



FACULTY OF LAW

Lund University

Lida Ayoubi

Human Rights Perspectives on-Access  
of the Blind, Visually Impaired and  
Other Reading Disabled Persons to  
Copyrighted Materials

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Dr. Anna Maria Andersen Nawrot

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# Summary

The present thesis deals with the unsatisfactory access of the blind and visually impaired persons to accessible copyrighted materials as part of the clash of human rights and intellectual property rights. Therefore, numerous human rights of these groups of people affected by the lack of access to copyrighted works are studied. Finally, the World Intellectual Property Organisation Draft Treaty for Improved Access for the Blind, Visually Impaired and Other Reading Disabled Persons to Copyrighted Materials and its contribution to the idea of a human rights framework for intellectual property is investigated. The thesis finds the Draft Treaty a useful tool in realization of a better access for the visually impaired community, as well as in creation of a human rights framework for intellectual property rights as a hybrid solution to the aforementioned clash of these two areas of law.

Keyword: Right to read, WIPO Draft Treaty, Human rights framework for intellectual property, Copyright

# Preface

Thanks to many people, this Master Thesis is written as the result of my interest in the chosen topic and appreciation for the efforts of the visually challenged community intended for equality:

Firstly, I would like to thank my family, especially my parents whose love and support always reached me even from far distance;

The second word of thanks, undoubtedly, goes to my supervisor Dr. Anna Maria Nawrot who inspired, guided and helped me in ways beyond her formal duty;

Moreover, this Thesis owes many of its parts to the possibilities that the Raoul Wallenberg Institute and the WIPO Culture and Creative Industries Sector provided for my research and I would like to specifically thank Mrs. Lena Olsson and Ms. Gao Hang for their helpful hand;

Last but not least, I am grateful to my fellow classmates and friends who cheered me up in hard times and gave me the confidence and strength I needed to finalize this work.

# Abbreviations

A2K	Access to Knowledge
BEP	Brazil, Ecuador, Paraguay
CD	Compact Disc
CESCR	Committee on Economic, Social and Cultural Rights
CRPD	Convention on the Rights of Persons with Disabilities
DAISY	Digital Accessible Information System
EU	European Union
GRULAC	Group of Latin America and Caribbean Countries
HRs	Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IP(Rs)	Intellectual Property (Rights)
KEI	Knowledge Ecology International
L&Es	Limitations and Exceptions
NGOs	Non-Governmental Organisations
SCCR	Standing Committee on Copyright and Related Rights
TRIPS A	Trade-Related Aspects of Intellectual Property Agreement
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Economic, Social and Cultural Organisation
VIPs	Visually Impaired Persons
WBU	World Blind Union
WIPO	World Intellectual Property Organisation

# INTRODUCTION

## 1.1 Overview

Throughout the world, less than five percent of the books published annually are available to the blind and visually impaired persons. More sadly, books are not the only thing that those with visual problems challenging their reading are deprived from enjoying in accessible formats such as Braille, audio, and large print. To reproduce works under copyright protection the blind and visually impaired persons need to seek a permit from the copyright holder and undertake the considerably high expenses for such procedure.

These conditions best described as ‘Book Famine’ or ‘Knowledge Famine’ is due to the lack of harmonization in existence of L&Es to copyright, which makes reproduction of copyrighted works possible as well as in the import/export regulations for the exchange of already available resources among countries.

The current situation is discriminatory, thus, in contrast with many human rights of visually impaired persons and asks for prompt measures from the side of the States. Moreover, development of the new technologies and internet facilitating the process for VIPs together and the emergence of Access to Knowledge Movement highlighting the concerns of the blind community shed more light on this issue. Therefore, to equalize the opportunities for VIPs in 2009 the Draft Treaty for Improved Access for the Blind, Visually Impaired and Other Reading Disabled Persons to Copyrighted Materials was proposed to WIPO and has been negotiated since then.

The present research deals with the inadequate and unsatisfactory access of the blind and visually impaired people to copyrighted material under the more general discussion of the clash of human rights and intellectual property. The main questions posed, therefore, are related to a



suitable framework for better access and consequently respect and enforcement of VIPs' human rights, and how the WIPO Draft Treaty matters for such a goal.

## **1.2 Outline**

Following this introductory chapter is Chapter 2 aimed at providing a historical and social insight to the topic and different factors that have an effect on it. The normative and legal basis of the discussion, which will be later used for analysing the originality as well as contribution of the Draft Treaty, is identified in Chapter 3. Chapter 4 applies the norms discussed earlier to the Draft Treaty.

## **1.3 Methodology**

As far as the research is dealing with theories on the interaction of human rights and intellectual property, the main source of reference are the legal and other scholarly publications such as books and articles. A handful of international human rights instruments are covered for the normative part of the discussion. Moreover, in order to apply them to the present case different statements, reports, declarations and comments from various international bodies are considered. Online resources such as the information on the WIPO's and various NGOs' website are referred to due to the novel and ongoing nature of the topic. In commenting on the Draft Treaty, some views are expressed based on an open interpretation of statements obtained from a number of experts involved with the Treaty with prior permission.

## **1.4 Delimitation**

Although the blind and visually impaired persons are not the only victims of discriminatory access to copyrighted works, the present research leaves out other forms of disability because the aforementioned groups form the biggest part of disabled people whose disability challenges reading ordinary version of copyrighted works. Moreover, the national legislations are left

untouched since the main problem is rooted and shall be addressed in the international level.

# HUMAN RIGHTS, COPYRIGHT AND VISUALLY IMPAIRED PERSONS: SETTING THE STAGE

*It is more difficult to teach ignorant to think than to teach  
an intelligent blind man to see the grandeur of Niagara.  
'Helen Keller'*<sup>1</sup>

## 2.1 The Relationship between Human Rights and Intellectual Property Rights

For many years since the formation of human rights and intellectual property rights, no one was exploring the clash, if any connection at all, of these two set of laws. While the international community was concerned with guaranteeing the human beings dignity and well-being by the means of human rights treaties “intellectual property” Helfer writes “has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows.”<sup>2</sup>

This inattention can be due to fact that at least in their facade and from a dogmatic point of view they are highly dissimilar and separate, one belonging to the area of public international law and the other mainly bears the characteristics of a private law member. However, “the respective terrains of both human rights and intellectual property regimes have grown

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<sup>1</sup> H. A. Keller, *The World I Live In*, edited and with an introduction by Roger Shattuck, (New York Review Books, New York, 2003) p. 56.

<sup>2</sup> L. R. Helfer, ‘Toward a Human Rights Framework for Intellectual Property’, 40 *U.C. Davis Law Rev.* (2007) p. 975.

significantly and the intersections between them have expanded. These intersections are evolving rapidly, requiring a new conceptual cartography to help map the changing landscape.”<sup>3</sup> These two strangers nowadays can be called as ‘increasingly intimate bedfellows’<sup>4</sup>.

Since the emergence of intellectual property rights and in course of their development, there has been a constant growth of their scope and offered length of protection. As a result, “the last decade has seen a dramatic expansion of intellectual property protection standards, both in their subject matter and in scope of the economic interest they protect.”<sup>5</sup> Many scholars, among which namely Yochai Benkler and James Boyle, have analogized this shift to a new ‘enclosure movement’ similar to what happened in England at the time of enclosure of common fields.<sup>6</sup> The incentive behind the mentioned enclosure was the idea of ‘privatization’, which according to Maskus and Reichman forms the characteristics of neo-liberalism, together with ‘deregulation and the elimination of the concept of public good’.<sup>7</sup> Taking account of the evolution of intellectual property law to its current position, Willem Grosheide suggests that the move toward neo-liberalism “fitted very well into the indicated turn towards the granting of new intellectual property rights, as advocated by policymakers and academics.”<sup>8</sup>

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<sup>3</sup> L. R. Helfer & G. W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, United States, 2011) p. xii.

<sup>4</sup> L. R. Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence?’, 5 *Minnesota Journal of Law, Science & Technology* (2003) p. 47.

<sup>5</sup> Helfer, *supra* note 2, p. 973.

<sup>6</sup> See for more on ‘enclosure movement’ J. Boyle, ‘The Second Enclosure Movement and The Construction of Public Domain’, 66 *Law & Contemp. Probs.* (2003) p. 33 and Y. Benkler, ‘Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain’, 74 *N.Y.U. L. Rev.* (1999) p.345.

<sup>7</sup> See K. E. Maskus and J. H. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, (Cambridge University Press, UK, 2005).

<sup>8</sup> W. Grosheide (ed.), *Intellectual Property and Human Rights: A Paradox*, (Edward Elgar Publishing Ltd., UK, 2010) p. 10.

The intellectual property rights are *exclusive rights* granted to intellectual creations, which lead to the monopolies justified by logics such as remuneration of creator, providing incentive for further innovation and safeguarding the connection between the author and his or her creation as a moral interest. Within this logic, “little thought is given to the idea of general public that transcends the interests of any given individual.”<sup>9</sup> Moreover, “this artificially created scarcity is in many ways inappropriate for knowledge-based assets, since they do not deplete when shared.”<sup>10</sup>

Therefore the main clash of human rights and intellectual property in general and copyright in particular manifest itself in the inconsistencies between the moral and material interests of the author being the owner of the copyright and the benefits of members of public as they claim their rights in enjoying the results of cultural, literary and scientific progress of the society as a whole.

When it came to addressing the relationship between human rights and intellectual property rights, two main standpoints on their interaction belong to either the ‘conflict or coexistence’ approach.<sup>11</sup> Among those who explore the interaction of human rights and intellectual property rights the advocates of coexistence approach believe that there is a possibility of tension, however firstly, both the intellectual property law system and human rights law follow the same objectives, and secondly, the current intellectual property law as it is offers the possibility to regulate intellectual property rights in a manner that would be compatible with human rights requirements by the use of balancing and taking benefit from the built-in flexibilities in intellectual property law system which makes it possible to

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<sup>9</sup> D. J. Halbert, *Resisting Intellectual Property*, (Routledge, UK, 2005) p. 14.

<sup>10</sup> P. Drahos and R. Mayne (eds.), *Global Intellectual Property Rights, Knowledge, Access and Development*, (Palgrave Macmillan, New York, 2002) p. 224.

<sup>11</sup> See for a detailed discussion on these two approaches Helfer, *supra* note 4.

“adjust IP systems so that they are consistent with the human rights obligations”.<sup>12</sup>

## 2.1.1 Balancing Public and Private Interests

As the intellectual property rights continue to develop, the question of their clash with human rights in the sense of inconsistency between protection of moral and material interests of authors recognized in international human rights instruments such as Universal Declaration of Human Rights<sup>13</sup> and International Covenant on Economic, Social and Cultural Rights<sup>14</sup> on one hand, and safeguarding the public’s right to access and benefit those works on the other is addressed and discussed in different fora which leads to interpretations of existing law in both regimes of human rights and intellectual property rights and adoption of resolutions, declarations and hard law in this field.

All the discussions by those supporting the coexistence of human rights and intellectual property rights meet in one common point and that is the need to balance these two areas of law with ‘actual’ or ‘potential’ conflict regarding the interests they safeguard. There is a consent on the fact that supervision should be applied to the scope and duration of the copyright protection for it to be compatible with the interests of the public, but the main difficulty remains in reaching the agreement on where to draw the line.

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<sup>12</sup> The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, report to the ESCOR Sub-Commission on the Promotion and Protection of Human Rights 52<sup>nd</sup> session, UN Doc. E/CN.4/Sub.2/2001/12, pp. 11.

<sup>13</sup> Article 27 (2) of UDHR states that, “[e]veryone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.” United Nations, *A Compilation of International Instruments*, (United Nations Publication, New York, 1988) p. 6.

<sup>14</sup> Article 15.1 (c) of ICESCR using the wording of UDHR states that, “[t]he States Parties to the present Covenant recognize the right of everyone: To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” United Nations, *Ibid.*, p. 14.

When studying the drafting history of ICESCR and especially its article 15 (1) (c) one can get a idea of the incentives and arguments for the inclusion of such provisions at the time, however, as Maria Green points out “[t]he distinguished men and women who gave us the ICESCR did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property. When the question was raised, they tended to dismiss it almost out of hand.”<sup>15</sup> This contributed to the situation as it is now and the inconsistencies between paragraphs of article 15 “has raised serious concerns among the poor, the vulnerable, the abused, the powerless, and the indigenous- all of whom are in great need of human rights protection.”<sup>16</sup>

It is here that the necessity to balance difference interests shows its significance. “It is especially important to ensure such a balance since IPRs are generally exploited not by authors or inventors, whose creativity they are supposed to reward, but by large information-based corporations.”<sup>17</sup>

There are different ways improvised in order to strike this balance and safeguard the public interests from the absolute and unconditional ruling of IP monopolies. First and foremost, the terms of IPRs protection is limited which means that they are not perpetual and after some time all the works fall under the category of public domain.<sup>18</sup> Moreover, one of the main mechanisms improvised to keep this balance regarding copyright protection is existence of limitations and exceptions to copyrights. Limitations and exceptions are the main attempts taken to balance the mentioned inconsistencies.

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<sup>15</sup> M Green, ‘Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C. 12/2000/15, Int’l Anti-Poverty L. Ctr., 2009, ¶ 45.

<sup>16</sup> P. K. Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’, 40 *U.C. Davis Law Rev.* (2007) pp. 1073.

<sup>17</sup> Drahos and Mayne, *supra* note 10, p. 225.

<sup>18</sup> L. M.C.R Guibault, *Copyright Limitations and Contracts*, (Kluwer Law International, U.K, 2002) p. 15.

## 2.1.2 Limitations and Exceptions to Copyright

Limitations and exceptions (hereafter L&Es) are provided for in almost all the copyright regimes across the world with subtle differences in tendencies where to draw the lines for the use of such limits. Guibault summarizes the basis for adoption of limitations as the “following four essential rationales: safeguarding the user’s fundamental rights, regulating competition and industry practice, promoting the dissemination of knowledge and alleviating symptoms of market failure.”<sup>19</sup>

In differentiating limitations from exceptions they can be divided to two categories of ‘authorization-free’ as well as ‘remuneration-free’ which is the full exemption of a work from copyright protection and second authorization and royalty based which are the limitations. “Two subcategories can be identified here: a statutory licence where the law itself permits certain kinds of use in combination with a statutory remuneration right; and a compulsory licence where the author has the exclusive right but is compelled by law to conclude a contract on the utilization of the work according to equitable terms.”<sup>20</sup>

Beside the mechanisms used by national legislations, which differ in every country and region, there are sets of regulations on how to apply L&Es to copyright protection in the international level.<sup>21</sup> The oldest version of limitations on copyright can be found in the text of the Berne Convention for the Protection of Literary and Artistic Works.<sup>22</sup> The first of such

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<sup>19</sup> *Ibid.*, p. 87.

<sup>20</sup> S. Von Lewinski, *International Copyright Law and Policy*, (Oxford University Press, U.S., 2008) p. 152.

<sup>21</sup> *E.g.*, Guibault suggests that, “In continental Europe, the economic rights are generally drafted in flexible and open terms, allowing the exclusive rights to encompass a wide range of exploitation acts, while limitations are strictly defined and closed... By contrast, economic rights are narrowly defined under the U.S. Copyrights Act and are limited by the open defence of fair use, which leaves courts sufficient room to interpret a variety of unauthorised uses as non-infringing.” Guibault, *supra* note 18, pp. 17-19.

<sup>22</sup> Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13,



provisions are its articles 7 and 8 concerning the articles in newspapers and periodicals and the use for educational purposes.<sup>23</sup> In the course of time the number of such L&Es in the Berne convention increased up until the introduction of article 9(2) which lead to adoption of what is called ‘three-step test’ today after its wide use by later intellectual property regimes such as TRIPS A<sup>24</sup>, WIPO Copyright Treaty (WCT)<sup>25</sup>, and WIPO Performances and Phonograms Treaty (WPPT).<sup>26</sup>

Under the mentioned test, there are three conditions to be fulfilled by a State to introduce a limitation: (1) such a special case is provided for in the national legislation, (2) no conflict with a normal exploitation of the

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1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979.

<sup>23</sup> P. Goldstein, *International copyright: Principles, Law and Practice*, (Oxford University Press, New York, 2001) pp. 344-345.

<sup>24</sup> Article 13 of TRIPS Agreement states that, “[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” C. M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, (Oxford University Press, New York, 2007) p. 538.

<sup>25</sup> Article 10 (1) of WIPO Copyright Treaty of December 20, 1996 states that, “[c]ontracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” Goldstein, *supra* note 23, p. 426.

<sup>26</sup> Article 16 (2) of the WIPO Performances and Phonograms Treaty of December 6, 1996 states that, “[c]ontracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases that do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or the producer of the phonogram.” *Ibid.*, p. 439.

work, and (3) no unreasonable prejudice to the legitimate interests of the author.<sup>27</sup>

The limitations and exceptions to copyright in favour of the blind, visually impaired and other reading disabled persons follow the first of the four purposes mentioned above and are provided for in many national legislations by the use of the ‘three-step test’; however, the problem lays in what Judith Sullivan propounds in her report:

“The framework in international treaties and conventions relating to intellectual property seems to permit exceptions for the benefit of visually impaired people .... However, the possibility of such provision is not specifically addressed and is not mandatory under these treaties and conventions.... Also, especially where several different treaties and conventions need to be considered, the conditions that might apply to exceptions are quite complicated and there may be some doubt regarding exceptions to the adaptation right in particular.”<sup>28</sup>

On a similar pattern, a study by Knowledge Ecology International (KEI)<sup>29</sup> exemplifies the non-efficiency of such L&Es by showing that despite the existence of a set of international limitations and exceptions to copyright of eleven developing countries in Asia Pacific none of them had taken advantage of all the limitations and exceptions available to them under the international law.<sup>30</sup>

### **2.1.3 Human Rights Law on the Way to**

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<sup>27</sup> Article 9(2), Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, *Ibid.*, p. 346.

<sup>28</sup> See J. Sullivan, WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired, WIPO Doc. SCCR/15/7, 20 February 2007, p. 9.

<sup>29</sup> Knowledge Ecology International, available at <http://www.keionline.org/>, visited on 21 April 2011.

<sup>30</sup> Consumers International, Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Law (Kuala Lumpur: Consumer International, 2006), pp. 29-31, available at [http://www.consumersinternational.org/media/303356/copyright%20and%20access%20to%20knowledge%20-%20full%20report%20\(pdf\).pdf](http://www.consumersinternational.org/media/303356/copyright%20and%20access%20to%20knowledge%20-%20full%20report%20(pdf).pdf), visited on 3 May 2011.

