Framework for Intellectual Property" (2007) 40 UC Davis Law Review 971.

²⁵ Helfer, at 1018. Derclaye has criticised Helfer's perspective for creation of a human rights framework for intellectual property because he "fails to more clearly state that human rights and IPR have the same goal." See Estelle Derclaye "Intellectual Property Rights and Human Rights: Coinciding and Cooperating" in Torremans, above n 13, at 138, n19. This criticism seems invalid because the framework that Helfer promotes embraces intellectual property rights that contribute to human rights outcomes. In this sense it signals that because of shared goals of human rights and intellectual property the latter can contribute to fulfilment of the former. The alternative solution of the framework that calls for changing (and not necessarily limiting) intellectual property rights is necessary due to over-protection of intellectual property rights and their added non-human rights attributes (or as Derclaye calls them unbalanced IPRs) that mostly serve economic interests and may not necessarily share the same goals with human rights.

²⁶ Ruth Okediji "Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations" in Margot E Salomon, Arne Tostensen and Wouter Vandenhoe (eds) *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, Antwerp, 2007) 211 at 234.

²⁷ Helfer, above n 24, at 1018 and Okediji, above n 26, at 213-214.

²⁸ Yu, above n 21, at 1094-1123 and Helfer, above n 24, at 1018.

B *The Interface of Copyright and Human Rights of the Visually Impaired*

The conflict, coexistence and beyond conflict and coexistence can each contribute to creation of a human rights framework for copyright to the extent it affects human rights of the visually impaired. Looking into the rationale and objective of copyright can inform the decision of what approach to choose for conceptualising the interface of copyright and human rights of the visually impaired.

1 *Finding common ground between copyright and human rights*

Different legal systems offer different rationales for copyright. These rationales usually fall into two main categories: natural law and utilitarianism.²⁹ Those who follow the author's rights (*droit d'auteur*) tradition place the rationale for copyright in natural law. This approach, which is more common in civil law countries, pays attention not only to the economic interests of the authors but also to their moral rights.³⁰ The other group values the economic contribution of copyright. This utilitarian view of copyright considers intellectual property in general as a means for legal appropriation of knowledge and responding to market failure. This view of intellectual property argues that, in the absence of protection offered by intellectual property, creators do not have an incentive to invent and create.³¹ In the case of copyright, particular attention is also given to remuneration of creators for their works.³² Many commentators have analysed theories of justifying copyright through natural law and utilitarianism and doing so is outside the scope of this thesis.³³

Whether copyright is considered as recognition of a natural right for authors in their creations or a granted right for incentivising creativity, protection and promotion of creative works is

²⁹ See generally Lionel Bently and Brad Sherman *Intellectual Property Law* (3rd ed, Oxford University Press, Oxford, 2009) at 34-39; Helfer and Austin, above n 11, at 18-24; and, Silke Von Lewinski *International Copyright Law and Policy* (Oxford University Press, Oxford, 2008) at 40-63.

³⁰ Von Lewinski, above n 29, at 53 stating that "even if today most countries of the copyright system have integrated moral rights into their laws in order to implement international obligations under the Berne Convention and the WCT, moral rights still seem to be perceived as an imposed element of protection, which does not have a place in the philosophy of the copyright system".

³¹ Commission on Intellectual Property Rights, Final Report of the Commission on Intellectual Property: Integrating Intellectual Property Rights and Development Policy, 2002, [Report of Commission on IP on IPR and Development] < www.ecipit.org >.

³² Report of Commission on IP on IPR and Development, at 15.

³³ See Christophe Geiger "The Constitutional Dimension of Intellectual Property" in Torremans, above n 13, at 108-111; Gillian Davies *Copyright and the Public Interest* (2nd ed, Sweet and Maxwell, London, 2002) at 243 et seq; Jane Ginsburg "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" in Brad Sherman and Alain Strowel (eds) *Of Authors and Origins: Essays on Copyright Law* (Oxford University Press, Oxford, 1994) 131; Alain Strowel "Droit d'Auteur and Copyright: Between History and Nature" in Sherman and Strowel; and, David Vaver "The Copyright Mixture in a Mixed Legal System: Fit for Human Consumption?" (2001) 5(2) Electronic Journal of Comparative Law <www.ejcl.org> for an analysis of copyright justifications.

ultimately done for enriching knowledge for the purposes of human development and welfare. Protection of authors' rights contributes to human welfare, through supporting the authors and promoting creativity. At the same time, access to copyright protected content for the visually impaired is essential for realisation of their human rights and their welfare as part of the bigger society.

Adoption of the Berne Convention, with the main purpose of promotion of economic, social, and cultural objectives highlights the instrumental nature of copyright for realisation of those objectives that it shares with the human rights law.³⁴

The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 17 states that the right of the author to moral and material interest of his or her works is “intrinsically linked to the other rights recognized in article 15 of the Covenant”.³⁵ Other authors have confirmed this view.³⁶ The Universal Declaration of Human Rights (UDHR) also mentions the rights of the authors and access to knowledge that encompasses access to culture and science together.³⁷ Gervais argues that human rights addressing intellectual property rights (such as art 27 of the UDHR and art 15 of the International Covenant on Economic, Social and Cultural Rights) “mirror the internal equilibrium of the copyright system”.³⁸

Application of intellectual property as a means to protect the human right of the authors to protection of their moral and material interests, resulting from their creative works which in return leads to creation of such works (as an intellectual property goal), shows the shared objective. Intellectual property also contributes to achievement of human rights beyond those of the authors. For instance, copyright contributes to freedom of expression, education, and

³⁴ See P Bernt Hugenholtz and Ruth L Okediji “Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report” (2008) Open Society Foundations <www.opensocietyfoundations.org> at 10 arguing that “there is agreement, however, that copyright has an instrumental purpose, and despite differences in the locus of that purpose (author’s rights or utilitarianism), the Berne Convention ultimately is directed at promoting the economic, social or cultural claims of States and their policy. As a Union, the Berne framework precludes any serious incursions into this foundational ethos”.

³⁵ CESCR General Comment No. 17, above n 22, at [4].

³⁶ See Yu, above n 21, at 1071; Audrey Chapman “Core Obligations Related to ICESCR Article 15(1)(c)” in Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentina, Antwerp, 2002) 305 at 314.

³⁷ United Nations General Assembly, Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948, art 27.

³⁸ Daniel Gervais “Intellectual Property and Human Rights: Learning to Live Together” in Torremans, above n 13, at 6.

participation in cultural life through the way it is structured (the idea/expression dichotomy) as well as its built-in mechanisms (fair use and copyright limitations and exceptions).³⁹

However, considering the promotion of creativity, innovation, and invention (that would then contribute to human development and welfare) as the ultimate rationale of copyright transforms incentive and reward to tools for achieving that objective and not objectives themselves.⁴⁰ Therefore, creativity and human welfare can be achieved through different tools rather than merely through financial reward which may not always be an incentive for authors. For instance, in addition to gaining material interests, the authors' incentive may be making a contribution to the body of knowledge which could be furthered if others can access their works. In this scenario, providing access for the visually impaired so that they can also contribute to the knowledge society is not in conflict with incentivising the creators. This is not to say that remuneration should be completely overlooked.⁴¹

When a common objective is found between copyright and human rights, the two systems can work together. Considering the common objective of intellectual property and human rights and the built-in flexibilities of intellectual property, it does not appear that countries have intrinsically conflicting international obligations.⁴² International treaties regulating copyright do not prohibit states from providing accessible formats for the visually impaired. On the

³⁹ See Okediji, above n 26, at 213-14 for a discussion of how copyright acts as a tool for achieving human rights aspirations and vice versa.

⁴⁰ See Geiger, above n 10, at 101 at 107-111 stating that "the copyright, which originally intended to promote the interests of the public, presents itself increasingly as a protection of the interests of some few private entities."; and, Derclaye, above n 25, at 136 and 159 stating that "even if IPR were not human rights, they would still be conducive of human well-being" and "intellectual property's philosophical underpinnings ... carry with them an intrinsic element of balance in order to achieve social welfare." For more analysis of the justifications of copyright see also Estelle Derclaye *The Legal Protection of Databases: A Comparative Analysis* (Edward Elgar, Cheltenham, 2008) at chapter 1.

⁴¹ See also Jane Ginsburg "Exceptional authorship: the role of copyright exceptions in promoting creativity" in Susy Frankel and Daniel Gervais (eds) *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press, Cambridge, 2014) 15 at 28 stating that adequate remuneration is still relevant even for modern authors and "the author may be dead, but she still responds to economic incentives".

⁴² See Derclaye, above n 25, at 134 and 140 stating that "there is no intrinsic conflict between IPR and human rights" and that "no conflicts have been identified at the level of treaty obligations. Thus countries which have adhered to both human rights and intellectual property treaties do not have conflicting international obligations"; Gabrielle Marceau "WTO Dispute Settlement and Human Rights" (2002) 13 *European Journal of International Law* 753 at 792 stating that "for a conflict to exist between a WTO provision and a provision of a human rights treaty, evidence must be put forward that the WTO mandates or prohibits an action that a human rights treaty conversely prohibits or mandates. Such situations would be rare"; and, Gervais, above n 38, at 22 stating that "in spite of occasional conflicts ... copyright and human rights share broadly similar objectives".

contrary, they allow for the state to do so by integrating flexibilities in their laws through mechanisms such as the three-step test.⁴³

Therefore, the most useful approach to the relationship of copyright and human rights of the visually impaired that helps improve their access to copyright protected material is one that is mindful of the common objectives of copyright and human rights. Intellectual property can even act as a means to achieve human rights aspirations through tools available in the intellectual property system. Human rights also contribute to realisation of intellectual property objectives.

However, shared interests do not mean that there is no conflict between copyright and access for the visually impaired to copyright protected works. The intellectual property's built-in balance between rights of the author and those of the public could be overshadowed by the upward harmonisation agenda in international intellectual property law.⁴⁴ Overprotection of author's or right holder's interests without consideration for the right of the visually impaired to access copyright protected works and their human rights is discriminatory, as discussed in detail in chapter 3.⁴⁵

The discrimination in the case of the visually impaired and the unsatisfactory balance between protection of the authors' rights and access for the visually impaired might be easier to prove than other similar cases such as in the case of people suffering poverty. In the case of the visually impaired, lack of access manifests itself in two scenarios. First, a very low percentage of published copyright protected works becomes accessible to the visually impaired. Therefore, the bigger portion of copyright protected works is physically inaccessible to the visually impaired. Second, from the 2-5 percent of the works that are accessible to the blind some are still virtually inaccessible because of their price or location (for example overpriced accessible formats or formats that are only available in certain cities in a country). The discrimination

⁴³ See chapter 4 for a discussion of how international copyright law offers flexibilities that can potentially facilitate and improve the access for the visually impaired.

⁴⁴ See Helfer and Austin, above n 11, at 18 defining "upward harmonisation" as "one important feature of the modern international intellectual property regime ... that seeks to achieve stronger intellectual property rights and more uniform intellectual property laws across nations with different histories and different levels of technological and economic development". See also Amy Kapczynski "Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector" (2009) 97(6) California Law Review 1571 for a discussion of the role of the TRIPS Agreement in "upward harmonisation" of intellectual property; and, P Bernt Hugenholtz "Copyright in Europe: Twenty Years Ago, Today and What the Future Holds" (2013) 23 Fordham Intellectual Property, Media and Entertainment Law Journal 503 for a discussion of upward harmonisation agenda in the Europe.

⁴⁵ See chapter 2, part II.

therefore mainly lies in non-existence of copyright content for the visually impaired, before the price and other factors become relevant. This is what makes the case of the visually impaired different from that of the impoverished people. This is not to say that price cannot constitute discrimination. However, in the case of the visually impaired, it is again easier to justify expensive accessible formats as discriminatory because of the low number of available works. In the case of the impoverished sighted people, it is imaginable that they can opt for cheaper alternatives. The visually impaired, however, do not have many options in this regard. Therefore, overpriced copyright protected works threaten even the minimum fulfilment of their rights to education, culture and so on. The discrimination against the visually impaired regarding their access to copyright protected material can be partly addressed through tackling the copyright related problems.

It is, however, possible to reconcile the two regimes to reach their common objective while protecting copyright and providing non-discriminatory access for the visually impaired. The problem, therefore, lies in the way that the international community and individual countries manage states' responsibilities under human rights and copyright law.⁴⁶ Prior to the adoption of the Marrakesh Treaty, the international community had left the adoption of copyright flexibilities to national states. In the case of access for the visually impaired, this resulted in an array of different decisions by countries. These decisions, which are discussed in previous chapters, range from adopting no copyright flexibilities, to adopting different versions of limitations and exceptions that discriminate against the right of the visually impaired for access.⁴⁷

The same issues exist with the Marrakesh Treaty. Although it requires its Member States to adopt mandatory limitations and exceptions, it leaves it to countries to decide on matters such as permitted accessible formats and commercial availability. As chapter 6 analysed, when the Marrakesh Treaty comes into force, this can create challenges for access of the visually impaired, particularly in terms of international exchange of accessible works.

