

**The Fight for Accessible Formats: Technology as A Catalyst for a  
World Effort to Improve Accessibility Domestically**

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**Abstract**

This note addresses the proposed WIPO International Instrument on the Limitations and Exception for Persons with Print Disabilities. I conclude that the current growth in technology - making previously inaccessible works accessible – calls for a change to current domestic copyright law and that ratification of the proposed treaty should be this change.

The proposed treaty compliments the growth of adaptive technology and the need for accessibility by permitting the creation of limited types of derivative works; providing rights to circumvent technological protection measures; and granting the freedom of import and export of accessible works. Furthermore, the proposed treaty compliments current disability law in the sense that it mirrors the legislative intent to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities, including discrimination in access to information.

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## The Fight for Accessible Formats: Technology as A Catalyst for a World Effort to Improve Accessibility Domestically

Mary Bertlesman\*

### I. Introduction

We live in a wireless, touch-screen, online world where technology is constantly evolving.<sup>1</sup> Technology is becoming an essential part of everyday life and while 81% of adults without disabilities use the Internet, only 54% of adults with disabilities use the Internet.<sup>2</sup> Despite the arguable lack of access causing this discrepancy, it is this growth in technology that is fostering a positive change and removing barriers for people with disabilities.<sup>3</sup> Technology is unlocking a world of ways in which people with disabilities can access previously inaccessible materials. Braille translators, screen readers, speech synthesizers, TTYs, and other adaptive technologies are providing people with disabilities more access to the world around us.

As our knowledge-based world goes through rapid technological developments, access to copyrighted work is becoming essential to everyday life.<sup>4</sup> Consequently, access to

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\*\* Syracuse University College of Law, J.D. expected 2013. I would first like to thank Professor Arlene Kanter for her encouragement and suggestions throughout the development of this note. I would also like to thank Adina Mulliken for her research help.

<sup>1</sup> THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, *Technology*, <http://www.aapd.com/what-we-do/technology/> (last visited Mar. 10, 2012).

<sup>2</sup> *Id.*

<sup>3</sup> Sheryl Burgstahler, *Working Together: People with Disabilities and Computer Technology*, DO-IT, <http://www.washington.edu/doit/Brochures/PDF/wtcomp.pdf> (last visited Mar. 10, 2012).

<sup>4</sup> Margot E. Kaminski & Shlomit Yanisky-Ravid, *Addressing the Proposed WIPO International Instrument on Limitations and Exceptions for Persons with Print Disabilities: Recommendation or Mandatory Treaty* (Yale Information Society Project, Working Paper, 2011), at 7.

copyrighted work is also essential to full participation in society.<sup>5</sup> The United States has created several federal laws to further the goal of full participation and to protect the rights of people with disabilities. The Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Individuals with Disabilities Education Act of 1990, and the Copyright Act are among several laws that have been enacted in the United States prohibiting discrimination on the basis of disability and promoting equality of all people with disabilities. These laws, particularly, the US copyright laws, have their limitations.<sup>6</sup> The United States copyright laws often prevent persons with print and other reading impairments from obtaining accessible versions of copyrighted works.<sup>7</sup>

The World Intellectual Property Organization (WIPO) is currently addressing this problem on a global scale.<sup>8</sup> According to a study done by WIPO, the licensing system for making written works accessible is inadequate and insufficient.<sup>9</sup> Despite protections provided to persons with print disabilities under international and domestic laws, they are frequently denied access to educational material, literature, entertainment, and the free flow of ideas, which allow for full participation in society.<sup>10</sup>

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<sup>5</sup> Kaminski, *supra* note 4, at 7.

<sup>6</sup> *Id.* at 8; U.N. World Intellectual Property Organization (WIPO), Standing Committee on Copyright and Related Rights (SCCR), Study on Copyright Limitations and Exceptions for the Visually Impaired, 38, WIPO Doc. SCCR/15/7 (Feb. 20, 2007) (prepared by Judith Sullivan) (hereinafter Fifteenth Session).

<sup>7</sup> Kaminski, *supra* note 4, at 8; Fifteenth Session, *supra* note 6, at 38.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

WIPO is now working with the United Nations to propose an international instrument to enable accessibility for persons with print disabilities.<sup>11</sup> The proposed instrument will provide specific limitations and exceptions to domestic copyright laws.<sup>12</sup> In particular, this instrument will make it legal for individuals with print disabilities and certain organizations to obtain accessible versions of copyrighted works in countries which sign the treaty. As a result, accessible books to be available to be sent internationally without permission from publishers. It also will prohibit contracts with publishers from undermining copyright exceptions for readers with disabilities.<sup>13</sup>

To better appreciate the need for an instrument like the one proposed by WIPO, it is important to understand the history of United States copyright law as well as the relationship between US disability rights laws and copyright law.

## II. The Copyright Clause of the United States Constitution

The drafters of the United States Constitution recognized the need for progress in science and the arts to create a prosperous and enduring nation. As such, they created the Copyright Clause of the Constitution. Article I, Section 8, Clause 8 of the United States Constitution states: “The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>14</sup> With the power given to it by the Copyright

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<sup>11</sup> Kaminski, *supra* note 4, at 3. The Standing Committee on Copyright and Related Rights (SCCR) agreed at its twenty second session in June, 2011.

