Brendan Kirwin
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Addressing the "Book Famine": The WIPO and VIP Accessibility

According the World Health Organization (WHO), of the approximately 314 million visually impaired persons (VIPs) that reside throughout the world, ninety percent reside in developing countries. And of that number, The World Blind Union (WBU) estimates that they have access to less than 1 percent of published reading materials.[1] Many activists have described this lack of accessibility as a worldwide "book famine," with the WBU rallying cry of "books before we die!" Article 27 of the Universal Declaration of Human Rights grants all individuals the right to freely participate in the cultural life of the community and enjoy the arts. Williams (2012) argues, because written discourse is critical for intellectual growth a lack of accessibility to written works "deprives society of a significant group of potential innovators" (p. 2).[2] And as Scheinwald (2011) describes, "community and national leaders have stated that the problem of VIP access to information is acute, the obligation to remedy this human rights violation clear, and the need for a solution apparent" (p. 449).

It is for these reasons that the World Intellectual Property Organization (WIPO) has spent over 30 years working to facilitate the harmonization of copyright law for VIP accessibility through an international treaty, in order to foster greater accessibility worldwide. However, there are a number of players involved with the negotiations, and as of this writing they have still not reached a consensus. In order to understand why we are where we are today, we must examine

[1] For developed countries it is only slightly higher — about 5 percent of works are VIP-accessible.
[2] Frick and Foster (2003) calculated the total economic cost of visual impairment in 2000, measured as lost productivity, to be over $60 billion worldwide. According to Scheinwald (2012), one 2004 Australian study estimated that visual impairment resulted in a net loss to the country of A$3.2 billion.
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the evolution of IP law, along with the history of WIPO members' various proposals and the organization's relationship to interested parties.

VIP Rights under Multilateral Copyright Treaties

Background

While individual nations protect copyright law based on natural law, encouragement of creativity, social utility, and just compensation, international IP law seeks to create reciprocal protection between such nations, as well as the development of international standards (i.e. minimum level of protection and rules against national discrimination). International copyright is subject to what is often called a "regime complex," involving governance by a number of different institutions with different actors and agendas (Kaminsky & Yanisky-Ravid, 2011, p. 22). Raustiala (2007) defines the concept in terms of "a collective of partially overlapping and even inconsistent regimes that are not hierarchically ordered, and which lack a centralized decisionmaker or adjudicator" (p. ??). Regime complexes are characterized in the following way: (1) negotiations in one forum begin with various predetermined assumptions (usually coming from other related forums), and often do not begin with the most recent history of that particular forum (2) states engage in "forum shopping," seeking the best forum for progressing their own political interests, and (3) legal inconsistencies arise between legal regimes in different forums, sometimes as a method of deliberate obstruction on the part of a nation in the form of "strategic inconsistency" (Kaminsky & Yanisky-Ravid, 2011, p. 22).

In terms of VIP accessibility rights, not only is there the tension between numerous different national IP regimes, but a philosophical debate as to the purpose of IP law in general. As Scheinwald (2012) explains:

> IP human rights protect the rights of natural persons who create intellectual property to maintain their creative autonomy and enjoy the material benefits resulting from that property. They do not protect the profit motive, they are inalienable—especially with respect to non-natural persons—and are fundamental rather than instrumental. In sum then, as the moral human rights of IP authors and creators appear to be on an equal plane with the human rights of VIPs, there is a conflict between VIPs who need access to information to enjoy their rights, and intellectual property creators who may need to withhold that access in order to enjoy their rights (p.492).

Understanding the historical precedents of international IP law, along with the different actors involved, and the competing points of view, allows us to more deeply understand an issue that affects millions of people worldwide.

The Berne Convention

The 1967 Stockholm revision to the Berne Convention, the primary international agreement requiring its signatories to recognize the copyright of works of authors from other signatory countries, introduced to international copyright law the three-step test for determining "fair use" exemptions to what would otherwise be a rights-infringing reproduction of an artist's work. Stated in Article 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."

A coalition of developing countries did seek to broaden the exemptions, wishing for better accommodation of their economic, social, cultural, and technological needs. India, for example, called for copyright flexibilities in order to assist in fostering social progress, such as increasing literacy (Williams, 2012). However, the Western signatories were successful in striking down such concessions, maintaining that strong copyright regimes outweighed the benefits of establishing flexibilities to aid developing countries. Furthermore, both Scheinwald

(2012) and Williams (2012) argue that throughout the IP debate, prominent holders of copyrights have strongly opposed treaty-based exemptions and other non-market solutions to increase access for VIPs, even when markets have failed on such fronts.