## Restricting Intellectual Property Rights

While the supporters of coexistence of human rights and IP seek the solution in striking the balance by the use of mainly L&Es the proponent of conflict approach, however, believe in the ‘normative primacy’ and restrictive role of human rights when addressing the intellectual property rights.<sup>31</sup> Even upon acceptance of intellectual property rights as human rights, at least to the extent guaranteed under article 27 of UDHR<sup>32</sup>, some like Ostergard argue that “it should be accepted that some human rights take priority over other human rights” and consequently “quintessential for Ostergard’s argument is the hierarchy of human rights which he promotes.”<sup>33</sup>

In a historical context, the emergence of some events and discourses such as the issue of rights and ownership of indigenous people on their cultural heritage, entering into force of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)<sup>34</sup>, biodiversity and technology transfer, and finally the Access to Knowledge (A2K) movement among others accelerated this process. All these trends together played an important role in this regard; however, two of them being the rights of indigenous people and the TRIPS Agreement due to their complicated nature and deep effects on the developing countries played the role of the starting force for this development.

“These events exposed serious normative deficiencies of intellectual property from a human rights perspective, and they promoted new standards setting initiatives which increased the contestations between the two regimes.”<sup>35</sup>

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<sup>31</sup> Helfer, *supra* note. 4, p. 48.

<sup>32</sup> Universal Declaration of Human Rights, *supra* note 13.

<sup>33</sup> Grosheide *supra* note 8, p. 29.

<sup>34</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, December 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round Vol. 31, 33 I.L.M. 81 (1994).

<sup>35</sup> Helfer, *supra* note 2, p. 8.

### 2.1.3.1 Protection of Traditional Knowledge and Indigenous People Rights

During the centuries, indigenous people and communities have been creating works of art for cultural, social and religious purposes and gathering knowledge on the use of natural resources found in their habitats. Their knowledge and cultural heritage have not been protected under the common intellectual property regime of protection due to different reasons, one of the most important ones being the fact that indigenous communities do not share the idea of private ownership over such creations. This fact had lead to the mostly free and unauthorized use of these heritages by third parties mainly to gain financial benefits in which the community that the work has originated from had no share.<sup>36</sup>

This state of affairs together with dissatisfaction of indigenous people from the situation brought the issue to light and to the attention of international bodies and lead to the adoption of a Declaration on the Rights of Indigenous Peoples<sup>37</sup> and Principles and Guidelines for the Protection of the Heritage of Indigenous People.<sup>38</sup> Based on the views expressed in these documents, “a human rights analysis of traditional knowledge views

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<sup>36</sup> An example of inefficiency of intellectual property law to protect traditional cultural expressions was the case of *Yumbulul v. Reserve Bank of Australia* where the Reserve Bank of Australia reproduced a design by Terry Yumbulul of the ‘Morning Star Pole’ on a commemorative bank note while the ‘Morning Star Pole’ is of high importance in Australian aboriginal ceremonies on the death of a significant person. The copyright claim of the Yumbulul was ultimately dismissed by the court. The court’s decision is available at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1991/233.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1991/233.html), visited on 23 May 2011.

<sup>37</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous People, UN Doc. A/RES/61/295.

<sup>38</sup> Sub-Commission on the Promotion and Protection of Human Rights, Decision 2000/107, UN Doc. E/CN.4/Sub.2/DEC/107/2000/107 (2000).

intellectual property as one of the problems facing indigenous communities, and, only perhaps, as part of a solution to those problems.”<sup>39</sup>

### **2.1.3.2 Adoption of the Agreement on Trade-Related Aspects of Intellectual Property and its Effects on Human Rights**

Adoption of the TRIPS Agreement and subsequently the “TRIPS Plus” Treaties “which often required adherence to WIPO instruments such as the 1996 Internet Treaties” can be seen as a milestone in underlining the interaction of human rights and intellectual property rights.<sup>40</sup> TRIPS Agreement bears a number of characteristics, which make it prominent and very much connected to human rights and its values; it asks for relatively high standards of protection for intellectual property rights which at the time of its adoption and even now are impossible to comply with for numerous developing and least-developed states.

Moreover, despite the fact that it is regulating intellectual property it is delivered and administered by World Trade Organization (WTO) and enjoys WTO’s dispute settlement system support for its enforcement which unlike many other UN agencies ‘has teeth’.<sup>41</sup> As a result, wide spread discontent and concerns were raised by developing countries. “In particular, the Agreement’s strengthening of intellectual property rights has led states, NGOs, and officials of intergovernmental organizations to raise concerns

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<sup>39</sup> Helfer, *supra* note 2, p. 9.

<sup>40</sup> G. Krikorian & A. Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property*, (Zone Books, New York, 2010) p. 100.

<sup>41</sup> The expression that WTO’s dispute settlement system ‘has teeth’ has been used since as early as in 1997 by different scholars as well as politicians, economists and civil society groups to describe its power in enforcing TRIPS A regulations by effective means such as trade sanctions among others.

about those rights in an expanding list of international venues.”<sup>42</sup> Even the developed world was having doubts on the functionality and promised success of TRIPs. However, as Grosheide argues the main concerns were coming from the developing countries as they were experiencing “a feeling of being economically trapped” and “it [was] here that a shift to the human rights perspective of intellectual property law [became] apparent.”<sup>43</sup>

Later on the inconsistency of TRIPS and its standards for intellectual property protection was highlighted in the United Nations sub-Commission on the Protection and Promotion of Human Rights Resolution 2001/21 stating that “[a]ctual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights.”<sup>44</sup>

After highlighting the obstacles that intellectual property rights lay in the way of human rights to deliver properly, the main solution that conflict approach theorists, and most prominently Laurence Helfer and Peter Yu put forward and advocate for is the idea of developing a human rights framework for intellectual property.

## **2.2 A Hybrid Solution to the Conflict of Regimes: Human Rights Framework for Intellectual Property**

After realizing that there is ‘potential’ and ‘actual’ conflict between human rights norms and intellectual property rights, many scholars

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<sup>42</sup> L. R. Helfer, ‘Regime Shifting: TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’, 29 *Yale Journal of International Law* (2004) p. 5.

<sup>43</sup> Grosheide, *supra* note 8, p. 12.

<sup>44</sup> United Nations High Commissioner for Human Rights, Sub-Commission on the Protection and Promotion of Human Rights Resolution 2001/21 on Intellectual Property Rights and Human Rights, 26<sup>th</sup> meeting, 16 August 2001.

suggested the use of human rights based approach for intellectual property law and on a more practical and holistic version, the application of a ‘human rights framework’ for intellectual property.<sup>45</sup>

The idea of a human rights framework to a large extent originated from the interpretation of human rights by international bodies and recognition of a set of characteristics for human rights which put them at a, if not higher, but relatively more important level than intellectual property rights. The most significant of those interpretations which highlighted the supremacy of human rights is the Committee on Economic, Social, and Cultural Rights General Comment No. 17 on article 15 (1) (c) of ICESCR as it elaborates that “[t]he right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the Covenant.”<sup>46</sup>

This General Comment though primarily addressing the rights of everyone to moral and material interests of a work of which one is the author and considering it as a human right itself, paved the way for formation of a human rights framework for IPRs in general by “reminding all governments of the primacy of human rights obligations over economic policies”<sup>47</sup> and presuming that “states” Yu concludes “would not be able to expand their protection of interests in intellectual creations at the expense of both existing protection and the core minimum obligations of other human rights.”<sup>48</sup>

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<sup>45</sup> Helfer, *supra* note 2, and Yu, *supra* note 16.

<sup>46</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author (Art. 15 (1) (c)), para. 35, 2006, UN Doc. E/C. 12/GC/17.

<sup>47</sup> Grosheide, *supra* note 8, p. 17.

<sup>48</sup> Yu, *supra* note 16, p. 5.

To go even further, some authors like Torremans argue, “copyright has a relatively weak claim of human rights status, as its inclusion in the international human rights instruments was highly controversial.”<sup>49</sup>

Therefore, when addressing the relationship of human rights and intellectual property rights, several points are worth mentioning especially if one is arguing for creation of a human rights framework for IPRs. Although the moral and material interests of author is recognized as a human right, this does not mean that all the other intellectual property rights, and to be more specific, in the format they are now under international intellectual property regimes necessarily are human rights entitled to the value associated with them.

Moreover, even human rights are subject to limitations and exceptions considering the fact that human rights are distinguished by their nature, as being fundamental rights and non-fundamental rights, the latter being derogable under particular circumstances and the moral and material interests of the author is not any different from other HRs subject to limitations and exceptions.<sup>50</sup>

However, a number of scholars have expressed concerns and scepticism on the idea of a human rights framework for intellectual property. Their concerns are firstly due to the fear of elevation of intellectual property right to that of human rights in rhetoric since “intellectual property right holders have widely used the rhetoric of private

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<sup>49</sup> P. C. Torremans (ed.), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights*, (Kluwer Law International, Netherlands, 2008) p. 203, See for a detailed discussion on the history of inclusion of copyright in international human rights instruments P. K. Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’, 40 *U.C. Davis Law Rev.* (2007) pp. 1047-1075.

<sup>50</sup> *But see* C. Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, 37 *Int’l Rev. Intell. Prop. & Comp. L.* (2006) pp. 382-85; C. Flinterman, ‘Human rights law status report’, in W. Grosheide (ed.), *Intellectual property and Human Rights: A Paradox*, (Edward Elgar Publishing Ltd., UK, 2010) p. 37.



property to support their lobbying efforts and litigation”<sup>51</sup> and according to Deazley “the conceit and language of intellectual property as a natural property right has provided one of the key foundations for the rampant expansionism which is the story of copyright law throughout the twentieth and into the twenty-first century.”<sup>52</sup>.

Their other apprehension is the ‘ratchet effect’ of such framework leading to overprotection and uncontrollable upward drift of intellectual property rights as “construing intellectual property rights as human rights implies construing the right to enjoy monopoly right and rent as a human right even if it is at the expense of society at large. This goes against the very basis of Article 15.1 that talks of striking a balance.”<sup>53</sup>, and last but not least comes the fact that “intellectual property rights” Drahos argues “are universally recognized but that does not make them universal human rights”<sup>54</sup> taking account of their characteristics. The differences of human rights and intellectual property rights can be summarized as follow:

#### *Human Rights Characteristics*

- public law
- ex persona
- universal
- individual rights
- immaterial interests
- unlimited term
- not-assignable
- non-exploitable

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<sup>51</sup> P. K. Yu, ‘Challenges to the Development of a Human Rights Framework for Intellectual Property’, p. 5, abridged and adapted from P. K. Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’, 40 *U.C. Davis Law Rev.* (2007) pp. 1039-1149.

<sup>52</sup> Grosheide, *supra* note 8, p. 31.

<sup>53</sup> *Ibid.*, p. 30.

<sup>54</sup> *Ibid.*, p. 28.

### *Intellectual Property Rights Characteristics*

- private law
- ex lege
- territorial
- individual rights+ corporate rights
- material interests (but moral rights may be involved)
- limited term (but sometimes renewable)
- assignable
- exploitable

This distinction of characteristics suggested by Grosheide<sup>55</sup> shows that even if we consider the moral and material interests of author as a human right, still there are significant dissimilarities between human rights and intellectual property rights, which should be kept in mind while designing a human rights framework for intellectual property.

These concerns and observations are valid and noteworthy and both proponents of coexistence and conflict provide nuance analysis of the situation, however, as Yu argues “it is misleading to inquire whether human rights and intellectual property rights coexist or conflict with each other. Because of the overlapping human rights attributes [of intellectual property], these two sets of rights both coexist and conflict with each other.”<sup>56</sup>

He believes that ignoring or denying the fact that the moral and material interest of the author is mentioned in major human rights instruments as a human rights does not contribute to the improvement of the situation and to solve the problem one need to look at the big picture and develop an idea on “how we can alleviate the tension and resolve the

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<sup>55</sup> *Ibid.*, p. 21.

<sup>56</sup> Yu, *supra* note 16, p. 1078.

conflict between human rights and the non-human-rights aspects of intellectual property protection.”<sup>57</sup>

In Yu’s idea, the key to resolving the conflict is to “identify the human rights attributes of intellectual property rights and distinguish them from the non-human rights aspects of intellectual property protection.”<sup>58</sup> In this view, not all intellectual property rights have human rights attributes and therefore not all of them are human rights and since some attributes of intellectual property rights which are related to human rights are already recognised in international human rights instruments what is important is ‘to clearly delineate’ the non-human rights attributes which ‘should be subordinated to human rights obligations due to their lack of any human rights basis’.<sup>59</sup>

Therefore, in the same manner as Helfer, the opinions expressed by Yu results in favour of a ‘human rights framework’ arguing that “to the extent that human rights and intellectual property rights serve similar goals, the development of a human rights framework can only be beneficial, because it will promote and reinforce the underlying goals of these two sets of rights. To the extent that human rights and intellectual property rights are in conflict, however, the framework is urgent and necessary.”<sup>60</sup>

Daniel Gervais highlights the other benefit of such framework, especially for copyright, as emphasizing the ‘continuum between an author and her creation’ unlike the mere trade-related approach that focuses only on the economic aspect of copyright for an author.<sup>61</sup>

The opinions of the author of this research concur in broad terms with those of Helfer and Yu and the application of a human rights framework to the access of the blind and visually impaired to copyrighted material will be discussed in the last chapter.

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<sup>57</sup> *Ibid.*, p. 1078.

<sup>58</sup> P. K. Yu, ‘Ten Common Questions About Intellectual Property and Human Rights’, 23 *Georgia State University Law Review* (2007) p. 711.

<sup>59</sup> *Ibid.*, p. 740.

<sup>60</sup> *Ibid.*, p. 720.

<sup>61</sup> Torremans, *Supra* note 49, p.18.

## 2.3 Reading Disabled Persons and Access to Copyrighted Material

The issue of access to Copyrighted material by disabled people is very vast and includes a variety of disabilities that hinder reading materials. It is of no need to mention that works under copyright protection are not limited to books or other readable materials but access to books are the main problem and difficulty for disabled people while their access to other printed materials such as manuals, newspapers, etc is somehow an issue too. Since this research, due to space limitations, only deals with the disabled persons who are blind, visually impaired or have other disabilities that challenges reading in the following parts I will provide a brief definition of these disabilities to make it clear to some extent that who falls under this category.

### 2.3.1.1 Visual Impairment and Blindness

There are various definitions of blindness and visual impairment, however they are similar and do not bear fundamental differences. To put it simple, a blind person is someone who is “unable to see because of injury, disease, or a congenital condition”.<sup>62</sup>

Nevertheless, when it comes to technicalities and more precise definitions to be used for different purposes such as providing health and medical services, statistics and data assessments or to evaluate someone’s condition to perceive if he or she meets a certain criteria for education, employments, financial aid and so on blindness and visual impairment are difficult to be defined.

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<sup>62</sup> Oxford Dictionaries, available at [http://oxforddictionaries.com/view/entry/m\\_en\\_gb0084320#m\\_en\\_gb0084320.039](http://oxforddictionaries.com/view/entry/m_en_gb0084320#m_en_gb0084320.039), visited on 14 April 2011.

For this last purpose, some institutions use the terms ‘legally sighted’ and ‘legally blind’. The National Federation of the Blind (NFB)<sup>63</sup> in United States uses this division for granting of its scholarship and applies the Federal Statute where it states “[t]he term "blindness" means central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees, shall be considered for purposes in this paragraph as having a central visual acuity of 20/200 or less.”<sup>64</sup> But, a simple dichotomous distinction between those who are considered ‘legally sighted’ and those considered ‘legally blind’, while useful for simple eligibility rules, is clearly not satisfactory for more detailed reporting.<sup>65</sup>

To fill this gap and for the benefit of reporting and uniformity of definitions, different recommendations by different bodies are given. One of the most simple and comprehensive definition seems to come from the International Classification of Diseases 10 (ICD-10)<sup>66</sup> which is initiated and used by World Health Organization. It was recommended by WHO Study Group on the Prevention of Blindness (Geneva, 6-10 November 1972) and classifies four levels of sight based on levels of severity on a basis of

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<sup>63</sup> National Federation of the Blind Website, available at [http://www.nfb.org/nfb/Legally\\_Blind\\_Definition.asp?SnID=2](http://www.nfb.org/nfb/Legally_Blind_Definition.asp?SnID=2), visited on 14 April 2011.

<sup>64</sup> U.S.C. § 416(i)(1)(B) (Supp. IV 1986).[1], available at <http://www.law.cornell.edu/socsec/rulings/ssr/SSR90-05.html>, visited on 14 April 2011.

<sup>65</sup> International Standards: Visual Standards, Aspects and Ranges of Vision Loss with Emphasis on Population Surveys, Report prepared for the International Council of Ophthalmology at the 29th International Congress of Ophthalmology, Sydney, Australia, April 2002, page 6, available at <http://www.icoph.org/downloads/visualstandardsreport.pdf>, visited on 14 April 2011.

<sup>66</sup> ICD-10 was endorsed by the Forty-third World Health Assembly in May 1990 and came into use in WHO Member States as from 1994. The classification is the latest in a series, which has its origins in the 1850s. The ICD is the international standard diagnostic classification for all general epidemiological, many health management purposes and clinical use. World Health Organization website, available at <http://www.who.int/classifications/icd/en/>, visited on 14 April 2011.

‘maximum less than... minimum equal or better than’. They are normal vision, moderate visual impairment, severe visual impairment, and blindness.<sup>67</sup> Moderate visual impairment combined with severe visual impairment is grouped under the term ‘low vision’: low vision taken together with blindness represents all visual impairment.<sup>68</sup>

International Council of Ophthalmology on the other hand suggests the use of the following terminology for reducing the confusion in use of different definitions of visual impairment: “**Blindness-** to be used only for total vision loss and for conditions where individuals have to rely predominantly on vision substitution skills. **Low Vision-** to be used for lesser degrees of vision loss, where vision enhancement aids and devices can help individuals significantly. **Visual Impairment-** to be used when the condition of vision loss is characterized by a loss of visual functions (such as visual acuity, visual field, etc.) at the organ level.”<sup>69</sup>

### 2.3.1.2 Other Reading Disabilities

Apart from the visual impairment and blindness, there are other disabilities, which hamper reading, and the people with those challenges also deserve to be entitled to equal enjoyment of accessible formats of copyrighted material as well as the blind and visually impaired community.

“Reading disabilities are demonstrated by atypical reading behaviours and presumed cognitive irregularities. These effects could be attributed to a range of factors or conditions, and necessary conditions could likely include multiple factors.”<sup>70</sup> One of the main disabilities caused by

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<sup>67</sup> For detailed information on severity levels visit the WHO Website available at <http://apps.who.int/classifications/apps/icd/icd10online/>, visited on 14 April 2011.

<sup>68</sup> World Health Organization, Visual Impairment and Blindness, available at <http://www.who.int/mediacentre/factsheets/fs282/en/>, visited on 14 April 2011.

<sup>69</sup> International Council of Ophthalmology, *supra* note 65.

<sup>70</sup> S. L. Strauss, ‘Neuroscience and Dyslexia’, in A. McGill-Franzen & R. L. Allington (eds.), *Handbook of Reading Disability Research*, (Routledge, New York, 2011) p. 79.

neurological problems is dyslexia. According to the National Institute of Neurological Disorders and Stroke, “Dyslexia is a brain-based type of learning disability that specifically impairs a person's ability to read.”<sup>71</sup> Dyslexia is related to different difficulties, which affect reading, and among them are vision problems.

In adults, dyslexia usually occurs after a brain injury or in the context of dementia. It can also be inherited in some families, and recent studies have identified a number of genes that may predispose an individual to developing dyslexia.<sup>72</sup> Due to the difficulties that the dyslexic people experience it is not possible for them to read the printed material to the same level that non-dyslexic people do, but since dyslexia and IQ are not interrelated, they just need different methods compatible with their condition to be able to read. There are technologies, which provide this opportunity for dyslexic persons to read by the use of text-to-speech systems.<sup>73</sup>

### **2.3.1.3 Accessible Formats**

For people with reading disabilities to be able to read they need to use accessible formats. “A completely ‘accessible product’ is one which offers the maximum flexibility of user experience for all readers and allows the content to be accessed and manipulated with ease by those with or without disabilities.”<sup>74</sup>

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<sup>71</sup> National Institute of Health, National Institute of Neurological Disorder and Stroke Website, available at <http://www.ninds.nih.gov/disorders/dyslexia/dyslexia.htm>, visited on 14 April 2011.

<sup>72</sup> *Ibid.*

<sup>73</sup> Davis Dyslexia Association International offers a range of programs, among them the text-to-speech programs, which helps people with dyslexia, available at <http://www.davidyslexia.com/details.html>, visited on 14 April 2011.

<sup>74</sup> S. Hilderley, Accessible Publishing: Best Practice Guidelines for Publishers, prepared for World Intellectual Property Organisation, April 2011, available at [http://www.visionip.org/export/sites/visionip/technology/en/pdf/accessible\\_best\\_practice\\_guidelines\\_for\\_publishers.pdf](http://www.visionip.org/export/sites/visionip/technology/en/pdf/accessible_best_practice_guidelines_for_publishers.pdf), visited on 28 April 2011.

There are a variety of ways to convert a normal print to an accessible formats based on different levels and types of disability affecting the reading potentials of disabled people. Here I will discuss a range of most common, practical and globally recognized formats, which benefit the blind and visually impaired community as well as those with other reading disabilities.

*Braille*, designed by Louis Braille, is the first and most common method used by visually impaired people to read and write. It uses a Braille cell containing six dots, which depending on the letter, number or punctuation that they represent three of them may be raised. By raising the dots in every cell, it is possible for blind people to read by touching the cell by their fingertips. It is also possible to write in Braille by the use of different devices such as stale and stylus, Braille typewriter, Perkins Brailier or Braille embosser, which is to be used together with a computer. Moon is an alternative to Braille. It uses raised shapes to represent letters and words. It can be considered easier to learn than Braille, especially for those who lose their sight later in life. It can also be useful for people who have sight loss and learning difficulties.<sup>75</sup>

*Large Print* is another technique to make normal printed material available to visually impaired people by reprinting the books and other printed material in large print. The pioneer of using this system was Fredrick A. Thorpe, a retired publisher and printer. He formed Ulverscroft Large Print Books Limited in 1964 as a non-profit making organization to republish standard books in large print for sale to public libraries.<sup>76</sup>

In this method the text of a book, magazine, etc is simply reprinted or put online or on a digital screen in larger font size. While no legislation provides legal parameters for large print, the U.S. Library of Congress has

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<sup>75</sup> For more information on accessible formats visit Royal National Institute of Blind People (RNIB) Website, available at [http://www.rnib.org.uk/livingwithsightloss/readingwriting/braille/learning/Pages/learn\\_braile.aspx](http://www.rnib.org.uk/livingwithsightloss/readingwriting/braille/learning/Pages/learn_braile.aspx), visited on 14 April 2011.

<sup>76</sup> The Ulverscroft Foundation Website, available at <http://www.foundation.ulverscroft.com/foundation1.html>, visited on 14 April 2011.



published guidelines for large-print editions. According to these guidelines, “the minimum acceptable size for large print is 14-point type, while the most common size is 16 to 18-point type.”<sup>77</sup> However, some libraries and bookshops around the world offer different large print sizes for the customers to choose based on their needs. The problem with the large print books for the consumers is that a small amount of publishers makes the large print version of a new title available simultaneously with the normal version, if at all.

*Audio book* as clear from their title are books, magazines, journals and other sort of printed material which are read and recorded as an audio format. The audio books were first produced to help blind people but later on, they attracted a part of sighted people as their audience as well. “Sound recordings are unquestionably the most accessible format for people with impaired vision, because they, unlike Braille, call for no prior learning process.”<sup>78</sup>

When the technological developments in sound recording hit the market, the audio books recorded on CDs also appeared as a more convenient version, however due to some complexities affiliated with them they did not find a popular position among visually impaired as fast as they were accepted and welcomed by sighted people. This delay can partly be related to the fact that when using a cassette tape, the listener was able to continue listening from the exact same point that he or she had last stopped the tape while with the CDs it was not possible to do so. Later on, this problem was solved by institutions involved in providing access for blind people through producing audio books which offer the ability to resume the CD and also to brows the ‘pages’ of a book and reach a special chapter without the need to replay from the start every single time.

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<sup>77</sup> Legal Definition of Large Print, available at [http://www.ehow.com/facts\\_5982715\\_legal-definition-large-print.html](http://www.ehow.com/facts_5982715_legal-definition-large-print.html), visited on 14 April 2011.

<sup>78</sup> F. J. Martinez Calvo, Technological Advances Benefiting Visually Impaired People, World Intellectual Property Organization, Information Meeting on Digital Content for the Visually Impaired, Geneva, November 3, 2003

As the most advanced format for producing digital audio books with navigation possibilities, the Digital Accessible Information System (DAISY) operated by the Daisy Consortium is used to produce digital audio books from printed text as well as images and make the printed material such as encyclopaedias available for blind and partially sighted users.<sup>79</sup>

As a result, Daisy is reaching the status of the standard format for producing digital audio books and most of the organizations who are involved in reproduction of such books from copyrighted material are moving toward using DAISY format only. The superiority of DAISY books compared to more traditional formats such as cassettes and CDs is mainly due to fact that 'reader can navigate by a hierarchy of headings, by pages, or by other significant constructs.'<sup>80</sup>

### **2.3.2 Main Difficulties Faced by the Visually Impaired Persons**

According to the World Health Organization there are 314 million visually impaired people living in the world as in 2009, among them 45 million are blind. A big part of this population meaning about 87 percent of them lives in developing countries.<sup>81</sup> One of the problems that world's visually impaired population has had to deal with, in addition to health difficulties, is the issue of access to cultural and educational printed literary materials. "It is estimated that in the United States, less than five percent of published works are available in accessible formats. Some 95 percent of books never

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<sup>79</sup> DAISY Consortium Website, available at <http://www.daisy.org/>, visited on 15 April 2011.

<sup>80</sup> George Kerscher, DAISY is, available at [http://www.digitalkingbook.com/publications/docs/20040510214528/DAISY-in-Brief\\_final.htm](http://www.digitalkingbook.com/publications/docs/20040510214528/DAISY-in-Brief_final.htm), visited on 15 April 2011.

<sup>81</sup> World Health Organization website, available at [www.who.int/mediacentre/factsheets/fs282/en/](http://www.who.int/mediacentre/factsheets/fs282/en/), visited on 2 April 2011.

become available to blind and partially sighted readers, who use alternative formats such as audio book, Braille or large print. The figure is even lower in developing countries.”<sup>82</sup> According to Royal National institute of Blind People (RNIB) 98 percent of books in United Kingdom are only available in standard print version as in 2008.<sup>83</sup> Even in the Netherlands, where there is a partnership between Dutch Publishers and specialist agency Dedicon, only 2000 new adapted Dutch titles a year are available to people with reading disabilities out of some 40,000 new titles that are published in the Netherlands market.<sup>84</sup>

This phenomenon is referred to as ‘book famine’ or ‘knowledge famine’ by some scholars and civil society members, which prevents persons with different types of sight problems to read as much and as freely as other people.<sup>85</sup> This causes difficulties for pupils and higher education students when it comes to educational materials and affects other reading disabled people by limiting their choice of reading for cultural and recreational purposes

As complicated as the phrasing of ‘access of blind, visually impaired and reading disabled persons to copyrighted materials’ may seem, the problem is very simple: people with visual disabilities cannot go to their local bookstore and buy the same book to read as others who are sighted do. They need accessible formats. “All blind and visually impaired people want

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<sup>82</sup> J. T. Pilch, ‘Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons’, 12 October 2010, Library Copyright Alliance, p. 2 [www.librarycopyrightalliance.org/bm~doc/briefvifinalrev101509.pdf](http://www.librarycopyrightalliance.org/bm~doc/briefvifinalrev101509.pdf) visited on 5 May 2011.

<sup>83</sup> RNIB [www.rnib.org.uk/aboutus/mediacentre/mediareleases/media2007/Pages/mediarelease02nov2009.aspx](http://www.rnib.org.uk/aboutus/mediacentre/mediareleases/media2007/Pages/mediarelease02nov2009.aspx), visited on 17 April 2011.

<sup>84</sup> Paper by the World Blind Union on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, 7 October 2010 [www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/WBU\\_II.doc](http://www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/WBU_II.doc), visited on 17 April 2011.

<sup>85</sup> Pilch, *supra* note82.

to be able to access information at the same time and cost and with the same range of choice as their fellow citizens.”<sup>86</sup>

In order to have a more clear idea about what it really means to be blind or visually impaired when it comes to access copyrighted material the following examples are listed: lack of access to educational materials mainly books for students, fiction and other non-educational literary works, newspapers and as a result lack of access to basically any sort of written information.

### **2.3.3 The Factors Causing the ‘Book Famine’**

The issue of access of blind, visually impaired and other reading disabled persons to copy righted material is not addressed practically in any international instrument<sup>87</sup> and despite the attempts to provide a coherent framework, it is still left to national legislations to decide upon since “despite over a century of international norm setting in the field of copyright, limitation and exceptions have largely remained “unregulated space.””<sup>88</sup>

The majority of the produced books in accessible formats are made by specialized agencies, which use charitable money to reproduce and distribute the already published materials in standard formats by getting permission from publishers.<sup>89</sup> To add insult to injury, when blind people take the initiative to help themselves they face the following obstacles:

- Delays with respect to the time that the same document becomes available to sighted people.

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<sup>86</sup> Martinez Calvo, *supra* note 78.

<sup>87</sup> See Sullivan, *supra* note 28, p. 12.

<sup>88</sup> V. Franz, ‘Back to Balance: Limitations and Exceptions to Copyright’, in Krikorian and Kapczynski, *supra* note 40, p. 520.

<sup>89</sup> Pilch, *supra* note 82.

- Very high costs, which cannot be undertaken by the users themselves but must be defrayed by organizations and associations providing such services.
- Limitations with respect to the number of documents available in these media.

In the best-case scenario even after passing different obstacles such as providing financial resources and obtaining the permission from the copyright holder to produce an accessible format such as Braille or audio books, it still requires a lot of time. Imagine a twelve years old visually impaired boy or girl who is impatiently waiting to receive the newly published title of Harry Potter books while his or her sighted friend have already finished reading.

Secondly, due to the lack of harmonization in this area in regional and/or international level the attempts to exchange the already available sources of accessible material for visually impaired persons are blocked and unsuccessful because regulating the export and import of these copy righted materials are left to the nation states and is highly territorial<sup>90</sup> which hamper the efficient swapping of books among countries, specially access to materials by the developing or least developed countries (LDCs) which leads to the duplication, meaning that the same book is being reproduced in many countries, wasting the resources, while a great deal of titles are remained untouchable and therefore unreachable for blind and visually impaired part of the society.<sup>91</sup>

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<sup>90</sup> “The nature and scope of exceptions and limitations to rights has been largely left to national policy makers to determine within broad permissive areas.” Sullivan, *supra* note 28, p. 12.

<sup>91</sup> An example is provided in a paper by WBU on A WIPO Treaty For Improved Access for Blind, Visually Impaired and other Reading Disables Persons, October 7, 2010:

“When Harry Potter and the Chamber of Secrets (Book 2) by J.K. Rowling was published the English speaking visually impaired organizations around the world had to produce 5 separate national Braille master files and 8 separate national Daisy audio master files. Had they been able to avoid the unnecessary use of financial and production resources

Accordingly, the main causes of the problems described above can be briefed as having their roots in two issues; First, the non-existence of any limitations and exceptions to copyright granting access to copyrighted materials for visually impaired and other reading disabled persons in the domestic legislations of the countries. Second, the excessive difficulties in using such possibilities, if existed, together with the fact that in many instances the available limitations and exceptions are optional, depending on member States in international level and on stakeholders in national level.<sup>92</sup>

Since this practice decelerate the process of providing the reading disabled community with books and also raise a large amount of unnecessary fees and expenses there is an increasing need for harmonization in this area as well as the need for cooperation and collaboration between actors in international community in order to activate import and export relations to facilitate the access and enable the consumers to benefit from the already existing resources beyond the traditional copyright protection boundaries. Millions of people are missing out on not only the 'information revolution' and its benefits, but on access to even the most basic educational texts-not to mention novels, instruction manuals, and so on.<sup>93</sup>

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for this duplication they could have produced a further 4 Braille titles and a further 7 Daisy audio titles for sharing around the world.” WBU, *supra* note 84.

<sup>92</sup> The non-efficiency of the optional models of L&Es is pointed out in a study in regarding the European Union Information Society Directive of 2001 mentioning that, “The Directive’s chapter on limitations and exceptions is ... proof of the draw-back of an optional approach towards limitations and exceptions. Of the 27 Member States of the European Union, not a single one has seen fit to implement all the limitations and exceptions permitted under the Directive.” P. Bernt Hugenholtz & Ruth L. Okediji, ‘Conceiving an International Instrument on Limitations and Exceptions to Copyright’, Study Sponsored by Open Society Institute (OSI) March 6, 2008, p. 27, available at [http://www.soros.org/initiatives/information/articles\\_publications/publications/copyright\\_20080506/copyright\\_20080506.pdf](http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf), visited on 3 May 2011.

<sup>93</sup> See D. Pescod, “The 'Right to Read' – Why a WIPO Treaty for Print Disabled People?”, 3 *KEStudies* (2009).

## 2.3.4 Disabled Persons' Social Movements

Similar to many other groups of people who have been and are still to some extent discriminated, persons with disabilities have been trying to achieve an equal position in accessing their rights and enjoying their life in a manner not any different from other people without their conditions. Disabled persons social movement has followed and passed through three main phases. The first is “the ideological”<sup>94</sup> phase defining disability and impairment and challenging the existing models for the change to a more desirable approach, then “the legislative”<sup>95</sup> stage for seeking to obtain legal guarantees and accreditation for their rights, and finally “the organizational”<sup>96</sup> step which is identified by formation of independent organization by and for disabled persons.<sup>97</sup>

The *Disability Rights Movement* was initiated in late 1960s worldwide and slightly more strongly in United States, both stirred by and simultaneously working with other movements of the time such as Women movement, African-Americans movement and the subsequent discourses such as those against Sexism, Racism, and Homophobia. There are common grounds and practices for advocating disabled persons rights around the world; however, there exist differences in each country and it is more significant when it comes to comparing U.S and Europe. Clearly, the USA

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<sup>94</sup> J. A. Winter, ‘The Development of the Disability Rights Movement as a Social Problem Solver’ in P. Blanck (ed.), *Disability Rights*, (Ashgate Publishing Ltd., England, 2005) p. 144.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, p. 138, Winter suggests that all the social movements including the Disability Rights Movement “can be said to develop in phases(Fuller & Myers 1842, Blumer 1971, Mauss 1975: 57-70, and Spector & Kitsuse 1977). In particular, the disability rights movement can be said to entail three phases. 1) definition of the problem, 2) solutions; and 3) aftermath.”

has a different tradition of protest and social reform from Britain and much of Western Europe.<sup>98</sup>

*The Disability Rights Movement* started by asking for the basic needs of the disabled people to be able to live a life with equal opportunities and possibilities as others, let alone the protection of their right to life fearing the repetition of what happened in Germany during World War II under the idea of ‘destruction of life unworthy to live’.<sup>99</sup>

The main requests of the movement in the beginning were related to safety and accessibility in the society concerning transportation and other public services that are vital for a normal daily life. Freedom from abuse, neglect, harassment and maltreatment in the healthcare system as well as custody institutions was among the other main concerns of the disabled people and advocates of the *Disability Rights Movement*, since a wide range of persons with mental or physical disabilities were subject to such violations by those involved in medical or other institutional cares.

The other steps taken to enable disabled people to participate actively in the society both for their own development and also their contribution to the world were to enhance the acceptance of disabled people in educational organizations, workplace and in the public in general. “In sum, then, disability rights movement seeks to replace oppression with empowerment, and, marginalization with full inclusion.”<sup>100</sup>

This was done by changing the approaches that see them as dependent and a burden to their surroundings and society by “enable[ing] the persons with disabilities to be productive, contributing citizens”<sup>101</sup> and

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<sup>98</sup> T. Shakespeare, ‘Disabled People’s Self-organisation: a new social movement?’, 8:3 *Disability & Society* (1993) p. 250, available at [http://www.um.es/discatif/PROYECTO\\_DISCATIF/Textos\\_discapacidad/00\\_Shakespeare.pdf](http://www.um.es/discatif/PROYECTO_DISCATIF/Textos_discapacidad/00_Shakespeare.pdf), visited on 19 April 2011.

<sup>99</sup> S. Köbsell, ‘Towards Self-Determination and Equalization: A Short History of the German Disability Rights Movement’, 26:2 *Disability Studies Quarterly* (2006) available at <http://www.dsqsds.org/article/view/692/869>, visited on 19 April 2011.

<sup>100</sup> Winter, *supra* note 94, p. 137.

<sup>101</sup> *Ibid.*, p. 141.



also by the use of adaptive technologies that make it possible for people with disabilities to undertake duties and roles in diverse positions.

Achieving the proof on the existence of segregation in the societies based on disabilities helped the movement in a great deal in guaranteeing these rights. They did so by drawing the attention of the public and policy makers to the fact that in many instances a big part of the population is deprived from their fundamental rights, denied access, and being treated discriminatory only due to their disability under a ‘medical model as an oppressive plausibility structure’.<sup>102</sup>

After guaranteeing the very basic needs of the disabled people and as a transition from the ‘caring and controlling tradition’<sup>103</sup> to a more self-organized model, the *Independent Life (IL) Movement* was created on the foundations already present thanks to the Disability Rights Movement. The IL movement believes that since disabled people know themselves and their needs best they are the most suitable ones to take over improvement of their conditions. Therefore, they should try to achieve political power in their benefit as Shakespeare concludes that “liberation struggles have to be led and controlled by the colonized group itself and... must involve the most wide spread possible action and mobilisation.”<sup>104</sup>

Nowadays, disabled people do this by forming meta-organizations capable of raising the voices of many actors that otherwise would not be able to participate in policymaking. According to proponents of ‘resource mobilization’ approach, the creation of a meta-organization is a way to mobilize resources that can be changed into political influence.<sup>105</sup>

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<sup>102</sup> *Ibid.*, p. 142.

<sup>103</sup> K. Davis, ‘The Disabled People’s Movement-Putting the Power in Empowerment’, Paper presented at the seminar at Sheffield University Sociology Department, U.K., 1996, available at <http://www.leeds.ac.uk/disability-studies/archiveuk/DavisK/davis-empowerment.pdf>, visited on 19 April 2011.

<sup>104</sup> Shakespeare, *supra* note 98, p. 254.

<sup>105</sup> I. Storgaard Bonfils, ‘Disability Meta-organizations and Policy-Making under New Forms of Governance’, 13:1 *Scandinavian Journal of Disability Research*, p. 45, available at [http://pdfserve.informaworld.com/717171\\_751304644\\_927982667.pdf](http://pdfserve.informaworld.com/717171_751304644_927982667.pdf), visited on 22 March 2011.

This idea is highly connected to the importance of the principle of *self-determination* for disabled people's movement. During the development of the Disability Rights Movements and its affiliated movements, disabled people have reached the vision that for the real change to come, they should act themselves and that is the way to achieve self-determination which enables one to control his or her life while participating in the social arena and reaching the full realization of his or her objectives.

This does not necessarily mean that disabled people refuse the help and support offered to them but that "independence and self-determination are about having access to the support necessary to make choices, to say what it is [they] need in [their] lives. Self-determination is achieved by tackling the disabling barriers of inaccessible environments, lack of communication and services, which disempower rather than empower people. It is also achieved by taking political action."<sup>106</sup>

### **2.3.5 Digital Technologies and Visually Impaired Persons**

As the digital technologies and information systems keep developing and being improved, one of the aspects of the problem for blind and visually impaired people to have access to readable books is closer to being solved. The effects of digital technologies on disabled people in general and those with reading disabilities particularly can be discussed in two main areas.

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<sup>106</sup> J. Morris, 'Citizenship, self-determination and political action: the forging of a political movement', Talk at Conference in Sydney, Australia on Citizenship and Disability, February 1998, p. 5, available at <http://www.leeds.ac.uk/disability-studies/archiveuk/morris/disabled%20people%20and%20citizenship.pdf>, visited on 19 April 2011.

### 2.3.5.1 Production and Reproduction Costs

Using the digital technologies and innovations, it is now much easier and cheaper to produce books in accessible formats for reading disabled persons; Digital technologies made the production of audio books possible as they were recorded on audiotapes and later on with the new developments it is even more convenient to record audio books on Compact Discs (CDs) and Digital Versatile Disk (DVDs). Audio books are among the most popular forms of accessible books in general and especially for blind and visually impaired people, especially in countries such as in Canada, United States and United Kingdom.<sup>107</sup>

In comparison to traditional methods of providing accessible formats such as paper raised Braille, audio books and large print there are now improved technologies like Digital Accessible Information SYstem (DAISY) which is not only suitable for producing enhanced formats of books such as refreshable raised Braille or high-quality audio books but also provides other useful options such as advanced search methods and access to detailed and well-organized indexes.<sup>108</sup>

Innovations in information technology have created exciting opportunities to expand access, particularly with regard to works that can be

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<sup>107</sup> One of the library services of the U.S. Library of Congress is the free use of audio books for visually impaired. Moreover, a survey by the Audio Publishers Association in 2004 shows that retail and wholesale sales of audio books increased fourteen percent and library sales increased by seven percent from 2002-2003. Audio Publishers Association (APA) Fact Sheet, available at [http://www.audiopub.org/LinkedFiles/APA\\_Fact\\_Sheet.pdf](http://www.audiopub.org/LinkedFiles/APA_Fact_Sheet.pdf), visited on 19 May 2011. The CNIB Library in Canada also provides similar services to those of Library of Congress. In UK the Royal National Institute of Blind provides over 18,000 audio books together with all the major daily and weekend papers, features and articles from best selling magazines and some specialist publications.

<sup>108</sup> Daisy Consortium, more information available on [www.daisy.org](http://www.daisy.org), visited on 19 May 2011.

distributed digitally over the Internet and mobile phone networks.<sup>109</sup> With the high growth of internet and mobile phones as well as digital reading devices it is very practical and cost-effective at the same time (considering the availability and accessibility of these services even in most of the developing countries) for the reading disabled population to benefit from.

### 2.3.5.2 Distribution

Blind community similar to other people can benefit from the possibilities that digital technologies have provided regarding the reduction of cost and time requirements for distribution of works. A copyrighted work once became accessible in a digital format under the relevant regulations, can be easily distributed across the world with a marginal cost of highly less than those required for transporting and distributing paper works. “Digital technology now not only makes the reproduction of copyrighted material easier, cheaper and of better quality than ever, but it also allows for an unlimited distribution of copies without any loss of quality.”<sup>110</sup>

So, new digital technologies can play a significant role in increasing access to books for reading disabled people, decrease the costs and overcome the time limits (taking into consideration the speed of producing Braille, audio or large print from a digital file) when it comes to distribution mechanisms which are extremely fast compared to traditional ways of reproducing and distributing materials. However, “while new technologies make it possible to imagine a world where visually impaired persons have access to a broad variety of knowledge, the out-of-date legal environment is a serious barrier.”<sup>111</sup>

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<sup>109</sup> World Blind Union (WBU) available on [www.worldblindunion.org](http://www.worldblindunion.org), visited on 19 May 2011.

<sup>110</sup> C. Lenk, N. Hoppe, and R. Andorno (eds.), *Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology*, (Ashgate Publishing Ltd, USA, 2007) p. 232.

<sup>111</sup> Franz, *supra* note 88, p. 517.

## 2.3.6 Access to Knowledge Movement and Visually Impaired Persons

The right to Access to Knowledge covers a variety of human rights and even though Access to Knowledge is not yet recognized as a human right, there is global consensus that it is a right that should be respected.<sup>112</sup> The importance of the right to access to knowledge is hidden in its function as an umbrella encompassing a set of rights, which affects the civil, political as well as economic, social and cultural rights of those entitled to it especially the marginalized groups of rightholders, here being visually impaired people.

Access to Knowledge movement has contributed, among other things, to support the idea of rights of blind and visually impaired people to knowledge as well as culture since its main objective from the very beginning has been the move toward ‘a more balanced and development-oriented intellectual property system’.<sup>113</sup> As dealing with the issue of access to knowledge in general and access to education and educational material and access to culture and participation in cultural life in particular, access to knowledge movement has included reading disabled persons as one of the vulnerable groups facing difficulties raised by current intellectual property regime.

A key instrument in the history of A2K movement i.e. The Report of the UK Commission on Intellectual Property Rights (CIPR) has

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<sup>112</sup> Barbara Stratton analogize the A2K movement to the environmental movement half a century ago saying that “A2K has become an established global movement, though without structure or formal membership.” B. Stratton, ‘A2K Quinquennium – Now we are five- The Library perspective’ in H. Essalmawi (ed.), ‘The Access to knowledge movement: Opportunities, Challenges and the Road Ahead’, (Bibliotheca Alexandria Access to Knowledge Toolkit II, 2009)

<sup>113</sup> Krikorian and Kapczynski, *supra* note 40, p. 103.

enumerated, among the main issues which need be to addressed, the fact that “access to books and learning materials is still a real problem in many developing countries.”<sup>114</sup> “The report invited developing countries to achieve their goals for education ... by maintaining or adopting broad exemptions for educational, research, and library uses in their national copyright law.”<sup>115</sup>

Access to knowledge proponents have always recognized and addressed the rights of persons with sight problems and tried to raise the issue when discussing the limitations and exception to copy right laws since the visually impaired groups has been among the activists and to some extent founders of the A2K movement.<sup>116</sup> The WIPO Access to Knowledge draft treaty also considers the rights of visually impaired persons in its Article 3-1(a) vii among other types of usage which will not be affected by the exclusive economic rights of copyright holders by mentioning “[t]he use of works specifically to promote access by persons with impaired sight or hearing, learning disabilities, or other special needs.”<sup>117</sup>

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<sup>114</sup> Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy*, (Commission on Intellectual Property Rights, London, 2002).

<sup>115</sup> Krikorian and Kapczynski, *supra* note 40, p. 102.

<sup>116</sup> See A. Abdel Latif, ‘The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing-Country Delegate’, p. 110, in Krikorian and Kapczynski, *supra* note 40.

<sup>117</sup> Draft Treaty on Access to Knowledge, available at [http://www.cptech.org/a2k/a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k/a2k_treaty_may9.pdf), visited on 19 May 2011.

# LEGAL NATURE OF THE RIGHTS OF VISUALLY IMPAIRED PERSONS TO ACCESS COPYRIGHTED MATERIALS

*The calamity of the blind is immense, irreparable. But it does not take away our share of the things that count—service, friendship, humour, imagination, wisdom. ‘Helen Keller’<sup>118</sup>*

The importance of the issue of access of blind, visually impaired and other reading disabled persons to copyrighted material comes from the fact that such an access has crucial effects on a set of their human rights. As generally agreed upon, human rights are indispensable and interdependent; because of such interdependency, almost all of the VIPs’ human rights are affected by their lack of access to books and other reading materials protected under copyright. As a visually impaired child commences the primary school, his or her educational and consequently professional, economic, social and cultural aspects of life are dependent on the level of his equality of access to copyrighted material compared to his or her peer group.

Therefore, when talking about the right of VIP to access copyrighted works, primarily we should consider their right to be free from discrimination, which would be enforced by equal access. Following this human rights principle, comes the other set of rights, which shape the

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<sup>118</sup> Keller, *Supra* note 1.

private, and public life of one with reading disabilities.<sup>119</sup> In this chapter I will demonstrate the set of human rights which are the foundation and the starting point for the improved access for VIP and also their fulfilment and realization is related to the accomplishment of such better access.

### **3.1 Toward Realization of the Visually Impaired Persons' Human Rights: why does access to copyrighted materials matter?**

As discussed before, access to copyrighted material is highly connected to the VIP's human rights. Human Rights are designed to be recognized and protected to provide human beings with a decent life while respecting every single individual's dignity.<sup>120</sup>

As stated before, access to copyrighted material means more than mere access to a book or a device manual and the enjoyment accompanying reading a work of art or the ability to use a newly bought machine properly. In our age, the information matters a lot, and due to the expansion of intellectual property rights in the course of time a big amount of information

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<sup>119</sup> See The Human Rights Committee General Comment No. 18 on Non-Discrimination, especially para. 10 where it states, "[t]he Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a *certain part of the population prevent or impair their enjoyment of human rights* [emphasize added], the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant." Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989, U.N. Doc. HRI/GEN/1/Rev.1.

<sup>120</sup> See preamble of the Universal Declaration of Human Rights, *supra* note 13, p.3.



in its various forms such as literature, academic materials, manuals and other know-hows, news, scientific achievements, etc are protected under copyright law. This means that a variety of aspects of people's lives is affected with this protection in the sense of access and that is the reason why the improved access for visually impaired people to copyrighted material matters.

When it comes to law, the rights of peoples with disabilities are protected as much, if not more, as other people. All the international norms and universal human rights applies to these people as they are all “universal in scope and so implicitly include persons with disabilities within their preview”.<sup>121</sup>

Moreover, Due to disabled persons condition which asks for extra consideration we see the emphasis on their rights and position in the society by the use of specific instruments, namely the United Nation Convention on the Rights of Persons with Disabilities (CRPD).<sup>122</sup> This Convention along with all the other human rights principle guarantees the rights of disabled persons<sup>123</sup> and banns any discriminations based on their disability.<sup>124</sup> The member states have the responsibility to adopt these values both in their

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<sup>121</sup> O. M. Arnardottir & G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities, European and Scandinavian Perspectives*, (Martinus Nijhoff, The Netherlands, 2009) p. 19.

<sup>122</sup> UN Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007), available at <http://www.un.org/disabilities/default.asp?id=150>, visited on 1 April 2011.

<sup>123</sup> See, e.g., Universal Declaration of Human Rights article 1 and 7; International Covenant on Civil and Political Rights article 2; International Covenant on Economic, Social and Cultural Rights article 2, and the Convention on the Rights of the Child article 23.

<sup>124</sup> UN Convention on the Rights of Persons with Disabilities Article 3 enumerate 'non-discrimination' as one of the principles of the convention and Article 4 more specifically addresses non-discrimination by stating that, “[s]tates Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.”

domestic legislations as well as in their practice towards disabled community.<sup>125</sup>

The content of the UN CRPD is a reiteration of other major human rights instruments. However, the new Convention brings the obligations of UDHR and ICESCR one-step further in that it defines the rights of disabled persons in more details in different areas of daily life.

In the following part, I will go through the different rights of disabled people, which are affected by limited and not equal access to copyrighted materials. I will discuss how and on what basis they are guaranteed. Later on, I will examine the recent developments in this field, which have resulted in a better understanding of disabled people's rights and provided a stronger ground for their claims. This includes mainly the interpretations of a set of rights by human rights bodies such as the general comments of the Committee on Economical, Social and Cultural Rights specially its Comment No. 21 on Article 15 (1) (a) of the ICESCR on the concept of the right to participate in cultural life which is a turning point both for the disabled people rights and the clash of human rights and intellectual property rights in general.

### **3.1.1 Right to Education**

One way to regard education is as a welfare factor, another way is to approach education as a well-being component which is used in WHO's *International Classification of Functioning, Disability and Health (ICF)*.<sup>126</sup>

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<sup>125</sup> See, e.g., Article 4 of the UN CRPD calls on states to 'adopt all appropriate legislative, administrative and other measures', 'to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities' and 'to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes'.

<sup>126</sup> R. Baltander, *Education, Labour Market and Incomes for the Deaf/Hearing Impaired and the Blind/Visually Impaired*, Doctoral Thesis in Economics at Stockholm University, Sweden, (Stockholm University, Sweden, 2009) p. 30.

On another definition, “education is a social good, because it creates opportunities and provides people with choices. In this sense, education is an end in itself.”<sup>127</sup> However, as one of the essential means to participate in the social life, achieve self-fulfilment, pursue a descent career in future, and as one of the main ingredients of integration recipe, it is a means as well, especially for disabled people.

“A postsecondary education is no longer a luxury of the wealth but a necessity for anyone who wants to enjoy a decent lifestyle.”<sup>128</sup> One of the reason why the right to education is the first chosen to be discussed is the fact that “[c]ivil and political rights, such as freedom of expression, freedom of association or the right to political participation, only obtain substance and meaning when a person is educated.”<sup>129</sup>

There are a number of provisions that recognize the right to education for everyone and obviously the persons with disabilities, such as Article 26 of the UDHR<sup>130</sup> where it states “[e]veryone has the right to education” and Article 13 of ICESCR<sup>131</sup>, which provides more detailed obligations for Member States. From the wordings of these two instruments, one can conclude that right to education and its premises are essential for, if not equal to, the full development of human personality.

It goes without saying that the right to education ‘contributes in an important way to the promotion of the essence of human rights, i.e. living in human dignity’ and the right of visually impaired persons to education (including access to education, quality of education and special education as subsets of right to education in general) is being deterred by their lack of

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<sup>127</sup> Y. Donders and V. Volodin (eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, (UNESCO Publishing, UK, 2007) p.185.

<sup>128</sup> P.S. Wall and L. Sarver, ‘Disabled student access in an era of technology’, *6:3 Internet and Higher Education* (2003) p. 282.

<sup>129</sup> Donders and Volodin, *supra* note 127.

<sup>130</sup> The Universal Declaration of Human Rights, United Nations, *supra* note 13, p.1.

<sup>131</sup> The International Covenant on Economic, Social and Cultural Rights, United Nations, *Ibid.*, p. 17.

access to educational printed material.<sup>132</sup> States and government are responsible for providing the reading disabled population of students with accessible educational material under their obligations in aforementioned international instruments<sup>133</sup> accentuated in Article 24 of UN Convention on the Rights of Persons with Disabilities.<sup>134</sup>

### **3.1.2 Right to Participation in Cultural Life and Activities**

One of the other human rights of reading disabled people at stake, which is ‘intrinsically linked to the right to education’,<sup>135</sup> is the right to participate in cultural life. Disabled people as part of the whole society should be able to participate in cultural life and enjoy the cultural activities and its benefits as it is expressed in Article 27 of UDHR<sup>136</sup> along with

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<sup>132</sup> Donders and Volodin, *supra* note 127, p. 186.

<sup>133</sup> See for a detailed discussion on state obligations resulting from the right to education F. Coomans, ‘Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization’, in Donders and Volodin, *supra* note 127, pp. 203-208; and F. Coomans, ‘In Search of the Core Content of the Right to Education’, in A. Chapman and S. Russles (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Intersentia, Oxford, 2002) pp.217-246 where he enumerates the elements of the core content of the right to education as “access to education on a non-discriminatory basis, the right to enjoy free and compulsory primary education, special facilities for persons with an educational deficit, quality of education, free choice of education, and the right to be educated in the language of one’s own choice.”

<sup>134</sup> Article 24 of UN CRPD begins by saying that, “[s]tate parties recognize the rights of persons with disabilities to education” and continues more specifically that States have the obligation to ensure that “education of persons who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication”.

<sup>135</sup> Committee on the Economic, Social and Cultural Rights General Comment No.21, Dec 21, 2009, UN Doc. E/C.12/GC/21, para. 2.

<sup>136</sup> Universal Declaration of Human Rights, United Nations, *supra* note 13.

Article 15 (1) (a) of ICESCR<sup>137</sup> and Article 30 (1) of the UN CRPD which states that State Parties “[s]hall take all appropriate measures to ensure that persons with disabilities ... enjoy access to cultural materials in accessible formats.”<sup>138</sup>

The provisions on and the obligations of States with regard to the access to cultural life and information which will be discussed later in the Convention on the Rights of Persons with Disabilities could be regarded as merely an echo of UDHR Article 27, ICESCR Article 15, and ICCPR Article 19 (2), because for example as Chapman discusses the wording of article 15 it is obvious that ICESCR puts the obligation on the states so that when regulating the intellectual property law, a State party must assure that “intellectual property protections complement, fully respect, and even promote other components of Article 15.”<sup>139</sup> Therefore, it must for example facilitate cultural participation since the responsibility of states with regard to these rights is not merely satisfied in a negative sense and asks for positive action.<sup>140</sup>

The same idea is also expressed in Paragraph 17 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities that ‘[s]tates should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential’.<sup>141</sup>

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<sup>137</sup> International Covenant on Economic, Social and Cultural Rights, United Nations, *Ibid.*, p. 13.

<sup>138</sup> UN CRPD Article 30 (1), *supra* note 122.

<sup>139</sup> A. Chapman, ‘Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)’, Discussion paper submitted to Committee on Economic, Social and Cultural Rights Twenty-fourth session, Geneva, 13 November-1 December 2000, E/C.12/2000/12, p. 9, para. 24.

<sup>140</sup> *See* for a detailed discussion on state obligation with regard to the right to take part in cultural life Donders and Volodin, *supra* note 127, pp. 257-260.

<sup>141</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Adopted and Proclaimed by General Assembly resolution 48/96 of 20 December 1993, T. Degener and Y. Koster-Dreese (eds.), *Human Rights and Disabled Persons*, (Martin Nijhoff, Netherlands, 1995) p. 285.

One of the manifestations of participation in cultural life is access to written cultural materials such as books<sup>142</sup> and disabled people's right is violated when they are denied access on account of their disability<sup>143</sup> to read in the same way as people without disabilities and this right need to be balanced in connection to copyright and intellectual property rights in general as held in UN CESCR General Comment No. 17:

“States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights ... to take part in cultural life and to enjoy the benefits of scientific progress and its applications.”<sup>144</sup>

The availability of accessible formats for disabled people is expressly mentioned in the Committee's General Comment No. 21 under the issue of *Accessibility* by stating that “[i]t is essential ... that access for ... persons with disabilities ... is provided and facilitated.”<sup>145</sup> In order to facilitate this accessibility the Committee requires the State parties to “recognize the right of these persons to have access to cultural material... in accessible forms.”<sup>146</sup>

### **3.1.3 Right to Enjoy the Benefits of Scientific Progress and Its Applications**

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<sup>142</sup> See Committee on the Economic, Social and Cultural Rights General Comment, *supra* note 135, para. 13.

<sup>143</sup> See *Ibid.*, para. 15 (a) and (b).

<sup>144</sup> Committee on Economic, Social and Cultural Rights, *supra* note 46, para. 35.

<sup>145</sup> Committee on Economic, Social and Cultural Rights, *supra* note 135, para.16 (b).

<sup>146</sup> *Ibid.*, para. 31.

Named under the general cultural context of the article 27 of UDHR and article 15 of ICESCR is the right of everyone to ‘share in scientific advancement and its benefits’<sup>147</sup> and ‘to enjoy the benefits of scientific progress and its applications.’<sup>148</sup> However, as Schabas argues this right not only “suffer(s) from the more general marginalization of economic, social and cultural rights” but also “within that category of human rights it has received little attention.”<sup>149</sup> This marginalization appears as more ominous when considering the interdependency and effects of this right on a range of other human rights.<sup>150</sup>

Considering the fact that the major possibilities for individuals to take advantage of the contributions of this already marginalized right is through the use of published results of scientific advancement, the significance of improving access for the blind and visually impaired community to copyrighted materials reflecting the scientific progress becomes more clear.

As stated before, the legal content of this right needs to be clarified and there is no clear-cut internationally agreed upon definition of this human right. However, on a logical basis and taking the normal meaning of the wordings of these two articles, one can argue that enjoyment of the scientific advancement may imply that one shall be able to enjoy the

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<sup>147</sup> Article 27, Universal Declaration of Human Rights, United Nations, *supra* note. 13.

<sup>148</sup> Article 15 (1) (b), International Covenant on Economic, Social and Cultural Rights, United Nations, *Ibid.*, p. 14.

<sup>149</sup> W. A. Schabas, ‘Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Application’, in Donders and Volodin, *supra* note 127, p. 274.

<sup>150</sup> See for an analysis of relationship of other human rights with this right ‘Report of the Experts’ Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Application’, Amsterdam, 7-8 June 2007, available at <http://unesdoc.unesco.org/images/0015/001545/154583e.pdf>, visited on 27 April 2011.

scientific innovations for a better life and realization of his human rights in general.<sup>151</sup>

Chapman expresses the same view in proposing functions for the States by means of “[h]aving or creating distribution systems through which the benefits of science and technology can widely reach groups and communities, particularly those who hitherto have been disadvantaged in access to these benefits.”<sup>152</sup> This interpretation seems more meaningful when focusing on ICESCR’s language where it emphasises ‘the benefits of scientific progress and its applications’.<sup>153</sup>

It can also be concluded from the common tone of the experts in drafting the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications when saying that “the processes, products and applications of science should be used for the benefit of all humanity without discrimination, particularly with regard to disadvantaged and marginalized persons and communities.”<sup>154</sup> Therefore, people with disabilities challenging their capability to read have a right to the use of scientific progress in order to improve their opportunities to reach for the reading materials in accessible formats.

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<sup>151</sup> In taking of the normal meaning of the wordings of the two mentioned articles, the general rule of interpretation set out by article 31 of the Vienna Convention on the Law of Treaties is considered. Article 31 (1) of the Vienna Convention states that, “[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty”. For more on the ordinary meaning *See* M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Martinus Nijhoff Publishers, The Netherlands, 2009) p. 421.

<sup>152</sup> A. R. Chapman, ‘Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications’, 8:1 *Journal of Human Rights* (2005), p. 25.

<sup>153</sup> Article 15 (1) (b), ICESCR, United Nations, *supra* note 13, p. 14.

<sup>154</sup> Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, Report of the Third Experts’ Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications, 16-17 July 2009, Venice, Italy, available at <http://unesdoc.unesco.org/images/0018/001855/185558e.pdf>, visited on 27 April 2011.



In conclusion, the right to enjoy the benefits of scientific progress for disabled people is twofold. Under the requirements of the positive obligation i.e. responsibility to fulfil, States should firstly provide the blind and visually impaired people with scientific knowledge findings in general and secondly with the novel technologies, as a product of scientific progress, which will aid them, among other things, to enjoy the copyrighted materials in accessible formats.

### 3.1.4 Right to Freedom of Expression

Our time is recognized by characteristics that make it entitled to be named the age of ‘information revolution’. In this age, people are categorized as rich or poor not only based on their wealth but also their access to and possession of information. It is here that the importance of access to information shows itself and the paradigm of ‘information inequity’ appears.<sup>155</sup>

Right to ‘seek’ and ‘receive’ the ‘information and ideas’ is recognized in Article 19 of International Covenant on Civil and Political Rights<sup>156</sup> as being part of the right to freedom of expression and is emphasized in Article 21 of the UN Convention on the Rights of Persons with Disabilities<sup>157</sup> by asking the Member States to provide disabled people with accessible modes and formats of information such as Braille or other alternatives.<sup>158</sup>

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<sup>155</sup> See for ‘information equity’ V. Chaudhry and T. Shipp, ‘Rethinking the Digital Divide in relation to Visual Disability in India and the United States: Towards a Paradigm of “Information Inequity”’, 225:2 *Disability Studies Quarterly* (2005).

<sup>156</sup> Article 19, International Covenant on Civil and Political Rights, United Nations, *supra* note 13, p. 26.

<sup>157</sup> UN CRPD Article 21, *supra* note 122.

<sup>158</sup> See also UN CRPD Article 9 where it generally talks about the right of disabled people to access information and information technologies and system equally with other people, *Ibid.*

Restrictions to exercise of these rights is only justifiable if it's due to 'respect of the rights or reputations of others' or 'national security or of public order (ordre public), or of public health or morals' and none of these applies to the lack of access of the blind and visually impaired persons to information in accessible formats.<sup>159</sup> Right to access to information is related to many other rights and is important for their realization, such as right to health. Blind people should be able to reach the information they look for in accessible formats similar to people without disabilities.

### 3.1.5 Right to Adequate Standard of Living

The right of every human being to an adequate standard of living is recognized in Article 11 of ICESCR<sup>160</sup> as well as Article 28 of UN CRPD.<sup>161</sup> The wording of these articles expressly talks about right to food, clothing and housing which may express the idea that right to adequate standard of living is limited to these rights. However, when it addresses the "continuous improvement of living conditions" in both articles and with the recent developments in interpreting the concept of adequate standard of living, it can be concluded that it is not limited to primary needs of a human

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<sup>159</sup> Article 19.3 (a) and (b), United Nations International Covenant on Civil and Political Rights, United Nations, *supra* note 13, p. 26.

<sup>160</sup> Article 11 (1) of International Covenant on Economic, Social and Cultural Rights asks State Parties to "[r]ecognize the right of everyone to an adequate standard of living ... and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." ICESCR, United Nations, *supra* note 13, p. 11.

<sup>161</sup> Article 28 (1) of UN Convention on the Rights of Persons with Disabilities holds that "[s]tates Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability." UN CRPD, *supra* note 122.

being but also to ones necessary for a decent and intellectual life compatible for the twenty-first century's modern human being living in the 'knowledge society'<sup>162</sup>.

It is understood that all the discussed rights are the entitlements of every individual regardless of elements such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>163</sup> Additionally, some groups of individuals are more vulnerable and the State has the responsibility to take extra measures to ensure the realization of their rights and freedom from discrimination.

Likewise, among disabled people there are subset groups who are even more exposed to discrimination and marginalization. For this reason, the rights of children with disabilities are recognized in the UN Convention on the Rights of the Child. Article 23 of the Convention declares that the States shall provide the disabled children with such assistance ensuring "that the disabled child has effective access to and receives education, training,... preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development".<sup>164</sup>

All the above-mentioned rights, among others, show the lawfulness and legitimacy of blind, visually impaired and other reading disabled persons' request to enjoy some minimum exclusive limitations and exceptions to the copyright protection over printed materials.<sup>165</sup>

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<sup>162</sup> See on 'Knowledge Society' A. Nassehi, 'What Do We Know About Knowledge: An Essay on the Knowledge Society', 29:3 *The Canadian Journal of Sociology* (2004), pp. 439-449; A. M. Nawrot, 'Why Do We Need Social Worlds While Talking about D-Knowledge Commons Ecosystem in Cyberspace?' 2/2008 *Masaryk University Journal of Law and Technology* (2009) pp. 189-200; UNESCO World Report, *Towards Knowledge Societies*, (UNESCO, Paris, 2005).

<sup>163</sup> Article 2 (1) International Covenant on Civil and Political Rights, as well as Article 2 (2) of International Covenant on Economic, Social and Cultural Rights, United Nations, supra note 13.

<sup>164</sup> Degener and Koster-Dreese, supra note 141, p. 208.

<sup>165</sup> In addition to the mentioned rights recognized in international human rights instruments, which are directly affected by lack of access for the blind, and visually

### **3.2 Interpretative Approaches on the VIPs' Economic, Social and Cultural Rights Effected by the Intellectual Property Rights**

As discussed in the previous sections, when claiming the human rights of persons with disabilities there are two main approaches. First, their human rights have been long guaranteed in the entire international human rights instrument, beginning with Universal Declaration of Human Rights (UDHR) followed by ICCPR and ICESCR, as they are part of the society as a whole and as human beings are entitled to all the recognized human rights. This entitlement in its nature requires the member states to provide and facilitate the conditions for disabled people to enjoy their rights as part of the rightholders towards which state has a responsibility.

Furthermore, due to the need for special actions for realization of human rights of disabled people and due to the discriminations that have been existing against them, the international community came to the conclusion that there should be a separate and specific internationally binding instrument merely dealing with disabled people's rights and that's how the UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol was adopted on 13 December 2006.<sup>166</sup> Since then,

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impaired, article 32 of the Convention on the Rights of Persons with Disabilities is also highly relevant and important for the claims of VIPs. It asks for the international cooperation for the purpose of realisation of disabled persons' human rights by saying that, "[s]tates 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 ... between and among States and ... in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities."

<sup>166</sup> Convention on the Rights of Persons with Disabilities, *supra* note 122.

there are even more grounds to claim for the rights of persons with disabilities and States face a stronger responsibility in this regard.

During the developments of both human rights and intellectual property rights, there have been some interpretations made by international bodies in different forms, which can be used for better understanding as well as argumentation for the rights of disabled people and in the present case the visually impaired persons' access to copyrighted material.

A breakthrough event in this field was the adoption of General Comment No. 17 by the Committee on Economic Social and Cultural Rights (hereafter the Committee) on Article 15 paragraph 1 (c) of ICESCR<sup>167</sup> on the right of everyone to benefit from the protection of the moral and material interests of a work of which he or she is the author, followed by the General Comment No. 21<sup>168</sup> on the right of everyone to take part in cultural life protected under Article 15 paragraph 1 (a) of the same convention. The significance of General Comment No. 17 comes from the fact that it made it clear that intellectual property rights are not human rights by stating that:

“Human rights are fundamental, inalienable and universal entitlements... whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity... In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else... *It is therefore important not to equate intellectual property rights with the human rights recognized in article 15, paragraph 1 (c).* [emphasize added]”<sup>169</sup>

Moreover, the Committee stresses the point that however the author's right to benefit from moral and material interests on his or her work is a human right and should be protected it “does not necessarily coincide with what is referred to as intellectual property rights under national

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<sup>167</sup> Committee on Economic, Social and Cultural Rights, *supra* note 46.

<sup>168</sup> Committee on Economic, Social and Cultural Rights, *supra* note 135.

<sup>169</sup> Committee on Economic, Social and Cultural Rights, *supra* note 46, p. 2.

legislation or international agreements.”<sup>170</sup> The importance of these points for the visually impaired community can be summarized in the primacy of their human rights (some of which are mentioned before) over the existing intellectual property rights protections as the Committee endorses the freedom of States to adopt different levels of protection “provided these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant.”<sup>171</sup>

The points made on article 15 (1) (c) are followed and enhanced in the Committee’s General Comment No. 21 as referred to before. Under the clarification of the obligation to fulfil, the Committee in its General Comment No. 21 expressly asks the States to “provide all that is necessary for fulfilment of the rights to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal.”<sup>172</sup> In addition, it considers the failure of the States “to take appropriate steps to achieve the full realization of the right of everyone to take part in cultural life” as a violation.<sup>173</sup>

### **3.3 Prior Norm-Setting Initiatives for Improved Access for VIPs**

Attempts and considerations regarding this issue are not limited to recent debates and efforts turned to WIPO to take action. Indeed, as back as in 1982 there has been attention on the issue and recommendations made to WIPO and UNESCO when they jointly created a Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Produced by Copyright. The efforts of this working group lead to

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<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*, p. 4.

<sup>172</sup> Committee on the Economic, Social and Cultural Rights, *supra* note 135, para. 54.

<sup>173</sup> *Ibid.*, para. 63.

production of a report on model exceptions for national copyright laws.<sup>174</sup> Later on in 1983, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention asked states to comment on this report. Other prominent events that provided the background for the present Draft Treaty Proposal are briefly as the followings.

### **3.3.1. Sundberg Declaration on Action and Strategies for Education, Prevention and Integration**

This Declaration was another effort to ensure consideration of some important principles regarding disabled persons, among them most significantly the fundamental principles of participation and personalization. Article 1 of the Declaration, adopted by UNESCO World Conference in the international Year of Disabled Persons (1981) in Spain, reads as follow, “every disabled person must be able to exercise his fundamental right to have full access to education, training, culture and information.”

Furthermore, it emphasizes their right to have access to educational, cultural and information programmes adapted to their specific needs<sup>175</sup> and urges all governments and national and international organization to consider these principles and take effective measure for the purpose of inclusion of disabled people in educational and cultural spheres. Mentioning the adaptable programmes which suit disables persons’ needs

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<sup>174</sup> Report of the Working Group on Access by Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, UNESCO/WIPO/WGH/I/3, Paris, 3 January 1983.

<sup>175</sup> Article 5, Sundberg Declaration, Adopted by the World Conference on Actions and Strategies for Education, Prevention and Integration on 7 November 1981 Degener and Koster-Dreese, *supra* note 141, p. 555.

shows the notability of providing them with accessible material in the appropriate formats.

### **3.3.2 Study on the Problems Experienced by the Handicapped in Obtaining Access to Protected Works**

In a report submitted by Wanda Noel published by the Executive Committee for the Berne Convention and the Intergovernmental Committee of the Universal Copy Right Convention on the topic of Problems Experienced by the Handicapped in Obtaining Access to Protected Works, she addresses the same issues existing today in the WIPO Standing Committee on Copy Right and Related Rights' agenda, meaning the production and distribution costs of accessible materials for handicapped people (including reading disabled people) and also the prohibition of "circulation of special media materials ... because of importation provisions contained in the copyright laws of most countries"<sup>176</sup>.

As a solution, she recommended the creation of

"[a]n entirely new international instrument addressing both matters. Such a "convention" would provide that the Contracting States permit the production of special media materials and services within their borders in accordance with the terms set out and, in addition, permit the free circulation of those materials and services amongst Contracting States."<sup>177</sup>

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<sup>176</sup> W. Noel, Copy Right Problems Raised by the Access by Handicapped Persons to Protected Works, report to the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union, Paris, 1985, available at [http://keionline.org/sites/default/files/noel\\_wipo\\_unesco\\_85\\_readable.pdf](http://keionline.org/sites/default/files/noel_wipo_unesco_85_readable.pdf), visited on 15 May 2011.

<sup>177</sup> *Ibid.*, p. 26



### 3.3.3 Standard Rules on the Equalization of Opportunities for Persons with Disabilities

As an attempt to give direction to the policy making in member states on the equal opportunities for disabled persons and as a ‘compensatory alternative’ to a treaty<sup>178</sup>, the United Nations General Assembly in 1993 adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities as an annex of its resolution 48/96 which according to its preamble “represents a strong moral and political commitment of Governments to take action to attain equalization of opportunities for persons with disabilities.”<sup>179</sup>

This set of rules takes account of the history of policy making on the living condition of disabled people, gives particular weight to issues such as equal opportunities for disabled people in the society especially concerning their equal participation in all aspects of life, and asks for monitoring measures as well. It also follows the considerations of the World Program Action Concerning Disabled People which was adopted also by the UN General Assembly as the outcome of the International Year of Disabled People on issues such as equal opportunities for disabled people in the society especially concerning their equal participation in all aspects of life and asks for monitoring measures as well.<sup>180</sup>

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<sup>178</sup> A. O’Reilly, A UN Convention on the Rights of Persons with Disabilities: The Next Steps, Paper presented at the General Assembly Meeting of Rehabilitation International Arab Region, 8-9 March 2003, Bahrain, available at [http://www.disabilityworld.org/01-03\\_03/news/unconvention.shtml](http://www.disabilityworld.org/01-03_03/news/unconvention.shtml), visited on 18 April 2011.