<sup>12</sup> WIPO Secretariat, *Study on Copyright Limitations and Exceptions for the Visually Impaired 3*, (WIPO Doc. SCCR/22/8, Working Paper No. 38, 2011) (hereinafter Twenty-Second Session).

<sup>13</sup> See Twenty-Second Session, *supra* note 12.

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 8.

Clause, Congress enacted the first federal copyright statute in 1970.<sup>15</sup> Since then, the legislative scheme has been amended many times.<sup>16</sup> The most recent version of the US Copyright Act was adopted in 1976 and is codified in Title 17 of the United States Code.<sup>17</sup>

### III. The Copyright Act of 1976

The Copyright Act of 1976 protects the original works of authorship fixed in a tangible medium of expression, including books, music, sound recordings, and audiovisual works.<sup>18</sup> The author of a work has the exclusive right to reproduce, prepare derivative works, distribute, publically perform, publically display, and digitally transmit audio.<sup>19</sup> Furthermore, the author of a work has the right to authorize these exclusive rights.<sup>20</sup> However, there are certain limitations and exceptions to these exclusive rights. The tension between the interests of the author and the users is the foundation of these limitations and exceptions.<sup>21</sup>

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<sup>15</sup> MARY LAFRANCE, COPYRIGHT LAW IN A NUTSHELL 1 (West 2d ed., 2008).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> ADVISORY COMM'N ON ACCESSIBLE INSTRUCTION MATERIALS, DRAFT REPORT FROM TASK FORCE 4 (LEGAL), (Jan 7, 2011); Copyright Act of 1976, 17 U.S.C. § 102 (1976).

<sup>19</sup> 17 U.S.C. § 106 (2002).

<sup>20</sup> *Id.*

<sup>21</sup> Kaminski, *supra* note 4, at 6.

### A. *The Fair Use Exception*

The fair use exception is the most significant limitation on a copyright holder's exclusive rights.<sup>22</sup> This doctrine prevents "rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>23</sup> It exempts from liability certain moderate uses of a copyrighted work when those uses will not undermine the economic interests of the copyright owner.<sup>24</sup> The Fair Use exception involves the balancing of four factors: (1) the purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) the effect upon the market of the copyrighted work.<sup>25</sup> Because Section 107 of the law specifies that the analysis of fair use "shall include" the four factors, there is an indication that other factors may also be considered.<sup>26</sup> For example, some courts have considered the bad faith of the defendant, the industry custom, and the public interest of the defendant's activities.<sup>27</sup> Although the court may consider other factors, the term "shall" indicates that all four of the listed factors must be addressed.<sup>28</sup>

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<sup>22</sup> UNITED STATES COPYRIGHT OFFICE, *Fair Use*, <http://www.copyright.gov/fls/fl102.html> (last visited Mar. 10, 2012).

<sup>23</sup> ROGER E. SCHECHTER & JOHN R. THOMAS, *PRINCIPLES OF COPYRIGHT LAW* 432 (West 2010).

<sup>24</sup> *Id.*

<sup>25</sup> 17 U.S.C. § 107 (1992).

<sup>26</sup> SCHECHTER, *supra* note 23, at 437.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

*i. The Purpose and Character of Use*

The first of the fair use factors concentrates on the “purpose and character” of the defendant’s use.<sup>29</sup> This focus mirrors the theme of Section 107’s preamble, which lists several types of uses that the statutory drafters considered fair use.<sup>30</sup> Fair uses listed in the preamble includes: (1) criticism; (2) comment; (3) news reporting; (4) teaching; (5) scholarship; and (6) research.<sup>31</sup> However, just because a defendant purports to be engaged in one of these “protected” activities does not mean that a defendant will prevail on a claim of fair use.<sup>32</sup> For example, a teacher who makes duplicate copies of a textbook and distributes them to his entire class will not escape liability as a result of the fair use exception.<sup>33</sup> In addition to the uses listed in the preamble, a work that is significantly altered, used for a different purpose, and appeals to a different audience, is likely to be considered fair use.<sup>34</sup> This situation often referred to as transformative use.<sup>35</sup>

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<sup>29</sup> SCHECHTER, *supra* note 23, at 437.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> SCHECHTER, *supra* note 23, at 437.

<sup>34</sup> NOLO LAW FOR ALL, *The 'Fair Use' Rule: When Use of Copyrighted Material is Acceptable*, <http://www.nolo.com/legal-encyclopedia/fair-use-rule-copyright-material-30100.html> (last visited Mar. 10, 2012).

<sup>35</sup> SCHECHTER, *supra* note 23, at 442.



As the statutory language indicates, the issue of commercial use is also important. Generally, courts are less willing to extend the fair use exception when the use is commercial in nature.<sup>36</sup>

*ii. Nature of the Copyrighted Work*

The second factor courts consider in granting exceptions to the protections of the copyright law is the nature of the copyrighted work. Typically, highly creative works are afforded the greatest degree of protection.<sup>37</sup> Courts, therefore, are less likely to extend the fair use exception when a fictional copyrighted work is in question. “The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”<sup>38</sup> However, a fictional or creative work may not preclude a finding of fair use when the copying is deemed transformative under the first factor.<sup>39</sup>

Furthermore, the unpublished nature of a copyrighted work may affect the court’s use of this exception. Typically, if the copyrighted work is unpublished, it is less likely to be considered fair use. The Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises* concluded the following: “the author’s right to control the first public appearance of his expression weighs against such use of the work before its release.”<sup>40</sup>

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<sup>36</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”).