2 Copyright flexibilities and the common objectives of copyright and human rights

A balance between copyright protection and the public interest has always been an integral part of the copyright regime. The significance of the balance was highlighted in art 15 of the

⁴⁶ See Derclaye, above n 25, at 141 arguing that if there are any conflicts, they are the “result of unbalanced IPR legislation”.

⁴⁷ See chapters 1 and 3 for the range of problems discriminatory limitations and exceptions can create for the visually impaired.

ICESCR that puts protection of the author's right and the right to culture and science under the same article reflecting the necessary balance between protection and access.⁴⁸ Therefore, to maintain the balance promoted by art 15, copyright legislation that affords the authors protection for their works should also facilitate and promote access to culture and science and what it entails for all members of society.⁴⁹

According to the UN Special Rapporteur on the right to science and culture a human rights perspective to the connection of copyright and human rights requires "recognition of the social and human values inherent in copyright law".⁵⁰ Recognition of social and human values in copyright can be achieved in two ways; first, through ensuring that copyright rules "genuinely benefit human authors"⁵¹ and second, through valuing public interest. Flexibilities that would promote social and human values through access have always existed in the copyright system. However, the built-in mechanisms in the Berne Convention that have ensured the strengthening of copyrights together with the design on the three-step test have not allowed a balance between access and protection to become an integral part of the copyright system.⁵² The concept of public interest can, therefore, help us evaluate the balance.

Defining the concept of public interest is a difficult, if not impossible task. Frankel suggests that trying to define public interest, as a stand-alone concept, may not be the best approach. Even though a normative definition of public interest may not easily be reached, "public interest can still be instrumental as a tool for articulating policy goals and developing related norms" if it is defined in relation to the relevant context.⁵³

⁴⁸ United Nations International Covenant on Economic, Social and Cultural Rights [ICESCR] 999 UNTC 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 15. See also Human Rights Commission, Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, UN Doc. E/CN.4/Sub.2/2001/13, 27 June 2001 [Report of the High Commissioner on the Impact of the TRIPS on Human Rights], at [59].

⁴⁹ Audrey Chapman "Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c)) (2001)" 35 Copyright Bulletin 4 at 14 stating that "to be consistent with the full provisions of Article 15, the type and level of protection afforded under any intellectual property regime must facilitate and promote cultural participation and scientific progress and do so in a manner that will broadly benefit members of society both on an individual and collective level".

⁵⁰ Farida Shaheed, Report of the Rapporteur in the field of cultural rights, Copyright Policy and the Right to Science and Culture, Human Rights Council Twenty-eighth session, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 24 December 2014 <www.daccess-dds-ny.un.org> at 8-9.

⁵¹ Farida Shaheed, above n 50, at 19.

⁵² Ruth Okediji "The International Copyright system: Limitations, Exceptions and Public Interest Considerations for Developing Countries" (2006) ICTSD/UNCTAD Issue Paper No. 15 <www.ictsd.org>.

⁵³ Susy Frankel, discussions during the Intellectual Property and Regulation of the Internet: The Nexus with Human and Economic Development workshop, organised by the New Zealand Centre for International Economic Law and the InternetNZ, 19-20 February 2015, Wellington, New Zealand.

Therefore, in the present case public interest needs to be defined in the context of the balance between copyright protection and access for the visually impaired. In this context, human rights of the visually impaired (as the representatives of the public) that are affected by copyright can define the public interest.⁵⁴ Copyright laws currently cause difficulties for equal access to copyright protected material for the visually impaired and therefore negatively affect their right to education, access to information, culture and science.⁵⁵ Therefore, public interest in the context of this thesis entails guaranteeing the principle of non-discrimination and fulfilling the human rights of the visually impaired that are affected by copyright. It is against such human-rights based public interest that rights of the author need to be balanced.⁵⁶

International copyright treaties seem to promote the protection of the public interest. However, against the background of a public interest defined based on human rights, the optional nature of flexibilities in international copyright law and the problems associated with the three step test, namely the ambiguity of its language, demonstrate a lack of consideration for public interest.⁵⁷ Moreover, the system of flexibilities in international copyright law exacerbates the ineffectiveness of domestic regimes. At the same time, the protection for the rights of the authors, that are the other side of the balance equation, is mandatory. Moreover, minimum mandatory standards and the principle of national treatment provide global protection for the authors. The visually impaired, on the other hand, are unable to share the accessible works internationally.

Therefore, there is a need to restrike the balance to provide the visually impaired with equal access to copyright protected material. Re-striking the balance is also in line with the common objective of copyright and human rights discussed in the previous section of this chapter. Consequently, the new desired balance would provide equality and realisation of information-mediated human rights of the visually impaired.

⁵⁴ See also Peter Drahos “The Universality of Intellectual Property Rights: Origins and Development” in *Intellectual Property and Human Rights* (World Intellectual Property Organization Publications, Geneva, 1999) 13 at 33; Jakob Cornides “Human Rights and Intellectual Property, Conflict or Convergence?” (2004) 7 *Journal of World Intellectual Property* 135 at 138; Paul L C Torremans “Copyright as a Human Right” in Paul L C Torremans (ed) *Copyright and Human Rights* (Kluwer Law International, The Hague, 2004) 1 at 9 et seq for a discussion of how human rights can be instrumental for shaping intellectual property.

⁵⁵ See chapter 3.

⁵⁶ See also Geiger, above n 33, at 111 stating that “fundamental rights and human rights can offer a suitable basis for a balanced system [of intellectual property law]”; Drahos, above n 54, at 33; Abbe Brown “Socially responsible intellectual property: A solution?” (2005) 2(4) *SCRIPT-ed* 485 at 527; Adolf Dietz “Constitutional and Quasi-Constitutional Clauses for Justification of Authors’ Rights (Copyright)- From Past to Future” in *Exploring the Sources of Copyright – Proceedings from the ALAI Congress 2005* (AFPIDA, Paris, 2007) 55.

⁵⁷ See chapter 4.

Second, since the balance is guided by human rights, adoption of a human rights framework for copyright law to the extent that it affects human rights of the visually impaired is the next step.⁵⁸ A human rights framework for intellectual property highlights its internal balance.⁵⁹ Such a framework builds on the public interest values defined by the human rights of the visually impaired and provides a holistic solution to the problem of book famine.

III A Human Rights Framework for Copyright and Human Rights of the Visually Impaired: Re-striking the Balance

To re-calibrate the balance between copyright and human rights of the visually impaired, this section builds on Helfer and Austin's and Yu's proposals for addressing the interface of intellectual property rights and human rights. Based on their proposed approaches, a human rights framework for the copyright, to the extent that it affects the information-mediated human rights of the visually impaired, is offered.⁶⁰

Helfer and Austin promote an updated version of the human rights framework for intellectual property. The new framework slightly varies from the old version, that Helfer proposed, but still follows the same principles. It has two dimensions: protective and restrictive.⁶¹ The protective dimension that requires states to guarantee the moral and material interests of the creators is in line with the idea of embracing intellectual property when it is conducive to human rights outcomes (here the human rights outcome is to respect, protect, and fulfil the human rights of the authors).⁶²

The second element of the protective dimension is avoiding unnecessary interference with creators' rights.⁶³ Therefore, such a framework for copyright is compatible with, if not more

⁵⁸ See also Helfer, above n 24; Yu, above n 21; and, Hector MacQueen "Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Human Rights and Competition Law" (2005) 2(4) SCRIPT-ed 453, discussing how human rights can contribute to a balance intellectual property law system.

⁵⁹ Chapman, above n 49, at 14.

⁶⁰ See Helfer, above n 24.

⁶¹ Helfer and Austin, above n 11, at 512.

⁶² At 512 stating that "the protective dimension requires states (1) to recognize and respect the rights of individuals and groups to enjoy a modicum of economic and moral benefits from their creative and innovative activities".

⁶³ At 512 requiring states to "refrain from bad faith and arbitrary interference with intellectual property rights that the state itself has previously granted or recognized".

stringent than, the existing system of copyright flexibilities, mainly the copyright limitations and exceptions in the case of visually impaired guided by the three-step test.⁶⁴

The first component of the restrictive dimension of the framework is there to establish whether intellectual property is neutral, helpful, or detrimental to the realisation of human rights.⁶⁵ It is only after “careful, objective, and context-specific empirical assessments”⁶⁶ that the human rights framework should advocate “(1) a diminution of intellectual property protection standards and measures, (2) a restructuring of incentives for private creativity and innovation, or (3) both”.⁶⁷

A The protective dimension of a human rights framework

To create a human rights framework for copyright in the case of visually impaired, it is essential to primarily recognise and respect the human rights of the author.

The protective dimension of the framework makes it essential to make copyright about authors. Doing so, in the case of access for the visually impaired persons, means evaluating whether their access would harm benefits of the author in exploiting a work of which he or she is the author. The discussion of “normal exploitation of a work” and “unreasonable prejudice to the legitimate interests of the author”, in previous chapters, can inform this re-evaluation of the balance between interests of the author and human rights of the visually impaired.⁶⁸

A human rights framework that protects the interests of the authors also enables them to exploit a zone of personal autonomy.⁶⁹ Leaving the authorisation of access entirely to authors and the addition of right holders (in the absence of limitations and exceptions) has proven harmful to the rights of the visually impaired.⁷⁰ However, offering the authors room to exercise their rights

⁶⁴ At 514-515. See also chapter 5 for a detailed discussion of the impact of the three-step test recognised in international copyright law on access for the visually impaired.

⁶⁵ At 517 stating that “intellectual property protection can help or hinder the attainment of [human rights] ends, or it may be entirely irrelevant to their realization. The first component of the framework’s restrictive dimension, therefore, is a process inquiry that seeks to determine what role, if any, intellectual property protection plays in this regard”.

⁶⁶ At 518.

⁶⁷ At 512.

⁶⁸ See chapters 4 and 5.

⁶⁹ See Helfer and Austin, above n 11, at 514 for a discussion of a zone of personal autonomy for creators.

⁷⁰ See chapters 4 and 5 for a detailed discussion of difficulties that arise in the absence of copyright limitations and exceptions.

and receive remuneration in relevant situations can complement the system of mandatory flexibilities.⁷¹

B The restrictive dimension of a human rights framework

A human rights framework for copyright and access for the visually impaired also calls for change. It is true that the book famine exists because of a myriad of reasons that vary to different degrees in developed, developing, and least developed countries. However, as previous chapters demonstrated, copyright has a significant impact on the availability of accessible works for the visually impaired.⁷²

The interests of the visually impaired that were discussed in chapter 3 include equality and fulfilment of their information-mediated human rights. Therefore, when copyright is an impediment to provision of access and the realisation of the human rights of the visually impaired, the relationship between the two should be restructured.⁷³

The same normative approach proposed for interpretation of the three-step test applies to enforcement of the Marrakesh Treaty. As discussed in chapter 6, the Treaty asks for adoption of mandatory limitations and exceptions but leaves some “wobble-room” for States. In interpreting the provisions of the Marrakesh Treaty and framing limitations and exceptions in their national copyright laws, countries shall consider the objectives of the Treaty as outlined in its title and the Preamble.⁷⁴ This becomes important when States Parties to the Convention decide on the type of accessible formats they authorise, the commercial availability test, and the remunerations of the authors or copyright holders. Countries shall evaluate the impact of their decisions on these issues on the facilitation of access for and the realisation of the human rights of the visually impaired in their jurisdiction.

Taking account of the objectives of the TRIPS and the Marrakesh Treaty is in line with art 31(1) of the Vienna Convention on the Law of Treaties that states “a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty

⁷¹ See Reto Hilty “Five Lessons about Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn” (2006) 53(1-2) *Journal of the Copyright Society of the USA* 103 for a discussion of the role of contracts in exploitations of copyrights by authors.

⁷² See chapters 3, 4, and 5.

⁷³ See Yu, above n 21 stating that human rights should be given primacy over intellectual property rights where there is a conflict between human rights and non-human rights attributes of intellectual property rights. See also Gervais, above n 38, at 14 stating that “human rights principles and analogies are able to provide normative boundaries to the age-old quest for intrinsic equilibrium in copyright policy: the protection of interests resulting from expressed creativity, on the one hand, and the right to enjoy and share the arts and scientific advancement”.