Scheinwald (2012) emphasizes that the WIPO-initiated "Study on Copyright Limitations and Exceptions for the Visually Impaired" (known as the Sullivan study) expressed that the Berne Convention either "does not contemplate or does not grant" a number of exemptions that would clarify how VIP rights fit into the three-step context; no exceptions are explicitly made for the adaptation, reproduction, or distribution of a copyrighted work that would be directly relevant to issues of greater accessibility (p. 463). According to the Sullivan study, a reading of the Berne Convention that provides sufficient production of materials to satisfy VIP needs "seems possible, but it is likely to need careful drafting to comply with the conditions" (as quoted in Scheinwald, 2012, p. 464). Furthermore, the study made clear that granting exemptions for VIP accessibility would likely only work if the "fair use" did not conflict with existing and/or potential future markets for the rights holder, and did not create outright competition with the rights holder as well.

The Rome Convention

The Rome Convention, a 1980 treaty that protects performers, producers of phonograms and broadcasting organizations, offers treaty-specific exemptions and exemptions as described as "the same kind" as those existing under a nation‘s domestic laws given to literature and other art forms. The treaty-specific exemptions allow member states to create national exemptions for four types of uses: private use, brief excerpted use for news reporting of current events, ephemeral fixation of broadcast organization material by an organization and for its own use only, as well as the use solely for the purpose of teaching or scientific research ("Rome

Convention", 1968). Based on these definitions, none of the exemptions apply to VIP accessibility, and exemptions of "the same kind", as Scheinwald (2012) points out, is merely a reference back to the Berne convention, which already covers such works and for which most nations are already bound.

The two most recent international IP treaties, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) were adopted in 1996. While both the WPPT and the WCT (known together as the WIPO Internet Treaties) extend the reach of the Rome Convention and the Berne Convention, respectively, into the digital and wireless realm, both treaties use the same three-step test originating from the Berne Convention, offering no additional exemptions that could be applied to VIP accessibility[3] (Scheinwald, 2012, p. 466).

UN General Convention on the Rights of Persons with Disabilities

In addition to the above treaties, in 2006 the United Nations created and ratified the UN General Convention on the Rights of Persons with Disabilities, an international human rights instrument intended to protect the rights and dignity of persons with disabilities. Article 30(3) of the document obliges that Member States "shall 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" ("UN Convention", 2006). Scheinwald (2012) argues that the obligations laid out by the UN Convention are significant, because it "both makes avoidance of [VIP exemptions] on grounds of vagueness difficult," and because it contradicts the argument that "vaguely phrased obligations in the international sphere tend to create reticence and distrust among states (p. 462).

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[3] There are some commentators that do believe that the three-step test can be used to assist access for VIPs, however Scheinwald (2012) argues that because it is not a mandatory test, states are free to reject copyright exemptions and therefore current multilateral IP treaties only minimally support VIP rights.

However, regardless of the UN's direct address of the issue of VIP accessibility, it has not led to any significant change in national or international IP law, as many of the Member States have not complied with this general obligation (Kaminsky & Yanisky-Ravid, 2011).

History of WIPO Treaty

The Genesis of the Treaty

The UN declared 1981 as the International Year of Disabled Persons. That same year, the governing bodies of WIPO and UNESCO reached an agreement to create a Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Produced by Copyright, and from October 25-27, 1982 the group met in Paris and produced a report that included model exceptions for national copyright laws. In December of the following year, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention decided separately to solicit states to provide comments on the "Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by Copyright" which had been drawn up by the October Working Group, and throughout 1984 they continued working on the issue of VIP access.

In 1985, the two WIPO committees published "Problems Experienced by the Handicapped in Obtaining Access to Protected Works" (known as the Noel report) detailing the use of copyright-protected works by VIPs and how each relevant copyright is affected by such use (Noel, 1985). The report articulated concerns over the importance of cross-border sharing of VIP accessible copies and laid out five alternative methods of providing better access. These included special provisions in national law, voluntary exercise of rights[4], the possibility of

[4] These refer to obtaining copyright permissions either through individual or collective negotiations.

amending or adding a Protocol to the Berne Convention, and the development of international instruments. The conception of an international instrument involved the creation of a "convention" on copyright exceptions that would provide that the signatories would permit the production of special media materials and services for VIPs from within their borders, while concurrently allowing free circulation of those materials and services among the other member states (Noel, 1985, p. 26). Following the publication of the Noel report very little else was done at WIPO in terms of exceptions for VIPs (Love, 2011).