<sup>37</sup> SCHECHTER, *supra* note 23, at 447.

<sup>38</sup> *Harper & Row*, 471 U.S. at 563.

<sup>39</sup> *See Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) (“[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.” (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006))).

<sup>40</sup> *Harper & Row*, 471 U.S. at 564.

*iii. Amount and Substantiality of the Portion Used*

The third factor lends itself to the logic that the more a work is copied, the more likely it infringes upon copyright protections. As a result, extensive takings are less likely to be ruled as fair use than a single borrowing.<sup>41</sup> While this analysis is closely tied to considerations regarding the first factor, the determination of the amount and substantiality of the portion used in relation to the copyrighted work as a whole involves not only a quantitative analysis, but also a qualitative analysis.<sup>42</sup> In other words, the third factor focuses on the quantity of the material taken and the significance of that material to the plaintiff's work as a whole.

*iv. The Effect Upon the Market of the Copyrighted Work*

In *Harper & Row*, the Supreme Court explained that the fourth factor is "undoubtedly the single most important element of fair use."<sup>43</sup> This factor considers the effect of the defendant's use on the potential market for the plaintiff's work.<sup>44</sup> This factor assumes that if the defendant's conduct causes a significant number of people to refrain from paying for the plaintiff's work, the incentive to be creative would be reduced. Such weighing of potential effects must focus on both the particular effects of the defendant's conduct, and the market implications if the defendant's conduct were to become widely engaged by others.<sup>45</sup>

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<sup>41</sup> SCHECHTER, *supra* note 23, at 449.

<sup>42</sup> *Id.* at 449-50

<sup>43</sup> *Harper & Row*, 471 U.S. at 565

<sup>44</sup> SCHECHTER, *supra* note 23, at 451.

<sup>45</sup> *Id.*

## **B. *The Chafee Exception***

In addition to the fair use exception, the “Chafee exception” is another limitation on an author’s exclusive rights. The Chafee Amendment to the Copyright Act of 1976 was introduced in 1996 to permit nonprofits and governmental agencies to provide alternative accessible copies of previously published nondramatic literary works in specialized formats. This amendment is particularly important when considering the rights of persons with disabilities, especially the blind. The “Chafee exception” provides that “... it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”<sup>46</sup> An authorized entity “means a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.”<sup>47</sup>

While this exception does provide persons with disabilities some rights, it applies only to reproduction and distribution rights.<sup>48</sup> Therefore, the exception does not allow a covered entity to prepare a derivative work, such as an audio book recording. Nevertheless, the “Chafee exception” has provided a remedy for organizations devoted to supplying accessible materials. Prior to the “Chafee exception,” organizations would need to get permission from individual copyright owners, which proved to be a slow and laborious

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<sup>46</sup> 17 U.S.C. § 121 (2004).

<sup>47</sup> 17 USC § 121(d)(1) (2004).

<sup>48</sup> 17 USC § 121(a) (2004).

process filled with significant administrative complexities.<sup>49</sup> While this exception has provided a remedy, there is a caveat – only authorized entities have been provided this remedy.

#### **IV. The Individual with Disabilities Education Act**

The Individual with Disabilities Education Act (IDEA) was enacted to govern how special education and related services are provided for children with disabilities. The IDEA of 2004 included provisions related to the “Chafee exception.” In particular, the 2004 IDEA requires the Chafee Amendment to cover instruction materials provided to the visually impaired.<sup>50</sup> Furthermore, the IDEA of 2004 created a National Instructional Materials Accessibility Standard (NIMAS).<sup>51</sup> The NIMAS required educational agencies to create accessible versions of textbooks as well as an XML-based format that would allow for the easy creation of derivative works.<sup>52</sup>

#### **V. The Digital Millennium Copyright Act of 1998**

The Internet has been a driving force in helping people share intellectual works.<sup>53</sup> The problem, however, is that many people share such works without regard for the

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<sup>49</sup> ADVISORY COMM’N ON ACCESSIBLE INSTRUCTION MATERIALS, DRAFT REPORT FROM TASK FORCE 4 (LEGAL), 6 (Jan 7, 2011).

<sup>50</sup> WIPO, *Best Practices*, [http://www.visionip.org/vip\\_resources/en/best\\_practices/us.html](http://www.visionip.org/vip_resources/en/best_practices/us.html) (last visited Mar. 10, 2012).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Iheanyi Samuel Nwankwo, *Proposed WIPO Treaty for Improved Access for Blind, Visually Impaired, and Other Reading Disabled Persons and Its Compatibility with TRIPS Three-Step Test and EU Copyright Law*, JIPITEC, <http://www.jipitec.eu/issues/jipitec-2-3-2011/3175/nwankwo.pdf> (last visited Mar. 10, 2012).

requirements of copyright law. This situation has brought about many challenges to authors and has resulted in greater copyright protections.

