

Centre for Disability Law and Policy NUI Galway

Tracking the Progress of an International Instrument for the Print Disabled at WIPO

Abigail Rekas, JD¹

Centre for Disability Law and Policy, NUI Galway

The Centre for Disability Law and Policy (CDLP) at the National University of Ireland Galway was formally established in 2008. The Centre's work is dedicated to producing research that informs national and international disability law reform. Since its establishment, the CDLP has organized a number of key events to provide a space to discuss disability reform, such events include: an International PhD Colloquium (2010), an international conference on national disability strategies (2010), a Summer School in conjunction with the Harvard Project on Disability (2011) and a national conference 'Active Citizenship and Disability' examining the transition to individualization of services and supports (2011). The Centre regularly runs seminars and public lectures and produces policy briefings. The CDLP runs a Ph.D program and a Masters (LL.M) in International and Comparative Disability Law and Policy.

¹ Abigail Rekas is a Ph.D. student at the Centre for Disability Law & Policy at NUI Galway, researching access to culture and print disability. She holds a JD from Northeastern University School of Law. The author would like to thank the CDLP, particularly Dr. Gerard Quinn, Dr. Eilionoir Flynn, Conor Newman and Roisin Fitzpatrick for their help and guidance in writing this paper.

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“In a word, literature is my Utopia. Here I am not disfranchised. No barrier of the sense shuts me out from the sweet, gracious discourse of my book-friends. They talk to me without embarrassment or awkwardness. The things I have learned and the things I have been taught seem of ridiculously little importance compared with their “large loves and heavenly charities.” – The Story of My Life by Helen Keller²

1. Introduction

Close your eyes. Picture your favorite bookstore. Do you see it? Can you see shelf after shelf filled with books? Hundreds of books, perhaps thousands. Now imagine the same bookstore, only missing 95% of those books. That 95% has been taken away without regard for your tastes or interests. Those remaining books, only 5%, are all of the books you will be able to read. The shelves look awfully barren don't they? That is the book famine experienced by those who are unable to read standard print format material.

The book famine affects more than just those who are blind or visually impaired. There is also the wide, often overlooked, community of people with print disabilities,³ disabilities like severe dyslexia or inability to physically manipulate a standard print book. “Print Disability” is a term first coined by George Kersher of the DAISY Consortium⁴ to describe any person who is unable to access print material in a standard format. It has become a catchall phrase with too many definitions to count, none of which are precisely the same. This inconsistency in definition results in members of the print disabled

² Helen Keller, *The Story of My Life*, 54 (1903) (Project Gutenberg E-text <http://www.gutenberg.org/ebooks/2397>).

³ For the purposes of this brief, the term print disabled will encompass any person who cannot access standard print text material, but who does not need substantive adaptation of the content of the work in order to access it. While there are any number of other disabilities affecting a person's ability to read and understand print material, this brief will only address visual impairment and print disability.

⁴ DAISY stands for Digital Accessible Information System. The DAISY Consortium is an international association that develops, maintains and promotes international DAISY standards. It was formed in 1996 by talking book libraries to lead the worldwide transition from analog to Digital Talking Books.

community being left out of legislation, and subsequently excluded from benefits intended for the print disabled community. Severe dyslexia can be just as prohibitive of reading print material as blindness can, but it is not as prominent a cause to the general public.

The World Health Organization estimates that there are 314 million blind or visually impaired persons (VIP) living in the world today.⁵ Added to this 314 million are the countless people with print disability.⁶ This number grows daily as life expectancy increases and more and more people are experiencing the difficulties presented by age related vision loss. All of these people will experience the book famine first hand.

It is a disturbing thought, isn't it? A frequently cited figure puts annual accessible book publishing at only about 5% of all books published. Picture your bookstore again. Instead of making 95% disappear, picture them behind a locked glass window. You can see them, you know they are there, but there is no chance you will get to read them. The key is also readily available, but held tantalizingly just out of reach. This is the case all over the world, where the universe of ideas has been locked away from the blind, VIP and print disabled community⁷ and the key, accessible formats for print material, is present and real, but out of reach.

Unfortunately, even 5% is a best-case scenario, available only in the wealthiest nations. 87% of the estimated 314 million blind and visually impaired persons live in the developing world.⁸ That is an estimated baseline of 273,180,000 people without appreciable access to the written word.

This brief will explain the foundations of the right to read, a concept that is not expressly stated in any international instrument, but a right which must be inferred from other

⁵ World Health Organization Fact Sheet (Jan. 31, 2011, 1:08 PM), <http://www.who.int/mediacentre/factsheets/fs282/en/>

⁶ The WHO does not issue statistics on print disability, or even simply dyslexia. The true number of people experience the book famine is unknown.

⁷ From here on, the term "print disabled" encompasses members of the blind, VIP and print disabled community.

⁸ WHO Fact Sheet, *supra*.

rights articulated by these documents. It will explain exactly what an “accessible format” is, and explain how they are made. It will give a basic understanding what copyright law is, describe how exceptions to copyright function, and give a simple explanation of the structure of international copyright law. The World Intellectual Property Organization (WIPO) is considering some kind of international instrument relating to access for the print disabled community. This process started with four proposals, and now is down to two. This brief will discuss each in turn. Lastly, this brief will look at the fears of the publishing community and the possibility of a market solution to the world book famine.

2. Right to Read

It is impossible to overstate the importance of literacy. Through the written word, past generations speak to the present, great ideas are expressed, language is learned, critical thought is developed, political movements rise and fall, the grand sweep of history and knowledge is encompassed. Not only this, but reading provides pleasure, a chance to step out of your own skin and see the world through the eyes of a boy wizard, or trade witticisms with Mr. Darcy⁹, or if one is particularly daring, to hop in a convertible with Raoul Duke and Dr. Gonzo to hit Vegas.¹⁰

The written word provides the foundations for the right to political involvement, the right to education and the right to access culture. These are fundamental human rights articulated first by the Universal Declaration of Human Rights¹¹ and reaffirmed again and again in various treaties and conventions, most recently by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).¹² Other fundamental rights also implicate the written word, like the right to freedom of expression and opinion and access to information, the right to participate in the political process and the right to employment (rights also guaranteed by the Convention on the Rights of Persons with

⁹ Jane Austin, *Pride & Prejudice* (1813) (Project Gutenberg, e-text ed. <http://www.gutenberg.org/ebooks/1342>).

¹⁰ Dr. Hunter S. Thompson, *Fear and Loathing in Las Vegas* (Kindle Edition, Vintage 2d ed. 2010)

¹¹ Universal Declaration of Human Rights, art. 26, 27, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III). (Dec. 10, 1948)

¹² Convention on the Rights of Persons with Disabilities, arts. 21, 24, 30, G.A. Res 61/106, U.N. Doc. A/RES/61/106. (Jan. 24, 2007) [UNCRPD]

Disabilities).¹³ Within the penumbra of all of these rights is an implied right to read, for none of them are fully possible without the ability to access the written word.

All state parties who have signed and ratified the UNCRPD have an obligation to address the global book famine. Not only is it a moral imperative, it is also a legal one. Article 4(1) of the UNCRPD obligates the state parties to undertake “(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present convention...” Article 9 requires member states to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others (...) to information and communications...” Not only must they legislate to make sure the printed work is accessible, they must also cooperate to promote the rights outlined in the UNCRPD! Article 32(1) requires that “State parties recognize the importance of international cooperation and its promotion in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among states and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.”

It should be mentioned, however, that the rights outlined in the UNCRPD, much like those in the Universal Declaration of Human Rights, and any other number of human rights treaties, are in tension, though not necessarily in conflict, with those outlined in the various intellectual property treaties. This is most obvious in cases relating to access to medicine, where patent rights compete with rights to health. This tension is the source of many heated academic debates, and there is no simple or easy solution. This is true in medicine and it is true when trying to address the book famine. Both sides of the issue have valid arguments. Encouraging and rewarding creativity and creating universal access do not have to be mutually exclusive ideas. When the debate centers around exceptions, rights holders and users have very different interests, and both have valid arguments, compromise is difficult. However, with collaborative effort between the

¹³ Id. Arts. 29, 27.

various stakeholders, and the rise of new, relatively inexpensive, digital technologies it may be possible to reach a solution acceptable to both sides of the issue.