The WTO and TRIPS

In the late 1980s and early 1990s, WIPO found itself facing the challenge of a number of developed countries seeking to shift intellectual property rights (IPRs) norm setting to the newly created World Trade Organization (WTO). A number of commentators have characterized the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as an attempt to prevent developing countries from advocating for more flexible IP law (Chang, 2008; Love, 2011; Williams, 2012). It has further been argued that developed countries campaigned to shift international IP law from WIPO to the WTO because of the increased strength of WIPO members from developing countries, and the resulting frustrations to the agendas of developed nations (Musungu & Dutfield, 2003, p. 10).

Chang (2008) argues that a handful of industries, including entertainment and pharmaceuticals, led the campaign to introduce the TRIPS agreement into the WTO, and have been driving the international agenda on IPRs from the 1990s on (p. 122). TRIPS incorporated the Berne Convention's existing copyright protections in order to maintain strong IPRs, and has been interpreted to allow countries to negotiate bilateral or plurilateral agreements that go even further than TRIPS (TRIPS-plus) (Williams, 2012).

One telling example of how TRIPS-plus is affecting IP law involves the United States-Jordan Free Trade Agreement (known as the JUSFTA). Jordan acceded into the WTO in April 2000, and the JUSFTA was signed on October, 24 2000 and entered into force on December 21, 2001. In regards to copyrights and related rights, the JUSFTA added significant requirements, and therefore higher standards of copyright protection (Nesheiwat, 2010). Of particular interest is article 4(11), which gives control of the importation of protected works to the rights holder, who may allow or deny such transaction regardless of whether the product in question is pirated or an authorized version[5]. Such language may deeply hinder the use of exceptions and limitations to increase VIP accessibility, as it explicitly protects copyright owners beyond that of the Berne Convention and the three-step test.

Furthermore, as Ruse-Kahn (2009) argues, the consequences of binding decisions from the WTO dispute settlement body that could ultimately lead to retaliatory countermeasures, along with a significant lack of clarity and guidance on what exceptions or limitations a WTO member can introduce into their national law, results in a "chilling effect" for those countries that may seek to create new exceptions for their IP regimes (p. 75). This is compounded further by the dispute panels' historical interpretation (in the form of panel reports) of limitations and their relation to the three-step test[6], where either the status quo is maintained, or international law is expanded to secure stronger protection for rights holders; movement toward IP flexibility, such

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[5] Article 4(11) states: "Each Party shall provide to authors and their successors in interest, to performers and to producers of phonograms the exclusive right to authorize or prohibit the importation into each Party's territory of copies of works and phonograms, even where such copies were made with the authorization of the author, performer or producer of the phonogram or a successor in interest" ("Office of the USTR", 2000).

[6] To date, three dispute settlements have looked at exceptions and limitations related to IP. Of these, one has dealt with copyright (*USA — copyright*), involving the European Communities seeking consultation with the United States in respect to Section 110(5) of the US Copyright Act, as amended by the Fairness in Music Licensing Act. The dispute was over the legality of "the playing of radio and television music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee" ("Dispute settlement"; 2002).

as for reinforcement of limitations intended to improve access to copyrighted material, is either severely impeded or "even straightforwardly outlawed" (Kur, 2008, p. 31).

Readdressing VIP Accessibility at WIPO

While in the 80s and 90s, WIPO had seen IP law shift from its own domain to that of the WTO, beginning in 2001 a campaign by civil society organizations brought the issue of VIP accessibility back within its building. That year, the World Blind Union (WBU) and the International Federation of Library Associations led a campaign to deal with disabilities related copyright issues at WIPO. The campaign was catalyzed by a WBU paper by David Mann titled, "WIPO: Advancing Access to Information for Print Disabled People," which provided an analysis of the intergovernmental organization and offered a detailed advocacy agenda.

In the document, Mann laid out three key areas that the WBU and VIP activists needed from WIPO and other international bodies. These were: (1) international treaties that allow the creation of non-commercial alternative, accessible versions of copyrighted works, along with their free flow across international boundaries, (2) the harmonization of national legislative regimes for ensuring consistency for organizations, individuals, and right holders, which protect right holders from exploitation and protect VIPs and their agencies from unjustified barriers, and (3) international and national IP law that empowers member states to oblige rights holders to make available to VIPs and their respective organizations accessible versions of works that are ordinarily presented to the public with some form of digital rights management that which may render them inaccessible (Mann, 2001).

Mann's final concern sought to shed light on the fact that while the electronic age has brought great advances in assistive technology, it has also led to new problems and barriers in the form of rights protection. As Mann (2001) explains, "there are now two copyright-related

barriers that may have to be surmounted before information can be accessed: the permission of the rights holder and the potential technological block of digital rights management schemes or other forms of presentation incompatible with screen reading technology" (p. 1).