The Digital Millennium Copyright Act (DMCA) was enacted to implement two 1996 treaties of WIPO.<sup>54</sup> The DMCA criminalizes production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works.<sup>55</sup> The juxtaposition of the Chafee Amendment with the DMCA—one permitting reproduction in specialized formats, such as text-to-speech, but the other prohibiting the use of certain technology, such as synthetic-voice screen readers, to make or use those formats—has created a legal ambiguity.<sup>56</sup> The ability to exercise current limitations and exceptions to copyright protections, including those provided by the fair use doctrine and the Chafee exception, is proving more difficult as authors focus on ways to protect their ownership rights against unauthorized uses made available through technological innovations.<sup>57</sup>

While new copyright laws have focused on the conflicts between copyright owners and those who pirate their work, persons with visual impairments have been the unintended victims of this conflict.<sup>58</sup>

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<sup>54</sup> U.S. COPYRIGHT OFFICE, *The Digital Millennium Copyright Act of 1998*, <http://www.copyright.gov/legislation/dmca.pdf> (last visited Mar. 10, 2012).

<sup>55</sup> AMERICAN LIBRARY ASSOCIATION, *DMCA: The Digital Millennium Copyright Act*, <http://www.ala.org/advocacy/copyright/dmca> (last visited Mar. 10, 2012).

<sup>56</sup> Elsa F. Kramer, *Digital Rights Management: Pitfalls and Possibilities for People with Disabilities*, THE JOURNAL OF ELECTRONIC PUBLISHING *available at* <http://quod.lib.umich.edu/jjep/3336451.0010.106?rgn=main;view=fulltext> (last visited Mar. 10, 2012); THE COLUMBIA GUIDE TO DIGITAL PUBLISHING 325-68 (William E. Kasdorf ed., Columbia University Press 2003).

<sup>57</sup> Kramer, *supra* note 56.

<sup>58</sup> Nwankwo, *supra* note 53.

## VI. Current Events Reflect Tension Between Accessibility and Copyright

### A. *Authors Guild v. Google*

In 2004, Google announced that it had entered into agreements with several major research libraries to digitally duplicate books and other writings.<sup>59</sup> In July of 2011, Google scanned more than 12 million books and delivered digital copies to the participating libraries, created an electronic database of books, and made text available for online searching.<sup>60</sup> Millions of the scanned books, however, were still protected by copyright.<sup>61</sup> As a result, authors and publishers brought a class action suit against Google for copyright infringement. While the plaintiffs sought both damages and injunctive relief, Google claimed that its actions were exempt from copyright infringement through the fair use exception.<sup>62</sup>

In its claim of fair use, Google argued the numerous benefits of increased accessibility. Google argued that libraries, schools, researchers, and disadvantaged populations would gain access to far more books. Through digitization, conversion of books to Braille and audio formats would be facilitated. Furthermore, older books—particularly out-of-print books – would be preserved. In its defense, Google also argued that the reproductions would not undermine the economic interests of copyright owners and such

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<sup>59</sup> *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011); *See generally* Emily Anne Proskine, *Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project*, 21 Berkeley Tech. L. J. 213, 220–21 (2006) (describing project).

<sup>60</sup> *Authors Guild*, 770 F.2d at 670; Proskine, *supra* note 59.

<sup>61</sup> *Id.* at 670.

<sup>62</sup> *Id.* at 670-71.

reproductions would actually benefit authors by generating new audiences, and thus new sources of income.<sup>63</sup>

The case was eventually settled in October of 2008. Nevertheless, the issues of fair use and the conversion of works to accessible formats through the use of new technologies were not decided.<sup>64</sup>

### **B. *Authors Guild & Amazon***

Less than a year after the settlement between the Authors Guild and Google, a request was made by the Authors Guild for Amazon to disable its Kindle 2's robotic text-to-speech feature. This feature enabled any book to be read aloud in a synthesized voice.<sup>65</sup> While this feature gave persons with visual impairments access to books they otherwise would not have had, the Authors Guild contended that such a feature would cut the sale of books that were already available in audio formats.<sup>66</sup> To avoid potential litigation, Amazon disabled the feature and yet again the issues of fair use and the conversion of works to accessible formats through the use of new technologies were left unresolved.<sup>67</sup>

Cases like those between the Authors Guild, Google, and Amazon soon gained international attention. While current domestic law has created ambiguities regarding which texts are covered by copyright laws and for what purpose, it also has limited the cross-border

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<sup>63</sup> *Authors Guild*, 770 F.2d at 670.

<sup>64</sup> *Id.* at 670-71.

<sup>65</sup> Nwankwo, *supra* note 53.

<sup>66</sup> *Id.*

<sup>67</sup> *Authors Guild*, 770 F.2d at 671.

transfer of accessible formats.<sup>68</sup> It is in this light that an international treaty, which can clarify current domestic law and create uniformity across borders, is necessary.