⁷⁴ See chapter 6.

in their context and in light of its object and purpose”.⁷⁵ This principle is reiterated in the Doha Declaration on the TRIPS Agreement and Public Health that states that “in applying the customary rules of interpretation of international law, each provision of the TRIPS Agreement shall be read in the light to the object and purpose of the Agreement as expressed, in particular, in its objectives and principles”.⁷⁶

Two sets of options are discussed next for creation of a human rights framework for copyright to the extent it affects the human rights of the visually impaired. These options are proposed with a view of providing short-term and long-term responses to the problems caused by the impact of the copyright on human rights of the visually impaired.⁷⁷

1 Limitations and exceptions

According to Helfer and Austin, when intellectual property protection proves problematic and calls for action, the governments should take action while having the common objective of human rights and intellectual property in mind.⁷⁸ They should also primarily opt for measures that are consistent with the existing intellectual property regime.⁷⁹

Flexibilities have always been part of copyright to ensure the interests of the public. Limitations and exceptions are part of the flexibilities system. Therefore, to ensure the compatibility of copyright and human rights the limitations and exceptions should be used to their fullest potential.⁸⁰

The emphasis of this chapter is that adoption of limitations and exceptions for the benefit of the visually impaired, as part of a human rights framework, should be done under overarching human rights principles and with a certain degree of coherence. Therefore, the following section does not provide specific guidelines for limitations and exceptions in terms of factors

⁷⁵ United Nations, Vienna Convention on the Law of Treaties [Vienna Convention] 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 31(1). See chapter 4. See also Susy Frankel “WTO Application of ‘the Customary Rules of Interpretation of Public International Law’ to Intellectual Property” (2006) 46 Virginia Journal of International Law 365 for a detailed discussion.

⁷⁶ The Doha Declaration on the TRIPS Agreement and Public Health adopted by the Ministerial Conference, WT/Min (01)/DEC/2, 20 November 2001, art 5a.

⁷⁷ See Helfer and Austin, above n 11, at 520-522 where they discuss short-term and long-term responses to the “troubling state of affairs” caused by the conflict of human rights and intellectual property rights due to different ways that each regime achieves their common objective.

⁷⁸ At 520.

⁷⁹ At 521.

⁸⁰ In her report on copyright policy and the right to science and culture the UN Special Rapporteur states that “a human rights perspective also requires that the potential of copyright exceptions and limitations to promote inclusion and access to cultural works, especially for disadvantaged groups, be fully explored”. Shaheed, above n 50, at 13.

such as accessible formats, remuneration, and commercial availability. These and similar issues regarding the limitations and exceptions do not drive the human rights framework; but rather the framework should determine their fate in different countries based on local conditions.

(a) Minimum mandatory limitations and exceptions

Limitations and exceptions are necessary for ensuring access, which is in turn important for achieving the common objectives of human rights and copyright.⁸¹ Access to copyright work for the visually impaired facilitates the realisation of their human rights that not only enriches their personal lives but also enables them to contribute to creativity and therefore human welfare. This is not to say that access to copyright content does not have a human rights-based justification if an individual with visual or other impairments is unable to create or innovate.

Considering the negotiating history of the Berne Convention, some authors describe the voluntary nature of its flexibilities as the international community's attempt in reaching an otherwise unachievable agreement.⁸² A human rights framework for copyright supports mandatory limitations and exceptions because it views rights of the visually impaired as equal to those of the authors.⁸³ Minimum mandatory limitations and exceptions guarantee "minimum protection" for the rights of the visually impaired regarding access to copyright protected material.⁸⁴ Therefore, limitations and exceptions as part of copyright flexibilities should be given the same attention afforded to copyright protection.⁸⁵

Some commentators have argued that mandatory limitations and exceptions are contrary to the Berne framework. For instance, it is argued that (a) application of a binding international standard deprives the countries from changing their law, if the adopted exceptions prove

⁸¹ Hugenholtz and Okediji, above n 34, at 10-11 stating that "it is firmly established that most innovation occurs incrementally by building on preceding technologies or existing knowledge, which underscores the crucial role that access plays in the achievement of copyright's fundamental goals. ... As mechanisms for access, L&Es contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal development.

⁸² See Hugenholtz and Okediji, above n 34, at 9 stating that the "success of the [Berne] negotiations necessitated that members have policy space to decide the appropriate balance between the strength of proprietary rights on the one hand and the availability of access mechanisms on the other"; and, Sam Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer, Alphen aan den Rijn, 1987).

⁸³ See Helfer, above n 24, at 58 stating that "in the world of TRIPS, the producers and owners of intellectual property products are the only "rights" holders ... A human rights approach to intellectual property, by contrast, grants these users a status conceptually equal to owners and producers".

⁸⁴ See Helfer, above n 24 for a discussion of "minimum protection of human rights".

⁸⁵ See for example Hugenholtz and Okediji, above n 34, at 28 stating that "prima facie, the obvious place for any instrument on limitations and exceptions is within the framework of international copyright law. The instrument could for instance be shaped as a protocol to the Berne Convention or the WCT, as a stand-alone agreement under the aegis of WIPO, or perhaps *an amendment to part II, section 1 of TRIPS (copyright and related rights)* [emphasis added]".

unwarranted in the local context; and, (b) adoption of an instrument with the sole purpose of diminishing the rights of the author is profoundly inconsistent with the spirit and history of the Berne.⁸⁶

However, there are several arguments that contest this interpretation of the interaction of the Berne framework and mandatory limitations and exceptions. First, the Berne Convention itself contains the mandatory exception for purposes of quotation.⁸⁷ The scope of this exception is not comparable to the exceptions for the visually impaired in terms of the proportion of the work that is reproduced. However, inclusion of a mandatory exception in the Berne could perhaps mean that mandatory exceptions are not fundamentally contrary to the Berne framework.

While ratifying the Marrakesh Treaty would require amending the national laws of most countries, the drafters of the Treaty have, to a reasonable extent, addressed the potential negative effects of imposing obligations on the Contracting Parties that is incompatible with their local conditions.⁸⁸ While adoption of minimum exceptions for the benefit of the visually impaired is mandatory,⁸⁹ it can be done through an array of measures.⁹⁰ The records of the Stockholm Conference show that one of the reasons specific exceptions were not introduced was the fear of complete abolition of the right of remuneration.⁹¹ The Marrakesh Treaty leaves the decision regarding remuneration of the author⁹² and the commercial (un)availability,⁹³ to the discretion of the states.

Finally, the sole purpose of the Marrakesh Treaty, through provision of mandatory limitations and exceptions, does not seem to be diminishing the rights of the author. While art 9 (2) uses

⁸⁶ Jane Ginsburg “Do Treaties Imposing Mandatory Exceptions to Copyright Violate International Copyright Norms?” (28 February 2012) The Media Institute <www.mediainstitute.org>.

⁸⁷ See Berne Convention for the Protection of Literary and Artistic Works [Berne Convention] 1161 UNTS 31 (opened for signature 9 September 1886, entered into force 5 December 1887), art 10 (1) stating that “it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”.

⁸⁸ See Ginsburg, above n 86. See also the International Literary and Artistic Association (ALAI) “Report of the Ad Hoc Committee on the Proposals to Introduce Mandatory Exceptions for the Visually Impaired” Adopted by the Executive Committee (27 February 2010) <www.alai.org> at 3.

⁸⁹ See Marrakesh Treaty, above n 5, art 4 (1) (a).

⁹⁰ See arts 4 (1) (b), 4 (2), 4(3). See also chapter 5 for a discussion of flexibility in adoption of limitations and exceptions.

⁹¹ Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (World Intellectual Property Organization, Geneva, 1971) vol 1 at 112, n 2.

⁹² See Marrakesh Treaty, above n 5, art 4 (4).

⁹³ See art 4 (5).

the language of possibility⁹⁴ and the Marrakesh Treaty applies that of obligation,⁹⁵ the outcomes of the two are arguably the same. Furthermore, the realisation of the Berne's possibility language in the Marrakesh Treaty is in line with what art 9 (2) requires. In that sense, the Marrakesh Treaty could strengthen and protect the rights of the author by ensuring that exceptions are compatible with the three-step test. In other words, through harmonisation of exceptions for the visually impaired, the Treaty ensures that a possibility, that is part of the Berne, does not violate the rights of the author, when actuated on a large scale.

Countries have a positive obligation under the CRPD to fully exploit the flexibilities in international copyright law. Accessible books are important for the realisation of human rights of the visually impaired. Minimum mandatory limitations and exceptions are necessary, if not sufficient, for tackling the problem of book famine. Hence, the CRPD imposes on states an obligation to adopt minimum mandatory limitations and exceptions as part of the measures they can take for realisation of the rights in the Convention.⁹⁶

The proposed minimum mandatory limitations and exceptions address the difficulties that are caused in the absence of limitations and exceptions or by flawed limitations and exceptions.⁹⁷ Changing copyright laws alone is not sufficient for providing the visually impaired with accessible works or progressive realisation of their human rights dependent on such access. However, the change is necessary for three reasons. First, from a normative point of view minimum mandatory limitations and exceptions should be present in every country's copyright law the same way that copyright protection is. The importance of the balance between protection and access recognised by all copyright traditions justifies this normative necessity. This legal recognition of the rights of the visually impaired is also in line with the formal idea of equality discussed in chapter 3 that is necessary but not sufficient for providing equality for the visually impaired.

Second, as chapters 4 and 5 illustrated, the importance of adopting normative measures regarding mandatory limitations and exceptions goes beyond semantics.⁹⁸ Limitations and

⁹⁴ See Berne Convention, above n 87, art 9 (2).

⁹⁵ See Marrakesh Treaty, above n 5, art 4 (1) (a).

⁹⁶ See Paul Harpur and Nicolas Suzor "Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm" (2013) 36(3) UNSWLJ 745 at 747. Check that this format is consistent. Almost all other references give the journal title in full.

⁹⁷ See chapters 2, 4, and 5.

⁹⁸ See Helfer, above n 12, at 58 stating that "a human rights approach to intellectual property, by contrast, grants these users a status conceptually equal to owners and producers. This linguistic reframing is not simply a matter of rhetoric. It also shapes state negotiating strategies".

exceptions relieve the visually impaired and authorised entities from having to seek the right holders' permission.⁹⁹ Consequently, limitations and exceptions, if properly framed, can lower the transactional costs of reproduction of accessible formats.

There is no doubt that in many countries the number of locally reproduced accessible works would remain low even after adoption of copyright limitations and exceptions due to lack of financial and other resources. Nevertheless, the visually impaired in such countries can still benefit from the international exchange of accessible works currently made difficult or impossible by copyright law.¹⁰⁰ Even if all other factors remain the same, lower transactional costs and cross-border exchange possibilities facilitate production and distribution of more accessible works. This means both that more titles are made accessible to the visually impaired and that more visually impaired persons can access those titles.

Chapter 3 explained the importance of books and other copyright protected content for human rights such as the right to education, information, culture and science. More books help facilitate the realisation of the information-mediated human rights of the visually impaired. Therefore, minimum mandatory limitations and exceptions that facilitate production and flow of accessible formats make a real difference to realisation of the human rights of the visually impaired.

Third, countries would also need to ensure that nothing in their copyright or other laws may impede the application of minimum mandatory limitations and exceptions. Therefore, such limitations and exceptions would indirectly guarantee the compatibility of other laws with access for the visually impaired.

Changing the copyright law of a country, in the form of adoption of minimum mandatory exceptions, is justified by the impact that they have on provision of more accessible works for the visually impaired, which consequently assists the progressive realisation of their human rights, that are dependent on equal and non-discriminatory access to copyright protected material.

Many human rights of the visually impaired, that depend on access to copyright works, are economic, social, and cultural rights and subject to progressive realisation. However, as

⁹⁹ See chapter 1.

¹⁰⁰ See chapter 4.

discussed in chapter 2, progressive realisation does not relieve countries from taking adequate steps towards realisation of socio-economic and cultural rights.

After meeting their minimum obligations through ensuring de jure equality in access to copyright protected works for the visually impaired, countries should adopt measures that would facilitate progressive realisation of human rights of the visually impaired.¹⁰¹ These measures will depend on the conditions of each country and the resources at their disposal.

For instance, countries cannot expect their publishers to produce accessible versions of all their publications simultaneously or even subsequently. However, they can encourage and assist them to progressively do so through regulating their domestic copyright law. Cooperation between different actors is also very important for provision of accessible works and minimum and progressive realisation of human rights of the visually impaired. Countries can regulate and facilitate such cooperation by, for instance, requiring the publishers to share their digital files with authorised entities to reduce the time and cost of the reproduction. Some countries are already practicing this through the WIPO Accessible Book Consortium that connects the right holders with authorised entities across the world.¹⁰²

Moreover, confining the authorised entities to non-profit organisations negatively affects the provision of access for the visually impaired. To facilitate the access and the realisation of the human rights of the visually impaired, countries could limit the use of limitations and exceptions to non-commercial purposes. In countries such Brazil,¹⁰³ Chile,¹⁰⁴ and Austria¹⁰⁵ profit-making entities can use reproduce accessible works so long as they do not have a commercial purpose.