This paper, and the work of the WBU and related organizations, helped garner support for more significant intervention in WIPO. In 2002, during the seventh session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), a WBU representative articulated the key points of Mann's paper and asked the committee for support in studying such issues. The SCCR recognized the issue needed attention and began a process of research and data gathering[7].

In November 2004 at SCCR 12, there was a Proposal by Chile (at the initiative of the Chilean Ministry of Education) on the Subject "Exceptions and Limitations to Copyright and Related Rights". The proposal sought the inclusion of the subject of exceptions and limitations to copyright and related rights for the purposes of education, libraries and disabled persons, in the session's agenda ("Proposal by Chile", 2004). The discussion on the possibility of a copyright-exemptions treaty for VIP access yielded a number of proposals and made evident the "vast negotiating space separating rights-holders and those seeking greater access to protected works" (Scheinwald, 2012, p. 468). Additionally, the proposal to begin discussions on the issue was partially stalled on the question of whether such an issue would involve information sharing or norm setting. In other words, would such discussion focus on a restatement of existing international law principles of the development of a new set of principles.

At SCCR 13, in November 2005, Chile elaborated its proposal in SCCR 13/5 detailing three areas that must be explored through the SCCR. These were as follows: (1) the identification of national models and practices, (2) the analysis of exceptions and limitations needed to

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[7] For a detailed timeline visit: http://keionline.org/timeline-reading

promote creation and innovation, along with the dissemination of such developments, and (3) the establishment of agreement on exceptions and limitations that are produced as a minimum in all national legislations, especially for the purpose of giving access to the most vulnerable or socially prioritized sectors ("Proposal by Chile", 2005, p. 1). Chile pointed out that such an initiative fell within the consensus of having minimum exceptions that had been in place since the Berne Convention, over a century ago. As a basis of comparison, the proposal explains how such agreements as TRIPS and the WIPO Internet Treaties have incorporated rental rights and the rights of distribution (respectively), implementing a number of extensions and clarifications beyond Berne. In contrast, they say, interest in extending and clarifying the rights of rightsholders has not been as pronounced for establishing *balance* in the IP systems, especially in terms of the digital environment. They concluded the proposal by stating: "We are convinced that the initiation in the World Intellectual Property Organization of a process aimed at reaching a consensus on minimum exceptions and limitations which would guarantee a sound balance between rightsholders and users would promote development of creation and innovation, cultural exchange, technology transfer, and would promote in particular the international legitimacy of the copyright system without affecting the legitimate rights of the rightsholders" ("Proposal by Chile", 2005, p. 3).

The reaction to Chile's proposal was mixed. Non-state parties, such as the International Publishers Association, were strongly against such a treaty. They referred to copyright exemptions as "the crudest and bluntest tool in a large toolbox...and were 19th century solutions to 21st century problems" and emphasized that creative solutions pursuant to the three-step test would be the only way to reach a fair balance (Scheinwald, 2012, p. 469). State parties, such as Benin and Morocco, expressed concern that a discussion around accessibility would result in

new principles, stating that a treaty should not harm the interests of rightsholders. Other states expressed moderate or strong support for an exemptions based treaty. Regardless, the discussion ended with a plan to include the issue in next session, without any concrete workplan for subsequent meetings.

Over the next six years discussion continued at WIPO's SCCR tri-annual meetings, and a at these meetings a number of papers were presented that progressed the understanding of the issue. One such paper "WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions" examined, among other things, the effect of digital rights management (DRM) on VIPs. In the paper, Garnett (2006) stated that "neither the market nor technology appears to be supporting a basis for facilitating the access to information by visually impaired people in a way that is consistent with the general standards for the full social and economic integration of people with disabilities" (p.33).

The WIPO Draft Instruments

The WBU Proposed Treaty

Currently, there are four draft instruments that have been proposed to the SCCR. The first proposed instrument, developed by the WBU and formally introduced in May 2009 by Brazil, Ecuador, and Paraguay, offers an exemption for VIPs to access copyrighted works without the rightsholder's consent. Similar to provisions already in effect in such nations as the United States and the United Kingdom, the treaty would allow exceptions for creating accessible formats and duplication under certain conditions by both for-profit and nonprofit entities (Hely, 2010).