## VII. The Need for a Treaty

The controversy between the economic interests of authors to enjoy the fruits of their labor and the interest of the State to provide the public with access to literary works for the advancement of knowledge, appears to remain unsolved despite the exceptions provided by the fair use and Chafee doctrines.<sup>69</sup> This battle also exists on a global scale and the recent attempt to internationally harmonize the limitations and exceptions for the benefit of people with vision impairments has caused this controversy to resurface.<sup>70</sup>

Currently, there is no provision in any international treaty relating to intellectual property that specifically provides for exceptions or limitations to copyright for the benefit of those who are visually impaired.<sup>71</sup> While the Berne Convention, the Agreement of Trade Aspects of Intellectual Property Rights, and the WIPO Copyright Treaty allow states to include in their intellectual property law exceptions or limitations to copyright (that do not conflict with the interests of right holders), accessibility for people with visual impairments has not improved.<sup>72</sup> WIPO is taking steps to address this problem and has commissioned

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<sup>68</sup> Nwankwo, *supra* note 53.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Nwankwo, *supra* note 53; Fifteenth Session, *supra* note 6.



several studies focusing on the problems that visually impaired people face in regards to access of intellectual works.<sup>73</sup>

The United Nations is, at the same time, working to change the attitudes and approaches towards persons with disabilities. The Convention on the Rights of Persons with Disabilities (CRPD) was adopted on December 13, 2006. Signed by the United States in 2009 (but not yet ratified), the CRPD affirms the right of all persons with disabilities to dignity, autonomy, freedom and nondiscrimination.<sup>74</sup> Further, Article 30 of the CRPD specifically obliges Member States to take appropriate measures to ensure that copyrighted law does not constitute an unreasonable or discriminatory barrier to access to cultural materials by persons with disabilities.<sup>75</sup>

Despite these international and domestic efforts, people with vision impairments are still challenged to gain access to adaptive formats of literary works. It remains a challenge technically, legally, and economically.<sup>76</sup> Studies indicate that only five percent of all published books are available in accessible formats.<sup>77</sup> Furthermore, people with visual impairments can only have access to literary works if they exist in adaptive formats, such as Braille, audio recording, audio-visual, or digital-compatible formats.<sup>78</sup> The WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired observed that the shortage

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<sup>73</sup> Nwankwo, *supra* note 53, at 205.

<sup>74</sup> See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, at 25(d), U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

<sup>75</sup> Kaminski, *supra* note 4, at 8.

<sup>76</sup> Fifteenth Session, *supra* note 6.

<sup>77</sup> *Id.*

<sup>78</sup> Nwankwo, *supra* note 53, at 205.

of access to copyrighted works is created by “difficulties in reaching licensing agreements” for accessible copies.<sup>79</sup> Moreover, the high cost of converting works into accessible formats and the restriction on the importation of accessible formats from cheaper sources has also harmfully affect persons with visual impairments from accessing information that would benefit them.<sup>80</sup> WIPO has acknowledged this problem by proposing a treaty to provide specific limitations and exceptions to copyright.<sup>81</sup>

## VIII. History of the WIPO Copyright Treaty for Improved Access

### A. *The Eighteenth Session*

At the eighteenth session of the WIPO Standing Committee on Copyright and Related Rights (WIPO Standing Committee), Brazil, Ecuador, and Paraguay, on behalf of the World Blind Union, proposed a treaty aimed at improving access to copyrighted works for those who have visual impairments.<sup>82</sup> The proposed treaty addresses three important issues facing those with visual impairments: (1) the creation of limited types of derivative works; (2) rights to circumvent technological protection measures; and (3) the freedom of import and export of

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<sup>79</sup> Fifteenth Session, *supra* note 6.

<sup>80</sup> Nwankwo, *supra* note 53, at 205; KNOWLEDGE ECOLOGY INTERNATIONAL, *Background and Update on Negotiations for a WIPO Copyright Treaty for Persons Who Are Blind or Have Other Disabilities*, <http://www.keionline.org/node/1089> (last visited Mar. 11, 2012). See also, *International Committee of the Universal Copyright Convention: Copyright Problems Raised by the Access by Handicapped Persons to Protected Works* (1985), available at <http://unesdoc.unesco.org/images/0006/000651/065169eb.pdf>.

<sup>81</sup> Twenty-Second Session, *supra* note 12.

<sup>82</sup> WIPO, Standing Comm. on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), Annex 1 pmbl., at 2, SCCR/18/5 (May 25, 2009) [hereinafter WBU Proposed Treaty]; Patrick Hely, *A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO*, 43 Vand. J. Transnat'l L. 1369, 1393 (2010).

accessible works.<sup>83</sup> The scope of these exceptions would be limited to personal reproduction by the visually impaired individual, a nonprofit organization, or by a for-profit organization on a nonprofit basis or with “adequate remuneration to copyright owners.”<sup>84</sup> Like other limitations on exclusive rights, such as the United States’ Chafee exception, a party meeting one of these qualifications would not need the author’s permission. Furthermore, this treaty would grant the right of distribution and the right to create additional copies.<sup>85</sup>

### **B. *The Twentieth Session***

At the twentieth session of the WIPO Standing Committee, the European Union, the African Group, and the United States proposed three additional instruments.<sup>86</sup> While the solutions offered by the United States and the European Union arguably narrowed the scope of the exceptions provided by the first proposed treaty, the African treaty expanded scope of the debate.<sup>87</sup> The African treaty went as far as to include “unauthorized and unrecompensed reproduction for research purposes, educational and research institutions, libraries, and archives.”<sup>88</sup> Moreover, the African proposal expanded the class of beneficiaries, including persons with “a physical, mental, sensory, or cognitive incapacity.”<sup>89</sup>

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<sup>83</sup> Hely, *supra* note 82, at 1393.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1395.

<sup>87</sup> Hely, *supra* note 82, at 1395.

<sup>88</sup> *Id.*

<sup>89</sup> WIPO, Standing Comm. on Copyright and Related Rights, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive

While the African proposal aimed to increase the ability to reproduce, and thus increase accessibility, the United States' proposal limited trade to that of Braille texts and required the establishment of "trusted intermediaries" for trade in other accessible formats.<sup>90</sup> Trusted intermediaries include governmental agencies and nonprofit organizations dedicated to assisting the visually impaired.<sup>91</sup> In addition, the United States' proposal limited imports and exports to published works that are not domestically available in the accessible format concerned.<sup>92</sup>

The European Union's proposal mirrored many ideas expressed in the other proposals. However, it was the only proposal that encouraged programs aimed at seeking affordable technological solutions.<sup>93</sup>

### **C. *Twenty-Second Session***

The twenty-second session continued to focus on the issue of blind and visually impaired people's access to copyrighted material. However, the focus also was placed on the limitations and exceptions for the benefit of other "disabled persons."<sup>94</sup> Brazil, Mexico, the

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Centers, SCCR/20/11 (June 15, 2010) [hereinafter African Proposed Treaty] (offering a second proposed treaty presented by the African Group) art. 21(a), at 10; Hely, *supra* note 82, at 1395.

<sup>90</sup> WIPO, Standing Comm. on Copyright and Related Rights, Draft Consensus Instrument, SCCR/20/10 (June 10, 2010) [hereinafter U.S. Consensus] (proposing a consensus instrument presented by the United States) art 2-3, at 3-4; Hely, *supra* note 82, at 1396.

<sup>91</sup> Hely, *supra* note 82, at 1396.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INTELLECTUAL PROPERTY E-NEWS, *WIPO Standing Committee on Copyright and Related Rights*, <https://www.aippi.org/enews/2011/edition20/WIPO.html> (last visited Mar. 11, 2012).

United States, and the European Union submitted an unofficial joint text.<sup>95</sup> Whereas the joint text was agreed upon, the legal nature of the instrument was not settled – the European Union and the United States prefer a nonbinding instrument while Brazil, India, and the African Group prefer a binding convention.<sup>96</sup>

The joint text, also referred to as the “non-paper,” was the topic of much debate – the result – a chair proposal. This proposal is now the “basis for future text-based work.”<sup>97</sup>

#### **D. Twenty-Third Session**

The twenty-third session provided the library community an unprecedented opportunity to share its knowledge and experience concerning issues related to copyright for libraries.<sup>98</sup> Member States also had the opportunity to comment on the Chair’s proposal. These comments were incorporated into a new working instrument to be used as the basis for work at the twenty-fourth session, sometime in 2012.<sup>99</sup>

### **IX. Current Domestic Exceptions Compared to Proposed Treaty Exceptions**

As previously mentioned, the twenty-second session of the Standing Committee on Copyright and Related Human Rights focused on the limitations and exceptions on accessible

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<sup>95</sup> INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INTELLECTUAL PROPERTY E-NEWS, *WIPO Standing Committee on Copyright and Related Rights*, <https://www.aippi.org/enews/2011/edition20/WIPO.html> (last visited Mar. 11, 2012).

<sup>96</sup> *Id.*

<sup>97</sup> Twenty-Second Session, *supra* note 12.

<sup>98</sup> DISTRICT DISPATCH, *Copyright Limitations for Print Disabled Discussed at WIPO*, <http://www.districtdispatch.org/2011/12/copyright-limitations-for-print-disabled-discussed-at-wipo/> (last visited Mar. 11, 2012).

<sup>99</sup> *Id.*

formats. In the *National Law Exceptions on Accessible Format Copies* section, the proposed treaty requires Member States to “... provide in its national copyright law for an exception or limitation to the right of reproduction, the right of distribution and the right of making available to the public, to facilitate the availability of works in accessible formats for beneficiary persons ....”<sup>100</sup> This section also suggests that the national exception cover “accessible format copy ... which may include any means needed to navigate information in the accessible format.”<sup>101</sup> This is significant because the phrase “accessible format” would include any work that is accessible – even if it could be used by the general public and not limited to use by people with disabilities.<sup>102</sup>

This exception differs from the Chaffee Exception, which only covers “specialized formats” – formats only intended for use by people with disabilities.<sup>103</sup> Historically, these formats have included large print and Braille. While there are numerous interpretations of “specialized formats,” the general interpretation of “specialized formats” has resulted in the exclusion of many modern formats, such as electronic books.