(b) Accessible formats

The difficulty that comes with recognition of all formats under minimum mandatory limitations and exceptions is that some formats, such as audio books, are harder to reconcile with rights of the author than the others because they are also accessible to the sighted.

¹⁰¹ See chapter 2 for a discussion of de jure equality.

¹⁰² Accessible Books Consortium is a WIPO Multi Stakeholders Platform <www.accessiblebooksconsortium.org>.

¹⁰³ Law No. 9.610 of February 19, 1998 (Law on Copyright and Neighboring Rights) (Brazil), art 46 (I) (d) that does not mention non-profit organisation but states that “the reproduction [should be] done without gainful intent”.

¹⁰⁴ Law No. 20.435 amending Law No. 17.336 on Intellectual Property, 24 May 2010 (Chile), art 71C.

¹⁰⁵ Copyright Law 1998 (Austria), s 42d(1).

An element of the minimum mandatory limitations and exceptions that needs further exploration is the scope of permitted accessible formats. Countries that have limitations and exceptions in place for the benefit of the visually impaired are either silent about the permitted formats, explicitly allow for production of all accessible formats, or limit the formats that can be reproduced.¹⁰⁶ On an international level, the Marrakesh Treaty leaves it to states to decide which approach they are going to take regarding permitted formats. To build a human rights framework for copyright and access for the visually impaired, the issue of permitted formats can be viewed from different perspectives. Provision of at least one permitted accessible format under mandatory copyright limitations and exceptions is in line with the minimum core obligations approach to the balance of copyright protection and access. By allowing the visually impaired to reproduce at least one format such as braille countries ensure to meet their minimum core obligations regarding the right to education, information, culture and so on.

However, from a progressive realisation perspective, countries shall allow reproduction of more than one and ultimately all accessible formats. Sanctioning different formats by different countries can be justified by each country's economic, legal, social, cultural and other conditions. In least-developed countries, where there is a lack of necessary technologies and resources for reproduction of accessible works, the type of permitted accessible formats is not relevant. This is only true regarding domestic reproduction of accessible formats, because if we consider international exchange of works, such countries can still import various accessible formats and for the import to happen we may need the format to be authorised. Moreover, they may receive technological assistance from other countries that can be applied in the presence of legal authorisations. On the other hand, individuals and institutions in a developed country may not only have the resources to reproduce various accessible formats but also the country itself may have a stronger obligation towards progressive realisation of human rights of its visually impaired citizens. Therefore, provision of multiple permitted accessible formats in the copyright law of such countries is both meaningful and mandatory under a human rights framework.

Moreover, authorising of various accessible formats does not equal an obligation to provide. In other words, by allowing reproduction and distribution of multiple accessible formats countries are not undertaking an obligation that requires positive action. Therefore, economic

¹⁰⁶ See chapter 3 for examples of countries belonging to each category.

and other conditions of countries may not be a relevant option for restricting the type of authorised accessible formats.¹⁰⁷

Some accessible formats, such as braille, are of no interest to the general public. Therefore, there are fewer concerns regarding their piracy. Other formats such as audio books that could be used by sighted as well as the visually impaired users are more the subject of such concerns. Domestic laws of the countries with limitations and exceptions in place, together with the Marrakesh Treaty, require the authorised entities to ensure that reproduced accessible formats are only delivered to visually impaired users.

Considering the different levels of piracy risks associated with different formats, countries can perhaps take different measures regarding each format. For instance, countries can require authorised entities to take extra care when reproducing and handling audio books or large print books that could potentially be used by the public because they have the potential of infringing steps 2 and 3 of the three-step test and infringe the human rights of the author to his or her material interests. For example, authorised entities could only provide the visually impaired with audio books on site after the beneficiary's identity is confirmed or make the works accessible only through a restricted-access electronic retrieval system.

(c) Commercial availability

Some countries only allow for production of accessible formats when an accessible commercial copy is not obtainable under reasonable terms. The Marrakesh Treaty does not require states to include a lack of commercial availability requirement in their domestic law. However, the Treaty reserves the states the right to do so.¹⁰⁸ It may seem logical that, upon commercial availability of an accessible copy, the visually impaired are banned from reproduction of another copy of the same work. For example, if a braille or audio book version of a title is already on the market, there is no reason to obtain a free copy.

The concept of commercial availability of an accessible copy depends on a number of factors. First, the price and geographical location of the copy together with the conditions of the visually impaired individual or institution can hinder obtaining of a commercially available copy. This

¹⁰⁷ See chapter 2 arguing that if countries are members to human rights instruments, they have an obligation to take positive action for provision of equal access to rights such as the right to education and culture. As part of this obligation, they need to make sure that copyright is not an obstacle to progressive realisation of equal access to those rights. This, therefore, would require authorising various types of accessible formats.

¹⁰⁸ Marrakesh Treaty, above n 5, art 4(4) stating that “a Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market”.

is perhaps what the Marrakesh Treaty means by commercial availability “under reasonable terms for beneficiary persons in that market”.¹⁰⁹ The Treaty does not define “reasonable terms”. This is perhaps to give countries room to define those terms according to the conditions in their respective territories. However, this may create difficulties in case countries fail to account for factors that surround the commercial copy or certain individuals.

Second, copies that seem accessible to the blind may not fully meet their needs. For instance, most other eBook readers, other than iPads, are not accessible to the blind. Therefore a commercially available eBook that is not compatible with the iPad is inaccessible for the visually impaired. Another example is an audio book that is essentially produced for the general public and could be considered an accessible copy. However, it is not the same as a navigable audio book that truly benefits the visually impaired.

Leaving the decision to states to come up with measures to stop piracy of accessible works or decide on and determine commercial availability could be problematic. What would be the normative principle against which a decision can be evaluated regarding what formats and what requirements should be regulated? Under a human rights framework, a good starting point is instructing the countries to consider the impact of their decisions on human rights of their visually impaired citizens. For instance, if countries decide to only authorise reproduction of accessible copies when an accessible commercial copy is not obtainable under reasonable terms, they shall define “reasonable term” in a way that is consistent with the principle of non-discrimination and conducive to realisation of human rights of the visually impaired. This means that account could be taken of financial and other conditions of the visually impaired individual or institution, the price, location, and technical specifics of the copy.

To avoid discrimination, reasonable terms can be defined using the effort that a sighted user would have to make to obtain the same title as a reference point. The difficulty with the commercial availability test, even when human rights are considered, is the burden it puts on the visually impaired regarding ensuring lack of a commercially available copy and the potential need to justify that they have searched for the copy with due diligence. Moreover, piracy risks are not limited to the accessible copies for the visually impaired. Such risks are

¹⁰⁹ Marrakesh Treaty, above n 5, art 4(4).

part of the bigger problem of the copyright piracy that countries need to address. Therefore, piracy risks should not stop in the way of access to knowledge for the visually impaired.¹¹⁰

(d) Technological Protection Measures (TPMs)

Under a human rights framework, countries would need to ensure that mandatory limitations and exceptions cannot be overridden by contract or technological measures.¹¹¹ Ensuring this can be an alternative to the desired release of accessible copies at the same time as the normal copies are released. Many publishers produce eBooks that could potentially benefit the visually impaired. However, encryption of the eBooks stops the visually impaired from using adaptive technologies that turn the eBooks to audio books.¹¹²

The Marrakesh treaty requires member states to ensure that TPMs would not interfere with limitations and exceptions. In order to fully comply with this, countries should not only give the visually impaired the right to circumvent TPMs, if needed for production of accessible formats, they should also ensure that publishers do not stop or discourage the visually impaired from doing so through contracts or other measures.¹¹³

It is not feasible to think that a system of DRMs can ensure access only for the visually impaired.¹¹⁴ This may be applicable for braille and for devices that are only used for production of braille versions of copyright works that are only used by the visually impaired. More and more individuals are using mainstream technology such as iPads and Kindles to access copyright works. Enabling text to speech features on eBooks by publishers make them accessible to everyone and not just the visually impaired. Producing special formats only for sale to the blind or removing the DRMs once an individual's status is confirmed as a beneficiary

¹¹⁰ See for example Joe Karaganis (ed) *Media Piracy in Emerging Market Economics* (Social Science Research Council, 2012) <www.ssrc.org>. Having analysed trademark and copyright piracy in different countries, this study argues that global piracy exists because of "high prices for media goods, low incomes, and cheap digital technologies". However, the impact of these factors have been absent in IP policy making. Countries cannot successfully address piracy until they consider these factors.

¹¹¹ See chapter 3 for examples of countries who have designed their copyright law to ensure the integrity of limitations and exceptions in this regard.

¹¹² Harpur and Suzor, above 96, at 749.

¹¹³ See Harput and Suzor, at 750, n 25 and 26 stating that the Australian Copyright Act allows the circumvention of encryption for the benefit of the visually impaired but according to Harpur and Suzor this right is not widely used because it can be stopped by a contract or that the visually impaired are reluctant to disturb their relationship with the publishers.

¹¹⁴ See Nic Garnett, Automated Rights Management Systems and Copyright Limitations and Exceptions, SCCR/14/5, 27 April 2006; and, Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, 5 April 2003, at 25-34. See also Corrine Tan, Hui Yun "Moving Towards a More Inclusive Regime for the Visually Impaired" (2012) 24 SAclJ 433 format at 439 stating that "it is rare, if not impossible, for a DRM system, which includes TPMs as a subset, to be designed to respect all exceptions on a technical level, as the complexity of the law defies any clear technical definition that could be used in the real world DRM system".

are alternative solutions that seem too complicated to be practical. Therefore, the public interest can be used to justify the circumvention of DRMs for the benefit of then visually impaired under a system of minimum mandatory limitations and exceptions to copyright.

(e) Remuneration

The three-step test does not discuss remuneration for the authors or right holders. The WTO Panel in the 110(5) decision stated that remuneration could be a solution to exceptions that unreasonably prejudice the legitimate interests of the right holder.¹¹⁵ The Marrakesh Treaty also leaves it to its Member States to decide whether certain limitations and exceptions would require remuneration.¹¹⁶ Countries have adopted different measures towards remunerating the authors or right holders for reproduction and distribution of their works. In some countries, no remuneration is required.¹¹⁷ Other countries, however, provide that the author should be remunerated, either generally, or in certain cases such as production of sound recordings.¹¹⁸

Reproduction and distribution of accessible formats by authorised individuals and entities should not be subject to remuneration for multiple reasons. Almost all existing copyright exceptions require the visually impaired or the authorised entities to have lawful access to works that they are producing. In many cases, this means that they have already paid the price of the normal copy. Alternatively some authorised entities, such as public libraries, are deposited with normal copies, which they then proceed to lend to their sighted members free of charge. Therefore, remunerating the right holder for reproduction of a legal copy that they own, for the benefit of the visually impaired members, appears unnecessary.

In the cases where blind institutions charge their members, the law states that the payment should not be more than the reproduction expenses and potentially the price of the work if the organisation has paid for it. Finally, it is usually the authorised entities or the beneficiaries who undertake the cost of reproduction of accessible works.¹¹⁹ Considering that remuneration is a

¹¹⁵ World Trade Organization (WTO), United States- Section 110(5) of the US Copyright Act WT/DS160/R, 15 June 2000.

¹¹⁶ Marrakesh Treaty, above n 5, art 4(5).

¹¹⁷ See for example Armenian Copyright Law of 2006, art 22(2)(ii(h)); Chinese Copyright Law 2010, art 22; Act No. LXXVI of 1999 on Copyright (Hungary), art 41(1); Law No. 17.336 on Intellectual Property 2010 (Chile), art 71C; and, Intellectual Property Code 1992 (France), art L311-8.

¹¹⁸ See for example Copyright Law 1998 (Austria), s 42d(2); Law on Copyright and Neighboring Rights 1998 (Germany), s 45(a); Copyright Act 1998 (Iceland), art 19; Copyright and Related Rights Act of 1995 (Slovenia), art 47a; Act on Copyright in Literary and Artistic Works 1995 (Sweden), art 17(3); and, Copyright Act 1968 (Australia), art 135ZP. See also The Consolidated Act on Copyright 2010 (Denmark), art 17(3) that requires remuneration only for reproduction of sound recordings of published literary works.

¹¹⁹ See also chapter 4 stating that limitations and exceptions for the visually impaired mostly do not interfere with the author's right to normal exploitation of a work in the existing and potential markets. Moreover, in instances

compromise for unreasonably prejudicing the legitimate interests of the author, it should not apply to acts of beneficiaries and authorised entities that do not unreasonably prejudice those interests.