The proposed instrument addresses three critical obstacles for VIP access, involving (1) exceptions for reproduction and limited duplication of a work into accessible formats, (2) rights to circumvent DRM, and (3) the freedom of import and export of accessible works. The

reproduction exceptions are specified in scope to the personal reproduction by a VIP, by a nonprofit entity, or by a for-profit entity on either a nonprofit basis or could be extended to permit commercial rental of copies with "adequate remuneration to copyright owners" (SCCR, 2009, p.5) To the last point, the treaty would allow any signatory to decline such an exception. It should also be noted that while the exceptions do require acknowledgement of the author's name and the work's title, the treaty does not make distribution or reproduction "subservient to the exercise of the moral rights by the author" (Hely, 2010, p. 8).

Article 10 of the proposed treaty establishes an online database maintained by WIPO that allows copyright owners to voluntarily identify works for the purposes of attribution and remuneration, along with providing VIPs and their respective organizations to be aware of the availability of the work in accessible formats (SCCR, 2009, p. 7). Article 11 articulates that any remuneration for commercial reproductions in developing countries, "takes into consideration the need to ensure that works are accessible and available at prices that are affordable, taking into account disparities of income for persons who are visually impaired" (SCCR, 2009, p. 7). Hely (2010) notes that the proposed treaty's implication that a marginalized class, in this case VIPs, should have access to works that are within their economic means creates a unique precedent in international copyright law (p. 9). Hely (2010) goes on to note that the proposed treaty would "erode the potential for contractual control of copryighted works in a digital marketplace" through Article 7, setting up a structure that "runs contrary to the majority of exceptions already in place and enshrines the exception as a quasi-right rather than a noninfringement" (p. 9).

Ruse-Kahn (2009) identifies the IP structure proposed by the WBU Treaty proposal as a method for addressing the issue of whether countries are able to go beyond the proposed

minimum exceptions that are now in place in TRIPS and other international IP law, what he characterizes as "exceptions-plus" (p. 82). Unless broader exceptions violated the provisions laid out in the treaty, Member States would have the ability to implement such exceptions on issues such as VIP accessibility. Ruse-Kahn (2009) sees the proposed treaty as a good example of how ceilings to IP protection may be used to "establish and give effect to minimum user's rights" (p. 85). Therefore, the proposed treaty may offer a healthy precedent for a paradigm shift away from unlimited protection for copyright holders.[8]

[give more pros]

A number of detractors have expressed concern with the far-reaching and ambitious language that the proposed treaty utilizes. To begin, a group of WIPO members, including Australia and the EU, have commented that some of the provisions in the treaty are inconsistent with their nation's legislation (as well as that of international law), preventing them from ratifying it even if they wished to (Rekas, 2011).

Scheinwald (2012) points to the arguments many of rightsholder representative groups, such as the Motion Picture Association of America (MPAA) and Recording Industry Association of America (RIAA), that exemptions under the WBU treaty would be "too rigid, or too categorical, to respect right-holders' legal entitlements" and could make it more difficult to adapt IP law according to changing circumstances (p. 488). Furthermore, these groups claim that creating development-based IP exemptions may be counterproductive, because in nations where resources are already scarce such exemptions would further reduce incentives to invest in the production and distribution of VIP accessible works (Scheinwald, 2012, p. 488).

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[8] Whereas current international IP treaties set out minimum standards of protection, with no explicit limits, Ruse-Kahn (2009) argues that articulating maximum standards in international IP law may be a better method to ensure legal security and predictability about bounds of protection, the global protection of user's rights, and the free flow of goods, services, and information.

The MPAA, specifically, worried that what they saw to be a loose definition of "visual impairment" may cover dyslexia and other disorders. They speculated that "a broad VIP definition might 'allow unauthorized duplication and distribution of copyright works – even for commercial purposes – and the circumvention of technological protection measures [could] be invoked by any person who is self-defined as having any form of disability'" (Williams, 2012, p. 8).

The issue of global piracy of copyright materials is a major cause of concern as well. Often referred to as the "gateway drug" argument, rightsholder organizations worry that mandatory treaty exemptions, acting as "the thin edge of the wedge", would exacerbate the dire problem of piracy (Scheinwald, 2012, p. 489). While the VIPs themselves may utilize such exemptions for legitimate means, other individuals and entities may use the proposed treaty as a loophole, exercising their belief that international copyright law is too restrictive and should be disregarded altogether. Scheinwald (2012) offers another aspect of this problem in terms of human rights, by arguing that if VIPs are granted broad exemptions for copyrighted material so that they can access materials to realize their rights to education, employment, and other defined essentials of personhood, "on what principle would one continue to refuse copyright exemptions to provide educational materials to all those who cannot afford them?" (p. 497). Ultimately, we return to the ongoing debate in regards to the human rights for rightsholders versus that of other individuals.