The lack of explicitly defining the term “specialized format” has resulted in confusion. This confusion is evident in the different practices by nonprofits in the United States. For example, the National Library Service for the Blind and Physically Handicapped loans books

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<sup>100</sup> Twenty-Second Session, *supra* note 12.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> 17 U.S.C. § 121 (2004).

in a “specialized format” that are unusable by the general public.<sup>104</sup> Bookshare, on the other hand, provides digital formats via the Internet that could be easily used by the general public, if security controls failed.<sup>105</sup> Despite the fact that these digital formats can be accessed by the general public at more ease than formats provided by the National Library Service for the Blind and Physically Handicapped, Bookshare is under the impression that these formats are “specialized formats.”<sup>106</sup>

This debate over what qualifies as a “specialized format” has not been resolved. In 2011, the Advisory Commission on Accessible Instructional Materials in Post Secondary Education for Students with Disabilities tried to provide some guidance with a statutory definition. According to the Advisory Commission, “braille, audio, or digital text which is exclusively for use by blind or other person’s with disabilities; and with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.”<sup>107</sup> This definition makes clear that there are two parts of the definition up for debate: (1) the nature of the format and (2) the scope of who is covered by the law. While the Advisory Commission has come to the conclusion that there should be limitations on those covered, as prescribed in Section 121 of

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<sup>104</sup> NATIONAL LIBRARY SERVICE, *NLS: Frequently Asked Questions: Digital Talking Books*, <http://www.loc.gov/nls/dtbfaq.html> (last visited Mar. 11, 2012).

<sup>105</sup> BOOKSHARE, *Legal Information*, [http://www.bookshare.org/\\_/aboutUs/legalInformation](http://www.bookshare.org/_/aboutUs/legalInformation) (last visited Mar. 11, 2012); BOOKSHARE, *International Membership*, [http://www.bookshare.org/\\_/membership/international](http://www.bookshare.org/_/membership/international) (last visited Mar. 11, 2012).

<sup>106</sup> BOOKSHARE, *International Membership*, [http://www.bookshare.org/\\_/membership/international](http://www.bookshare.org/_/membership/international) (last visited Mar. 11, 2012).

<sup>107</sup> U.S. DEPARTMENT OF EDUCATION, *Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities*, <http://www2.ed.gov/about/bdscomm/list/aim/publications.html> (last visited Mar. 11, 2012).

the Chafee Amendment, a Treaty could expand on these limitations by changing national copyright laws.

Despite the Advisory Commission's conclusion, the Commission made the following recommendation:

Congress should review the scope, effectiveness and function of the Copyright Act as amended to determine whether it or any of its key component elements, as well as its implementation through applicable standards, need to be updated to adequately address the needs of individuals with print disabilities, including those enrolled in postsecondary education.

## **X. Importance of Treaty in Regards to Digital Rights Management**

In addition to the issues related to the scope of individuals covered by current domestic copyright exceptions, the proposed Treaty addresses current digital rights management (DRM) issues. DRM is a class of access control technologies that are used to protect the copyrights of electronic media.<sup>108</sup> DRM is important to publishers of electronic media because it helps ensure they will receive the appropriate revenue for their products.<sup>109</sup> DRM furthers the publisher's ability to protect, monitor, track, and control the trade of digital media, thus limiting the illegal proliferation of copyrighted works.<sup>110</sup>

DRM poses accessibility issues for persons with disabilities because it can interfere with ability of screen readers and other text to speech software to operate.<sup>111</sup> While DRM is technology can be circumvented through hacking measures or through anti-encryption

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<sup>108</sup> TECHTERMS.COM, *Digital Rights Management*, <http://www.techterms.com/definition/drm> (last visited Mar. 11, 2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Kramer, *supra* note 56.



software, those circumvention methods are not always easy or legal to obtain. While the United States allows users to legally circumvent DRM for screen reader access, the rule could arguably be stronger.<sup>112</sup> The proposed Treaty would further the United State's rule to permit circumvention.<sup>113</sup> According to the proposed Treaty:

In the absence of voluntary measures by rightholders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities, Member States shall take appropriate measure to ensure that beneficiaries of the exception provided by [the] Article [on National Law Exceptions on Accessible Format Copies] have the means of benefiting from that exception when technical protection measures have been applied to the work ...<sup>114</sup>

The language places a responsibility for the government to help find a way to circumvent DRM.

## **XI. Domestic Significance of a Binding International Instrument**

The binding nature of the proposed instrument is one of the many issues up for discussion at the next WIPO Standing Committee session. While WIPO traditionally favors binding hard law, such as treaties and conventions, the organization did favor a series of nonbinding "Joint Recommendations" in the area of trademark law.<sup>115</sup> Proponents of hard law argue that enactment as soft law would undermine the ultimate goal of the instrument – to make copyrighted works more accessible to individuals with print disabilities.<sup>116</sup>

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<sup>112</sup> 37 C.F.R. § 201.40.

<sup>113</sup> Twenty-Second Session, *supra* note 12.

<sup>114</sup> *Id.*

<sup>115</sup> Kaminski, *supra* note 4, at 10.

<sup>116</sup> *Id.* at 1.

One way in which a nonbinding instrument would likely undermine the ultimate goal is by becoming dead letter – a likely result of enactment as soft law.<sup>117</sup> More importantly, soft law is less appropriate where there is a consensus, as there is here.<sup>118</sup>

Supporters of hard law argue that there are both normative and structural benefits to hard law.<sup>119</sup> Normatively, Member States are more likely to comply because of historical norms of compliance with hard law.<sup>120</sup> Structurally, Member States are required to implement hard law.<sup>121</sup> This not only brings domestic law into compliance with hard law, but it also “increases the number of actors encouraging states to comply ... internally.”<sup>122</sup>

## **XII. Opposition to the Proposed Treaty**

During the twenty-second session, the United States expressed the opinion that current copyright exceptions are adequate.<sup>123</sup> Consequently, the United States joined the European Union and the International Publishers Association in opposition to the proposed Treaty. Despite the common resistance to the Treaty, the International Publishers Association has a different reasoning behind their opposition. While the United State’s government cited adequacy as their reason, publishers are generally against further copyright limitations and exceptions as part of an effort to maintain and increase control over their

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<sup>117</sup> Kaminski, *supra* note 4, at 1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 12.

<sup>120</sup> *Id.*

<sup>121</sup> Kaminski, *supra* note 4, at 12.

<sup>122</sup> *Id.*

<sup>123</sup> Twenty-Second Session, *supra* note 12.

intellectual property. Furthermore, Publishers exhibit a general resistance to technological developments that likely impede on their ability to control the formats and distribution of such property.

It is no stretch of the imagination to conclude that these publishers largely influenced the United States government in its decision to oppose the proposed Treaty. In 2010 alone publishers generated a net revenue of \$27.9 billion.<sup>124</sup> Furthermore, this net revenue was a 5.6% increase since 2008, making it even more likely that the publishing industry's opinion had significant weight; especially in the current economy.<sup>125</sup>

In addition to arguments surrounding the adequacy of current exceptions and limitations, as well as arguments surrounding the economic implications of further exceptions and limitations, many opponents argue that derivative works will likely result from technology permitted by the proposed Treaty. For example, many publishers believe that text to speech technology is an audio work that can be copyrighted, while the proposed Treaty takes the stance that text to speech technology only results in temporary copies – which have no economic value and are thus not covered by copyright law.<sup>126</sup> Current U.S. copyright law seems to support the stance taken by the proposed Treaty. Under U.S. copyright law, text to speech creates a temporary, transient work in which a copy does not exist for copyright purposes.<sup>127</sup>

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<sup>124</sup> Julie Bosman, *Publishing Gives Hints of Revival, Data Show*, N.Y. TIMES, Aug. 9, 2011, available at <http://www.nytimes.com/2011/08/09/books/survey-shows-publishing-expanded-since-2008.html> (last visited Mar. 11, 2012).

<sup>125</sup> *Id.*

<sup>126</sup> Kramer, *supra* note 56.

<sup>127</sup> 17 U.S.C.A. § 110 (2005).

Despite the argument that audio rights do not exist for text-to-speech, it is more than likely that the multitude of adjustments needed to create a truly accessible work would result in the creation of a derivative work – which is the sole right of the copyright holder.<sup>128</sup>

### **XIII. Conclusion**

While a growth in innovative technology is fostering the removal of barriers for persons with print disabilities, current U.S. copyright laws are making this new accessibility illegal. Protections afforded to persons with disabilities by the American's with Disabilities Act, the Rehabilitation Act, the Individuals with Disabilities Education Act, the Fair Use Exception, and the Chafee Amendment are no adequate. Moreover, copyright laws created to promote progress through education are actually denying person's with print disabilities access to educational materials, literature, and entertainment. The need to provide incentives to authors and publishers has become arguably more important than the fundamental right of equality. This discrimination has become even more evident through recent events involving Google and Amazon.

In recognizing this discrimination, WIPO has proposed a treaty to provide for specific limitations and exceptions to copyright law – something the Berne Convention, the Agreement of Trade Aspects of Intellectual Property Rights, and the WIPO Copyright Treaty have not done. The proposed treaty addresses three important issues facing those with visual impairments: (1) the creation of limited types of derivative works; (2) rights to circumvent technological protection measures; and (3) the freedom of import and export of accessible works.<sup>129</sup> The scope of these exceptions would be limited to personal reproduction by the

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<sup>128</sup> 17 U.S.C. § 121 (2004).

<sup>129</sup> Hely, *supra* note 82.

visually impaired individual, a nonprofit organization, or by a for-profit organization on a nonprofit basis or with “adequate remuneration to copyright owners.”<sup>130</sup> Like other limitations on exclusive rights, such as the United States’ Chafee exception, a party meeting one of these qualifications would not need the author’s permission. Furthermore, this treaty would grant the right of distribution and the right to create additional copies.<sup>131</sup>

In addition to the three aforementioned issues of focus, the proposed treaty, if binding, has the ability to provide greater access by providing a model law for countries that do not have current copyright exceptions for accessible works, as well as for countries that do have current exceptions - but which are failing to provide truly accessible works.

As our knowledge-based world goes through rapid technological developments, access to copyrighted work is becoming essential to everyday life and total welfare. Access is essential to full citizenship.

While current copyright laws have arguably fostered discrimination on the basis of disabilities, in particular print disabilities, the ratification of the proposed treaty is a step closer to providing the equality guaranteed to all people with disabilities throughout the world in the 2006 Convention on the Rights of People with Disabilities.

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<sup>130</sup> Hely, *supra* note 82.

<sup>131</sup> *Id.*