In terms of piracy risks, use of accessible works by the sighted can unreasonably prejudice the legitimate interests of the authors and justify a requirement for remuneration. However, normal copies of copyright protected works are also subject to piracy. An audio book in the hands of a visually impaired person is no different than a commercial copy of the same audio book in the hands of a sighted person. The only possible difference is that the version reproduced using limitations and exceptions may not have the same TPMs to enable the visually impaired person to use it on multiple devices for more convenience. However, nowadays it is not difficult to hack such technological protection measures that normal copies of copyright works may carry. Moreover, authorised institutions have obligations regarding the safety of the accessible formats they reproduce or distribute.

If countries opt to require remuneration, it should be done with having the conditions of the visually impaired and their human rights in mind. For instance, no remuneration should be required if the majority of the visually impaired population of a country are older individuals who are braille-illiterate and mainly use audiobooks. Alternatively, in a developing or least developed country, the visually impaired may not be able to afford the devices that read audio books. Therefore, without first addressing the issue of access to technology, requiring remuneration for production of audio books would not have a real effect on their access.

(f) Implications of the Marrakesh Treaty for a human rights framework

Adoption of the Marrakesh Treaty is in line with the creation of a human rights framework. The Treaty recognises and safeguards the rights of the authors and right holders and only introduces changes to the copyright system in the specific areas that it harms the human rights of the visually impaired persons.¹²⁰

Some commentators believe that the purpose of the Marrakesh Treaty and the preparatory work that led to its adoption was to clarify the legislative and administrative solutions for facilitation

that there is a chance of interference, the public policy objectives of copyright law can be used to justify the prejudices to the legitimate interests of the author.

¹²⁰ See the Marrakesh Treaty, above n 5, Preamble “emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations” and “reaffirming the obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and other international instruments”.

of access to books for the visually impaired. In their view, the three-step test has already made adoption of limitations and exceptions for the benefit of the visually impaired possible. Therefore, the Marrakesh Treaty merely provided examples of how such flexibilities could be best enforced by requiring adoption of mandatory limitations and exceptions and offering model provisions.¹²¹

Another view that seems to downplay the human rights importance of the Treaty is that, although it serves some human rights purposes, its legal nature is an intellectual property instrument that builds on previously existing principles.¹²²

Such views of the Marrakesh Treaty and potential subject-specific documents in the future¹²³ miss the importance of such documents for the interface of human rights and intellectual property rights. The purpose of subject-specific documents on copyright and human rights goes beyond repetition of already existing copyright norms. Although the Marrakesh Treaty is principally an intellectual property instrument, it is also a vehicle for addressing human rights concerns. The Marrakesh Treaty highlighted the consequences of the current state of copyright law on the human rights of the visually impaired. The three-step test has long offered helpful flexibilities. However, the proposal for the Treaty and its preparatory work showed the negative impact of leaving the adoption of flexibilities to national regulatory autonomy on the human rights of the visually impaired.

The Marrakesh Treaty, therefore, served more than as a guideline on how to apply the three-step test in the domestic copyright of states; it informed the discussion of human rights and intellectual property rights in the bigger context of intellectual property and access to knowledge. The negotiations leading to the Treaty and the contributions from the civil society and blind organisations drew attention to the negative effects of the copyright law on access of the visually impaired to information and hence their rights to education, information, culture and so on. It also emphasised the importance of international collaboration for tackling obstacles to access to knowledge for the visually impaired persons.

The Marrakesh Treaty also showed that similar to the international adoption and implementation of copyright laws that protect the interests of the authors, the interests of the

¹²¹ See Mihlay Ficsor “Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired” (11 October 2013) Copyright See-Saw <www.copyrightseesaw.net>.

¹²² Ficsor, at 9.

¹²³ See chapter 5 for a discussion of potential WIPO instruments on limitations and exceptions for the libraries and archives.

visually impaired should also be internationally recognised and protected. This issue is of importance to the bigger discussion of the clash of intellectual property rights and human rights because the importance of realisation of human rights of the visually impaired can apply to other users.

The same effect can be created through adoption of other subject-specific documents in the future that would shed light on the other aspects of the relationship between copyright and human rights law. Documents that address specific limitations and exceptions help alleviate the uncertainties regarding interpretation and application of the three-step test.¹²⁴ For instance, through adoption of the Marrakesh Treaty it is now clear that mandatory limitations and exceptions for the benefit of the visually impaired are justified as certain special cases that the three-step test requires. Moreover, reproduction, distribution, and making available of accessible formats by non-profit organisations are compatible with steps 2 and 3 of the three-step test. Further documents can clarify the eligibility and the required criteria for adoption of copyright limitations and exceptions for the benefit of the libraries and archives, educational institutions, and people with other disabilities under the three-step test.

Chapter 3 discussed the difficulties that exist for the visually impaired because of the different limitations and exceptions that countries have adopted. International instruments, such as the Marrakesh Treaty, that provide minimum mandatory limitations and exceptions could harmonise countries' interpretation of the three-step test and resolve the issues regarding user's rights.¹²⁵

Adopting individual instruments on copyright limitations and exceptions may also have a number of benefits compared to revision of already existing international copyright treaties. It may be easier and more feasible to focus the attention of the international community on a certain issue than to convince it to amend the existing copyright framework. In the case of access to books for the visually impaired, the role of copyright law on the low numbers of accessible books brought the member states of the WIPO to an agreement on the need to address the issue.

¹²⁴ See Christophe Geiger, Reto Hilty, Jonathan Griffiths, and Uma Suthersanen "Declaration: A Balanced Interpretation of the "Three-Step Test" in Copyright Law" (2010) 1(2) JIPITEC 119 format for more on uncertainty regarding interpretation of the three-step test.

¹²⁵ See Hugenholtz and Okediji, above n 34, at 11 stating that "a new international instrument on [limitations and exceptions] could help to eliminate diverging interpretation of the three-step test across national jurisdictions and therefore provide coherence and predictability in an environment of dynamic innovation".

Nevertheless, it still took the members of the WIPO a rather long time to adopt the Marrakesh Treaty.¹²⁶ The SCCR as the body responsible for creating new documents has multiple issues on its agenda. Different stakeholders, the public, the media and many other actors can determine whether the SCCR will address new limitations and exceptions.¹²⁷ For instance, the SCCR has yet to decide the fate of minimum mandatory limitations and exceptions for libraries and archives, educational institutions and people with other disabilities. These additional issues were part of Chile's initial request from the SCCR to consider mandatory limitations and exceptions and the subsequent treaty proposal.¹²⁸

Moreover, treaty-based approaches, such as the Marrakesh Treaty, that are separate from the main international copyright law system (the Berne Convention, the TRIPS agreement, and the WIPO Copyright Treaties) may face other obstacles such as ratification and implementation. Bottom-up approaches are an alternative to such solutions, where best practice and guidelines are formed based on the practical and informal practice of parties involved. For instance, there are no limitations and exceptions for the benefit of the visually impaired in Iran Copyright Act 1970.¹²⁹ In order to facilitate access to educational material for higher education students, the Roodaki Institute has entered into an agreement with the Organization for Researching and Composing University Textbooks in the Humanities (SAMT). The Roodaki institute is a non-profit entity that caters to the visually impaired and is the main producer of braille copies in Iran. Although Iran is not a member of any international copyright instruments that include the three-step test, the terms of the mentioned agreement is in line with the requirements of the test and ensuring the moral and material interests of the authors and SAMT as the copyright owner.

¹²⁶ It took the WIPO nearly 10 years to adopt the Marrakesh Treaty. In 2004 Chile first made a proposal for SCCR to prioritise and set working time aside "to strengthen international understanding of the need to have adequate limitations, learning from existing models and moving towards an agreement on exceptions and limitations for public interest purposes." See WIPO SCCR Thirteenth Session, Geneva, November 21 to 23, 2005, WIPO Doc. SCCR/13/5, [Proposal by Chile], at 1. This was followed by the 2009 proposal of Brazil, Ecuador and Paraguay together with the World Blind Union (WBU) of the text that later became the Marrakesh Treaty. See Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), WIPO SCCR Eighteenth Session, Geneva, May 25 to 29, 2009, WIPO Doc. SCCR/18/5 [Proposal by Brazil, Ecuador, and Paraguay].

¹²⁷ See Peter Yu "The Confuzzling Rhetoric against New Copyright Exceptions" (2014) 1 *Kritika* <www.papers.ssrn.com> for an analysis of some of the reasons why the copyright industries have been opposing the introduction of new copyright exceptions.

¹²⁸ See Proposal by Chile; Proposal by Brazil, Ecuador and Paraguay; and, WIPO SCCR, Twentieth Session, Geneva, June 21–24, 2010, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group, WIPO doc. SCCR/20/11.

¹²⁹ Act for Protection of Authors, Composers and Artists Rights 1970 (Iran).

According to the agreement, Roodaki can borrow master files of university textbooks to reproduce braille formats that will then be provided to the visually impaired free of charge.¹³⁰

Similarly, despite the legal vacuum on such international transactions prior to the Marrakesh Treaty, blind institutions in different countries arranged for agreements for cross-border exchange of accessible works. For instance, the New Zealand Blind Foundation has had an arrangement with Vision Australia to exchange accessible works. Both institutions are required to clear copyright for the exchange titles.¹³¹

Although bottom-up approaches can offer an insight for treaty-based solutions, they are ad hoc solutions that create no uniform standards and therefore are partial in their effect. The international community can maximise the desired outcomes by combining the two systems, meaning adopting the most beneficial bottom-up approaches as part of treaty-based solutions. For instance, the Accessible Book Consortium and its TIGAR project are great examples of how such ad hoc solutions can complement and facilitate the implementation of the law.¹³²

2 International coherence in adoption of minimum mandatory limitations and exceptions

The signatories of the Marrakesh Treaty highlighted the importance of a legal framework on minimum mandatory limitations and exceptions for the benefit of the visually impaired on an international level in the Preamble of the Treaty. According to the Preamble, an enhanced legal framework may reinforce the positive impact of new information and communication technologies on the lives of the visually impaired.¹³³

International harmonisation of minimum mandatory limitations and exceptions through revision of international copyright law means that a country would be obliged to include copyright flexibilities in its copyright law. Harmonisation through subject-specific documents such as the Marrakesh Treaty may not provide the same guarantee since its effectiveness is dependent upon voluntary ratification by countries. Nonetheless, international harmonisation

¹³⁰ The Organization for Researching and Compsong University Textbooks in the Humanities <www.en.samt.ac.ir>.

¹³¹ E-mails from Jennifer Ashton (Pre-Production Co-ordinator, Accessible Format Production, Blind Foundation) and Lyviana King (Accessible Formats Facilitator, Blind Foundation) to Lida Ayoubi regarding provision of accessible works to the visually impaired in New Zealand (10 July 2013 and 18 June 2014).

¹³² Accessible Books Consortium, above n 102.

¹³³ Marrakesh Treaty, above n 5, at 2. See also Proposal by Chile, above n 126, at 1 where Chile suggested “establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors”.

facilitates international access to and flow of works reproduced, distributed or made available online under limitations and exceptions.

In the case of the visually impaired, internationally harmonised minimum mandatory limitations and exceptions make exchange of available accessible works between countries possible. Such a system also encourages the visually impaired individuals and institutions to use accessible works originating from foreign countries that are available online. Lack of internationally harmonised minimum mandatory flexibilities can confuse and even deter individuals and entities like libraries from using online resources.

However, it is crucial not to overlook varying conditions of different countries when harmonising copyright flexibilities internationally. Therefore, the best solution is to normatively harmonise minimum mandatory limitations and exceptions and concurrently allow countries to adjust them to their national needs. This approach ensures coherent respect for the internal balance of copyright and consequently human rights.

C Further Directions for Building a Human Rights Framework

Relying on existing flexibilities in copyright is not enough for the creation of a human rights framework that facilitates access for the visually impaired and fulfilment of their rights.¹³⁴ Therefore, this section offers complementary solutions to the existing system of copyright limitations and exceptions. The different issues that will be discussed under following the headings can also be used in addressing the other areas of conflict between intellectual property law and human rights law and adopting a more general human rights framework for intellectual property rights.

1 Clarifying implications of copyright and human rights

To solve a problem, we first need to understand it. Clarification of human rights and intellectual property rights comply with Helfer's proposed human rights framework.¹³⁵ Clarification of the former fulfils the first step of the building of the framework by establishing the minimum

¹³⁴ See Helfer and Austin, above n 11, at 508 stating that "we endorse calls to revive and expand policy levers that have long been part of the intellectual property regimes but we part company with scholars and experts who believe 'bolstering these policy tools is not only necessary but also sufficient to reconcile the human rights and intellectual property regimes'".

¹³⁵ See Helfer, above n 24 for the human rights framework. A clearer understanding of human rights provide a scope and delimitation for each right and also helps separate the protective and restrictive functions of international human rights law. See Helfer and Austin, above n 11, at 503 for a discussion of protective and restrictive functions of human rights.

outcomes expected from states.¹³⁶ This minimum outcome is similar to the idea of states “core obligations”.¹³⁷ Clarifying human rights is an evolving process that is necessary for reconciling human rights and copyright.¹³⁸ Establishing the minimum outcome expected from countries through clarifying core aspects of each human rights is necessary for the second step of the framework.

Clarification of the copyright separates its benefits for human rights from its negative effects to highlight what needs to be changed, hence addressing the second step of the framework building.¹³⁹ Different UN entities have been doing so in the process of conceptualising the relationship between human rights and intellectual property rights and states’ obligations towards human rights.¹⁴⁰

As discussed in chapter 3, different international bodies have clarified a number of human rights and commented on the responsibilities of states regarding the obligations to respect, protect, and fulfil. This will provide the countries with better guidelines when making new IP law or implementing the existing ones when they know what their human right responsibilities entail, how those responsibilities relate to and are affected by intellectual property rights and how to balance their responsibilities towards intellectual property rights and information-mediated human rights.

Yu argues that in order to overcome the challenges of building a human rights framework for intellectual property rights policy makers need to “anticipate the challenges while at the same time [advance] a constructive dialogue at the intersection of intellectual property and human

¹³⁶ See Helfer, above n 24, at 1018.

¹³⁷ CESCR General Comment No. 17, above n 22, at [35] requiring the states to ensure that “legal and other regimes” of intellectual property “constitute no impediment to their ability to comply with their core obligations in relation to the right to food, health, education culture, as well as the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications or any other right set out in the Covenant”.

¹³⁸ See Helfer, above n 24, at 998 stating that “the Committee has thus linked violations of the ICESCR to an evolving legal standard that its members will develop in future general comments identifying the core aspects of specific Covenant rights, including the public’s right ‘to enjoy the benefits of scientific progress and its applications’”.

¹³⁹ At 1018. Clarifying intellectual property rights outlines states’ responsibilities also helps with identifying human rights attributes of each intellectual property right that is crucial in striking a balance between said right and other human rights. See Yu, above n 9 for human rights and non-human rights attributes of intellectual property. See also the WIPO Copyright Treaty [WCT] 36 ILM 65(1997) (opened for signature 20 December 1996, entered into force 6 March 2002) Preamble stating that the Contracting Parties recognise “the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments”.

¹⁴⁰ See for example Report of the High Commissioner on the Impact of the TRIPS on Human Rights, above n 48, and The Committee on Economic, Social and Cultural Rights General Comments on different human rights, available at <www.tbinternet.ohchr.org>.

rights”.¹⁴¹ Clarification of the copyrights and human rights of the visually impaired that are impacted in the issue of book famine informs a constructive dialogue and also helps anticipate the challenges that may exist for ensuring the balance of copyright and human rights. While a constructive dialogue alone is not sufficient for addressing the book famine and similar issues, its positive contribution cannot be overlooked.

2 *Ensuring compatibility of copyright and human rights*

Ensuring compatibility of human rights and intellectual property rights on an international level has been happening in the past years. As Helfer pointed out in 2007, the international organisations’ intellectual property law-making was at the time “closely aligned with the human rights framework for intellectual property reflected in the CESCR Committee’s ... interpretive statements”.¹⁴² This view was recently confirmed by adoption of the Marrakesh Treaty that “expressly draw[s] support from human rights law.”¹⁴³

Express reference to human rights in intellectual property legislation is another measure to ensure compatibility of the two. Presence of human rights principles in intellectual property legislation that will affect them is an acknowledgement of the potential effects. It can also act as a reminder of the need for compatibility between human rights and intellectual property rights when implementing the latter.¹⁴⁴

(a) Adopting compatible policy and law

The creation of a human rights framework for intellectual property rights requires a regulatory paradigm shift that treats the public interest and rights of the users with equal importance as those of the author. Such a paradigm shift requires attaching equal value to protection and flexibilities when adopting copyright law and policy.¹⁴⁵ Harpur and Suzor argue that the reason

¹⁴¹ Peter Yu “Challenges to the Development of a Human-Rights Framework for Intellectual Property” in Torremans, above n 13, at 100.

¹⁴² Helfer, above n 24, at 1001.

¹⁴³ At 1001.

¹⁴⁴ See Report of the High Commissioner on the Impact of the TRIPS on Human Rights, above n 48 stating that “an important aspect of the human rights approach to IP protection is the express linkage of human rights in relevant legislation. Express reference to the promotion and protection of human rights in the TRIPS Agreement would clearly link States’ obligations under international trade law and human rights law.... This would assist States to implement the ‘permitted exceptions’ in the TRIPS Agreement in line with their obligations under ICESCR”.

¹⁴⁵ Attaching equal value to protection and access is different than arguing that strengthening copyright protection is in the interest of the public. See for example Susan Isiko Strba “Impact of the Three-Step Test under the Berne Convention and the TRIPS Agreement on Access to Education in Developing Countries” in *International Copyright Law and Access to Education in Developing Countries* (Brill/ Martinus Nijhoff, Leiden, 2012) 53 at 59 stating that “where producer countries sought international copyright regulation, the aim was to ensure effective protection of their copyright works and not to create rules that would facilitate access to those works”.

the book famine has persisted is a regulatory paradigm that views rights of the persons with disabilities as a limited exception to the interests of the copyright holders.¹⁴⁶ Adoption of the Marrakesh Treaty, however, may mark the beginning of a paradigm shift in that regard.¹⁴⁷

Chapter 5 discussed the interpretation of the three-step test by a WTO Panel.¹⁴⁸ The Panel's interpretation of the Test regarding implementation of copyright limitations and exceptions in the US had an economic focus. Many scholars have criticised the Panel's interpretation for not taking account of the "underlying public policy objectives of national system" underscored in the Preamble to the TRIPS Agreement.¹⁴⁹ Moreover, re-thinking copyright law through a human rights framework would require a new reading of the three-step test (as the main authority for adopting limitations and exceptions).¹⁵⁰ The new reading should be in line with human rights of the visually impaired affected by copyright.¹⁵¹

Ensuring compatibility when adopting policy and law is required both on an international level, particularly through avoiding adoption of bilateral or multilateral agreements that hinder countries ability to comply with their human rights responsibilities, as well as on the national level.¹⁵² The UN Special Rapporteur on the right to science and culture states that "international copyright instruments should be subject to human rights impact assessments and contain safeguards for freedom of expression, the right to science and culture, and other human

¹⁴⁶ Harpur and Suzor, above n 96, at 746.

¹⁴⁷ See Abbe Brown and Charlotte Waelde "Human rights, persons with disabilities and copyright" in Geiger, above n 10, at 602 stating that "the needs of people with disabilities and their human rights were recognised on the international policy-making stage as being at least of equal weight to the interests of copyright right holders".

¹⁴⁸ See chapter 5.

¹⁴⁹ See Jane Ginsburg "Towards Supra national Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (2001) 187 *Revue Internationale du Droit d'Auteur* 3, Sam Ricketson and Jane Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, Oxford University Press, Oxford, 2006) at [13.21] stating that "non-economic as well as economic normative considerations" should be taken into account for interpretation of the three-step test.

¹⁵⁰ See Christophe Geiger "Right to Copy v. Three-Step Test: The Future of the Private Copy Exception in the Digital Environment" (2005) 1(7) *Computer Law Review International* (Cri) 1 at 12; Geiger "The Three-Step Test, A Threat to a Balanced Copyright Law?" (2006) 37 *International Review of Intellectual Property and Competition Law* 683 for new readings of the three-step test. See also and, Geiger, Daniel Gervais, and Martin Senftleben "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law" (2014) 29(3) *American University International Law Review* 581 at 616 stating that "from the perspective of national legislation, it would seem more logical to interpret the three-step test as not designed exclusively for restricting new use privileges, but also as enabling them. ... Many use privileges that have become widespread at the national level are directly based on the international three-step test".

¹⁵¹ See chapter 4 for a detailed analysis of the impact of existing readings of the three-step test on adopting copyright limitations and exceptions for the benefit of the visually impaired.

¹⁵² See Daniel Gervais "Human rights and the philosophical foundations of intellectual property" in Geiger, above n 10, at 97 stating that "at the multilateral level, human rights should inform ongoing policy debates".

rights”.¹⁵³ Moreover, she advises states to provide “a human rights impact assessment for their domestic copyright law and policy”.¹⁵⁴

Countries should ensure that their intellectual property policy and law is not only compatible with their obligations under international intellectual property instruments by which they are bound, but also with their human rights responsibilities and therefore produce intellectual property policy and law with a reasonable awareness of the potential impacts on human rights of the public with extra attention to be granted to the benefits of vulnerable groups such as those with disabilities, women, those with financial difficulties, and indigenous people. The ways in which intellectual property rights affect human rights and the interaction of these two areas of law should be part of the process of evidence-based intellectual property policy making.¹⁵⁵ When the assessments show that current or future intellectual property policies and laws have negative impacts on human rights, countries shall take proper measures to address those impacts.

Some countries are practising these assessments to some extent. For example, prior to the 2008 amendment of its Copyright Act of 1994, the New Zealand government drafted a Regulatory Impact Statement.¹⁵⁶ The report discussed the need for bringing domestic copyright law in line with technological developments and related policy objectives. The Impact Statement was partly based on the submissions received from different stakeholders.¹⁵⁷ The Impact Statement and the other relevant documents indirectly addressed human rights by referring to concepts like ‘public interest’, ‘access’ and ‘balance’. However, there was no direct reference to human rights or an evidence of any empirical assessment of the impact of the proposed changes on the information-mediated human rights of the users.¹⁵⁸

¹⁵³ Shaheed, above n 50, at 19.

¹⁵⁴ At 19.

¹⁵⁵ See Chapman, above n 49, at 15 stating that “for the State to protect its citizens from the negative effects of intellectual property ... governments need to undertake a very rigorous and disaggregated analysis of the likely impact of specific innovations, as well as an evaluation of proposed changes in intellectual property paradigms, and to utilize these data to assure nondiscrimination in the end result. When making choices and decisions, it calls for particular sensitivity to the effect on those groups whose welfare tends to be absent from the calculus of decision-making about intellectual property ... [for example] the disadvantaged.”; and, Helfer and Austin, above n 11, at 518 stating that “the determination of whether and to what extent intellectual property, as opposed to other factors, impedes the attainment of desired human rights outcomes requires careful, objective, and context-specific empirical assessments”.

¹⁵⁶ Ministry of Business, Innovation and Employment, *Regulatory Impact Statement - Digital Copyright Review*, by Hon Judith Tizard, June 2003 <www.med.govt.nz/business>. The initiative led to adoption of the Copyright (New Technologies) Amendment Act 2008.

¹⁵⁷ *Regulatory Impact Statement - Digital Copyright Review*, at [17]-[18].

¹⁵⁸ Related documents including Cabinet paper: Policy recommendations, Position Paper: Digital Technology and the Copyright Act, and a summary of submissions received <www.med.govt.nz>.

A similar instance, but on the international level, was the 2006 report of the National Human Rights Commission of Thailand on a potential United States - Thailand Free Trade Agreement.¹⁵⁹ Although some have challenged the validity of the Commission's claims and its recommendations, the underlying incentive to safeguard the right to health and food is in line with the UN Special Rapporteur's recommendation.¹⁶⁰

This thesis' survey of copyright flexibilities that facilitate access for the visually impaired on a national and international level highlighted the difficulties that current copyright law is creating for the visually impaired.¹⁶¹ The adoption of the Marrakesh Treaty was a response to the assessments presented to the WIPO.¹⁶² Further impact assessments can guide the Marrakesh Treaty's Member States in enforcing their obligations and adopting further copyright policy and law that may affect the human rights of the visually impaired.

When adopting intellectual property policy and law the international community and states need to be wary of different factors. First is the question of *who* they are regulating. In the case of access to copyright protected works for the visually impaired, the Marrakesh Treaty focuses on the visually impaired and the institutions acting for their benefit. On a national level, the countries may also choose to regulate the authors, the publishers, or the other actors. For instance, countries can regulate the terms of compulsory licenses between the author or right holder and the profit-making entities.¹⁶³ They can also subject the publishers to the legal obligation of providing authorised entities with files that facilitate and accelerate reproduction of accessible formats. In the US, under the Individuals with Disabilities Education Improvement Act 2004, publishers are required to deposit a digital file of the books that states buy as educational material for schools to a federal repository.¹⁶⁴

¹⁵⁹ See National Human Rights Institutions Forum, *Human Rights Impact Assessment of the US-Thai Free Trade Agreement*, 22 January 2007 <www.nhri.net/news.asp?ID=1115>.

¹⁶⁰ See James Harrison and Alessa Goller "Trade and Human Rights: What Does "Impact Assessment" Have to Offer?" (2008) 7 Human Rights Law Review 587 at 604 for criticism of the impact assessment.

¹⁶¹ See chapters 3 and 4.

¹⁶² See WIPO, Standing Committee on Copyright and Related Rights (SCCR), Study on Copyright Limitations and Exceptions for the visually impaired, prepared by Judith Sullivan, SCCR/15/7, 20 February 2007.

¹⁶³ See Laurence Helfer "Collective Management of Copyright and Human Rights: An Uneasy Alliance" in Daniel Gervais (ed) *Collective Management of Copyright and Related Rights* (Kluwer Law International, Alphen aan den Rijn, 2006) 75 at 90-91 stating that "not all of the functions that CMOs [Copyright Management Organisations] perform are human rights enhancing" and therefore there is a "need for governments to regulate (1) the licenses that CMOs offer to users, (2) the relationships between CMOs and their members, and (3) the relationships among the members themselves".

¹⁶⁴ See Individuals with Disabilities Education Improvement Act 2004 (US).

Second, *what* do they aim to achieve through policy and law making? Promotion of the public interest and social and economic welfare are among the policy statements of the international copyright law instruments.¹⁶⁵ However, so far the main focus of intellectual property law and policy has been maximising the protection of copyright holders and securing revenue through enforcement of rights.¹⁶⁶ Therefore, to create a human rights framework for intellectual property rights protection of public interest and the role of intellectual property rights in realisation of human rights should be among the countries' IP policy goals.

Assessing the impact of copyright protection on access for the visually impaired can inform the adoption of policy and law that improves the realisation of their human rights.¹⁶⁷ In the case of the visually impaired, countries should ensure that facilitating access for the visually impaired is among their policy goals and adjust their copyright laws accordingly. For instance, they should focus on adopting or improving limitations and exceptions for the benefit of the visually impaired in their copyright laws. They should also consider accommodating the needs of the visually impaired in other copyright-related legislation that may indirectly affect their access.

Moreover, countries should calibrate their copyright law and policy based on their local conditions to best serve the interests of their visually impaired citizens. Considering intellectual property as part of a bigger policy, which aims for human welfare, justifies calibration of the domestic IP policy for the realisation of human rights.¹⁶⁸ This calibration does not necessarily

¹⁶⁵ See chapter 4 for a discussion of the public interest in international copyright law instruments such as the TRIPS Agreement.

¹⁶⁶ See above n 44 for sources that discuss the "upward harmonisation" of intellectual property rights agenda. See generally Daniel Gervais *The TRIPS Agreement: Drafting History and Analysis* (4th ed, Sweet and Maxwell, UK, 2012); Susy Frankel "Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes" (2009) 12(4) *Journal of International Economic Law* 1023; Graeme B Dinwoodie and Rochelle Dreyfuss "Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond" (2009) 46 *Houston Law Review* 1187; Ruth Okediji "Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection" (2004) 1 *University of Ottawa Tech Law Journal* 125; and, John Braithwaite and Peter Drahos "Ratcheting Up and Driving Down Global Regulatory Standards" (1999) 42(4) *Development* 109.

¹⁶⁷ See chapters 3, 4, and 5.

¹⁶⁸ See Daniel Gervais "IP Calibration" in Daniel Gervais (ed) *Intellectual Property, Trade and Development* (2nd ed, Oxford University Press, Oxford, 2014) 86 for a full discussion of calibrating IP policy and law. See also Hannu Wager and Jayashree Watal "Human rights and intellectual property law" in Geiger, above n 10, at 159 stating that "if we consider the IP system as a tool of public policy, human rights considerations may be helpful in defining the objectives of the policy".

reject international harmonisation¹⁶⁹ (which, for example, the TRIPS Agreement promotes), nor does it entail violating countries obligations under international copyright law.¹⁷⁰

Finally, the *relationship* between the copyright holder and the copyright protected work also needs to be discussed when creating policy and law. Public interest goals can be achieved through enabling the copyright holder to go beyond the flexibilities that copyright law provides. When authors are afforded the zone of personal autonomy that the human rights framework promotes, they can more actively contribute to the public interest.¹⁷¹ For instance, in countries where the authors need to be remunerated, they could waive their right to remuneration. Similarly, they can authorise reproduction of additional accessible formats, upon publishing of a work, and complement the limitations and exceptions in a copyright law.

The regulators should also be mindful of the changing behaviour of copyright holders regarding management of their rights and that of the users regarding their access to and use of copyright protected works. Knowledge-related technological developments greatly influence these changes in behaviour. This can be partly done through ensuring compatibility of TPMs and limitations and exceptions.

The next step for the States Parties to the Marrakesh Treaty is its ratification and effective implementations. Although the Marrakesh Treaty imposes a number of obligations on states, it still gives them some freedom for regulating limitations and exceptions in their domestic law. Therefore, countries should consider the human rights implications of the way they regulate limitations and exceptions.

(b) Ensuring compatibility when implementing policy and law

When implementing intellectual property rights, focusing on their founding rationales and their common objectives with human rights can ensure their compatibility with human rights. In this case, human rights can be used to correct intellectual property rights when they are “used excessively and contrary to their functions”.¹⁷²

¹⁶⁹ See Gervais, IP Calibration, above n 168, at 89 stating that calibration recognises “appropriate differences among regions, countries, and industries”.

¹⁷⁰ See Okediji, Legal Innovation in International IP Relations: Revisiting Twenty-One Years of the TRIPS Agreement (2014) 36(1) University of Pennsylvania Journal of International Law 191 at 264-266 discussing the IP policy in South Africa that “creatively establishes the contours of the domestic IP debate in a way that delimits the role of the multilateral system without violating the TRIPS Agreement”.

¹⁷¹ See Helfer and Austin, above n 69.

¹⁷² Christophe Geiger “Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?” (2004) 35 International Review of Intellectual Property and Competition Law 268 at 278.

In the case of the visually impaired, this means that countries would adopt intellectual property laws that facilitate access of the visually impaired to copyright protected material because it would be in line with one of the foundational principles of copyright- the development and dissemination of knowledge. Information-mediated human rights of the visually impaired can serve as measures against which interpretation, judicial decisions, and legal actions are made.¹⁷³

Article 30(3) of the Convention on the Rights of Persons with Disabilities requires State Parties to “take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials”.¹⁷⁴ One of the appropriate steps that countries can take is ensuring that their domestic copyright policies facilitate access to copyright protected works for the visually impaired. This may require revision of their existing copyright laws or introduction of necessary limitations and exceptions. Moreover, since the CRPD does not specifically refer to domestic intellectual property laws of its State Parties it could be argued that the international community as a whole has an obligation to balance its obligations under intellectual property and human rights law and ensure the compatibility of the two. As discussed in chapter 2, states who fail to consider the role of intellectual property in the realisation of human rights, are in violation of those human rights even if they do not directly authorise, mandate, or engage in such violations.¹⁷⁵

Moreover, states should establish a body or to instruct the existing entities to decide legal conflicts that rise from copyright protection and access of the blind while considering the human rights implications of their decisions.¹⁷⁶ Providing a human rights framework against

¹⁷³ See Derclaye, above n 25, at 141 stating that in cases of conflict “courts must interpret IPR restrictively to restore their intrinsic balance and ... for their respective countries to fulfil their international or even national obligations concerning human rights”.

¹⁷⁴ United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 March 2008) art 30(3).

¹⁷⁵ Chapter 2. See also Thomas W Pogge “Human Rights and Global Health: A Research Program” (2005) 36(1/2) *Metaphilosophy* 182 at 199 where after discussing poverty and global health by formulating them in human rights terms he argues that “participation in the imposition of social rules constitutes a human-rights violation only when these rules foreseeably and avoidably deprive human beings of secure access to the objects of their human rights- only when the imposers of the rules could and should have known that these rules fail to realize human rights insofar as this is reasonably possible, could and should have known that there are feasible and practicable reforms of these rules through which a substantial portion of existing deprivations can be avoided. *I think this condition is fulfilled in the world today* [emphasis added]”.

¹⁷⁶ See Chapman, above n 49, at 16 suggesting “establishment of a body competent to review patent and trademark decisions on human rights grounds and/or the ability to appeal decisions to a court or tribunal able to make a determination of the human rights implications”.

which courts can evaluate copyright will help them decide the outcomes of cases on access to copyright protected material for the visually impaired.¹⁷⁷

For instance, in a recent decision, the Constitutional Court of Colombia was presented with a case on unconstitutionality of the exceptions for the visually impaired in Colombia's copyright law.¹⁷⁸ In making the decision, the Court considered the balance between the importance of accessible formats of copyright protected works to the lives of the visually impaired and the potential financial impact on the authors.¹⁷⁹ The Court "found that the Act 1680 in its entirety and Article 12 thereof were in line with the Constitution".¹⁸⁰

(c) Monitoring compatibility

Moreover, ensuring compatibility of human rights and copyright can be done both before adoption of copyright policy and law and after the entry into force of copyright related instruments.

Evaluation of the impacts of copyright and intellectual property rights in general on human rights in different countries and internationally can be done through monitoring mechanisms designed for intellectual property law or human rights law instruments. In reporting on their compliance with intellectual property instruments, states can include the steps they have taken to equally guarantee protection of public interest and realisation of those human rights that are affected by intellectual property rights.¹⁸¹ Members to international copyright law instruments have established monitoring mechanisms for different issues. For instance, the developed Member States of the TRIPS need to report on their actions for technology transfer to least

¹⁷⁷ See Gervais, above n 38, at 15 stating that in the context of article 15 of ICESCR "by giving purpose to exceptions [which is enjoyment of culture and science], human rights may ... serve as a guidance to courts"; See also Daniel Gervais "The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes" in Oonagh Fitzgerald (ed) *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) 549 for a further discussion of effects of human rights on the decisions of courts.

¹⁷⁸ See Law No. 1680 by which guarantees the access to information, communications, knowledge and information technologies to the blind and low vision people (2013), art 12.

¹⁷⁹ See Jhonny Antonio Pabón Cadavid "Copyright exceptions and affirmative actions for visually impaired persons" 10 (6) *JIPLP* 407 at 408.

¹⁸⁰ Luisa Fernanda Guzmán Mejía "Colombian Constitutional Court Upholds Law No. 1680 of 2013, Safeguards the Right of the Blind to Works in Accessible Formats" (9 March 2015) Infojustice <www.infojustice.org>. See also Geiger, above n 38, at 115 and 119 discussing the advantages of using fundamental rights embedded in constitutions of countries for achieving a balanced intellectual property system as well as the numerous decisions of European courts that have used the rights in ECHR in copyright disputes to limit the rights of the author. See generally Okediji, above n 170, at 200 stating that "courts in the U.S, for example, have issued a series of opinions that clearly are in tension with the maximalist narrative of the TRIPS Agreement".

¹⁸¹ See Report of the High Commissioner on the Impact of the TRIPS on Human Rights, above n 48, at [61] encouraging states to "monitor the implementation of the TRIPS Agreement to ensure that its minimum standards are achieving ... [the] balance between the interests of the general public and those of the authors".

developed countries.¹⁸² Protection of the public interest is also one of the objectives of the TRIPS Agreement and three-step test offers the possibility of realising that objective.¹⁸³ Under its existing transparency requirements, the World Trade Organization (WTO) requires its Members States to report about their specific measures, policies or laws, and WTO itself regularly reviews the Members' trade policies. States' performance in terms of safeguarding the public interest and accommodating their human rights obligations in their intellectual property-related trade policies can be added to the current revision mechanism. This, however, may first require political will and the paradigm shift that was discussed before regarding rights of the users.

Alternatively, they can report on the measures they have taken to ensure that their intellectual property policy and law are not interfering with the human rights to which they are committed. Countries that are member to the ICESCR have an obligation to report on the actions they have taken and on their progress on realisation of the rights recognised in the Covenant.¹⁸⁴ The CESCR has in the past provided guidelines regarding the reporting process.¹⁸⁵ Therefore, the Committee can require the ICESCR Member States to specifically report on the impact of their copyright law and policy on access for the visually impaired and other similar issues.

Countries that have ratified the UN Convention on the Rights of the Child (UNCRC) have to report to the Committee on the Rights of the Child (CRC) two years after ratification of the Convention and every five years thereafter.¹⁸⁶ The Committee has provided guidelines for state reports and can request further information regarding implementation of the Convention.¹⁸⁷

¹⁸² See World Trade Organization (WTO), Council for Trade-Related Aspects of Intellectual Property Rights, Implementation of Article 66.2 of the TRIPS Agreement, IP/C/28, 20 February 2003. The TRIPS Council established a monitoring mechanism for developed countries to report on their obligations regarding technology transfer. Under the monitoring mechanism the countries "shall submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they shall provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports".

¹⁸³ Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS] 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1996) arts 7 and 8.

¹⁸⁴ ICESCR, above n 47, art 16(1).

¹⁸⁵ Article 16(2) of the ICESCR assigned the United Nations Economic and Social Council (ECOSOC) with the task of monitoring the implementation of the Covenant. The ECOSOC Resolution 1985/17 of 28 May 1985 established the CESCR to monitor States' reports and provide country-specific and general comments.

¹⁸⁶ United Nations Convention on the Rights of the Child 1577 UNTS 3 [CRC] (opened for signature 20 November 1989, entered into force 2 September 1990) art 44(1) and (2).

¹⁸⁷ CRC, art 44(4). See also The Committee on the Rights of the Child (CRC), General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, paragraph 1 (a), of the Convention, CRC/C/5, 30 October 1991 [CRC, General Guidelines]; and, CRC, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child, CRC/C/58/Rev.3, 3 March 2015 [CRC, Treaty-specific guidelines].

Similarly, the States Parties to the UN Convention on the Rights of Persons with Disabilities (CRPD) shall also submit reports to the Committee on the Rights of Persons with Disabilities (CRPD) two years after ratification of the Convention and at least every four years thereafter.¹⁸⁸

As chapter 2 argued, the CRC and the CRPD emphasise the rights of the visually impaired to equal access to copyright protected works that are important for realisation of their rights recognised by these two conventions.¹⁸⁹ Therefore, the CRC and the CRPD can require the States Parties to report on the impact of their laws on the access to copyright works for the visually impaired as part of reporting on the rights that are affected by access (for example the right to education or culture).¹⁹⁰ Countries shall report on the actions they have taken to ensure that their copyright law and policy is consistent with realisation of principle of non-discrimination and the human rights of the visually impaired recognised in the CRC and the CRPD. For instance, the initial report of New Zealand on Implementation of the Convention on the Rights of Persons with Disabilities mentions copyright. Under participation in cultural life, the report states that the Copyright Act 1994 facilitates production of accessible formats for the visually impaired.¹⁹¹ However, the report does not refer to the difficulties of cross-border exchange of accessible works. The NZ Blind Foundation highlighted this problem in its submission on the draft of the initial report of NZ to CRPD.¹⁹²

The Marrakesh Treaty does not establish a monitoring body and a reporting mechanism. However, art 13 (2) (a) of the Treaty mandates an Assembly of the Contracting Parties with the task of dealing with matters concerning the maintenance, development, application, and operation of the Treaty.¹⁹³ Therefore, in light of the art 13 (2) (a), the Assembly could agree to

¹⁸⁸ CRPD, above n 174, arts 34 and 35..

¹⁸⁹ See chapter 2 for a discussion of the impact of access to copyright work on the human rights of the visually impaired (children and adults) and their right to equal and satisfactory access.

¹⁹⁰ See CRC, General Guidelines, above n 186, at [21] holding that States need to provide information regarding legislative, judicial, administrative, or other measures they have taken as well as the factors and difficulties they face for implementation of the right to education recognised by the CRC; CRC, Treaty-specific guidelines, above n 121, at [38]; and, CRPD, Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities, CRPD/C/2/3, 18 November 2009, at 13-14.

¹⁹¹ CRPD, Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties under article 35 of the Convention, New Zealand, CRPD/C/NZL/1, 1 October 2013, at [231].

¹⁹² Blind Foundation “First New Zealand Report on Implementing the United Nations Convention on the Rights of Persons with Disabilities Submission” (11 February 2011) <www.blindfoundation.org.nz> at 4.

¹⁹³ Marrakesh Treaty, above n 5, art 13 (2) (a).

require states to report on their progress on adoption of the “measures necessary to ensure the application of this Treaty” to the Assembly, the International Bureau of WIPO, or both.¹⁹⁴

Countries can adjust their existing reporting mechanisms to enable them to monitor the impact of their copyright law and policy on their human rights obligations. Many of the actors who have been reporting to the governments such as ministries, educational institutions, and NGOs can add copyright to the list of factors they consider. Moreover, other actors who are more directly engaged with the visually impaired and their access to copyright works can be added to the list of contributors.¹⁹⁵

Building a human rights framework for copyright so that it better accommodates the human rights of the visually impaired is about using it as a means for achieving human rights goals and ultimately human welfare. Many countries struggle with compliance with their international human rights obligations regarding the rights of the visually impaired. Highlighting the importance of copyright to access for the visually impaired can help countries to identify the causes of these problems more accurately. Therefore, countries can better respond to their obligations towards their visually impaired citizens.

This is achieved in two ways. In some countries copyright is an impediment to access for the visually impaired because there are no flexibilities in place or that the flexibilities are flawed. In these countries, reporting on copyright highlights the states’ obligation to take the necessary legislative and administrative measures to address the problem, ie through introducing or amending the flexibilities. In other countries copyright may not be the reason behind lack of access for the visually impaired because there is no legal copyright protection. The main reason behind the book famine in such countries is lack of financial and technological resources. In these cases, adoption of a copyright law that includes flexibilities for the benefit the visually impaired makes the import of accessible works possible. Therefore, in both cases, reviewing the impact of copyright on access for the visually impaired can contribute to the creation of a human rights framework.

¹⁹⁴ See Marrakesh Treaty, art 14 stating that “the International Bureau of WIPO shall perform the administrative tasks concerning this Treaty.” Monitoring the implementation of the Treaty by the States Parties can be considered an “administrative task”.

¹⁹⁵ This was the case for adoption of the Marrakesh Treaty where blind institutions such as the WBU, the national Blind Foundations, and similar entities played an important role in informing the international community of the impact of copyright on the book famine.

IV Conclusion

Regardless of the approach taken to conceptualise the relationship between human rights and intellectual property rights, they share the common objective of advancing human welfare. Therefore the element of balance between protection and access is of great significance because it is an internal part of the intellectual property law system and conducive to its common objective with human rights.

The common objective of human rights and intellectual property also means that they are not intrinsically in conflict with one another. However, because of the different routes that they each use to reach that common objective, there are areas of conflict between them. This chapter drew on the approaches that different commentators have used for conceptualising the interface of intellectual property and human rights (conflict, coexistence, and beyond) to frame the relationship between copyright and information-mediated human rights of the visually impaired. The chapter argued that improving access to copyright protected works for the visually impaired is not in intrinsic conflict with the rights of the authors. However, the existing balance between protection and access is not in line with the principle of non-discrimination and realisation of the information-mediated human rights of the visually impaired. Consequently, the existing balance is not compatible with the objective of copyright itself.

This chapter built on the idea of a human rights framework for intellectual property rights and proposed a human rights framework that specifically addresses the impact of copyright on access for the visually impaired. The focus of the framework is on how copyright, as a policy tool, can contribute to the realisation of human rights of the author as well as the visually impaired persons. The copyright law regime can better accommodate the needs of the visually impaired for better access and realisation of their human rights through different measures: (1) the international copyright law should include minimum mandatory limitations and exceptions that will then be adopted in the domestic copyright law of national states; (2) the scope of these limitations and exceptions need to be adjusted according to the human rights of the visually impaired. This is to avoid the difficulties that some existing limitations and exceptions have been creating for the visually impaired; (3) the international and domestic copyright laws should allow and facilitate cross-border exchange of accessible works for the benefit of the visually impaired; (4) while countries ensure minimum mandatory limitations and exceptions for the benefits of the visually impaired, they should also give authors more space to take

measures that could complement the system of limitations and exceptions for better access for the visually impaired; and, (5) countries should ensure compatibility of copyright and copyright-related policies, laws, and interpretations with human rights of the visually impaired that are affected by access to copyright protected works. The international community and national states should adopt a normative approach to interpretation of the three-step test. A normative approach to the Test takes account of the balance of rights, policy objectives, and the flexibilities that the TRIPS Agreement promotes.

CHAPTER 7

CONCLUSION

“Nothing is built on stone; all is built on sand, but we must build as if the sand were stone.”¹

- Jorge Luis Borges

I The Miracle in Marrakesh

The lack of coherent mandatory limitations and exceptions in international copyright law for the benefit of the visually impaired has resulted in lack of such flexibilities at domestic law and difficulties because of the differences in existing ones.

The visually impaired face many obstacles to reproduction and distribution of accessible formats in different countries. Moreover, international exchange of already existing accessible works is not possible. This has contributed to the book famine. While copyright law is not singlehandedly responsible for the book famine, it is one the main contributor to the lack of access for the visually impaired to copyright works.

Lack of access to copyright works, partly caused by copyright law, is discriminatory towards the visually impaired and is consequently a violation of many of their human rights. Therefore, copyright law is discriminatory towards the visually impaired, to the extent that it stands in the way of their access, and negatively affects the realisation of their human rights. Countries need to balance their obligations under both international copyright and human rights law in order to address discrimination.

International instruments on copyright flexibilities are the most promising vehicle for legal reform and reconciling potentially conflicting obligations of states under intellectual property and human rights regimes. A coherent model of copyright limitations and exceptions for the visually impaired ensures that states need not deal with their potentially conflicting obligations under international copyright and human rights law. They will be less subject to having to face international scrutiny for infringing the three-step test. Furthermore, if the limitations and

¹ Jorge Luis Borges *In Praise of Darkness* (Dutton, United States, 1974).

exceptions are incorporated in national laws with an internationalist perspective, states may be able to take account of complexities that may arise from varying national laws.

Adoption of the WIPO Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh Treaty) is a significant step towards changing the paradigm that views users' rights as a burden to copyright law. The Marrakesh Treaty highlighted the importance of the human rights of the visually impaired. However, the future will determine whether the Treaty was the start of a growing and continuous pattern or a one-off attempt for better accommodation of human rights by copyright.

II A Human Rights Framework for Access to Copyright Works for the Visually Impaired

To address the shortcomings of the Marrakesh Treaty, to complement it, and to further its objective of provision of equality of access for the visually impaired, this thesis proposed a human rights framework for copyright law and policy that affect the access and rights of the visually impaired.

The proposed human rights framework recognises the importance of copyright to creativity and respects the moral and material interests of the author. The framework is built on the premise that, copyright and human rights law have the common objective of achieving human welfare. It is therefore necessary to adapt copyright law to such objective. This requires an evaluation of the copyright protection against the policies of respect, protection, and realisation of human rights. This may require (a) changing the existing system of copyright flexibilities of states to improve the access for the visually impaired; (b) further interpretation of the human rights and copyright obligations in order to clarify their interaction; and, (c) ensuring the compatibility of copyright law and policy with human rights in all stages of adoption, enforcement, and interpretation.

A Restriking the Balance of Protection and Access

Existing regulation of copyright flexibilities in both international and national copyright laws falls short of non-discriminatory accommodation of human rights of the visually impaired. Therefore, countries should adopt the Marrakesh Treaty and bring their national copyright laws

in line with the Treaty's requirement for adoption of mandatory limitations and exceptions for the visually impaired. They should also provide for international exchange of accessible works. The Treaty still leaves the decision regarding some issues, such as the accessible formats, remuneration, and commercial availability, to the discretion of Member States. As a result, potential complexities can arise particularly in the context of international exchange of works when limitations and exceptions are not coherent. To address this, countries shall take full account of the implications of limitations and exceptions on human rights of the visually impaired, when incorporating the Treaty in their national laws. They should therefore frame the exceptions, and provisions regarding cross border exchange of works, in a manner that facilitates sharing of resources rather than complicating it.

B Filling the Gaps in the Interface of Copyright and Human Rights

The World Intellectual Property Organization (WIPO) can further clarify states' obligations under international copyright law and the interplay of different treaties. WIPO has been doing this through commissioning research and hosting formal and informal forums for discussion. Different United Nations (UN) bodies such as the Committee on Economic, Social and Cultural Rights (CESCR) should also continue to clarify different human rights and their connection with intellectual property rights. Such interpretation is essential for determining the core minimum obligations of states regarding each human right, against which copyright and other intellectual property rights shall be primarily balanced. Many of the human rights affected by copyright are socio-economic rights and subject to progressive realisation. Therefore, it is essential that the UN entities further define what progressive realisation regarding each human right means; what standards countries should aim for; and, what behaviour and policy is not justified under a progressive realisation defence.

C Ensuring De Facto Equality for the visually impaired

Adoption of exceptions for the benefit of the visually impaired, that facilitate the realisation of their human rights, is a right step in the provision of de jure equality for them. However, countries should ensure to also address the structural inequalities that exist for provision of accessible copyright works for the visually impaired. Having the human rights of the visually impaired in mind, when adopting further policy and law, is essential for developing the proposed human rights framework. The same applies to enforcement of the copyright law. Courts and other entities involved with enforcement could use the human rights of the visually impaired as a guide when dealing with related cases. Finally, monitoring and reviewing the

copyright and other relevant policies, laws, and enforcement mechanisms are crucial for achieving de facto equality under a human rights framework.

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