Hely (2010) notes that rightsholders seek a market-based approach to the issue of VIP accessibility. The WBU proposed treaty may result in weaker protection for rightsholders who wish to make their works VIP accessible, therefore discouraging rightsholders from producing accessible works and ultimately slowing down progress towards an "eventual market-based

solution"[9] (Hely, 2010, p. 10). The MPAA goes as far as asserting: "To the extent that the proposed Treaty would mandate gaping fissures in the current level of copyright productions with potentially devastating impact to create new works, society as a whole would be left with fewer works to access"[10] (Ress, 2009, p. 8).

The African Group Treaty

The "Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers.", known as the African Group Treaty, is the widest reaching of the four instruments proposed (Williams, 2012, p. 5) . While similar in language to the WBU Treaty (likewise establishing a binding law) it differs in a few key ways. As noted in the drafts title, the proposal dramatically expands the scope of the VIP exemptions by including unauthorized and unrecompensed reproduction for research purposes, educational and research institutions, libraries, and archives. In addition to VIPs, it expands the class of disabled beneficiaries to include persons with "a physical, mental, sensory, or cognitive incapacity" ("Draft wipo treaty," 2010, p. 10). Williams (2012) notes that the African treaty read at its broadest terms could very well include illiteracy as a form of disability (p. 8). Additionally in contrast to the WBU treaty, the African proposal does not contain exemptions in regard to for-profit entities, nor any additional exemptions for a VIP duplicating copyrighted works for personal use (Scheinwald, 2012, p.473). Lastly, as Williams (2012) points out, the treaty broadly permits countries to take any additional measures "necessary to achieve greater equality of access to knowledge and communications" (p. 6).

[reactions to the treaty]

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[9] Hely (2010) concedes that such a solution "may not be imminent", but emphasizes that a balance must be attained between the future interests of rightsholders and that of VIPs.

[10] Williams (2012) points out that this statement is made without any empirical evidence.

The EU Treaty

In great contrast to the WBU and African Group treaties, the 2010 EU treaty proposal offers a far more restrained vision of VIP exceptions than those of developing countries. Unlike the previous treaties, the EU proposed a Joint Recommendation, which would not create a binding obligation on any party that signed it. Rather, the EU proposal would be a form of "soft law" where any form of non-compliance would most likely be met with political consequences rather than legal ones (Rekas, 2011, p. 27).

Unlike the previous two treaties, the EU proposal never expressly endorses utilizing IP law exceptions to aid developing countries, and instead focuses explicitly on benefits to VIPs (Williams, 2012, p. 6). Additionally, the treaty is explicit in its mandate that "[s]uch exception may only be applied in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder" ("Draft joint recommendation," 2010). The joint recommendation leaves the question of what constitutes such conflicts and prejudice unanswered. Also particularly noteworthy is the fact that the EU proposal requires that the exemptions meet the three-step test and that no "sufficient and adequate market solutions" for VIPs, as defined by the proposal (Scheinwald, 2012, p. 473).

One area of major criticism of the EU proposal involves the establishment of trusted intermediaries to control the import and export of works made VIP accessible. To become a trusted intermediary, an organization must meet a set of standards[11], that many sees as much too vague. Rekas (2011) points out that there is nothing made explicit in regards to who would

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[11] The standards state that in order to become a trusted intermediary, an organization must: (1) operate on a not-for-profit basis, (2) register the individuals with a print disability that they serve, (3) provide specialized services relating to train, education, or adaptive reading or information access needs of VIPs, (4) maintain policies and procedures to establish the bona fide nature of individuals with print disabilities that they serve, (5) maintain policies to ensure full and complete compliance with copyright and data protection laws ("Draft joint recommendation," 2010).

determine whether the organization is in compliance with these standards (p. 28). Furthermore, as Williams (2012) points out, a trusted intermediary requirement would most likely put developing countries at a disadvantage; lacking the sufficient resources to establish viable trusted intermediaries may leave them unable to participate in international transactions and do nothing to solve issues of accessibility in such countries (p. 6). Additionally, according to the EU proposal, trusted intermediaries must be approved by rights holders, which would further complicate the issue around gaining permissions.

Another area of contention arises from how the EU proposal defines "Print Disability." It is not nearly as broadly defined as it is in the WBU Treaty proposal (though it does explicitly include dyslexia as a qualifying condition, which the others do not), and Rekas (2012) argues that the "static definition" of the defined term may not include some individuals who need VIP accessible formats (p. 28).