<sup>179</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, UN Doc. A/RES/48/96, 20 December 1993, Degener and Koster-Dreese, *supra* note 141, p. 285.

<sup>180</sup> World Program Action Concerning Disabled People, UN Doc. A/37/52, 3 December 1982, *Ibid.*, p. 320.

This set of rules along with the other aforementioned initiatives stress the necessity of taking action for advancement of disabled persons lives through different measures such as prevention, rehabilitation and most importantly related to the topic of the present research, equalization of opportunities for them. These initiatives especially the latter can be seen as the preparations for the international community to adopt a particular convention for the rights of disabled persons. These all can be used to claim for a better access to copyrighted material for visually impaired people as part of their right to equally enjoy their personal life while actively taking part in social life.

# **BUILDING                      TOWARDS FRAMEWORKS: ACCESS FOR THE        BLIND,        VISUALLY IMPAIRED        AND        OTHER READING                      DISABLES PERSONS**

*Everybody takes his own dreams seriously, but yawns at the breakfast-table when somebody else begins to tell the adventures of the night before. 'Helen Keller'<sup>181</sup>*

## **4.1 WIPO Draft Treaty for Improved Access for the Blind, Visually Impaired and Other Reading Disabled Persons**

As a result of the discriminative situation of access for blind and visually impaired people and the efforts and consideration of international and domestic organizations involved with their needs, on April 2008 The World Blind Union (WBU) took the initiative and put forward a draft treaty for improved access for blind, visually impaired and other reading disabled persons to the WIPO Standing Committee on Copyright and Related Rights (hereafter SCCR, or the Committee) to consider. Since then, the draft treaty although not passed has created an environment of attention and serious measure-taking on blind people's lack of access to copyrighted material while facing different approaches and standpoints from the member States

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<sup>181</sup> Keller, *Supra* note 1, p. 85.

of the WIPO and other related organisations on the form of a such commitment, if not its nature as such.

Although the draft treaty was presented recently, the issue and the need to address this problem have been existing for many years leading to the draft treaty, which is at hand today. In the following parts, I will briefly discuss the history of WIPO SCCR as the main body dealing with Copyright issues in the international level and how drafting of such a treaty has found its way in SCCR's agenda. I will continue by providing an insight to the aims and content of different proposals for a treaty and their proponents as well as opponents and the reactions to a treaty as such or other sorts of measures with the same purpose by governments, public, NGOs and last but not least, the blind people organizations.

Finally, I will discuss the fate of the draft treaty or any other somehow binding instrument in benefit of blind community and application of the idea of a human rights framework for intellectual property to the present case as well as the reasons why the draft treaty is necessary to the creation of such framework.

#### **4.1.1 WIPO Standing Committee on Copyright and Related Rights' History on the Issue**

As Ahmed Abdel Latif, delegate of the Permanent Mission of Egypt to the United Nations in Geneva accurately points out “with the globalization of intellectual property rights and the expansion of the scope in intellectual property protection, the main institutions involved in international deliberations and rule making on intellectual property issues, particularly the WTO and WIPO, have acquired unprecedented importance.”<sup>182</sup> The WIPO Standing Committee on Copyright and Related Rights as an influential body in international level composed of all member States of

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<sup>182</sup> Abdel Latif, *supra* note 116, pp. 99-125.

WIPO and/or of the Berne Union was set up under the 1998-1999 biennium in order to examine matters of substantive law or of harmonization in the field of copyright and related rights. A number of intergovernmental and non-governmental organizations and, as observers, certain member States of the UN non-members of WIPO and/or Berne Union are part of the committee for a better and more holistic perspective on the ongoing issues.<sup>183</sup>

While the main plan and focus of the WIPO SCCR since its establishment in 1998 has been largely on broadening the scope of copyright and related rights protection, its agenda seems to be evolving recently.<sup>184</sup> The change in SCCR policies is part of the general reform in WIPO due to inquiries by developing countries as well as NGOs for a more balanced intellectual property system and clearly, the birth of the A2K movement as elaborated on before.

The issue of limitations and exceptions to copyright in favour of education, libraries and disabled people has been discussed at every ordinary SCCR session from the 12<sup>th</sup> Session in November 2004 up to the present.<sup>185</sup> After receiving proposals firstly by the Chile and consequently, from a group of Latin American countries in its 16<sup>th</sup> session in 2008 regarding limitations and exceptions and a possible work plan for them, the Committee stated that it:

“ [a]cknowledged the special needs of visually impaired persons and stressed the importance of dealing, without delay and with appropriate deliberation, with those needs of the blind, visually impaired, and other reading-disabled persons, including discussions at the national and international level on possible ways and means facilitating and enhancing access to protected works. This should include analysis of limitations and exceptions...”<sup>186</sup>

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<sup>183</sup> Standing Committee on Copyright and Related Rights Webpage, WIPO Website available at <http://wipo.int/copyright/en/sccr.html> , visited on 12 April 2011.

<sup>184</sup> *E.g.* the prolix attempts to reach a treaty for protection of broadcasting, cable-casting and web-casting organizations.

<sup>185</sup> WIPO SCCR Twelfth Session, Geneva, November 17 to 19, 2004, WIPO Doc. SCCR/12/3.

<sup>186</sup> WIPO SCCR Seventeenth Session, Geneva, November 5 to 7, 2008, WIPO Doc. SCCR/17/5 PROV., p. 1.

Moreover, in accordance with its plan to consider copyright L&Es in its agenda, SCCR also prepared four studies (and at the present time is at the process of preparing more studies) regarding the copyright limitations and exceptions.<sup>187</sup> One of them is specifically on the access for the visually impaired people that could be seen as one of the many and probably first steps to build a more holistic framework for L&Es justifies by a variety of grounds influencing the realization of more human rights. In 2009, a proposal for a draft treaty was offered to the committee and since then it has been on its agenda and gave rise to diverse debates and studies, which will be discussed briefly in the following section.

## **4.1.2 Initiatives for a Treaty on Improved Access for Visually Impaired Persons**

An uncountable number of factors have contributed to improvement of life conditions for the blind and visually impaired people in general as well as their ‘right to read’; however, due to limitations of time and space I will only discuss the main initiators of the Draft Treaty Proposal at hand.

### **4.1.2.1 World Blind Union (WBU)**

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<sup>187</sup> These studies are as following: Nic Garnett, *WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions*, WIPO SCCR/14/5, April 27, 2006. 2; Judith Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired*, WIPO SCCR/15/7 Feb. 20, 2007; Kenneth Crews, *WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO SCCR/17/2, August 26, 2008; and, Raquel Xalabarder, *WIPO Study on Copyright Limitations and Exceptions for Educational Activities*, WIPO SCCR/19/7, November 5, 2009.

In 1984 “The World Council for the Welfare of the Blind, which had been established in 1949, and the International Federation of the Blind, which had been formed in 1964, were combined to create the World Blind Union (WBU). The International Federation of the Blind was an organization of blind consumers, and the World Council for the Welfare of the Blind was an organization of agencies for the blind.”<sup>188</sup>

World Blind Union as one of the main actors in advocating blind, visually impaired and other reading disabled persons’ rights<sup>189</sup>, in cooperation with Knowledge Ecology International (KEI)<sup>190</sup> and The International Federation of Library Associations (IFLA)<sup>191</sup>, has tried to convince WIPO SCCR to take action for harmonization and norm setting in the area of copyright limitations and exceptions for the better access by these vulnerable groups of rightholders and to draw the Committee’s attention to the existing complexities in providing access to them, such as production and distribution costs. As another important area of interest by WBU, it has referred to the preventive import/export policies, which hamper the free and effective flow of already accessible materials among countries.

#### **4.1.2.2 Latin-American Countries**

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<sup>188</sup> Timeline: Addressing Copyright Related Barriers to Overcoming Reading Disabilities Knowledge Ecology International Webpage, available at <http://www.keionline.org/timeline-reading>, visited on April 12, 2011

<sup>189</sup> The World Blind Union represents over 160 million blind and visually impaired persons from about 600 different organisations in 177 member states, available at [www.worldblindunion.org](http://www.worldblindunion.org), visited on 15 May 2011.

<sup>190</sup> Knowledge Ecology International (KEI), formerly known as Consumer Project on Technology (CPTech) is a not for profit nongovernmental organization that searches for better outcomes, including new solutions, to the management of knowledge resources, available at <http://keionline.org/>, visited on 28 April 2011.

<sup>191</sup> International Federation of Library Associations and Organizations (IFLA) founded in 1927 in Scotland and registered in the Netherlands in 1971 represents its 1600 members from almost 150 countries involved in library and related services, available at <http://www.ifla.org/>, visited on 20 May 2011.

Following the continuous set of studies, reports and discussions on limitations and exceptions to copyright<sup>192</sup>, the delegation of Chile made a proposal about L&Es in the SCCR's twelfth session (SCCR/12, November 2004) identifying "(t)he relevance of prioritizing and setting aside working time for this Committee to strengthen international understanding of the need to have adequate limitations, learning from existing models and moving towards an agreement on exceptions and limitations for public interest purposes."<sup>193</sup> This statement was followed by a more elaborated proposal in the 13<sup>th</sup> session (SCCR/13, November 2005) suggesting SCCR to undertake three areas of work: Firstly, identification of L&Es models and practices from member States national IP systems; Secondly, "analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming there from"; And lastly, making of an agreement on the minimum L&Es for the purpose of harmonization of all the national legislations.<sup>194</sup>

Later on, other Latin-American countries in support of the Chile's proposals provided the Committee with a broad work programme for L&Es in its 16<sup>th</sup> session in 2008<sup>195</sup> and following the submission of a WIPO Draft Treaty proposal by WBU and KEI to SCCR in the April of the same year<sup>196</sup> Brazil, Ecuador and Paraguay supported the idea and put forward the

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<sup>192</sup> Some of the examples are David Mann, *WIPO-Advancing Access to Information for Print Disabled People*, World Blind Union (WBU), 2001; Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7, April 5, 2003; and, Geidy Lung, *Copyright Exceptions for the Visually Impaired International Perspective*, IFLA General Conference and Council, August 2004.

<sup>193</sup> WIPO SCCR Thirteenth Session, Geneva, November 21 to 23, 2005, WIPO Doc. SCCR/13/5, p. 1.

<sup>194</sup> *Ibid.*

<sup>195</sup> The countries were Brazil, Nicaragua and Uruguay along with Chile.

<sup>196</sup> The report from the meeting leading to the proposed treaty is available at [http://www.keionline.org/misc-docs/tvi/meeting\\_report.pdf](http://www.keionline.org/misc-docs/tvi/meeting_report.pdf), visited on 20 May 2011.



Proposal for a WIPO Treaty based on the WBU proposal in the SSCR 18<sup>th</sup> session in 2009.<sup>197</sup>

#### 4.1.2.3 Main Focus of the Initiators

The main goal of the Draft Treaty Proposal according to the Christopher Friend, chair of the WBU Copyright and Right to Read Working Group is to “facilitate greater access to works under copyright limitations and exceptions, and also motivate publishers to publish works in accessible formats.”<sup>198</sup> This main goal is set as it is now due to experts and scholars’ ideas that it is the right moment to propose a treaty that harmonizes the minimum *mandatory* limitations and exceptions to copyright protection and to ensure that exchange of the works produced this way, over national borders, would be possible.<sup>199</sup>

There already exist and there has been a considerable amount of regulations on limitations and exceptions for the benefit of visually impaired in national legislations as well as the mechanisms that have been considered to be applied by the international instruments on intellectual property and copyright in particular. However, no regulations in this regard are available in the international level to ask for all the countries around the world to take measures to improve the VIPs’ access.

Moreover, there is a need for harmonization of the existing limitations and exceptions in international instruments as well as the need to facilitate and remove the obstacles of exchange of resources for the benefit of the countries and regions with common language, those countries sharing

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<sup>197</sup> Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), WIPO SCCR Eighteenth Session, Geneva, May 25 to 29, 2009, WIPO Doc. SCCR/18/5.

<sup>198</sup> Letter from Christopher E. B. Friend, Chair of the WBU Copyright and Right to Read Working Group, to WIPO Director General Francis Gurry, available at [http://www.keionline.org/misc-docs/tvi/wbu\\_coverletter\\_gurry.pdf](http://www.keionline.org/misc-docs/tvi/wbu_coverletter_gurry.pdf), visited on 20 May 2011.

<sup>199</sup> WBU and KEI, *supra* note 196.

the same cultural and literary values and finally the developing and least-developed population of the world.

One of the other main concerns of the initiators of a treaty is to reach a binding instrument, which “provide(s) legal norms to ensure that digital technologies can be used to greatly expand the number of accessible works.”<sup>200</sup>

The draft treaty presented to WIPO mainly follows this logic and aim for realization of these objectives. “A new international instrument on L&E’s offers a unique opportunity to coordinate, harmonize and balance the heightened (and new) standards of protection set forth in the successive Berne Convention Revisions, the TRIPS Agreement and the WIPO Internet Treaties.”<sup>201</sup>

### **4.1.3 Analysis and Comparison of the Four Proposals for a Treaty**

Following the submission of the Draft Treaty Proposal by GRULAC countries, there was a flow of proposals by other groups of countries, which amounted to four main proposals, which shows the standpoints of these countries and their idea on how the copyright L&Es should be regulated.<sup>202</sup> To get a grip on how the future of a treaty affecting the blind and visually impaired persons’ right to read would be, I will briefly discuss and compare these proposals and due to the similarities and for the sake of brevity i will look at them as two set of coalitions (in the sense that they share almost the same criteria):

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<sup>200</sup> 2009 WBU/KEI pamphlet on WIPO treaty for disabilities, available at [http://keionline.org/sites/default/files/new\\_treaty\\_disabilities.pdf](http://keionline.org/sites/default/files/new_treaty_disabilities.pdf), visited on 2 May 2011.

<sup>201</sup> Hugenholtz and Okediji, *supra* note 92.

<sup>202</sup> GRULAC (Grupo de Latinamerica y el Caribe) stands for the 33 member states of the Latin American and Caribbean Group as one of the United Nations Regional Groups.

Group One: Brazil, Ecuador and Paraguay (BEP) proposal based on WBU proposed treaty<sup>203</sup> and The African Group Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers Proposal<sup>204</sup> (with the support of GRULAC, Asian Countries, China and Russia)

Group B: European Union Draft Joint Recommendation<sup>205</sup> and the United States Draft Consensus Instrument<sup>206</sup> (with support of Australia, New Zealand, the Vatican, Japan and Canada)

While these proposals have many similarities, we will discuss their differences, which raise the dispute and make it hard and lingering to reach an agreed-upon treaty. Regarding the beneficiaries of the treaty, while African Group, having the broadest approaches to the concept of disability and copyright L&Es, defines disability as any “suffering from visual impairment or a physical, mental, sensory or cognitive incapacity”<sup>207</sup> and the BEP/WBU share a similar view and talks about blind, visually impaired and persons with any other disability that as its result needs an accessible format, the two other groups sharing fairly coherent views solely talk about print disabled persons.

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<sup>203</sup> WIPO SCCR, *supra* note 197.

<sup>204</sup> WIPO SCCR, Twentieth Session, Geneva, June 21–24, 2010, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group, WIPO doc. SCCR/20/11.

<sup>205</sup> WIPO SCCR Twentieth Session, Geneva, June 21 to 24, 2010, Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability, Proposal by the Delegation of the European Union, WIPO doc. SCCR/20/12.

<sup>206</sup> WIPO SCCR Twentieth Session, Geneva, June 21 to 24, 2010, Draft Consensus Instrument, Proposal by the Delegation of the United States of America, WIPO Doc. SCCR/20/10.

<sup>207</sup> WIPO SCCR, *supra* note 204, Article 21 (a).

The next controversial disparity that stands out is the scope of works that proposals seek to cover as it includes ‘literary, dramatic, musical and artistic works, databases and films’ in addition to ‘scientific’<sup>208</sup> works according to the first group while the second group believes in acquiescing only to ‘published works’.<sup>209</sup>

The main difference in defining the accessible format is that U.S limits it to Braille, large print and audio while others and specially the Group One countries leave it open.

One of the important dissimilarities is the introduction of the concept of ‘trusted intermediaries’<sup>210</sup> by Group B regarding import/export regulations (U.S ask for it by an exception of Braille while EU put it mandatory.)<sup>211</sup>

Regarding inclusion of minimal national domestic exceptions, while Group one use the language of “shall” the EU surprisingly proposes, “member states should provide...an exception to the right of reproduction”<sup>212</sup>.

As part of the use of copyrighted works for the benefit of persons with disabilities, commercial/profit use is allowed in Group One’s proposals under ‘limited circumstances and with possible reservation’ while it is not allowed in Group B’s suggested instruments.<sup>213</sup> Finally, the last but not least imperative difference is the fact that WBU with the support of developing countries and African group seek for a concrete and binding solution for the problem of visually impaired people to copyrighted material while Group B countries prefer to deal with the issue in a more guiding and hortative solution without an obligatory outcome.

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<sup>208</sup> WIPO SCCR, *supra* note 197 and 204.

<sup>209</sup> WIPO SCCR, *supra* note 205 and 206.

<sup>210</sup> WIPO Doc. SCCR/220/10, Art. 3(1) and SCCR/20/12 Art. 1 (iv), *Ibid.*

<sup>211</sup> *See* for definition and more information on ‘trusted intermediaries’ J. Sullivan, *supra* note 27.

<sup>212</sup> WIPO SCCR, *supra* note 205.

<sup>213</sup> WIPO SCCR, *supra* note 197 and 204.

#### 4.1.4 Embracement of the Proposed Treaty and Further Developments

As a controversial and sensitive matter of clash of interests for copyright holders and blind community and advocates of their rights from different backgrounds such as governments, international and national organizations, non-governmental organizations, prominent cultural and scientific figures and artists among others, the proposed draft treaty has received very different reactions, both supportive and sceptic.

Some, mainly the initiators of the treaty and those supporting them after they expressed their idea<sup>214</sup> argue that it is the right moment for a treaty as such and an international binding instrument which creates obligations and opens up real possibilities is the right answer to the visually impaired problems because today “while new technologies make it possible to imagine a world where visually impaired persons have access to a broad variety of documents at the same time as sighted people, the out-of-date legal environment is a barrier.”<sup>215</sup>

However, others are looking for alternative solutions while rejecting the idea of a treaty due to different reasoning. As already mentioned a large amount of opposition to a treaty comes from the United States as well as European Union as they have been strongly insisting on the fact that a treaty as such is unnecessary, ‘pre-mature’ and not timely at this point.

Upon the submission of the WBU’s proposed Draft Treaty to WIPO the International Federation of Reproduction Rights Organizations (IFFRO) advocating the rights of publishers as the major copyright holders asked for establishment of a ‘stakeholder platform’ to search and analyze

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<sup>214</sup> See for more information a list of supporters of the treaty available at <http://keionline.org/content/view/210/1>, visited on 2 May 2011.

<sup>215</sup> C. Friend, *supra* note 198.

the possible measures on a voluntarily basis that could replace the treaty proposal.<sup>216</sup>

The idea of replacing the treaty with this platform faced strong opposition by the proponents of the draft treaty and civil society, however, SCCR considered setting up the platform in its concluding remarks of its 17<sup>th</sup> session in order to “facilitate arrangements to secure access for disabled persons to protected works”.<sup>217</sup> So far, the Committee has received four Interim Reports of the Stakeholders Platform as the result of its four meetings in 2009 and 2010.<sup>218</sup>

On a step taken for facilitating the realization of VIP’s access to reproduced copyrighted works based on the available resources without establishment of new legally binding regulations, the Platform launched the Trusted Intermediary Global Accessible Resources project (TIGAR) which is designated to “enable publishers to make their titles easily available to trusted intermediaries. These intermediaries will create accessible formats and share them amongst each other and with specialized libraries.”<sup>219</sup>

The opposition of the EU to a legally binding instrument also originates from the fact that EU has been active on framing the issue of access to reproduced works under copyright protection on its own for quite

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<sup>216</sup> International Federation of Reproduction Rights Organizations (IFRRO), available at <http://www.ifrro.org/>, visited on 5 May 2011.

<sup>217</sup> WIPO SCCR, *supra* note 186.

<sup>218</sup> The meetings of the Stakeholders’ Platform have taken place as follows: First meeting in Geneva, on January 19, 2009; second meeting in London, on April 20, 2009; third meeting in Alexandria (Egypt), on November 3, 2009; and, fourth meeting in Geneva, on May 26, 2010. Interim Reports of the above meetings have been presented during the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> sessions of the SCCR (documents SCCR/18/4, SCCR/19/10 and SCCR/20/6, respectively) to provide an update of the work carried out by the Platform. *See* for more information Fourth Interim Report of the Stakeholders’ Platform, WIPO SCCRS 21<sup>st</sup> session, Geneva, 8-12 November 2010, WIPO Doc. SCCR/21/10.

<sup>219</sup> Stakeholders’ Platform Launches Project to Facilitate Access by VIPs to Published Works, WIPO, available at [http://www.wipo.int/pressroom/en/articles/2010/article\\_0043.html](http://www.wipo.int/pressroom/en/articles/2010/article_0043.html), visited on 28 April 2011.

some time. In July 2008, the European Commission adopted the ‘Green Paper on Copyright in Knowledge Economy’ in which ‘the long-term future of copyright policy in the knowledge intensive areas’ in general and ‘the special needs for the disabled to participate in the information society’ in particular was addressed.<sup>220</sup>

Based on the Green Paper the Commission organized a Stakeholder Dialogue in the EU level to “examine policy responses, including ways to encourage the unencumbered EU trade of works in accessible formats.”<sup>221</sup> In September 2010 the Stakeholder Dialogue adopted the ‘Memorandum of Understanding (MoU)<sup>222</sup> in cooperation with a number of organizations involved with the blind and visually impaired persons’ rights<sup>223</sup> ‘to improve the use of limitations and exceptions to copyright for the blind and visually impaired in EU Member States “with a system of distribution through Trusted Intermediaries, who can be institutions such as associations for the blind, libraries and special schools. The Memorandum also sets out a system

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<sup>220</sup> Europa Press Releases, Intellectual Property: Commission adopts forward-looking package, Reference: IP/08/1156, Date: 16/07/2008, available at [http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156&format=HTML&age\\_d=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1156&format=HTML&age_d=0&language=EN&guiLanguage=en), visited on 2 May 2011.

<sup>221</sup> Europa Press Release, European Commission puts challenges of books digitisation for authors, libraries and consumers on EU's agenda, Reference: IP/09/1544, Date: 19/10/2009, available at [http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1544&format=HTML&age\\_d=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1544&format=HTML&age_d=0&language=EN&guiLanguage=en), visited on May 3, 2011.

<sup>222</sup> EU Stakeholders Dialogue Memorandum of Understanding (MOU) on access to works by people with print disabilities, 14 September 2010, the text available at [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/2010/20100914\\_mou\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/2010/20100914_mou_en.pdf), visited on May 3, 2011.

<sup>223</sup> The undersigned of the Memorandum are as followings: Federation of European Publishers, European Blind Union, European Writers Council, European Dyslexia Association, International Federation of Reproduction Rights Organisations, and International Association of Scientific, Technical and Medical Publishers.

of mutual recognition among Trusted Intermediaries so that the registered persons will be able to access books from all over the EU.”<sup>224</sup>

Considering the fact that in spite of the result of the last SCCR meeting in November 2010, and reaching conclusions which seemed promising and positive for the blind community the aforementioned measures in general and publication of the Memorandum of Understanding in particular the World Blind Union suspended its cooperation with WIPO. In a statement made on 26 February 2011, WBU announced that it “suspends participation in the WIPO Stakeholders’ Platform and EU Stakeholder Dialogue projects, pending agreement at WIPO on a proper binding legal framework.”<sup>225</sup>

Following its past policy, EU made an informal proposal to WIPO in April 2011 to undertake ‘training, technical assistance on exceptions for the blind’ for the member States on a voluntary and non-binding basis for a period of three to five years and ‘provide detailed reports to the SCCR and the General Assembly’ by monitoring the progress.<sup>226</sup>

If only after this three-five year the ‘development of national law exceptions for persons with print disabilities and/or cross-border exchanges of special format copies remain inadequate to meet the reasonable needs of persons with print disabilities because of legal restrictions’ then the WIPO General Assembly may consider holding a diplomatic conference to discuss the international legal norms in the form of a protocol to Berne Convention

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<sup>224</sup> Europa Press Release, Copyright: Commissioner Barnier welcomes agreement on greater access to books for the visually impaired, Reference: IP/10/1120, Date: 14/09/09, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1120&format=HTML&age=d=0&language=EN&guiLanguage=en>, visited on 2 May 2011.

<sup>225</sup> World Blind Union Website, available at <http://www.worldblindunion.org/en/news-events/latest-news/Pages/default.aspx>, visited on 12 April 2011.

<sup>226</sup> Text of the European Union Proposal on 15 April 2011 is available at [http://keionline.org/sites/default/files/eu\\_15April2011.pdf](http://keionline.org/sites/default/files/eu_15April2011.pdf), visited on 2 May 2011.



based on the EU's Joint Recommendation to WIPO for a greater access for the blind and visually impaired.<sup>227</sup>

As Internal Market Commissioner Michel Barnier pointed out the EU's standpoint on the issue is that voluntary measures and "soft law" are better ways to end the "book famine" suffered by millions of visually impaired people.<sup>228</sup> Regarding this expressed view, David Hammerstein, a former member of the European Parliament from Spain stated that this view 'reflect more ideological motives rather than any concrete economic interest.'<sup>229</sup> There are views expressed that the EU and similarly United States' resistance to a internationally legally binding text on limitations and exceptions to copyright is due to the fear that this would become the first step of the growing demands for further measures on limiting the scope of copyright.

The views expressed by European Union and other member states with similar policies is not welcomed by the proponents of the draft treaty and causes reactions such as the mentioned suspension of cooperation from the side of WBU. However, one cannot ignore the fact that it is oversimplified to think that creating a treaty will magically solve all the problems regarding the access of the blind. Even upon adoption of a legal framework, it is inevitable to resort to measures such as 'trusted intermediaries' and 'stakeholder platform'.

For the accessible format (especially the 'Master File' as the most convenient and effective version of a work) to reach from the publishers to the VIPs' organizations there is an unavoidable need for intermediaries that

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<sup>227</sup> *Ibid.*

<sup>228</sup> Letter from Michel Barnier, member of the EC Internal Market and Services to Dan Pescod, European Blind Union, 2 March 2011, available at [http://keionline.org/sites/default/files/barnier2pescod\\_2march2011.pdf](http://keionline.org/sites/default/files/barnier2pescod_2march2011.pdf), visited on 7 May 2011.

<sup>229</sup> Interview with David Hammerstein regarding negotiations on WIPO treaty for persons who are blind or have other disabilities carried out on 3-6 March 2011 by Knowledge Ecology International, available at <http://www.keionline.org/node/1087> , visited at 14 March 2011.

carry out the process since the main challenge and obstacle in this field is how to reassure the publishers that the accessible\pre-accessible content that they provide and is usable for sighted persons as well will not leak on internet and furthermore, by making this content available to VIPs through mass licensing their revenue and profit will not be subject to dramatic decrease. Nevertheless, the question of such intermediaries should go through a legal framework for the purposes of harmonization and guarantee of effectiveness under the idea of a ‘global infrastructure’, which allows simple licensing and legal acquirement of content.<sup>230</sup>

## **4.2 How the WIPO Draft Treaty Contributes to the Creation of a Framework for VIPs’ Access to Copyrighted Material**

In the previous chapters, the general interaction of human rights and intellectual property rights and copyright in particular is discussed along with the effect of this interaction on the access of the blind and visually impaired persons to copyrighted materials in accessible formats. The VIPs’ human rights that are affected by the lack of access are also analysed on a normative as well as interpretative basis. Concurrently, the fact that they urge a better access due to the obligations they create for the States is also emphasized and finally in the first part of the chapter four, a brief description on the background and objectives of the WIPO Draft Treaty for such improved access is expressed.

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<sup>230</sup> See for more information on ‘global infrastructure’ Francis Gurry Director General of World Intellectual Property Organization speech in Blue Sky Conference: Future Directions in Copyright Law in Queensland University of Technology, Brisbane, Australia, 25 February 2011, the text of the speech is available at [http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html), visited on 2 May 2011.

In this part, I will discuss why the draft treaty or a similar international legally binding instrument guaranteeing and improving the access of the blind and visually impaired to reproduced works under copyright protection is necessary.

The first argument is the urge for legislative harmonization of the possibility to make copyrighted works accessible to VIPs and consequently give them the chance to enjoy their human rights equally with others and live a life with more dignity and prosperity.

The second argument for essentiality of such a binding instrument is based on its role as a contributor to a more holistic and forethoughtful purpose, being the alleviation of the tension between the human rights and intellectual property rights through creation of a human rights framework for the latter.

#### **4.2.1 General Remarks: Clash of Copyright and VIPs' Human Rights**

The existence of an intersection between human rights and intellectual property is a fact, regardless of one's point of view on their coexistence or conflict. This overlap of interests in many ways affects the human rights of different groups of people and in particular the more vulnerable and marginalized groups such as the blind and visually impaired persons.

The difficulty in the present case is due to the human rights nature of the claims of the blind community in contrast to the human rights nature of the right of the author of a work to benefit from its moral and material interest. Therefore, the main challenge remains as how to strike a balance between the moral and material interests of the author of a work protected under Article 15 (1) (c) of the ICESCR and the numerous rights of the blind

and visually impaired persons attached to their ability to reproduce copyrighted works in the form of accessible formats.<sup>231</sup>

As discussed under the scheme of balancing public and private interest, one of the most conventional and old mechanisms in handling such a clash is by the use of limitations and exceptions to copyright and in this case, there are some available L&Es to be employed by VIPs in reproduction of copyrighted works. However, based on the grounds of their non-efficiency pointed out before such as lack of harmonization, obstacles for import/export of available works and the time requirements the already existing L&S are not corresponding to the needs of VIPs and fail to strike the aforementioned balance and the conflict of interests continue to exist.

To address this multifaceted phenomenon better the idea of a human rights framework for intellectual property rights was examined as a comprehensive solution and in the author's view, it is also applicable to the case of VIPs' access to copyrighted material as an example of the more general interaction of these two areas of law.

#### **4.2.2 A Human Rights Framework for VIPs' Access to Copyrighted Materials**

In chapter two of the present research, the creation of a human rights framework for intellectual property is considered as a hybrid solution to the clash of human rights and intellectual property, which will 'bring values' Gervais writes 'back to the [IP] system'<sup>232</sup>. Such framework distances itself from both extremes of conflict or coexistence approach, as "it is misleading to inquire whether human rights and intellectual property rights coexist or conflict with each other [and] because of the overlapping human rights attributes, these two sets of rights both coexist and conflict with each other".<sup>233</sup>

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<sup>231</sup> ICESCR Article 15, *supra* note 14.

<sup>232</sup> Torremans, *Supra* note 49, p. 15.

<sup>233</sup> Yu, *supra* note 16, p. 1078.

As a result of studying different approaches to creation of a human rights framework for intellectual property rights and evaluating their weaknesses and strength, Helfer suggests that to build toward a human rights framework and use its restrictive dimension for the purpose of balancing the relationship between IPRs and HRs one need to make a “careful, objective, and context-specific empirical assessment”<sup>234</sup>. Such measurement is needed to make sure that IPRs are the main barrier in attainment of a certain human right or rights. “If these measurement tools” Helfer writes “reveal that specific intellectual property rules are ... an immediate obstacle to the realization of specific human rights, governments should revise those rules.”<sup>235</sup>

As explained in details in chapter three, a great number of human rights of the blind and visually impaired persons can be used as grounds for their rightfulness to claim for a better access to copyrighted materials. The importance of access to copyrighted material for realisation of human rights is due to the significant role of knowledge. This important factor for fulfilment of many human rights in the ‘age of intellectual property’ is produced and protected under auspices of IP.

To build a human rights framework for access of the blind and VIPs to copyrighted works one can take account of their well established and in some cases such as right to participation in cultural life well commented on rights. Whenever the limited or non-existence possibility of converting a copyrighted work to accessible formats is hindering one of the rights discussed before to be fully implemented, it is the right moment to address this situation under a human rights framework. To start doing so based on the current situation, one can take a legal instrument for minimum mandatory L&Es as a starting point. It is on the State parties to the international human rights instruments to do so because they ‘have duties’

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<sup>234</sup> Helfer and Austin, *supra* note 3, p. 518.

<sup>235</sup> *Ibid.*, p. 521.

Yu argues, “to regulate activities of private actors as part of their international human-rights obligations.”<sup>236</sup>

### **4.2.3 The WIPO Draft Treaty and Its Contribution to a Human Rights Framework**

Proposing a draft treaty to improve the access of visually impaired community to accessible works protected under copyright regulations by setting a stronger and internationally harmonized system of limitations and exceptions to copyright was a step for realization of the aforementioned access and simultaneously a wide range of VIPs’ human rights. There is for sure more to be done in this regard, however even this first step has faced excessive complications and obstacles so far.

#### **4.2.3.1 On The Role of WIPO: Do Regimes Matter?**

The role of the WIPO and its SCCR on the present issue was explored earlier in this chapter. The A2K movement originated by the will of developing countries to transform WIPO to a more development oriented organisation dealing with international intellectual property lawmaking and WIPO’s tendency to undergo such transformation is vital for the fate of the Draft Treaty.

To fully comprehend this vitality, one should look through the lens of the international relations scholars in analysing the importance of international regimes and the incentives of governments and non-state actors in choosing different regimes. What Helfer suggests under the idea of “regime shifting” is the need of the developing countries mainly to resort to venues rather than World Trade Organisation in order to decrease the negative effects of TRIPS Agreement on regulating international intellectual

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<sup>236</sup> Torremans, *Supra* note 49, p. 89.

property system or to fill in the existing gaps made by it because of omission of some issues.<sup>237</sup> In the present case, WIPO is the regime chosen by the blind and visually impaired community to address their needs as the most convenient and corresponding institution which is also able to deal with the issue.

Moreover, to use the human rights framework suggested by Helfer and put the results of measuring implication of IPRS for certain HRs in use in determining the result of the interaction of human rights and intellectual property one important factor is “how human rights norms are received in established intellectual property lawmaking venues such as WIPO and WTO”,<sup>238</sup> as “actors who engage with the legal and social policy issues to which both regimes are relevant” and they “have a large measure of discretion in determining the character of this interaction.”<sup>239</sup> Based on the WIPO’s agenda in general as well as its Standing Committee on Copyright and Related Rights in particular one can observe that there is incentive and good will for a change toward the inclusion of human rights in international intellectual property policy making.

Lawrence Lessig recently emphasized the same point by stating that “WIPO has a key role to play” in a designing a process for coming up “with simple and clear recommendations for a [copyright] system that is in tune with the digital age; a system that ensures that incentives are safeguarded while freedoms are assured” since according to him the current copyrights system fails to fulfil the purposes it has been designed for, especially it “fails to protect necessary freedoms in the digital environment.”<sup>240</sup>

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<sup>237</sup> See for more on “regime shifting” Helfer, *supra* note 42.

<sup>238</sup> Helfer, *supra* note 4, p. 59.

<sup>239</sup> Helfer and Austin, *supra* note 3, p. xiii.

<sup>240</sup> An Interview with Lawrence Lessig, WIPO Magazine, Issue 1/2011 (February), p. 4, available at [http://wipo.int/wipo\\_magazine/en/2011/01/article\\_0002.html](http://wipo.int/wipo_magazine/en/2011/01/article_0002.html), visited on 3 May 2011.

#### 4.2.3.2 WIPO Draft Treaty and its Promises

To this date, no reference to human rights is made in international intellectual property instruments and even though human rights have found more space to be considered in the international fora on intellectual property still there exists a noticeable instrumental lack in this regard.<sup>241</sup> Grosheide concludes upon a nuance analysis of the relationship between human rights and intellectual property rights in international regulations as well as in legal literature that one of the main requirements for the reconciliation of these two is a governmental intervention for reshaping the current intellectual property system. “Such governmental intervention should enjoy an instrumental approach as well.”<sup>242</sup>

Putting this idea next to what is discussed before on the necessities to shape a human rights framework and the important role that WIPO plays it can be observed that in the present case, all these requirements are met: primarily the long history of research, cooperation, and expertise of the governments as well as NGOs and scholars shows the negative and deterrent effects of copyright regulations in realizing access for VIPs. At the same time, WIPO has appeared as willing and geared up to provide the venue for gathering analogous voices and incentives and facilitating their interaction for the goal of highlighting human rights in international intellectual property law-making process. There are a great number of governments supporting the needs of the blind and visually impaired community and finally there is a proposal for a legal instrument at hand.

WIPO draft treaty for improved access for VIPs to works reproduced under copyright protection not only enables the blind and visually impaired persons to enjoy the benefits of reading in an equal and non-discriminatory manner as others, but also it adds value and assistance to the process of creation of a human rights framework for intellectual property which appears as a suitable response to the tension between human rights and intellectual property in general.

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<sup>241</sup> Grosheide, *supra* note 8, p. 33.

<sup>242</sup> *Ibid.*, p. 31.



It does so by striking a more meaningful balance between the moral and material interests of author and those of the public (here the blind and visually impaired) through application of certain limitations and exception to copyright while respecting and protecting the human rights attributes of intellectual property recognized by the ‘protective dimension’ of a human rights framework.<sup>243</sup>

It takes the setting of a balance as the first step without undermining or overprotection of neither human rights nor intellectual property rights in general, but giving the primacy to ‘human rights attributes’ of IPRs and balancing them in connection to other human rights based on the politics of these two in the given situations. The balance it is trying to create is based on the evident unsatisfactory situation of access to copyrighted material for VIPs causing violations of their named human rights by States failing to meet their obligations.

Although mere reliance on the L&Es for creation of a human rights framework is oversimplification of the problem, the value of L&Es guaranteed by the Draft Treaty lies in what Vera Franz enumerates as the benefits of ‘a regime of strengthened, harmonized limitations and exception to copyright’ for the future of intellectual property and human rights:

“It would make our intellectual property system fit for a global information society and economy, because it would foster cultural, educational, and economic activity cross border... it would alleviate the institutional weakness of states that need the diffusion of access to knowledge most. And from a strategic point of view, it would be able to rebalance our current copyright regime, in which the powers at the negotiating table are most unequal.... Also, such a regime would be a badly needed response to the aggressive intellectual property enforcement agenda currently being negotiated.... One could even argue that a strong regime of limitations and exceptions is a sine qua non for any new intellectual property enforcement regime and would in turn make any intellectual property enforcement agenda more acceptable.”<sup>244</sup>

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<sup>243</sup> Helfer and Austin, *Supra* note 3, p. 513.

<sup>244</sup> Krikorian and Kapczynski, *supra* note 40, p. 526.

# CONCLUSIONS

The issue of the ‘knowledge famine’ suffered by the blind and visually impaired population of the world because of their limited access to reproduced copyrighted works in accessible formats as a result of clash of copyright and VIPs’ interests is looked upon and analysed in the present research. The second chapter dealt with the topic based on a top-down approach by commencing with the general interaction of intellectual property and human rights and narrowing down the question to the clash of copyright and human rights and how it is the case for the limited access of VIPs to copyrighted materials.

Since the main aim of the research is exploring the role of the WIPO Draft Treaty and the minimum mandatory L&Es to copyright it contains for VIPs’ access, the normative grounds required for such evaluation were analysed in chapter three. A number of human rights, among others, were focused on due to both their more significant role in VIPs’ lives as well as their capacity to be robustly referred to, as they are effectively established and commented on. The General Comment No. 17 as a life vest for the right to participate in cultural right and as one of the key elements of A2K movement was specifically looked at to highlight its implications for the VIPs in reproducing accessible formats of copyrighted works.

Finally, WIPO Draft Treaty was studied in details and its necessity and advantages both for the visually impaired as well as the alleviation of the general human rights and intellectual property tension by creating a human rights framework were examined. The research illustrate that to build such a framework for VIPs’ access one can use the Draft Treaty as a legal basis and also put it in the concept of A2K movement which works as an umbrella encompassing all the human rights of VIPs infringed by lack of access to copyrighted works.

As Lawrence Lessig suggests in *Free Culture* it is the time to stop fighting the ‘copyright wars’ against what Internet has changed in our lives in the sense of culture. Similarly, the research shows now that digital

technologies allow the visually impaired people to benefit from and participate in the culture as well as the other aspects of life through accessible formats of copyrighted works it is up to the States, non-state policy makers, publishers and authors to understand that opening up the opportunities for VIPs to convert copyrighted materials to accessible formats, exchange those resources and digitalize them for an enhanced use will not lead to what they are afraid of most, piracy.

Therefore, based on the history of the issue and the normative nature of VIPs' claims, those in charge of regulating and implementing copyrights should embrace the visually challenged persons' demands as well as the offerings of technology for the sake of culture, knowledge, realization of VIPs' human rights and last but not least their own benefits since the visually impaired community is not asking for free-riding or a royalty-free exploitation of copyrighted works. The international community should realize that in cases where copyright is serving no good except blocking access to and the spread of knowledge as Lessig argues why not remove it instead of fearing what is not but a false impression.

However, there remains many questions to be answered about how such draft treaty should be implemented once passed, what other concurrent measures could be taken in order to facilitate the development of a human rights framework for copyright when it comes to VIPs' access and finally how to satisfy the copyrightholders and those in charge of safeguarding their benefits that their proceeds will not be at stake once they endorsed their obligations under the international human rights law. To pass the Draft Treaty or a similar internationally binding instrument for creation of a human rights framework towards a better access for VIPs resembles the very first step of the Twelve Labours of Hercules; the more is yet to come.

# Bibliography

## Books

Audrey Chapman and Sage Russles (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Intersentia, Oxford, 2002)

Anne McGill-Franzen & Richard L. Allington (Eds.), *Handbook of Reading Disability Research*, (Routledge, New York, 2011)

Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, (Oxford University Press, New York, 2007)

Christian Lenk, Nils Hoppe & Roberto Andorno (Eds.), *Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology*, (Ashgate Publishing Ltd., USA, 2007)

Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy*, (Commission on Intellectual Property Rights, London, 2002)

Debora J. Halbert, *Resisting Intellectual Property*, (Routledge, UK, 2005)

Gaëlle Krikorian & Amy Kapczynski (Eds.), *Access to Knowledge in the Age of Intellectual Property*, (Zone Books, New York, 2010)

Helen A Keller, *The World I Live In*, edited and with an introduction by Roger Shattuck, (New York Review Books, New York, 2003)

Keith E Maskus & Jerome H Reichman (Eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, (Cambridge University Press, UK, 2005)

Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface*, (Cambridge University Press, United States, 2011)

Lucie M.C.R Guibault, *Copyright Limitations and Contracts*, (Kluwer Law International, U.K, 2002)

Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Martinus Nijhoff Publishers, the Netherlands, 2009)

Oddny Mjöll Arnardóttir & Gerard Quinn (Eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, (Martinus Nijhoff Publishers, The Netherlands, 2009)

Paul Goldstein, *International copyright: Principles, Law and Practice*, (Oxford University Press, New York, 2001)

Paul C. Torremans (Ed.), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights*, (Kluwer Law International, Netherlands, 2008)

Peter D. Blanck (Ed.), *Disability Rights*, (Ashgate Publishing Ltd., U.K, 2005)

Peter Drahos & Ruth Mayne (Eds.), *Global Intellectual Property Rights, Knowledge, Access and Development*, (Palgrave Macmillan, New York, 2002)

Richard Baltander, *Education, Labour Market and Incomes for the Deaf/Hearing Impaired and the Blind/Visually Impaired*, (Stockholm University, Sweden, 2009)

Silke Von Lewinski, *International Copyright Law and Policy*, (Oxford University Press, U.S, 2008)

Theresia Degener & Yolán Kooster-Dreese (Eds.), *Human Rights and Disabled Persons*, (Martinus Nijhoff, Netherlands, 1995)

United Nations, *A Compilation of International Instruments*, (United Nations Publication, New York, 1988)

Willem Grosheide, *Intellectual Property and Human Rights: A Paradox*, (Edward Elgar Publishing Ltd, U.K, 2010)

Yvonne Donders & Vladimir Volodin (Eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, (UNESCO Publishing, U.K, 2007)

### **Articles**

Anna-Mari Nawrot, 'Why Do We Need Social Worlds While Talking about D-Knowledge Commons Ecosystem in Cyberspace?' 2/2008 Masaryk University Journal of Law and Technology (2009) pp. 189-200

Armin Nassehi, 'What Do We Know About Knowledge: An Essay on the Knowledge Society', 29:3 The Canadian Journal of Sociology (2004), pp. 439-449

Audrey R. Chapman, 'Towards an Understanding of the Rights to Enjoy the Benefits of Scientific Progress and Its Application', Journal of Human Rights, 8:1, pp. 1-36, 2005

Christophe Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’, 37 Int’l Rev. Intell. Prop. & Comp. L. 371- 404, 2006

Dan Pescod, “‘The Right to Read’- Why a WIPO Treaty for Print Disabled People?”, KEStudies, Vol. 3, 2009

Inge Storgaard Bonfils, ‘Disability Meta-Organizations and Policy-Making under New Forms of Governance’, Scandinavian Journal of Disability Research, vol. 13, No. 1, pp. 37-51, 2011

James Boyle, ‘The Second Enclosure Movement and the Construction of Public Domain’, 66 Law & Contemp. Probs. 33, 2003, p. 33

Janice T. Pilch, ‘Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons’, 12 October 2010, Library Copyright Alliance, [www.librarycopyrightalliance.org/bm~doc/briefvifinalrev101509.pdf](http://www.librarycopyrightalliance.org/bm~doc/briefvifinalrev101509.pdf)

Laurence R. Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence?’, Minnesota Journal of Law, Science & Technology 5 (2003), pp. 47-59

L. R. Helfer, ‘Regime Shifting: TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’, 29 Yale Journal of International Law (2004)

Laurence R. Helfer, ‘Toward a Human Rights Framework for Intellectual Property’, U.C. Davis Law Review 40 (2007). pp. 971-1020

Patricia S. Wall & Lee Sarver, ‘Disabled Student Access in an Era of Technology’, The Internet and Higher Education, Vol. 6, Issue 3, pp. 277-284, 2003

Peter K. Yu, 'Challenges to the Development of a Human Rights Framework for Intellectual Property', abridged and adapted from Peter K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', U.C. Davis Law Rev., Vol 40, pp. 1039-1149, 2007

Peter K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', U.C. Davis Law Rev., Vol 40, pp. 1039-1149, 2007

Peter K. Yu, 'Ten Common Questions about Intellectual Property and Human Rights', Georgia State Law Rev., Vol. 23, pp. 709-53, 2007

Swantje Köbsell, 'Towards Self-Determination and Equalization: A Short History of the German Rights Movement', Disability Studies Quarterly, Vol. 26, No. 2, 2006

Tom Shakespear, 'Disabled People's Self-Determination: a new social movement?', Disability and Society, Vol. 8, No. 3, pp. 249-264, 1993

Vandana Chaudhry & Tom Shipp, 'Rethinking the Digital Divide in Relation to Visual Disability in India and the United States: Towards a Paradigm of "Information Inequity"', Disability Studies Quarterly, Vol. 25, no. 2, 2005

Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain', 74 N.Y.U. L. Rev. 345, 1999

## **Papers**

A. O'Reilly, A UN Convention on the Rights of Persons with Disabilities: The Next Steps, Paper presented at the General Assembly Meeting of Rehabilitation International Arab Region, 8-9 March 2003, Bahrain



David Mann, WIPO-Advancing Access to Information for Print Disabled People, World Blind Union (WBU), 2001

Geidy Lung, Copyright Exceptions for the Visually Impaired International Perspective, IFLA General Conference and Council, August 2004

Hala Essalmawi (ed.), 'The Access to knowledge movement: Opportunities, Challenges and the Road Ahead', (Bibliotheca Alexandria Access to Knowledge Toolkit II, 2009)

Ken Davis, 'The Disabled People's Movement-Putting the Power in Empowerment', Paper presented at the seminar at Sheffield University Sociology Department, U.K., 1996, <http://www.leeds.ac.uk/disability-studies/archiveuk/DavisK/davis-empowerment.pdf>

Paper by the World Blind Union on a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, 7 October 2010, [www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/WBU\\_II.doc](http://www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/WBU_II.doc)

## **Studies**

Judith Sullivan, WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired, WIPO Doc. SCCR/15/7, 20 February 2007

Kenneth Crews, WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives, WIPO SCCR/17/2, August 26, 2008

Nic Garnett, WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions, WIPO SCCR/14/5, April 27, 2006

P. Bernt Hugenholtz & Ruth L. Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright', Study Sponsored by Open Society Institute (OSI) March 6, 2008

Raquel Xalabarder, WIPO Study on Copyright Limitations and Exceptions for Educational Activities, WIPO SCCR/19/7, November 5, 2009

Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, April 5, 2003

Sarah Hilderley, Accessible Publishing: Best Practice Guidelines for Publishers, prepared for World Intellectual Property Organisation, April 2011

## **Reports**

Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Law, report by Consumer International Asia Pacific Office, Kuala Lumpur, 2006

Fernandez J. Martinez Calvo, Technological Advances Benefiting Visually Impaired People, World Intellectual Property Organization, Information Meeting on Digital Content for the Visually Impaired, Geneva, November 3, 2003

International Standards: Visual Standards, Aspects and Ranges of Vision Loss with Emphasis on Population Surveys, Report prepared for the International Council of Ophthalmology at the 29th International Congress of Ophthalmology, Sydney, Australia, April 2002

Report of the Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Application, Amsterdam, 7-8 June 2007, <http://unesdoc.unesco.org/images/0015/001545/154583e.pdf>

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

The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, report to the ESCOR Sub-Commission on the Promotion and Protection of Human Rights 52<sup>nd</sup> session, UN Doc. E/CN.4/Sub.2/2001/12

Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, Report of the Third Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications, 16-17 July 2009, Venice, Italy,

<http://unesdoc.unesco.org/images/0018/001855/185558e.pdf>

Wanda Noel, Copy Right Problems Raised by the Access by Handicapped Persons to Protected Works, report to the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union, B/EC/XXIV/10 and IGC (1971) /VI/11, Paris, 1985

### **International Legal Instruments**

Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round Vol. 31, 33 I.L.M. 81 (1994)

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28,

1979. The Universal Declaration of Human Rights, G.A. res. 217A (III),  
U.N. Doc A/810 at 71 (1948)

International Covenant on Civil and Political Rights (ICCPR), G.A. res.  
2200A (XXI), U.N. Doc. A/6316 (1966)

International Covenant on Economic, Social and Cultural Rights (ICESCR),  
G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966)

United Nations Convention on the Rights of Persons with Disabilities, G.A.  
Res. 61/106 (2007)

World Intellectual Property Organisation Copyright Treaty (WCT), adopted  
in Geneva, December 20, 1996

World Intellectual Property Organisation Performances and Phonograms  
Treaty (WPPT), adopted in Geneva, December 20, 1996

### **Documents of International Organizations**

Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right:  
Obligations Related to Article 15 (1) (c)', Discussion paper submitted to  
Committee on Economic, Social and Cultural Rights Twenty-fourth session,  
Geneva, 13 November-1 December 2000, E/C.12/2000/12

Committee on Economic, Social and Cultural Rights, General Comment No.  
17: The Right of Everyone to Benefit from the Protection of the Moral and  
Material Interests Resulting from Any Scientific, Literary or Artistic  
Production of Which He is the Author (Art. 15 (1) (c)), 2006, UN Doc.  
E/C.12/GC/17

Committee on the Economic, Social and Cultural Rights General Comment  
No.21, Dec 21, 2009, UN Doc. E/C.12/GC/21

Human Rights Committee, General Comment 18, Non-discrimination, Thirty-seventh session, 1989, U.N. Doc. HRI/GEN/1/Rev.1

Maria Green, 'Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights', background paper submitted to the Committee of Economic, Social, and Cultural Rights, E/C.12/2000/15, 9 October 2000

United Nations General Assembly, United Nations Declaration on the Rights of Indigenous People, UN Doc. A/RES/61/295

United Nations High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Decision 2000/107, UN Doc. E/CN.4/Sub.2/DEC/107/2000/107 (2000)

United Nations High Commissioner for Human Rights, Sub-Commission on the Protection and Promotion of Human Rights Resolution 2001/21 on Intellectual Property Rights and Human Rights, 26<sup>th</sup> meeting, 16 August 2001

UNESCO World Report, Towards Knowledge Societies, (UNESCO, Paris, 2005)

WIPO SCCR Twelfth Session, Geneva, November 17 to 19, 2004, WIPO Doc. SCCR/12/3

WIPO SCCR Thirteenth Session, Geneva, November 21 to 23, 2005, WIPO Doc. SCCR/13/5

WIPO SCCR Seventeenth Session, Geneva, November 5 to 7, 2008, WIPO Doc. SCCR/17/5 PROV

WIPO SCCR Eighteenth Session, Geneva, May 25 to 29, 2009, WIPO Doc. SCCR/18/5, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)

WIPO SCCR, Twentieth Session, Geneva, June 21–24, 2010, WIPO doc. SCCR/20/11, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group

WIPO SCCR Twentieth Session, Geneva, June 21 to 24, 2010, WIPO doc. SCCR/20/12, Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability, Proposal by the Delegation of the European Union

WIPO SCCR Twentieth Session, Geneva, June 21 to 24, 2010, WIPO Doc. SCCR/20/10, Draft Consensus Instrument, Proposal by the Delegation of the United States of America

### **Speeches**

Jenny Morris, 'Citizenship, Self-Determination and Political Action: The Forging of a Political Movement', Conference on Citizenship and Disability, Sydney, Australia, February 1998.

Francis Gurry, Director General of WIPO, Speech at Blue Sky Conference: Future Directions in Copyright Law, Queensland University of Technology, Brisbane, Australia, 25 February 2011.

### **Letters**

Christopher E. B. Friend, Chair of the World Blind Union Copyright and Right to Read Working Group, to WIPO Director General Francis Gurry, 28 October 2008

### **Internet Sources**

Knowledge Ecology International, <http://www.keionline.org>

DAISY Consortium, <http://www.daisy.org>

European Union Official Website, Europa Press Releases, [www.europa.eu](http://www.europa.eu)

International Federation of Library Associations and Organizations (IFLA), <http://www.ifla.org>

International Federation of Reproduction Rights Organizations (IFRRO), available at <http://www.ifrro.org>

National Federation of the Blind, <http://www.nfb.org>

National Institute of Health, National Institute of Neurological Disorder and Stroke, <http://www.ninds.nih.gov>

Oxford Dictionaries, <http://oxforddictionaries.com>

Royal National Institute of Blind People (RNIB), <http://www.rnib.org.uk>

The Ulverscroft Foundation, <http://www.foundation.ulverscroft.com>

World Blind Union (WBU), [www.worldblindunion.org](http://www.worldblindunion.org)

World Health Organization, <http://www.who.int>

World Intellectual Property Organisation, [www.wipo.int](http://www.wipo.int)

# Table of Cases

Terry Yumbulul v Reserve Bank of Australia; Aboriginal Artists Agency Limited and Anthony Wallis [1991] Federal Court of Australia 233 (4 June 1991)