3. **Accessible Formats**

Harper Lee once wrote: “Until I feared I would lose it, I never loved to read. One does not love breathing.”¹⁴ Reading is something the sighted and non-print disabled community takes for granted. When someone raves about this wonderful book they’ve just read, it is a relatively simple thing for a sighted person or a person without a print disability to find a copy for their own enjoyment. This is not so for those who need accessible versions of any book they want to read.

But what is an accessible format book? In the days of Helen Keller, accessible books were published in Braille, a system of raised dots in different patterns that represent letters. It takes a great deal of time, money and expertise to convert a text to Braille format; it is not just simple substitution of letters.¹⁵ Braille can be used for more than simple reading, it is extremely important in teaching complex math and science. Braille is still in use today, however, there are a number of print disabled people who have never learned, or are physically unable to read Braille.

The world of accessible publishing has radically changed since the advent of Braille. First was the advent of audio technology, and audio books on records, then tapes and then CDs. The digital revolution was a game changer in the world of accessible publishing. The horizons of accessible publishing broadened exponentially.

Screen readers, refreshable Braille and digital files have changed how the print disabled community consumes copyrighted material. Today, you can get books in many formats, including Braille, large print, audio, digital output for a refreshable Braille reader and

¹⁴ Harper Lee, *To Kill A Mockingbird* 18 (Grand Central Publishing) (1960)

¹⁵ For more information about Braille please see National Federation of the Blind (US) Website at http://www.nfb.org/nfb/Braille_media.asp?SnID=538790589.

Digital Accessible Information SYstem¹⁶ (DAISY) standard books. DAISY books represent an exciting movement in accessible technology. A DAISY book can range from a simple audio file to a full on navigable, highlight-able, audio, text and refreshable Braille file. DAISY has recently partnered with the International Digital Publishing Forum¹⁷ to help create EPUB 3,¹⁸ a digital publishing standard that incorporates DAISY accessibility into its files. These standards are still in development, but many companies publishing digital books have used previous EPUB standards to create their files.

Unfortunately, the wide range of ways to make print materials accessible is a double-edged sword. On the one hand, more options should mean more access. On the other hand, the definition of accessible format in legislation is often not flexible enough to encompass the new and evolving world of accessible formats. Without a broad and flexible definition for “accessible format,” their production can be severely curtailed and result in less access, not more. In countries that allow only the production of Braille format material, a whole class of persons, who have not had the opportunity to learn Braille, are excluded.

Accessible books are expensive to make and are generally published by non-profit organizations¹⁹ with limited funds that are, for the most part, working under an exception to copyright. There is some collaboration with publishers and the occasional licensing scheme, especially for textbooks, but this is not the norm. In the Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons, it is asserted that in “over 90% of cases they use copyright exceptions to produce accessible books.”²⁰

¹⁶ For more information on the DAISY standard, please visit <http://www.daisy.org/>

¹⁷ “The International Digital Publishing Forum is a global trade and standards setting organization dedicated to the development and promotion of electronic publishing and content consumption.” For more information please see the IDPF website at <http://idpf.org/about-us>.

¹⁸ For more information on EPUB 3 please see <http://idpf.org/epub/30>.

¹⁹ Including, but not limited to: Bookshare.org, the Royal National Institute of Blind People (RNIB), the National Library Service for the Blind and Physically Handicapped (U.S. Library of Congress), and the National Council for the Blind of Ireland.

²⁰ World Intellectual Prop. Org. [WIPO], Standing Comm. On Copyright and Related Rights [SCCR], Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind,

4. What is Copyright?

Copyright, *n.* (18c) **1.** The right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work. **2.** The body of law relating to such works.²¹

Copyright law is frequently spoken about in terms of balance. This balance is between encouraging and rewarding creativity and making the creative work widely available for public consumption. The purpose of copyright is more than just protecting the right of an author to benefit financially from their creation. It is about encouraging creativity without preventing the public from accessing the creative work. It provides a limited monopoly to the creator, monopoly to encourage creation but limited to allow the public to freely access at some point. There is no point in encouraging creative activity if the means to encourage it prevents its use, or the right to copy prohibits further creativity that builds upon what has come before.

While many nations have differing justifications for the protection of copyright, this notion of balance is accepted throughout the world.²² WIPO's homepage states that it is "a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property²³ (IP) system, which rewards creativity,

Visually Impaired and Other Reading Disabled Persons, 19th Sess., SCCR/19/13 (Dec. 14-18, 2009) [Background Paper].

²¹ Black's Law Dictionary (9th ed. 2009)

²² Although it should be noted that no one is exclusively a creator or exclusively a consumer, and the tension that arises is in practice slightly artificial, as was pointed out by Stevie Wonder at his address to WIPO on September 20, 2010. He pointed out that as a creator, he needs the income from his creations to "feed his kids," but as a blind consumer, he needs accessible books. The video of this address can be seen at: http://www.wipo.int/pressroom/en/articles/2010/article_0035.html.

²³ This brief only addresses copyright, for more information about intellectual property please see WIPO "About IP" <http://www.wipo.int/about-ip/en/>.

stimulates innovation and contributes to economic development while safeguarding the public interest.”²⁴

This balance is, in part, maintained through a system of limitations and exceptions to the exclusive right of the owner of the copyright. Limitations are the outer bounds of copyright protection, for instance, in the United States, copyright lasts the life of the author plus 70 years. Exceptions are situations in which copyright law does not apply in the same way, i.e. licensing fees may be limited or waived, authors may not have the right to prevent distribution in a certain format and so forth. This paper examines exceptions to copyright, since currently there is no proposed limitation to copyright to benefit the blind, VIP and print disabled at WIPO, and it seems unlikely that a limitation would be relevant to their needs. These exceptions create situations where the copyrighted work can be reproduced without knowledge or consent of the copyright owner. Exceptions differ from country to country as their “nature and scope... has been largely left to national policy makers to determine within broad permissive areas”,²⁵ but are frequently created for things like commentary or criticism, news reporting, academic research, teaching, archiving, and access for the print disabled community. These exceptions are what safeguard the public interest in access to knowledge and culture as embodied in the written word.

Copyright law is territorial in nature and each country has created its own laws and regulations regarding protection. This lack of harmonization in national copyright laws, and by extension copyright law exceptions, has made trade across borders in accessible format books difficult. Export and import of books produced through copyright exception is, at best, a legal grey area. There has been some regional transfer of hard copy Braille format and analog audio cassettes between nations, but that is the extent of any sharing

²⁴ WIPO “About WIPO,” http://www.wipo.int/about-wipo/en/what_is_wipo.html (last visited Feb. 13, 2010).

²⁵ WIPO, SCCR, Study on Copyright Limitations and Exceptions for the Visually Impaired, 12, 15th Sess., SCCR/15/17 (Sep. 11-13, 2006) [Sullivan Study].

between nations.²⁶ There is a “lack of clarity about what types of distribution of accessible copies are within the scope of many of the specific exceptions to copyright for the benefit of visually impaired people.”²⁷ Added to this are “other aspects of the scope of the exceptions... such as who may act under the exception, how to determine whether or not the requirements about the end beneficiary of the exception are met, whether requirements that a work must have been published are met, whether or not only copies made under the exception may be distributed in the country and whether the same type of accessible copies in both importing and exporting countries are permitted”²⁸ which complicate the issue even further.

It is nigh impossible to determine the legality of the export and import of books created under an exception. Publishers of accessible print material are hesitant to send books across borders because that action might subject them to civil or even criminal penalties. Every exception is only valid to the borders of the country created that exception to their national copyright regime. The minute that book crosses a border it becomes, at best, a grey market good.

This results in great redundancy in the publishing world. A great case in point is Harry Potter and the Chamber of Secrets,²⁹ an English language novel. Each individual English speaking country was forced to make their own digital master copy for Braille or Daisy at great cost, instead of a single English language master file that would be shared between all of the accessible publishing organizations. This means that “5 separate national Braille master files and 8 separate national Daisy audio master files” were made.³⁰ If the transfer of digital master files were easily accomplished, the resources for 4 of those Braille master files and 7 of those DAISY audio master files could have been put towards different titles.

²⁶ For instance, the National Council for the Blind in Ireland receives books from the Royal National Institute of Blind People in the United Kingdom and the Library of Congress in the United States. Telephone Interview with Lina Kouzi, NCIB (Dec. 20, 2010).

²⁷ Id. at 10.

²⁸ Id.

²⁹ J.K. Rowling, *Harry Potter and the Chamber of Secrets* (Scholastic Paperbacks, 1st ed. 2000)

³⁰ Background Paper, *Supra* at 2.

There are six treaties dealing with copyright internationally. They are:

1. The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);³¹
2. The International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organizations (the Rome Convention);³²
3. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (the Geneva Convention);³³
3. The WIPO Performances and Phonograms Treaty of 1996 (WPPT),³⁴
4. The WIPO Copyright Treaty of 1996 (WCT),³⁵ and
5. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁶.

These treaties establish some baseline protections that each member country must provide the intellectual property of other members.

None of these treaties establish any baseline exceptions or limitations. As the Sullivan Study points out, “Much of the development of the international framework for copyright protection has, however, concentrated on defining rights needed to secure the aim of encouraging and rewarding creativity.”³⁷ Exceptions are allowed as long as they comply with the three step test established by the Berne Convention. It is possible to find an incarnation of the three step test in every subsequent treaty relating to copyright. The three step test states that exceptions must only be in “certain special cases,” it must not “conflict with the normal exploitation of a work,” and must not “unreasonably prejudice

³¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221 (Berne Convention).

³² International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 (Rome Convention).

³³ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 866 U.N.T.S. 67 (Geneva Convention).

³⁴ WIPO Performances and Phonograms Treaty of 1996, Dec. 20, 2002, 2186 U.N.T.S. 121 (WPPT).

³⁵ WIPO Copyright Treaty of 1996, Dec. 20, 2002, 2186 U.N.T.S. 121 (WCT)

³⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (TRIPS).

³⁷ Sullivan Study, Supra at 12.

the legitimate interests of the author.”³⁸ Any future treaty or international instrument must comply with this three-step test.

The World Intellectual Property Organization (WIPO) administers all the Berne Convention, Rome Convention, WCT and WPPT. WIPO is an agency of the United Nations, established in 1967. There are 184 member states, including China, the EU, the United States and the Russian Federation,³⁹ and 250 accredited observers,⁴⁰ including the World Blind Union⁴¹ and International Federation of Library Associations.⁴² The Standing Committee on Copyright and Related Rights (SCCR) is the committee that debates and negotiates any new international instruments relating to copyright.

WIPO, along with the United Nations Educational, Scientific and Cultural Organization (UNESCO),⁴³ another organ of the United Nations, asked for comments on Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by Copyright in 1983.⁴⁴ These model laws were never implemented.

TRIPS is administered at the World Trade Organization,⁴⁵ and is primarily concerned with intellectual property in the context of trade. It has adopted much of the text of the Berne Convention, including the three step test for exceptions. The creation of the WTO in 1996 brought many more nations into the basic protections outlined by the Berne

³⁸ Berne Convention, Supra at art. 9(2)

³⁹ WIPO “Member States” <http://www.wipo.int/members/en/index.jsp> (Last visited Feb. 13, 2011).

⁴⁰ WIPO “List of Observers” http://www.wipo.int/members/en/organizations.jsp?type=NGO_INT (Last visited Feb. 13, 2011).

⁴¹ The World Blind Union (WBU) represents over 160 million blind and partially sighted persons in 190 different countries. For more information, please visit the WBU website at www.worldblindunion.org.

⁴² The International Federation of Library Associations and Institutions (IFLA) is an international body representing the interests of library and information services and their users. IFLA has been involved in lobbying for exceptions for blind, VIP and print disabled persons at WIPO. For more information on their lobby, please visit <http://www.ifla.org/en/lsn>.

⁴³ UNESCO works to create the conditions for dialogue among civilizations, cultures and peoples, based upon respect for commonly shared values. Their primary focus is on gender equality and Africa. For more information on UNESCO please visit: <http://www.unesco.org/new/en/unesco/about-us/who-we-are/introducing-unesco/>.

⁴⁴ UNESCO/WIPO/WGH Model Provisions Concerning the Access by Handicapped Persons to the Works protected by Copyright, UNESCO/WIPO/WGH/I/3, 5th Sess., (Dec. 12, 1983).

⁴⁵ For more information regarding the World Trade Organization, please see http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

convention. The WTO has teeth where WIPO does not. It has a permanent dispute settlement body that can authorize trade sanctions against any member state that does not live up to its obligations. However, WIPO has a great deal more expertise when it comes to copyright, and is a more appropriate forum for the negotiations relating to exceptions.

5. A Timeline of the Right to Read

While the international community has recognized that there is a problem in creating access to copyrighted material for quite some time (it has been twenty eight years since UNESCO and WIPO asked for comments on their model laws), there has been little movement addressing the problem. The Executive Committee of the Berne Union and the Sixth Ordinary Universal Copyright Convention worked together with UNESCO produced a study on Copyright Problems Raised by the Access by Handicapped Persons to Protected Works in 1985.⁴⁶ This work, while extremely thoughtful and thorough, did not increase access for the print disabled.

Access to copyrighted material was not considered a pressing issue until very recently. In 2003 and 2006, studies were published on general exceptions and limitations, one by Professor Sam Ricketson on exceptions in the digital environment,⁴⁷ and one by Nic Garnett on exceptions and automated rights management systems.⁴⁸ Both examine exceptions for the visually impaired in their respective subjects. These two studies are evidence that copyright exceptions for the print disabled were finally entering the international conversation in a serious way.

In 2004, the WBU, the DAISY Consortium and IFLA Libraries for the Blind Section published a joint policy position paper in which they committed to strive for “for the

⁴⁶ Copyright Problems Raised by the Access by Handicapped Persons to Protected Works, Annex II of IGC (1971)/VI/11 of March 12, 1985, distributed for the 24th Sess. (9th Extraordinary) of the Executive Committee of the Berne Union and the Sixth Ordinary Universal Copyright Convention. The report was prepared by the Secretariats with the help of Wanda M. Noel.

⁴⁷ WIPO, SCCR, Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 9th Sess., SCCR/9/7 (June 23-37, 2003).

⁴⁸ WIPO, SCCR, Study on Automated Rights Management Systems and Copyright Limitations and Exceptions, 14th Sess., SCCR/14/5 (May 1-5, 2006).

creation of international agreements which would allow the unhindered transfer of accessible material created in one country to blind, partially sighted and print disabled people in another country.”⁴⁹

In 2006, Judith Sullivan presented her Study on Copyright Limitations and Exceptions for the Visually Impaired at the 15th Session of the SCCR.⁵⁰ This study highlighted the fact that only “57 countries have been found that have specific provisions that would permit activity to assist visually impaired people unable to access the written word, or to assist people with a print disability more generally, by making a copyright work available to them in an accessible form.”⁵¹ The study also focused on the disharmony between all of these exceptions and the difficulty facing anyone who wished to import or export accessible material. She highlighted some problems and solutions within national copyright legislation that she thought might be useful on the international level. At the end of her study, she presented several suggestions about how the international community could address copyright problems to improve access.

Also in 2006, the text of the UNCRPD was adopted, and opened for signature the following year. The text of the UNCRPD reaffirmed explicitly in article 21, and impliedly in articles 24 and 30, the right to read for people with disability, including blindness, visual impairment and print disability. It entered into force, for the 98 states⁵² that have signed and ratified it, in 2008.

In July of 2008, WBU with Knowledge Ecology International (KEI)⁵³ sponsored a meeting to discuss the possibility of a treaty to improve access to copyrighted material. They also sponsored a side event at the 17th session of the SCCR on the right to read.

⁴⁹ WBU, DAISY Consortium, and IFLA Libraries for the Blind Joint Policy Position, 12 (April, 2004), available at <http://www.worldblindunion.org/en/our-work/position-statements/Pages/default.aspx>.

⁵⁰ Sullivan Study, *Supra*.

⁵¹ *Id.* at 9.

⁵² As of Feb. 17, 2011, for most up to date information about ratification, please see <http://www.un.org/disabilities/>.

⁵³ Knowledge Ecology International is a non-profit, NGO that looks at the management of knowledge resources in the context of social justice. For more information, please see <http://www.keionline.org>.

Their actions created enough of a buzz that the formal Conclusions of the meeting⁵⁴ promised a draft questionnaire about exceptions for the print disabled, as well as the creation of a stakeholder's platform at WIPO to facilitate access to copyrighted work. The first meeting of the stakeholder's platform, occurred on January 19 of 2009. Their stated objective was to "make published works available in accessible formats in a reasonable time frame; [with the] initial focus... on print-disabled persons."⁵⁵

In 2009, Brazil, Ecuador and Paraguay, later joined by Mexico, proposed a treaty written by the WBU⁵⁶ at the 18th session of the SCCR (the WBU Treaty). The African Group, EU and US each responded at the 20th session of the SCCR with alternative proposals. The African Group proposed a Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers⁵⁷ (the African Group Treaty). The EU proposed a Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability⁵⁸ (the Joint Recommendation). The United States proposed a Draft Consensus Instrument⁵⁹ (the Consensus Instrument). Each of these proposals has strengths and weaknesses.

November 2010 marked the launch of the TIGAR (Trusted Intermediary Global Accessible Resources Project), the brainchild of the WIPO Stakeholders' Platform. It also marked the 21st session of the SCCR at which no tangible process was made towards reconciling all of the different proposals towards a viable solution. There was, however, a commitment to a two-year work program on Exceptions and Limitations.⁶⁰

⁵⁴ WIPO, SCCR, 7th Sess., SCCR/17/WWW[112533], (Nov. 7, 1008).

⁵⁵ WIPO, SCCR, Stakeholders' Platform: Interim Report, 18th Sess. SCCR/18/4 (May 11, 2009). The progress and limitations of Vision IP will be discussed in further detail below.

⁵⁶ WIPO, SCCR, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), 18th Sess. SCCR/18/5 (May 25-29, 2009). The Proposed treaty text is included in Appendix A.

⁵⁷ WIPO, SCCR, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, 20th Sess. SCCR/20/11, (June 21-24, 2010). The proposed treaty text is included in Appendix B.

⁵⁸ WIPO, SCCR, Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability, 20th Sess. SCCR/20/12, (June 21-24, 2010). The proposed joint recommendation is included in Appendix C.

⁵⁹ WIPO, SCCR, Draft Consensus Instrument, 20th Sess. SCCR/20/10, (June 21-24, 2010). The proposed Consensus Instrument text is included in Appendix D.

⁶⁰ WIPO, SCCR, Conclusions, 21st Sess., SCCR/21/Conclusions (Nov. 8-12, 2010).

The WBU and other rights organizations pulled out of the TIGAR program and the EU level stakeholders group in the spring of 2011 citing that work at those levels was being used to justify stalling progress for a treaty.⁶¹ The 22nd session of the SCCR, met from June 15 to June 24, 2011 and made appreciable progress, narrowing the field proposals from 4 to 2. The US, the EU and a number of other countries collaborated to draft an international instrument, the legal nature of which has yet to be determined. This will be discussed more fully below. The African Group issued a revised version of their proposed treaty. Each of the proposed solutions will be examined in the following section, including the Stakeholders Platform, and its work.

6. Stakeholders' Platform, Vision IP and TIGAR

The WIPO Stakeholders' platform consisted of organizations representing the blind and VIP community, like the WBU, organizations representing the publishing industry, like the International Federation of Reproduction Rights Organisations (IFRRO) and the International Publishers Association (IPA), and library organizations, like IFLA.⁶² The purpose of the Stakeholders' Platform was to allow all sides to the problem to come together and collaborate in an effort to find the most effective way forward.

The idea was that each stakeholder could comment on initiatives in the intellectual property field, from exceptions to technology, that were aimed at increasing access to “information and cultural content by the blind, visually impaired and other reading-impaired persons.”⁶³ The comprehensive study of barriers and solutions from all fields relating to access could have enabled the Stakeholders' Platform to see solutions that would otherwise escape experts in the field. Added to this comprehensive understanding would be a thorough discussion of the competing values of access and copyright protection desired by the various stakeholders. As pointed out by the Sullivan Study,

⁶¹ Jamie Love, KEI Online Blogs (Feb. 27, 2011) <http://keionline.org/node/1082> (Last visited Oct. 25, 2011).

⁶² For a full list of partner organizations participating in Vision IP, please see <http://www.visionip.org/about/en/partners.html>.

⁶³ Vision IP Homepage, <http://www.visionip.org/portal/en/> (last visited Feb. 17, 2011).

“successful outcomes are more likely if an environment of trust and mutual understanding of everyone’s needs can be created. At the international level, it may therefore be appropriate for WIPO to facilitate discussions...”⁶⁴

One of the ways the Stakeholders’ Platform was trying to address the problem was through VisionIP.org,⁶⁵ the webpage of the Stakeholders’ Platform. It was designed to be a forum for everyone. Comments, suggestions and inputs were all welcomed, from every sector. This willingness to consider voices from everywhere was one of the great strengths of the Vision IP website. However, the forum was closed in 2010, and as the disability rights organizations have suspended participation in the Stakeholders’ Platform, this initiative appears to be dead in the water.

TIGAR was supposed to be the great experiment of the Stakeholders’ Platform. The goal was to make the publishing community feel comfortable sharing their master files with trusted intermediaries, who would then transfer those files in accessible format to users.

The term “Trusted Intermediary” has come up frequently in the international debate about access to copyright for print disabled users. The term comes from the Sullivan study, where the author talks about using trusted intermediaries in licensing schemes as an alternative to exceptions to facilitate international trade in accessible format print material. The theory is that it encourages rights holders to license their material, retaining control over the use, while preventing them from establishing a licensing scheme that would be more restrictive than the exception the accessible work would otherwise be produced under.⁶⁶ Since they would not be losing control over their work, as they do under an exception, they are incentivized to participate in the licensing program.

As a result of this licensing, each individual publisher of accessible formats would not have to create master files from scratch, expending great time and effort, the digital files

⁶⁴ Sullivan Study, Supra at 123.

⁶⁵ For more information on Vision IP, please visit <http://www.visionip.org>.

⁶⁶ Sullivan Study, Supra at 123.

would instead be provided to them. The trusted intermediary would make certain that the files were only going to legitimate or “bona fide” users, easing fears of piracy, and would have the expertise necessary to publish in accessible format.

The fact that publishers, in the past, have been slow to respond or not responsive at all to licensing requests from organizations publishing accessible formats does present a problem. However, collective licensing could streamline the process, providing a model contract and a simple, standard process that each publisher would become familiar with. Instead of multiple organizations approaching the rights holders, it would be a single organization, the trusted intermediary.

The TIGAR pilot program dealt not only with the concept of trusted intermediaries, it also featured a second initiative to establish a global accessible library. This library would make those works available to users in different countries, in perpetuity. A set of standard agreements for the transfer of files and rights have been written with input from all the stakeholders and the three year pilot program was launched in November of 2010.

TIGAR was envisaged as adopting a “multi-stream approach in order to provide early demonstrable results within the first year, and manage the risks involved... The focus of these streams is as follows.

- Stream 1: The sharing of files, and information about them, between TIs for new and existing titles, and establishing and testing agreements with rightholders and the infrastructure required to make this happen (i.e. Business to Business(B2B)).
- Stream 2: Enabling End users to search and download accessible content directly from TIs, and in due course commercial providers (i.e. Business to Customer (B2C)).
- Stream 3: The ongoing development of agreements, guidelines, best practices and sustainable operational business models.
- Stream 4: Assisting TIs, particularly those from developing countries, to become effective participants in the TI network.
- Stream 5: Development of a centralized ICT⁶⁷ Component supporting the successful implementation of the above-mentioned streams.”⁶⁸

⁶⁷ Information and Communication Technology

In the timeline laid out by the Stakeholders' Platform, the first transfer of copyright clearances would have happened in February of 2011. Unfortunately, one of the major producers of accessible format books, Organización Nacional de Ciegos Espanoles (ONCE) pulled out of TIGAR very early, reportedly due to the complexity of becoming a trusted intermediary under the TIGAR regulations. The bureaucratic process of becoming a trusted intermediary was considered to be prohibitive of the work TIGAR hoped to accomplish. While the publishers want to make sure that their property is as safe as possible, if the process to become a trusted intermediary is so complex that even a sophisticated organization in the developed world does not want to participate, it seems unlikely that organizations in the developing world will even be able to participate.

With the suspension of participation in this initiative by the WBU and others, it appears that it has permanently stalled.

7. Four Proposals at WIPO

A. Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union

The WBU treaty aims to establish a global baseline exception to copyright for access by print disabled persons. It is an attempt to essentially do for these users what the other copyright treaties do for rights holders; provide a minimum level of protection (access). The treaty was tabled by Brazil, Ecuador and Paraguay⁶⁹ as an example of “norm-setting activity in the field of exceptions and limitations.” The field of exceptions and limitations includes persons with disabilities, libraries and archives, educational activities and the fostering of technological innovation.⁷⁰ It is easy to understand why they presented this issue first, as it is easy to begin norm-setting with a group that

⁶⁸ WIPO, SCCR, Fourth Interim Report of the Stakeholders' Platform, 21st Sess. SCCR/21/10 (Nov. 8-12, 2010).

⁶⁹ Who were later joined by Mexico.

⁷⁰ WBU Treaty, Supra, Annex § 1.

everyone can agree needs better access to books and print works than it does presently. All sides of the issue agree on this fact. It is a good place to begin discussion of limitations and exceptions.

The purpose of the treaty proposed is “to provide the necessary minimum flexibilities in copyright laws that are needed to ensure full and equal access to information and communication for persons who are visually impaired or otherwise disabled in terms of reading copyrighted works, focusing in particular on measures that are needed to publish and distribute works in formats that are accessible for persons who are blind, have low vision, or have other disabilities in reading text...”⁷¹ This would do more than simply allow for the international exchange of accessible formats and master files, it would require member states that signed and ratified the treaty to introduce exceptions if they didn’t already have them, or expand them if they were less broad than those contained in the treaty. The motivation for this is the small number (57) of states that currently have exceptions. In countries where treaties are self-executing⁷² they would not even really need to legislate, it would just be adopted into the corpus of law for that state, and in states where treaties are not self-executing, they would have a model for their legislation.

The WBU treaty has a very flexible functional definition of the end beneficiary. It benefits anyone who is blind, or “has a visual impairment which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no visual impairment and so is unable to access any copyright work to substantially the same degree as a person without disability,” or to any person “with any other disability who, due to that disability, need[s] an accessible format.”⁷³ An accessible format is defined as “any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the

⁷¹ Id. art. 1.

⁷² A treaty is self-executing in nations that hold international law as part of the highest law of the land. In these nations, simply becoming a member of a treaty creates domestic law in compliance with the terms of the treaty. If a treaty is non self-executing, it requires that member nations undertake domestic legislation to come into line with the treaty.

⁷³ Id. art. 15.

work accessible to a visually impaired person.”⁷⁴ Both of these definitions are extremely inclusive, and would make all forms of accessible works available to the broadest range of users covered.

The import and export provisions are also extremely broad, allowing the producer of a work made accessible under copyright exception to send them to any organization or person worldwide, without employing trusted intermediaries, so long as the person or organization has lawful access to the work in their own country, and supply the work exclusively to print disabled persons on a non-profit basis.⁷⁵ This may alienate publishers, since their largest stated fear is that of piracy. Without some way to verify that end-users actually need these alternative formats, they fear that their property may be going to those who should not have it. The response to this is that exceptions already exist in some states without trusted intermediaries and piracy is not rampant within those communities.

The treaty also allows for member states to institute a “for profit entity” exception,⁷⁶ where the work is used in a non-profit manner. An example of this would be the Amazon Kindle text to speech software, which is provided free of charge on all books unless the publisher wishes otherwise. Amazon is a for-profit entity providing an accessible function (text to speech) on a non-profit basis (at no further profit for itself). The exception would pre-empt situations like that of Amazon, when the writers guild and publishing industry complained their audio rights were being violated, and asked Amazon to turn the feature off, a request Amazon complied with, even while maintaining that the text to speech function did not violate the audio rights of the rights

⁷⁴ Id. art. 4(a)(2).

⁷⁵ Id. art. 4(a).

⁷⁶ Id. art. 4(c).

holder.⁷⁷ This provision is the only article that member states are welcomed to make a reservation to.⁷⁸

The treaty does not require any sort of notification or remuneration if the work is being produced for non-profit, non-commercial use. When the rights holder is entitled to remuneration, it is not to exceed the reasonable commercial norm for a license for that work, taking into consideration that in developing countries there is a need to ensure that prices are low enough that the work still remains accessible. The price charged for a copy in a for-profit situation should be similar or lower than that of the work in a standard format in a developing country, and must be affordable in developing countries.⁷⁹ These provisions could pre-empt the formation of a market in accessible format print material. It is possible that if given notification, the possibility of remuneration, and a reasonable timeframe within which to respond if they should choose to license, the publishing community would have sufficient incentive to begin to establish a market. It seems that it would be useful to encourage collaboration in this matter, and that not notifying a rights holder of use when it is reasonably possible to do so may alienate more than encourage collaboration.

The right of print disabled persons to circumvent technological protection measures (including digital rights management systems) is enshrined in the WBU treaty. This would address situations where a digital work has technological protections that prevent its use with an accessible reader of some kind, and allows the user to legally circumvent those measures.⁸⁰ Of course, TPMs/DRMs are a double-edged sword. The same measures that can prevent access may also be useful for the publishers to create accessible formats that are designed specifically for accessible readers. Breaking these types of TPM/DRM would indeed be the piracy that the publishers fear.

⁷⁷ Publishers that disable this function are: Anchor, Ballantine Books, Bantam, Broadway, Crown, Doubleday, Dell, The Dial Press, Knopf Group eBooks, Random House, Three Rivers Press, Villard, and Vintage Publishing (non-exhaustive). For a partial list of titles that have had this function disabled, please see <http://spreadsheets.google.com/pub?key=rnTkXHh0qqDeYzh2HpaWFuw>.

⁷⁸ A reservation in international law basically means that the state has signed on to the agreement in its entirety with the exception of that provision.

⁷⁹ It should be noted that affordable is not defined, not who makes that determination.

⁸⁰ WBU Treaty, Supra art. 6.

The WBU Treaty legally pre-empts any contractual relationship that would limit the basic exceptions guaranteed by the treaty, it creates a baseline exception which all signatory states must comply with. This would prevent any right holder from trying to get around the provisions of the treaty.⁸¹ Of course, it also may prevent licensing schemes that would benefit both publishers and users.⁸² If these types of contractual relationships are in place, but have not yet come to fruition, there is nothing to stop other people, acting under the exception, from making their own copies and frustrating the purpose of the contract.

The WBU treaty also establishes a body that will monitor and modify or enhance the implementation of the treaty.⁸³ The treaty will also be monitored and implemented by WIPO, which is charged with soliciting contributions from members to finance studies about the implementation of the treaty.⁸⁴ It also suggests creating an international database of works so that finding the rights holder of any particular work would be streamlined. This is an excellent proposal, and would help any number of organizations who wish to publish accessible format works, even outside of those that benefit the print disabled. WIPO could maintain that database with the assistance of its member states.

There are a lot of positives about this treaty, and it is easy to see why it has garnered a great deal of support among the rights organizations and users it benefits. There are also some drawbacks. The first, truly, is the nature of a treaty. Treaties are entirely voluntary documents. Each treaty needs a certain number of states to sign and ratify before it can enter into force, and this number varies from treaty to treaty. While they are binding on those who sign AND ratify them, a state is not bound to sign a treaty under any circumstances.⁸⁵

⁸¹ Id. art. 7.

⁸² This question was asked of the proponents of the WBU treaty, and has not yet been answered.

⁸³ Id. art 17.

⁸⁴ Id. art 20.

⁸⁵ Except under the WTO umbrella, where new dimensions of the WTO treaties (including TRIPS) are adopted by reverse consensus (i.e. every party must say no in order for it not to bind every party of the WTO). However, this proposal is not at the WTO, and therefore the members of the Berne Union and other WIPO treaties are not obligated to sign.

This process takes a long time. KEI has a page entitled “How Much Time is Necessary to Negotiate the Text of a Multilateral Agreement on Intellectual Property,” which presents treaty negotiation as taking one to four years.⁸⁶ This is true, but it isn’t made clear that from treaty proposal to treaty text is not the same as from treaty proposal to the treaty entering into force, and much less than the treaty entering into force with a majority of nations. For instance, the 1996 WCT is mentioned as having taken one to two years. The WCT treaty only has 88 members, and is only in force for 79 of those members. The treaty text was adopted in 1996, and the treaty entered into force in 2002 with 37 members. Nine years later, it has less than half of the 184 WIPO member states involved.⁸⁷ It has been 16 years from its first inception to present. It is argued that while a country may not sign or ratify, their legislative process will at least take the treaty into consideration. This is true, and for example, the EU effectively implemented the WCT before ratifying it, but they are not bound to and many choose not to.

A number of WIPO members have commented that the provisions of this treaty are inconsistent with their national legislation, and that they could not ratify, even if they wished to. The Australian delegation points out “the proposed treaty in its current form is inconsistent in a number of areas with current Australian law and with international treaties to which Australia is a signatory. These inconsistencies would create very substantial difficulties for Australia if it decided to participate in such a treaty.”⁸⁸ The EU is also troubled with the idea that the treaty is inconsistent with EU law and international obligations. The language at the beginning of the WBU treaty does not help, Article 3(a) says “Contracting Parties agree that the provisions of this Treaty are consistent with obligations set out under those of the following treaties and conventions

⁸⁶ KEI Online, How Much Time is Necessary to Negotiate the Text of Multilateral Agreement on Intellectual Property, <http://keionline.org/node/861> (last visited Feb. 18, 2011).

⁸⁷ WIPO, Treaties Statistics, http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=16 (Last visited Feb. 18, 2011).

⁸⁸ Australian Copyright Council, Response to Attorney-General’s Department Stakeholder Consultation: World Blind Union Proposal for a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, November 2009 www.copyright.org.au/admin/cms.../11687345344c97fc1e013eb.pdf (last visited Feb. 18, 2011).

to which they are a party,” which is not the same as saying that the provisions are consistent.

It is clear that many of the major copyright producing states, including the United States, the EU, Canada and Australia are not going to sign this treaty, at least in its present form. This does not mean that a treaty will not be signed, but without those major copyright producing states, it is like an environmental treaty where the largest polluters will not sign. It just won't work without them.

C. Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (African Group)

The African Group Treaty, both the original and the revised version, incorporate very similar language to the WBU treaty, and as a result has many of the same limitations and problems. One difference is that it defines the end user more broadly and more inclusively, including intellectual disability and other disabilities not covered by any of the other proposed instruments. This is a reflection of the African Group's assertion that all exceptions and limitations should be addressed holistically, rather than singling out a specific group for benefit before any other. Their treaty is designed to benefit all disabled persons, not just the print disabled. It also addresses exceptions and limitations for Educational and Research Institutions and Libraries and Archive Centers. This holistic approach, while worthy morally,⁸⁹ is the downfall of the African Group Treaty. The African Group is trying to address the “public interest” (the justification for exceptions) in one fell swoop.

It will take much longer to negotiate the exceptions and limitations for all of those groups. The stakeholders' are a much broader community and there is no quick solution possible. It is possible that this treaty proposal, while gargantuan in scope is the most

⁸⁹ Access to knowledge, as was mentioned in section 2, is a universal right, and the African Group Treaty deals with access to knowledge for a multitude of populations, including those who live in poverty.

equitable way to address the problem of exceptions and limitations. It is artificial to place the rights of one group in front of the rights of another group, and the development agenda at WIPO requires that all of them be addressed. Unfortunately, the time it would take to address each of these issues and the different feelings the various stakeholders' may have about each exception and limitation would prohibit a quick resolution of any of them.

C. Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability (European Union)

The EU has tabled a proposal for a Joint Recommendation. A Joint Recommendation would not create a binding obligation on any party that signed it. A Joint Recommendation lacks the legal formalities of a treaty. Instead of the lengthy treaty process, it would be effective on signature. Another advantage is the ease with which a Joint Recommendation could be amended. Within the ever-changing world of intellectual property, and copyright in particular, the ability to quickly modify the provisions relating to exceptions for the print disabled is potentially crucial.

Since the Joint Recommendation does not bind as a treaty would, states that sign would need to implement it in their domestic legislation. The Joint Recommendation, as the EU has proposed it would be soft law, there would be political consequences for non-compliance, though perhaps not legal ones. If a case comes before an international court, the Joint Recommendation would be persuasive evidence in any interpretation of the legality of an exception, or trade in accessible print material.⁹⁰

The provisions of the EU Joint Recommendation are “predicated on the basis that every Member State should introduce in their national copyright law an exception... The exception should cover uses that are directly related to print disability to the extent

⁹⁰ For a more clear practical understanding of international law, I suggest Modern Treaty Law and Practice by Anthony Aust, (Cambridge University Press, 2000).

required by the specific print disability, and that are of a non-commercial nature.”⁹¹ They propose to create a network of trusted intermediaries, who would exchange accessible format works if there were no appropriate accessible format works were commercially available.

The definition of “Print Disability” is not nearly as broad as that in the WBU Treaty proposal, although it does specifically include dyslexia, which others do not. Print disability includes blindness, a visual impairment unable to be corrected, dyslexia, the inability to physically manipulate a book and physical inability to focus or move eyes to a sufficient degree to read standard print.⁹² This static definition of print disability may not cover all of those who need to use accessible formats.

The Joint Recommendation is predicated on a network of trusted intermediaries. There has been a great deal of criticism on the EU’s requirements for trusted intermediaries. To become a trusted intermediary, the organization must:

- Operate on a not-for-profit basis;
- Register the persons with a print disability they serve;
- Provide specialized services relating to training, education, or adaptive reading or information access needs of persons with a print disability;
- Maintain policies and procedures to establish the bona fide nature of persons with print disabilities they serve;
- Maintain policies and procedures to ensure full and complete compliance with copyright and data protection laws.⁹³

Every organization that wishes to be a trusted intermediary must comply with these standards, but these standards are vague. There is nothing written about who would make the judgment call as to whether the organization is in compliance with these standards. The EU is flexible and is not completely attached to this definition.⁹⁴

The Joint Recommendation requires notice be given to the rights holder when making a work under an exception, before the use of the work, to give the rights holder the right to

⁹¹ EU Joint Recommendation, *Supra*, Preface.

⁹² *Id.* art. 1.

⁹³ *Id.* art. 1(iv).

⁹⁴ Interview with Barbara Norcross, European Commission, (Feb. 15, 2011).

challenge the use.⁹⁵ This, if implemented by member states, would actually be a roll back in exceptions. Many countries currently have provisions that allow the making and distribution of accessible works without notice to rights holders. While it does make sense to provide notice, providing notice and waiting for an indeterminate amount of time to see if the rights holder is going to challenge for each individual work could be remarkably prohibitive to access. The problem of rights holders not responding to requests is not solved.

Without a system for dealing with notice and challenges to use, that could streamline that process, and that would allow for production of accessible works within a reasonable amount of time, the Joint Recommendation would actually decrease access. While Article 7 does “encourage the establishment of an online international catalogue listing accessible works,” this would not address the problem of notice and challenge.

Another aspect of the Joint Recommendation is the commitment to the promotion of enabling technology and the raising of awareness of the “challenges and opportunities regarding access to works for persons with a print disability amongst a range of stakeholders...” These forward-looking provisions are an important commitment to mainstreaming accessible publishing, which all parties agree is the ultimate goal.

The European Union has also created its own Stakeholders’ group. They published a Memorandum of Understanding (MoU)⁹⁶ to facilitate the trans-border transfer of accessible materials. This MoU represents the best work of all the stakeholders and is fuller and more robust than the Joint Recommendation proposed to WIPO. However the WBU and other organizations have suspended their participation in this as with the TIGAR and WIPO Stakeholders’ Platform.

⁹⁵ EU Joint Recommendation, supra art. 6.

⁹⁶ EU Stakeholders Dialogue Memorandum of Understand (MoU) on access to works by people with print disabilities, Dan Pescod (on behalf of the European Blind Union) and Alicia Wise (on behalf of the Federation of European Publishers), text available at http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#otherdocs (last visited Feb. 20, 2011).

One of the differences between the European MoU and the EU Joint Recommendation is greater flexibility in the requirements to become a trusted intermediary. Instead of static requirements, the stakeholders have allowed for the possibility of negotiation and dispute settlement procedures that are missing in the EU Joint Recommendation. Further, the MoU asks the rights holders to identify a representative body in each member state to liaise with the trusted intermediaries. This “single point of contact” will assist in the clearance of rights, and keep trusted intermediaries from having to chase the owners of rights to get licenses. On top of this, there is a commitment to helping publishers integrate accessible publishing methods into their normal course of business. This is a very pragmatic document, and could have created a very effective cross border trade program for accessible books. Unfortunately it is unlikely to be implemented until there has been more movement at WIPO.

D. Draft Consensus Instrument (United States)

A Consensus Instrument is a joint recommendation by another name. However, the United States (US) has taken a different approach to the interpretation of the legal effect of a joint recommendation. The US delegation argues that the Consensus instrument would be binding upon the members automatically as an interpretation of the Berne Convention’s three step test. This assertion is novel, and may or may not be correct. If it were found to be binding, the effects of the Consensus Instrument would be felt very quickly, particularly in countries where treaties are seen as self-executing and the official interpretation of Berne would now include provisions on import and export of accessible format works.

The Consensus Instrument is the shortest of the four initial proposals; it only addresses the import and export of accessible format works. The US justification for this is its belief that the best way to address the book famine is through a two step process, first with a stop gap measure (the Consensus Instrument) to increase access as soon as possible, and a second, dealing with national exceptions for persons with print disability, that will take longer to negotiate.

The Consensus instrument would allow Braille copies of work to be distributed worldwide without a trusted intermediary, so long as they were produced under a valid exception in the country of origin. Other formats would go through a trusted intermediary, but again would only need to be legally produced in the country of origin, without regard to whether there was an exception in the destination country, and they were distributed solely for the benefit of the print disabled.⁹⁷

The requirements for trusted intermediaries are less stringent than those imposed by the EU, though they must still be a “governmental agency or a non-profit entity with legal personality that has as a primary mission to assist persons with print disabilities by providing them with services relating to education, training, adaptive reading or information access.”⁹⁸ This primary mission requirement is not flexible, and could exclude agencies with a broader mission (for instance those whose primary mission is to assist all people with disabilities, not just print disabilities). Another issue not addressed is how these trusted intermediaries will be monitored and approved, although it has been said that initially, this will be up to each individual nation. It is also unclear whether there will be assistance for developing nations that might not have the resources or ability to set up a trusted intermediary for their country.

There has been criticism from James Love of KEI that the Consensus Instrument is really an effort by the publishing industry to end work on a treaty. He feels that by giving the print disabled community a few bread crumbs, the political will to find a solution for the book famine will fade. He compares the US proposal to the 1971 Berne Amendment negotiations on compulsory licenses and the 2003 changes to TRIPS that allowed for compulsory licensing for medications, where the process involved is so arduous that those wishing to take advantage of them are effectively blocked from doing so.⁹⁹

⁹⁷ Consensus Instrument, Supra art. 2.

⁹⁸ Id. art 1.

⁹⁹ Costs and Benefits of the US Proposal to WIPO SCCR on Copyright Exceptions for Disabilities, KEI Online, <http://keionline.org/node/856> (last visited Feb. 20, 2011).

This does not seem to be a valid criticism of the US proposal unless there is a substantial subsequent document detailing procedure. Yes, the US proposes having trusted intermediaries that verify the status of the people they serve, but it does not establish a lengthy bureaucratic process, in fact, it says practically nothing of how trusted intermediaries are going to be certified, and it does not require the country receiving them to even have an exception.

The US Consensus Instrument will not fix the problem, but the delegation has asserted that they are committed to continuing the work to find a solution, even after their proposal is adopted, as they acknowledge that it is not a full solution. This has encouraged a number of critics to adopt a “yes, and” attitude, that the Consensus Instrument may be a solid first step towards ending the book famine. Others doubt the United States commitment to solving the book famine, and view this as an underhanded attempt so they can say they have attempted to do something about the problem, and then move on to other matters.

8. Towards Consensus

SCCR 22 marked significant forward progress on an international instrument to create greater access to copyright materials for person with print disabilities. 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 create a unified text, essentially merging three of the four proposals discussed above. The African Group remains firm in its belief that all exceptions and limitations must be discussed at the same time.

The unified text, entitled *Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities*,¹⁰⁰ combines elements from each of those three proposed instruments. It is much less comprehensive in its scope than the WBU

¹⁰⁰ WIPO, SCCR, Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities, 22nd Sess. SCCR/22/15 Rev. 1 (June 15-24, 2011).

Treaty proposal, but provides more flexibility than the EU Joint Recommendation and is a little more robust than the United States Consensus Instrument. The language in the currently available draft of this proposal is not set in stone, as negotiations continue. For a brief while after the conclusion of SCCR 22 there was a more formal draft posted on the WIPO website, document SCCR/22/16 prov. 1,¹⁰¹ but it has been since removed. Due to this, the text of SCCR/22/15 REV 1 is examined below.

Document SCCR/22/15 REV 1. is obviously a collaborative work in process. Some of the Articles contained in it are vague and need to be more clearly drafted in order to provide a real international framework. Article C provides that all contracting parties “should/shall provide in their national copyright law for an exception or limitation to the right of reproduction, the right of distribution and the right of making available to the public, as defined in Article 8 of the WCT, for beneficiary person as defined herein.”¹⁰² It very explicitly requires that all national legislation must be in line with the 3-step test contained in the Berne Convention, but makes it optional whether they adopt proposed minimum standards in Article C (2) or just make an exception in line with the Berne Convention. This is an odd drafting choice, since setting a harmonized base level of exception has been the goal of the WBU and its supporting countries all along.

Article D deals with the exchange of accessible books made under an exception between contracting states. This essentially states that if the beneficiary person would have legal access to the accessible book in their country of origin, they may be sent that accessible book from another member state, even where the country of origin has no formal structure for verifying the bona fide nature of the beneficiary person. This addresses the problem faced by the global South, where lack of infrastructure could have been prohibitive of cross border trade.

¹⁰¹ A scanned version of SCCR/22/16 prov. 1 is available on the IP Watch website here <http://www.ip-watch.org/weblog/2011/06/23/wipo-members-advance-draft-texts-on-copyright-exceptions-av-protection/>.

¹⁰² *Id* Article C(1). *NB Throughout the text of this document, words that have not been agreed upon are listed as both.*

The only non-private citizens who are allowed to make use of these exceptions are “authorized entities,” which is essentially a trusted intermediary by another name. The definition requires that the authorized entity “has the trust of both rights holders and persons with print disabilities.”¹⁰³ However the complex registration process the EU was pushing for has been abandoned for the more flexible requirements of non-profit status and having as one of its primary missions to provide access to print material for persons with print disabilities. The document also allows member states to limit the importation exception to works that are not available at a reasonable time for a reasonable price in the importing country.

SCCR/22/15 REV 1 also requires that TPM/DRM that protects books must not create an unreasonable barrier for beneficiary persons. This includes a right to circumvent these measures to render a protected work accessible.¹⁰⁴ This provision is one that publishing interest groups will be interested in pushing back against. Much of the debate in intellectual property law revolves around protecting intellectual property in the digital age, and a lot of time and legislation has gone into strengthening and enforcing protective measures for content. Rights holders fear losing control over their property and the inevitable piracy that accompanies digital content. A mandatory acceptance of circumvention technology will certainly put them on the defensive.

Unfortunately, WIPO pulled down the most up-to-date draft of this proposal, SCCR/22/16. These provisions may not make it into the final text, or may be so worded that they do not have the same meaning. The SCCR will meet again in November of 2011 to discuss it further. Even if they do agree to a final text at that meeting, it is unlikely they will resolve the issue of what type of international instrument this will be. The US and EU are still pushing for a soft law solution. The WBU still wants a treaty. The Africa Group still feels this isn’t the correct way to address the issue of exceptions and limitations. This document is forward movement, but there still remains a great deal to negotiate.

¹⁰³ *Id* Article A.

¹⁰⁴ *Id* Article F.

9. A Market Solution?

Judith Sullivan wrote in her 2007 study presented to WIPO “Collaboration between all stakeholders can help ensure that technology improves access to the written word for visually impaired people, and WIPO could help facilitate and encourage such activity as well as help to raise awareness amongst all stakeholders about the issues covered by the Study. *The ideal is for accessibility to be built into the ordinary publishing process.*”¹⁰⁵

This ideal is within reach. While it may never be cost effective for books to be published in Braille format; the rise of digital technology makes accessibility for every book published a real possibility. Most publishers are putting out e-book editions of new books with the rise in popularity of e-book readers, like the Amazon Kindle, the Apple iPad and others. Further, projects like Google Books and Project Gutenberg are digitizing other types of books for general consumption. It does not seem like such a large leap that these companies and non-profits could begin using the EPUB 3 standards when they are released, which would allow for use by DAISY readers, or other accessible software programs. There is even the possibility of mobile phones containing accessible reader software for the developing world.

While exceptions may be necessary, especially in developing nations and for Braille hard copy books, the horizon holds a market (a fairly significant market based on the WHO statistics) for publishers to sell their accessibly formatted books. Publishers actually want people to be able to access their books, and the idea of increasing market share probably excites them. The rise of digital technology in publishing is very recent and it will take a while for publishing to catch up with that technology. Until then, exceptions provide as much access as possible for the print disabled, but it is very important that fully accessible publishing as a norm is encouraged and supported. Exceptions will never be able to give full accessibility. There are simply too many books published each year for each individual book to be transcribed into an accessible format, even with cross border transfer. The publishers themselves must take the initiative and publish in a format that

¹⁰⁵ Sullivan Study, Supra at 11 (emphasis added).

can be accessed by the print disabled. The member states of the UNCPRD are obligated to help them in this, by encouraging the necessary innovation in technology.¹⁰⁶

10. Conclusions

It is easy to see that everyone agrees that the print disabled deserve to read. Not only is the right to read enshrined in international law, it is also a gut feeling everyone must have when confronted with the book famine. Everyone deserves access to knowledge and culture. It is impossible to imagine life without access to those twin rights and all of the joys that flow from them. No one should be without.

This is an issue that evokes strong emotions. There is bitter acrimony between the proponents of the various solutions, with one blogger even accusing Kenya of “not caring about blind people” because they did not support the WBU treaty.¹⁰⁷ It is easy to see why there is so much tension. Publishing is in a state of flux, and it is a frightening time for that industry, with the music and film industries greatly affected by piracy and changing modes of consumption. This fear colors their opposition to the WBU treaty and other proposed solutions. It is easy to point out that if someone wants to pirate a book, they are not going to wait for an exception to do so. The print disabled community and its advocates rightly point out that there are exceptions in place in 57 countries and this has been true for quite some time without negative effect to the market. This does not assuage the publisher’s fears. Simply because a fear is not entirely reasonable does not mean it should not be taken seriously and addressed.

The proposed trusted intermediary system may help publishers rise above their fear, and perhaps encourage them to take steps towards increasing accessibility in their publishing process. However, if totally reliant on licensing, exceptions are useless, due to slow or no response on the part of the publishers. There must be balance between these two extremes, one with licensing requirements and the other without any sort of notification

¹⁰⁶ UNCPRD art. 4(g).

¹⁰⁷ Notes and US Statement at WIPO SCCR 19 (December 14-18, 2009), KEI Online, <http://www.keionline.org/node/724>, (last visited Feb. 21, 2011).

or trust building between the stakeholders. The EU MoU and US Consensus Instrument may be useful tools in this navigation.

This is a hard subject, without an easy solution. It is unlikely any party will be completely happy with whatever comes from all of these negotiations, and the acrimony between these parties makes it even more difficult to negotiate a solution that everyone can live with. However, the strength of international debate and public support for finding a solution is at a historical high, and it is clear that this issue is not going away without some resolution. The form of the ultimate solution remains indistinct; it is waiting to be shaped through international cooperation and support. There must be immediate action to address the book famine, and a long-term solution facilitating a market and ensuring access in the developing world.

Exceptions must be encouraged in national domestic legislation. There is nothing to prevent them; they are explicitly allowed for in the Berne Convention, as well as TRIPS. It may be that a global treaty establishing minimums for exceptions would not really facilitate much more accessible publishing. There are already exceptions in many of the world's biggest copyright producing nations, and still, accessible publishing is limited to 5% at most. Yes, there is duplication of effort, but even without it, accessible publishing would still only take care of a fraction of the books published in a country in any given year. Cooperation between publishers and groups creating accessible copies is the necessary way forward.

To become involved in this debate, or for further reading, please visit any of the organizations listed in the Appendix.

Appendix

1. International Bodies:

World Intellectual Property Organization
<http://www.wipo.int/portal/index.html.en>

Vision IP: WIPO Stakeholders Website
<http://www.visionip.org/portal/en/index.html>

World Trade Organization: TRIPS Portal
http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

2. Regional & National Bodies:

European Commission
http://ec.europa.eu/index_en.htm

US Copyright Office
<http://www.copyright.gov/>

3. For a directory of National Copyright Offices:

<http://www.wipo.int/directory/en/urls.jsp>

4. For More information on Irish Copyright

Copyright Act of 2000
www.oireachtas.ie/documents/bills28/acts/2000/a2800.pdf

5. Print Disability Advocacy Groups

World Blind Union
<http://www.worldblindunion.org/en/Pages/default.aspx>

European Blind Union
<http://www.euroblind.org/>

National Council for the Blind, Ireland
<http://www.ncbi.ie/>

Royal National Institute of Blind People
<http://www.rnib.org.uk/Pages/Home.aspx>

The Daisy Consortium
<http://www.daisy.org/>

International Council for Education of People with Visual Impairment
<http://www.icevi.org/>

International Federation of Library Associations and Institutions – Libraries
Serving Persons with Print Disabilities Section
<http://www.ifla.org/en/lpd>

- International Directory of Libraries for the Blind
<http://ifla.jsrpd.jp/>

Bookshare
<http://www.bookshare.org/>

Sightsavers
<http://www.sightsavers.org/>

Knowledge Ecology International: Right to Read
<http://keionline.org/r2r>

6. Rights Holder Advocacy Groups

Federation of European Publishers
<http://www.fep-fee.be/>

International Association of Scientific, Technical and Medical Publishers
<http://www.stm-assoc.org/>

International Federation of Reproduction Rights Organizations
<http://www.ifrro.org/>

International Publishers Association
<http://www.internationalpublishers.org/>

European Writers Congresses
<http://www.european-writers-congress.org/>