The US Proposal

The US proposal uses a non-binding consensus instrument, which is essentially a joint recommendation by another name (Rekas, 2010, p. 30). Similar to the EU proposal, the US instrument uses a restrained approach to exemptions around accessibility. It offers the most restrictive definitions for both VIPs and accessible formats, and utilizes a trusted intermediary framework, where governmental agencies and nonprofits qualify only if their principal purpose is assisting VIPs (Williams, 2012, p. 6). The provision, however, does allow for general trade in Braille texts between member states. Additionally, the US proposal is the only proposal to specifically reference Berne and the three-step test. Scheinwald (2012) posits that this may suggest that the proposal is a treaty-based interpretation of this test, which Williams (2012) notes

leaves the treaty without any "express stipulation[12] of the treaty's compliance with international law" (p. 6).

Blaming the rightsholders and the United States Patent and Trademarks Office (USPTO), Love (2010) argues that the US proposal is an attempt to obstruct the creation of an international treaty. As he sees it, if this non-binding consensus instrument is put in place, publishers and the like will insist on waiting to see how well it works. However, by the time it has been proven to be ineffective, many people, including the SCCR, will have likely moved on to different issues. This would mean the VIP rights advocacy process will have to begin again from scratch. And in the same manner as the EU proposal, the use of trusted intermediaries would be an insurmountable burden for almost all libraries, universities, and public institutions in developing countries (Bhat, 2010; David, n.d.). Furthermore, the use of the three-step test as "soft law," based on language that is permissive and imprecise, leaves countries that lack strong IP regimes without the resources or explicit mandate to enact such legal rights as exemptions for VIP accessibility (Kaminski & Yanisky-Ravid, 2011, p. 24).\

The Negotiations as They Stand

At SCCR 22 in June of 2011, progress was made toward an international instrument to give greater access to VIPs. Representatives from Argentina, Australia, Brazil, Chile, Colombia, Ecuador, the European Union and its Member States, Mexico, Norway, Paraguay, the Russian Federation, the United States of America and Uruguay worked together to essentially merge the WBU, EU, and US proposal into one unified text. The African Group, however, resisted taking

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[12] Express stipulation refers to the fact that a requirement is made explicit, where the mention of this requirement implies the exclusion of any other requirement (Bordoloi)

part in the consensus, arguing that all exceptions and limitations should be discussed at the same time.

The unified text, entitled "Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities," mandates that authorized entities must: (1) have "lawful access" to accessible forms of copyrighted work, (2) convert such work into accessible formats that do not "introduce changes other than those needed to make the work accessible to the beneficiary person," (3) supply the accessible works exclusively to VIPs, and (4) generally undertake the distribution on a non-profit basis ("International instrument," 2011). The definition of an "authorized entity" most closely resembles the trusted mediary of the EU and US proposals, where a governmental agency, a non-profit entity or non-profit organization has as one of its primary missions to assist VIPs, and has the trust of both VIPs and rightsholders.

As of the July 2012 SCCR 24, the document is an amalgamation of various member state's additions and bracketing[13] with no sense of a unified vision. What was decided was that there would be an inter-sessional meeting in Geneva between the 2012 WIPO General Assembly and SCCR 25. In addition, the item of limitations and exceptions for VIPs will continue in SCCR 25, with the purpose of making a recommendation on exemptions for the General Assembly in an extraordinary session.

It is unclear whether SCCR 25 will lead to any sort of consensus on a draft proposal, let alone an actual treaty or other legal instrument. As it stands, more than half of WIPO Member states lack any exception for VIPs. What is clear is that the regime complex, the complicated process of interaction between organizations, states, and private entities, has prevented a solution to the worldwide book famine from being found.

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[13] Bracketing is used in working documents to denote a word or phrase that is in contention.

REFERENCES

African Group, (2010). *Draft WIPO treaty on exceptions and limitations for the disabled, educational and research institutions, libraries and archive centers* (SCCR/20/11). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.pdf

Bhat, A. (2010, June 1). [Web log message]. Retrieved from http://www.publicknowledge.org/blog/us-proposed-agreement-fails-adequately-promot

Bordoloi, S. (n.d.). *Conditions implied and express*. Retrieved from http://www.legalservicesindia.com/articles/condi.htm

Delegation of the European Union, (2010). *Draft joint recommendation concerning the improved access to works protected by copyright for persons with a print disability* (SCCR/20/12). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf

Frick, K. D., & Foster, A. (2003). The magnitude and cost of global blindness: An increasing problem that can be alleviated. *American Journal of Ophthalmology*, *135*(4), 471-476.

Garnett, N. (2006). *Automated rights management systems and copyright limitations and exceptions*(SCCR/14/5). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf

Krishnan, B. (2008, January 24). [Web log message]. Retrieved from http://www.mind.org.my/news/step-forward?theme=Lite

Kur, A. (2008). Of oceans, islands, and inland water - How much room for exceptions and limitations under the three-step test? . *Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series*, *08*(04), 1-48. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317707

Love, J. (2009, August 12). Right to read for persons with reading disabilities [Web log message]. Retrieved from http://keionline.org/r2r

Love, J. (2010, June 2). [Web log message]. Retrieved from http://keionline.org/node/856

Love, J. (2011, April 6). Background and update on negotiations for a WIPO copyright treaty for persons who are blind or have other disabilities [Web log message]. Retrieved from http://www.keionline.org/node/1089

Mann, D. (2011, August). *WIPO – Advancing access to information for print disabled people*. Paper presented at 67th IFLA Council and General Conference, Libraries for the blind with copyright and other legal matters, Boston, MA. Retrieved from http://archive.ifla.org/IV/ifla67/papers/078-144e.pdf

Musungu, S. F., & Dutfield, G. (2003). *Multilateral agreements and a trips-plus world: The World Intellectual Property Organisation (WIPO)*. Retrieved from Quaker United Nations Office website: http://www.geneva.quno.info/pdf/WIPO(A4)final0304.pdf

Nesheiwat, F. K. (2010). The adoption of intellectual property standards beyond trips -- Is it a misguided legal and economic obsession by developing countries?. *Loyola of Los Angeles International & Comparative Law Review*, *32*, 361-394. Retrieved from http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1012&context=ilr

Noel, W. WIPO, (1985). *Copyright problems raised by the access by handicapped persons to protected works* (B/EC/XXIV/10). Retrieved from WIPO website: http://www.wipo.int/mdocsarchives/B_EC_XXIV_85/B_EC_XXIV_10 _IGC 1971_VI_11_E.pdf

Office of the United States Trade Representative, (2000). *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the establishment of a free trade area*. Retrieved from website: http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text

Rausitiala, K. (2007). International rights approaches to intellectual property: Commentary. *U.C. Davis Law Review*, *40*(1021), Retrieved from http://0-www.lexisnexis.com.library.lausys.georgetown.edu/hottopics/lnacademic/?verb=sr&csi=12494

Rekas, A. (2011). *Tracking the progress of an international instrument for the print disabled at wipo*. Informally published manuscript, Centre for Disability Law and Policy, National University of Ireland, Galway, Ireland.

Ress, M. (2009, October 13). Re: Facilitating access to copyrighted works for visually impaired persons and draft treaty proposal. *Federal Register*,*74*(196), Retrieved from http://www.copyright.gov/docs/sccr/comments/2009/reply-2/22-manon-ress.pdf

Ruse-Kahn, H. G. (2009). Time for a paradigm shift? Exploring maximum standards in international intellectual property protection . *Trade, Law and Development*, *56*, 56-102. Retrieved from http://intertradelaw.hlu.edu.vn/files/DATABASE/Academic%20Materials/33_TLD-Henning%20Grosse%20Ruse-Khan-Time%20for%20a%20paradigm%20shift-2009.PDF

SCCR, (2009). *Proposal by Brazil, Ecuador and Paraguay, relating to limitations and exceptions: Treaty proposed by the World Blind Union (WBU)*(SCCR/18/5). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf

SCCR, (2011). *Proposal on an international instrument on limitations and exceptions for persons with print disabilities* (SCCR/22/15 REV. 1). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_15_rev.pdf

Scheinwald, A. (2012). Note: "Who could possibly be against a treaty for the blind?". *Fordham Intellectual Property, Media & Entertainment Law Journal*, *Winter*, Retrieved from http://iplj.net/blog/wp-content/uploads/2012/03/C06_Scheinwald.pdf

WIPO, (1961). *Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* . Retrieved http://www.wipo.int/treaties/en/ip/rome/summary_rome.html

WIPO, (1996). *Wipo Performances and Phonograms Treaty*. Retrieved from http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html

WIPO SCCR, (2004). *Proposal by Chile on the subject "exceptions and limitations to copyright and related rights"* (SCCR/12/3). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_12/sccr_12_3.pdf

WIPO SCCR, (2005). *Proposal by Chile on the analysis of expectations and limitations.* (SCCR/13/5). Retrieved from WIPO website: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf

WTO Secretariat, (2002). *Dispute settlement: Dispute ds160 United States — section 110(5) of US Copyright Act* (DISPUTE DS160). Retrieved from website: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm