

# *Fordham Intellectual Property, Media and Entertainment Law Journal*

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*Volume 22, Issue 2*

2012

*Article 6*

VOLUME XXII BOOK 2

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## Who Could Possibly be Against a Treaty for the Blind?

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# Who Could Possibly be Against a Treaty for the Blind?\*

Aaron Scheinwald

## Abstract

This Note presents the history of the problem of VIPs' restricted access to information, a legal-realist analysis of the reasons for and against a WIPO treaty for the blind, and the contours of a best-case solution.

**KEYWORDS:** WIPO, human rights, VIP information access, copyright law

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\*J.D. Candidate, 2012, Fordham University School of Law; B.A., 2005, University of California-Berkeley. I would like to thank Anne Kelsey for suggesting this topic; my advisor, Professor Hugh Hansen, for his guidance and advice; Professor Katherine Hughes, Professor Greg Milne and the participants of the Fall 2010 Leitner Advanced Topics in Human Rights seminar for their input; and the editors and staff of the Fordham Intellectual Property, Media & Entertainment Law Journal for their editing, support and patience.

# “Who Could Possibly be Against a Treaty for the Blind?”<sup>1</sup>

Aaron Scheinwald\*

INTRODUCTION .....	448
I. WHAT ARE VIPs AND HOW DOES THEIR CURRENT STATUS PRESENT A HUMAN RIGHTS PROBLEM? AN EPIDEMIOLOGY AND A HISTORY OF NATIONAL AND GLOBAL SOLUTIONS TO THE VIP INFORMATION-ACCESS PROBLEM .....	451
A. <i>Overview of the Global Issue of Visual Impairment</i> .....	451
1. The Economic Impact of Visual Impairment...	453
2. The Disproportionate Burden Borne by LDCs and the Paradoxical Persistence of Treatable Visual Impairment in Developed Countries .....	454
B. <i>VIP Rights under Human Rights Treaties</i> .....	456
1. The ICESCR and the ICCPR .....	457
2. The CRPD.....	459

<sup>1</sup> James Love, Fordham Eighteenth Annual IP Conference, Session 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind 16 (Apr. 9, 2010) [hereinafter Love, Fordham Conference] (transcript on file with author). A “treaty for the blind” is the most commonly used reference to the current discussions at the World Intellectual Property Organization (WIPO) on a potential treaty mandating national copyright exemptions for VIPs. This Note similarly employs that phrase as the standard reference to the object of these discussions.

\* J.D. Candidate, 2012, Fordham University School of Law; B.A., 2005, University of California-Berkeley. I would like to thank Anne Kelsey for suggesting this topic; my advisor, Professor Hugh Hansen, for his guidance and advice; Professor Katherine Hughes, Professor Greg Milne and the participants of the Fall 2010 Leitner Advanced Topics in Human Rights seminar for their input; and the editors and staff of the Fordham Intellectual Property, Media & Entertainment Law Journal for their editing, support and patience.

C.	<i>VIP Rights under Multilateral Copyright Treaties</i> .....	463
1.	VIP-Oriented Copyright Exceptions Under the Berne Convention .....	463
2.	VIP-Oriented Public-Interest Exceptions Under the Rome Convention .....	465
3.	VIP-Oriented Public-Interest Exceptions Under the WCT and WPPT .....	466
D.	<i>The WIPO Standing Committee on Copyright and Related Rights' Debate on Copyright-Exemptions Treaty for VIPs</i> .....	468
1.	WIPO SCCR Treaty Negotiations in Brief: November 2004 to December 201 .....	468
II.	SHOULD THERE BE A MULTILATERAL VIP COPYRIGHT EXEMPTIONS TREATY?.....	474
A.	<i>Arguments for a WIPO Copyright-Exemption Treaty for VIP Information-Access Rights</i> .....	474
1.	Human Rights-Based Concerns .....	474
a)	States Have Not Acted Sufficiently to Provide VIPs With Meaningful Access to Information .....	474
b)	The Optional Protocol to the CRPD Does Not Sufficiently Encourage Cross-Border Information Sharing .....	477
2.	Arguments about Economic Efficiency .....	481
a)	States and NGOs Waste Significant Resources in Multiplicative Efforts to Provide Materials in VIP-Accessible Formats .....	481
3.	Arguments About Conflicts Between Legal Paradigms.....	485
a)	Broad Consensus Supports Berne's Three-Step Test and Prohibition Against Broader Copyright Exemptions .....	485
4.	Arguments about Practical Political Concerns .....	487
a)	Public and Private Entities Perceive the Treaty as a "Gateway Drug" to Global-Scale Copyright Infringements .....	487

2012]	<i>A TREATY FOR THE BLIND?</i>	447
	<i>B. Arguments Against a WIPO Copyright-Exemption Treaty for VIP Information Access Rights</i> .....	490
	1. Arguments about Human Rights-Based Concerns .....	490
	a) An Irreconcilable Conflict Between IP Rights-Holders and VIPs Precludes the Desired Mandatory Copyright Exemptions .....	490
	b) The Treaty for the Blind Embodies Rights-Based Rather than Rights-Infringing Treaty Exemptions.....	497
	2. Arguments about Economic Efficiency .....	498
	a) Copyright Exemptions Will Drive Further Global Piracy and Loss of Profits .	499
	3. Arguments about Conflicts Between Legal Paradigms.....	501
	a) Exemptions Subvert the Dominant Trend in Copyright Law and the History of International Human Rights Law .....	501
	4. Arguments about Practical Political Concerns .....	503
	a) A Treaty Is Premature Because Many Nations Lack Sufficient Negotiating Resources and Expertise .....	503
	b) A Treaty Would Waste Valuable Political Capital on Rights That are Not as Important to Developing States .....	505
	III. YES, THERE SHOULD BE A TREATY FOR THE BLIND: WHY THE WIPO SCCR SHOULD RECOGNIZE THE HUMAN RIGHTS OBLIGATIONS OF THE INTERNATIONAL IP COMMUNITY VIS-A-VIS VIP RIGHTS .....	507
	CONCLUSION.....	511

## INTRODUCTION

The world is in the midst of a book famine.<sup>2</sup> This famine, unlike many, is not exclusive to less-developed countries (LDCs), although the famine weighs most heavily on them. Nor is it exclusive to impoverished persons, though one might reasonably surmise that if any population group were to suffer from a lack of access to information and enabling technologies, it would be the world's poor. Rather, the global book famine is a condition exclusive to visually impaired persons. Somewhat ironically, one might call them VIPs. For the purposes of this Note, a VIP is anyone who, due to an accident of birth, aging or other natural factors, has a moderate to complete visual impairment that renders him or her unable to read standard-print text.<sup>3</sup> Even a VIP who otherwise is fortunate enough to live in a developed country with a high standard of living has, at best, only one out of every twenty

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<sup>2</sup> Dr. William Rowland, the President of the World Blind Union (WBU), has most notably used the phrase. See Dr. William Rowland, WBU President, Address on the Occasion of WBU's Press Conference Launching the WBU Global Right to Read Campaign (Apr. 23, 2008), available at [g3ict.com/download/p/fileId\\_783/productId\\_124](http://g3ict.com/download/p/fileId_783/productId_124).

<sup>3</sup> The entire point of the treaty, after all, is to help VIPs "who are unable to read copyright works in the form in which they are published," these forms being commonly referred to as "standard-print texts." WIPO, Standing Committee on Copyright and Related Rights, 15th Sess., Sept. 11–13, 2006, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, at 14, SCCR/15/7 (Feb. 20, 2007) (by Judith Sullivan), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_15/sccr\\_15\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf) [hereinafter *Sullivan Study*]. See CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), BUILDING A BASIS FOR ACTION: ENHANCING PUBLIC HEALTH SURVEILLANCE OF VISUAL IMPAIRMENT AND EYE HEALTH IN THE US 17, 36–38 (2011), available at [http://www.cdc.gov/visionhealth/pdf/surveillance\\_background.pdf](http://www.cdc.gov/visionhealth/pdf/surveillance_background.pdf) (tying VIP status to measurements of not only the underlying disease and visual acuity, but also "its effect on the individual (e.g., ability to perform daily activities like reading the newspaper,"); World Health Organization (WHO), *Visual Impairment and Blindness*, WHO.INT, <http://www.who.int/mediacentre/factsheets/fs282/en/index.html> (last visited Oct. 17, 2011) (referencing the 10th revision of the WHO International Statistical Classification of Diseases, Injuries and Causes of Death (ICD-10) and its four levels of visual function—"normal vision," "moderate visual impairment," "severe visual impairment," and "blindness"—thereby creating a definition of VIP as anyone whose impairment falls between moderate impairment to blindness); see also WHO, VISION 2020 THE RIGHT TO SIGHT GLOBAL INITIATIVE FOR THE ELIMINATION OF AVOIDABLE BLINDNESS: ACTION PLAN 2006–2011 18 (2007), available at [http://www.who.int/blindness/Vision2020\\_report.pdf](http://www.who.int/blindness/Vision2020_report.pdf) [hereinafter *Vision 2020 Report*].

books available to him or her.<sup>4</sup> If a VIP lives in an LDC—a circumstance which itself correlates with higher rates of visual impairment—availability drops to only one book out of every one hundred published.<sup>5</sup>

Responding to this famine, community and national leaders have stated that the problem of VIP access to information is acute, the obligation to remedy this human rights violation clear, and the need for a solution apparent.<sup>6</sup> Since the publication of studies for the United Nations (UN) and World Intellectual Property Organization (WIPO) in 1982 and 1985, international leadership has effectively joined the chorus, stating that a treaty giving VIPs copyright-exemption-based access to information is the best solution.<sup>7</sup>

So, if broad political support exists for a solution to a fairly straightforward human rights issue and significant members of the international community have endorsed a VIP copyright-exemptions treaty as the best means to that solution, why is there no treaty? Who could possibly be against a treaty for the blind? As it turns out, many parties are against such a treaty. The Standing Committee on Copyright and Related Rights (SCCR), the arm of the WIPO tasked with drafting an agreement for VIP access

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<sup>4</sup> *Sullivan Study, supra* note 3, at 14 (“A figure widely quoted as the proportion of books published that are currently available in alternative formats useable by visually impaired people is no more than about 5%.”); *see also* WIPO, Standing Committee on Copyright and Related Rights (SCCR), 19th Sess., Dec. 14–18, 2009, *Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons*, at Annex 1, SCCR/19/13 Corr., (Dec. 11, 2009), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_19/sccr\\_19\\_13.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_13.pdf) (stating that only 5 percent, or 2,000, of the 40,000 books published in the Netherlands in 2000 were translated into a VIP-appropriate format).

<sup>5</sup> *Sullivan Study, supra* note 3, at 14.

<sup>6</sup> *See* James Love, United States of America Statement on Copyright Exceptions and Limitations for Persons with Print Disabilities, Statement at WIPO, Standing Committee on Copyright and Related Rights, 19th Sess. (Dec. 15, 2009), available at <http://keionline.org/node/723> (stating that the “[United States is] also committed to policies that ensure everyone has a chance to get the information and education they need and to live independently as full citizens in their communities”).

<sup>7</sup> *See* United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO, *Application of the Berne Convention for the Protection of Literary and Artistic Property and the Universal Copyright Convention to Material for the Visually and Auditory Handicapped*, UNESCO/WIPO/WGH/I/2 (Aug. 1982), at 4, available at <http://unesdoc.unesco.org/images/0005/000507/050758eb.pdf>.

to information in useable formats and technologies, began formally debating this issue in November 2008,<sup>8</sup> although less-formal SCCR discussions have transpired since 2004.<sup>9</sup> No agreement has yet been reached.

This Note presents the history of the problem of VIPs' restricted access to information, a legal-realist analysis of the reasons for and against a WIPO treaty for the blind,<sup>10</sup> and the contours of a best-case solution. Part I discusses the background of the debate—from the basics of visual impairment to the responses and attempted action from world organizations. Part II explains and analyzes the arguments for and against a WIPO treaty according to three categories: human-rights arguments, economic arguments, and political/legal realist arguments. Responding to the concerns of Part I and the arguments of Part II, Part III proposes different solution, namely that a new international IP treaty, rather than a model law or consensus instrument or joint recommendation, is the optimal solution to the problem of VIP information access.

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<sup>8</sup> See WIPO, Standing Committee on Copyright and Related Rights, 17th Sess., Nov. 3–7, 2008, Draft Agenda, SCCR/17/1 (Sept. 1, 2008), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_1.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_1.pdf) (mentioning, for the first time, an SCCR session agenda item regarding exemptions); see also James Pooley, Fordham Eighteenth International IP Conference, Sess. 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind 5 (Apr. 9, 2010) [hereinafter Pooley, Fordham Conference] (transcript on file with author).

<sup>9</sup> SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 22.15 (2008).

<sup>10</sup> This Note refers most frequently to the potential treaty for copyright “limitations and exceptions” (the phrase used by the WIPO SCCR Secretariat) for VIPs as a “VIP copyright exemptions” treaty. Commentators and negotiators often refer to a potential treaty as a (WIPO) “treaty for the blind,” and this Note also occasionally employs that phrase.



I. WHAT ARE VIPS AND HOW DOES THEIR CURRENT STATUS  
PRESENT A HUMAN RIGHTS PROBLEM? AN EPIDEMIOLOGY AND A  
HISTORY OF NATIONAL AND GLOBAL SOLUTIONS TO THE VIP  
INFORMATION-ACCESS PROBLEM

A. *Overview of the Global Issue of Visual Impairment*

The World Health Organization (WHO) approximates the global VIP population at 285 million persons,<sup>11</sup> the vast majority of whom suffer from a reduction, not a loss, of visual perception.<sup>12</sup> Almost ninety percent of VIPs live in LDCs, disproportionately burdening these countries with the cost of medical care, financial support, and other services.<sup>13</sup>

For the purposes of this Note, it is important to distinguish between treatable and untreatable causes of visual impairment. Broadly, a treatable cause of visual impairment is any cause that is readily avoidable through the provision of basic preventative services, including simple procedures such as fitting a VIP for glasses and more expensive and complex—but ultimately cost-effective<sup>14</sup>—procedures such as cataract surgery.<sup>15</sup> The WHO

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<sup>11</sup> See WHO, *Visual Impairment and Blindness*, WHO.INT, <http://www.who.int/media/centre/factsheets/fs282/en/index.html> (last visited Oct. 20, 2011) [hereinafter WHO Fact Sheet].

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*; *infra* Part A.1. Of course, while the WHO Vision 2020 initiative and increased national efforts have produced many successes in reducing the population of treatable VIPs, it should be noted the provision of medical care, financial support and other services is generally minimal to non-existent in many LDCs. Vision 2020 Report, *supra* note 3, at 7 also explains:

As the prevalence of noncommunicable chronic eye diseases continues to grow substantially, global disparities in the availability of eye health-care services will continue to obstruct the prevention and control of avoidable blindness and low vision in the most populated, poorest parts of the world. To these challenges must be added the entrenched disparities in the allocation and availability of human and financial resources. Without the resources needed to implement national VISION 2020 plans for the prevention of blindness, there is a real danger that the momentum that has been built to eliminate avoidable blindness will be lost . . . .

*Id.*

<sup>14</sup> See generally Rob Baltussen et al., *Cost-Effectiveness Analysis of Cataract Surgery: A Global and Regional Analysis*, 85 BULL. OF THE WHO 338 (May 2004), available at <http://www.who.int/bulletin/volumes/82/5/338.pdf>.

estimates the population of persons whose visual impairment is readily avoidable—the treatable population of VIPs—at approximately 228 million, or slightly less than four percent of the world’s 2009 population.<sup>16</sup> The vast majority of VIPs with a treatable condition live in LDCs.<sup>17</sup>

The treatable population is the focus of the WIPO treaty for the blind and this Note. Much like other preventable diseases and conditions, the existence of such a significant and widespread population of VIPs kept separated from the written word is a human rights violation.<sup>18</sup> Given the predominance of VIPs in LDCs and the predominance of copyright holders who can provide VIPs with appropriately formatted materials in developed countries, the issue of VIP information access is also a classic issue of access to resources: developed, Northern Hemisphere nations

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<sup>15</sup> See *id.*; see also WHO, *What is Refractive Error?*, WHO.INT (May 18, 2009), <http://www.who.int/features/qa/45/en/index.html>.

<sup>16</sup> See WHO Fact Sheet, *supra* note 11 (noting that 285 million people are visually impaired worldwide, that eighty percent of impairment is avoidable or treatable, and that approximately ninety percent of VIPs live in LDCs).

<sup>17</sup> *Id.* It is also significant for the purposes of this Note that beyond the effect of improved data gathering, the process of economic development has in LDCs across the globe increased the lifespans of many persons. See Vision 2020 Report, *supra* note 3, at 5. Increased lifespans have effectively reduced the incidence of blindness, emphasizing in turn the significance of age-related causes of visual impairment, such as diabetic retinopathy, glaucoma and age-related macular degeneration. These treatable causes drive an extremely high incidence of visual impairment among older persons: despite representing only nineteen percent of the world’s population, they comprise over eighty percent of VIPs. See WHO Fact Sheet, *supra* note 11 and accompanying text. The WHO’s Vision 2020 initiative, which is aimed at eradicating avoidable (alternatively phrased, treatable) visual impairment, should further increase the significance of age-related causes of visual impairment. See Vision 2020 Report, *supra* note 3, at 53–60 (outlining initiatives and programs aimed at reducing global visual impairment incidence). It should be noted at this point that given the human rights involved in VIP information access, the breadth of activities engaged in by older persons, and in particular the continued participation of older persons in political and cultural activities, this shift has no bearing on the pro-treaty arguments presented in this Note. An additional consideration in discussing visual impairment on a global scale is that women are disproportionately at risk for some form of impairment, irrespective of nationality or age. See *id.*

<sup>18</sup> See *infra* Part I.B.

hold the material that those in less-developed, generally Southern Hemisphere nations require.<sup>19</sup>

### 1. The Economic Impact of Visual Impairment

Beyond human rights, treatable causes of visual impairment are significant because of their economic cost. While few studies exist on the economic loss associated with visual disability, one study conducted by Australia in 2004, estimated that visual impairment resulted in a net loss to the country of A\$3.2 billion.<sup>20</sup> This study is significant because, while Australia is a developed country, approximately seventy-five percent of the VIPs in that nation suffer from at least one of five preventable conditions.<sup>21</sup> Further, global estimates place the current cost of reduced productivity due to VIP status at almost \$75 billion; this figure notably excludes the collective cost savings to all nations of health care, medical equipment and welfare payments that they currently provide to VIPs.<sup>22</sup> The proportional costs of treating visual impairment and the resultant net benefit to the state indicate that at least LDCs,

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<sup>19</sup> See generally SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* (1998) (discussing the significance of the divide between the North-South intellectual property regimes). A somewhat cynical take on what this difference means for global politics and human rights is that “there is no international intellectual property law *per se*; instead intellectual property rights are subject to the principle of territoriality” and “vary according to what each state recognizes and enforces.” Laurence R. Helfer, *International Rights Approaches to Intellectual Property: Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 980 (2007) (citing Andrea Morgan, Comment, *TRIPS to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court*, 23 *FORDHAM INT’L L.J.* 795, 796 (2000)). Of course, regardless of how the conflict is cast, because the VIP information-access problem is acute in both the North and South, a WIPO copyright-exemptions treaty will provide those with untreatable visual impairment, and in particular blind persons, with equally improved access to books and materials, regardless of where they live.

<sup>20</sup> ACCESS ECONOMICS PTY. LTD., CENTER FOR EYE RESEARCH AUSTRALIA, *CLEAR INSIGHT: THE ECONOMIC IMPACT AND COST OF VISION LOSS IN AUSTRALIA* 6 (2004) [hereinafter CERA], available at [http://www.cera.org.au/uploads/CERA\\_clearinsight.pdf](http://www.cera.org.au/uploads/CERA_clearinsight.pdf).

<sup>21</sup> *Id.* at 5. These conditions are cataracts, age-related macular degeneration, glaucoma, diabetic retinopathy and refractive errors.

<sup>22</sup> Vision 2020 Report, *supra* note 3, at 7–8 (including Figure 6) (citing Kevin D. Frick and Allen Foster, *The Magnitude and Cost of Global Blindness: An Increasing Problem That Can Be Alleviated*, 135 *AM. J. OF OPHTHALMOLOGY* 471, 471–76 (2003)).

have a significant economic incentive to treat and educate their respective VIPs.<sup>23</sup>

## 2. The Disproportionate Burden Borne by LDCs and the Paradoxical Persistence of Treatable Visual Impairment in Developed Countries

It is important to underscore how VIPs disproportionately affect LDCs. The existence of such a high incidence of VIPs globally is a function of the existence and sustainment of treatable conditions such as cataracts, glaucoma, corneal diseases, and diabetes<sup>24</sup> in these states.<sup>25</sup> Approximately 90 percent of VIPs live in LDCs.<sup>26</sup> This figure roughly correlates with the WHO's estimate of 80 percent as the treatable percentage of global visual impairment.<sup>27</sup>

Visual impairment is also one of the diseases or conditions that causes the most impact. The standard of measurement for the impact of a disease or condition is disability-adjusted life years (DALYs), which measures the composite years impacted by a

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<sup>23</sup> Australia's economically reasonable position, for example, would be to treat all preventable cases of visual impairment.

<sup>24</sup> WHO, *Main Causes of Visual Impairment*, WHO.INT (Oct. 7, 2010), <http://www.who.int/blindness/causes/priority/en/index.html> (providing links to the referenced diseases and conditions and their definitions).

<sup>25</sup> Cataracts are, in fact, the leading cause of treatable visual impairment globally, but at the national level, cataracts are a leading cause of treatable visual impairment only in poorer countries. Vision 2020 Report, *supra* note 3, at 4 (Figure 1); WHO Fact Sheet, *supra* note 11. In developed nations, advanced medical care has rendered cataracts a source of visual impairment and DALYs virtually non-existent: for the United States, 2004 data on the VIP population estimated the combined incidence of blindness and low vision at 0.78% and 1.98%, respectively, for a combined VIP incidence of 2.6%. Nathan Congdon, et al., *Causes and Prevalence of Visual Impairment Among Adults in the United States*, 122 ARCH. OF OPHTHALMOLOGY 477, 477 (2004). However, some researchers believe that, in addition to the availability of medical and professional services, cultural norms regarding medical care, particularly preventative medical care, can play a role in the persistence of visual impairment. The presence of cultural norms may help explain, as is discussed in subsequent pages of this Note, the comparatively high incidence rates of visual impairment in many developed nations. See Serge Resnikoff et al., *Global Magnitude of Visual Impairment Caused by Uncorrected Refractive Errors in 2004*, 84 BULL. OF THE WHO 63, 67–68 (2004), available at <http://www.who.int/bulletin/volumes/86/1/07-041210.pdf> [hereinafter Resnikoff].

<sup>26</sup> WHO Fact Sheet, *supra* note 11.

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

disability or disease and years lost due to premature death.<sup>28</sup> Visual impairment is behind only the most acute global health issues—HIV/AIDS, coronary diseases and respiratory infections—and perinatal conditions.<sup>29</sup>

One might infer from the severe disproportionality of VIPs in LDCs and the wealth and health care systems that developed nations possess that developed nations have a below-average incidence of visual impairment. Substantial data, however, indicate the contrary. A nation's comparative wealth guarantees neither that the incidence of visual impairment of its population is acceptable according to the WHO Visual 2020 goals,<sup>30</sup> nor that VIPs in that nation have sufficient access to reading materials.<sup>31</sup>

The WHO's analysis of national surveys has compared the incidence of VIPs in developed nations such as the United States, Italy and Ireland with developing countries. Although developed countries in the aggregate may have a lower incidence rate of treatable visual impairment than LDCs, when considered individually, the developed countries have greater rates of visual impairment due to uncorrected refractive errors (myopia, hyperopia and astigmatism, all treatable causes of visual impairment) than those of countries such as Guatemala, South Africa and Iran.<sup>32</sup> Further, some of the lowest incidence rates in the WHO global sub-regions studies occurred in regions composed of mostly or exclusively LDCs.<sup>33</sup> The lowest incidence of correctable refractive errors for the five to forty-nine year-old age groups, for instance, was in three African nations.<sup>34</sup>

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<sup>28</sup> Vision 2020 Report, *supra* note 3, at 6. The DALY measurement is useful because it provides a basis for comparing the impact of diseases and conditions, which are otherwise highly dissimilar.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 53.

<sup>31</sup> See *supra* note 4 and accompanying text (discussing how even in developed nations, only five percent of written works published in a year are translated into VIP-accessible formats).

<sup>32</sup> Resnikoff, *supra* note 25, at Table 1.

<sup>33</sup> See *id.*, Table 1 for a list of the WHO sub-regions for which data was gathered.

<sup>34</sup> *Id.* Table 2.

In sum, visual impairment is a global issue in its depth and scope. It weighs most heavily on LDCs, where individuals do not have access to preventative measures and treatment therapies that limit or eliminate visual impairment. But whatever the national and global causes and the potential solutions, those who suffer from treatable visual impairment are found in every nation. Visual impairment is thus a global problem in every sense of the term: it affects all persons, regardless of nationality, ethnicity, age or gender.

### *B. VIP Rights under Human Rights Treaties*

Through human rights treaties, nations have sought to curb the consequences of visual impairment. Specific obligations to enable VIPs to access information have moved from early statements of general principles, such as in the Universal Declaration of Human Rights (UDHR),<sup>35</sup> to the more concrete statements in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and finally to the current and highly specific protections of disability rights under the Convention on the Rights of Persons with Disabilities (CRPD), passed in 2006. These treaties and the rights they create, in particular the rights found in the CRPD, support the right of VIPs as persons with disabilities to access educational, cultural, political, and employment information. It follows that the failure of states to facilitate this

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<sup>35</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217 (Dec. 10, 1948) [hereinafter UDHR]. Ratified in 1948 and considered to be one of the founding documents of modern international law, the UDHR contains several provisions that can be interpreted to convey VIP rights to materials and technologies. Special Rapporteur on the Right to Education, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": The Right to Education of Persons with Disabilities*, 4th Session, A/HRC/4/29 (Feb. 19, 2007), ¶¶ 27–34 [hereinafter Special Rapporteur Report] (describing state obligations according to the provisions of the CRPD). Article 19 includes a right, beyond freedom of thought and expression, “to seek, receive and impart information and ideas through any media and regardless of frontiers.” UDHR, *supra*. Similarly, but with respect exclusively to cultural matters, all persons have “the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” *Id.* art. 27(1). Most broadly, under Article 26(1), “[e]veryone has the right to education.” *Id.* art. 26(1).

access is a human rights violation, though it is also true that treaties themselves do not do enough to protect VIP rights.<sup>36</sup>

### 1. The ICESCR and the ICCPR

Ratified in 1966, the ICESCR<sup>37</sup> creates concrete legal rights out of the principles expressed in the UDHR. The ICESCR provides specific rights and clarifications of rights with respect to information access and the right to education, and indirectly addresses the rights to meaningfully participate in cultural activities and political life, enjoy an adequate standard of living through employment and employment advancement, and benefit from technological and scientific advancements.<sup>38</sup>

In contrast to the UDHR's general principle that states should make education available to their citizens,<sup>39</sup> the ICESCR obligates states to create "[s]econdary education in its different forms, including technical and vocational secondary education, [and make it] generally available and *accessible to all by every appropriate means.*"<sup>40</sup> The ICESCR clarifies the right to education by defining

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<sup>36</sup> Special Rapporteur Report, *supra* note 35, ¶¶ 16–21. Also relevant to this section is the question of interpretation. That there are multiple interpretive methods for a legal text such as a treaty is both an obvious and a contentious point. John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 6–7, 13–14 (2010) (reviewing some of the interpretive approaches to treaties, including the formalist, historical, sociological and constructive approaches). Tobin also notes that the common interpretation methodology is Article 31 of the Vienna Convention on the Law of Treaties, which advocates for an "ordinary meaning" standard based on the treaty text's context and the treaty's overall purpose. *See id.* at 2; United Nations, Vienna Convention on the Law of Treaties (1969), arts. 31(2)-(3) and 32, 1155 U.N. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>37</sup> ICESCR, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>38</sup> *Id.* art. 13(1).

<sup>39</sup> *See* UDHR, *supra* note 35, art. 19.

<sup>40</sup> ICESCR, *supra* note 37, art. 13(2)(b) (emphasis added). It is true that this second right is not a right to compulsory education, or what the UDHR and the ICESCR call "fundamental" and "primary" education. *See* UDHR, *supra* note 35, art. 26(1). However, the ICESCR text is written in such a way as to create an obligation to states that offer secondary and higher education to do so in a manner that makes materials available to all those who need it. ICESCR, *supra* note 37, art. 13(2)(b-c). Thus, if secondary and higher education is now available in a given nation, the ICESCR is a clear positive assertion of the right of all persons in that nation to have access to educational materials in appropriate formats.

the purpose of the right to education as “enabl[ing] all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”<sup>41</sup> Along with the ICCPR,<sup>42</sup> the right of all persons to “participate in a free society” creates for VIPs, as much as another person, a right to access the information required to effect that participation, through whatever media is appropriate.<sup>43</sup>

However, the ICESCR fails to extend certain rights to VIPs. For example, the ICESCR protects an individual’s right to work.<sup>44</sup> The realization of this right “include[s] technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”<sup>45</sup> However, neither scholars nor international organizations appear to have argued that this provision, coupled with the ICESCR anti-discrimination provision,<sup>46</sup> creates a positive obligation for states to provide VIPs with information access relating to work. Similarly, while the ICESCR ties together economic, social and cultural rights with the right of all to “enjoy the benefits of

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<sup>41</sup> ICESCR, *supra* note 37, art. 13(1).

<sup>42</sup> International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR] (respectively asserting that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice,” and that “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) [t]o take part in the conduct of public affairs, directly or through freely chosen representatives.”). The ICCPR was passed in the same resolution as the ICESCR. ICESCR, *supra* note 37.

<sup>43</sup> *Id.* art. 19(2).

<sup>44</sup> ICESCR, *supra* note 37, art. 6(1).

<sup>45</sup> *Id.* art. 6(2).

<sup>46</sup> *Id.* art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). Disability would therefore be covered under the “other status” protections.



scientific progress and its applications,<sup>47</sup> the content of this right is contentious.<sup>48</sup> Therefore, an argument for the advancement of an information-access right for VIPs based exclusively on this article would likely be contested or disregarded.<sup>49</sup>

## 2. The CRPD

Adopted in 2005, the CRPD<sup>50</sup> is by far the most explicit protection of individual rights and is the foundational international

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<sup>47</sup> *Id.* art. 15(1)(b).

<sup>48</sup> Most notably, in the context of the right to access anti-retroviral therapy (commonly known as ARV) as part of rights to medicine and the highest attainable standard of health, international law scholars, national leaders and pharmaceutical companies vehemently disagree about the content and scope of these rights. *Contrast* HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 102–07, 112 (2007) [hereinafter HESTERMEYER] (discussing the foundation of the right to health, ICESCR Article 12, and the supporting Article 15, and noting that according to the UN and international human rights law scholars, the right is in fact the highest standard of health one can attain, subject only to state resources and the limitation of supporting economic and social rights such as food and housing), *with id.* at 11–17 (discussing the actions of the United States through the World Trade Organization (WTO) and pharmaceutical companies in applying political and economic pressure against nations such as India and Brazil, which pushed back on the tightened intellectual property protections of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs)). One of the more noteworthy stories in this regard is the actions of Canada and the United States following the September 11<sup>th</sup> terrorist attacks and the October 2001 anthrax scare. *See id.* at 15–17.

<sup>49</sup> In addition, the immediately following subsection presents a limiting principle to this right, namely, that individuals have the right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production” that they author. ICESCR, *supra* note 37, art. 15(1)(c). Thus, even though the Committee on Economic, Social and Cultural Rights (“CESCR”), the treaty-administering body for the ICESCR, has stated that access to at least life-saving medicines is a human right and human rights law commentators have made arguments for a right to medicine as a customary law, this right is generally unsupported among nations. CESCR, *General Comment No. 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights* ¶ 12(a), U.N. Doc. E/C. 12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14], *available at* <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En> (noting that States Party must have “[f]unctioning public health and health-care facilities, goods and services,” which with respect to medicines includes “*essential drugs*, as defined by the WHO Action Programme on Essential Drugs”) (emphasis added); HESTERMEYER, *supra* note 48, at 122–34 (reviewing arguments for and against the presence of state practice and *opinio juris* supporting an international customary law of a right to medicine).

<sup>50</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

human rights treaty for VIPs. The CRPD treats VIPs as a category of persons with disabilities and creates explicit and more detailed rights to access information. First, the CRPD advances VIP rights through specific and inclusive definitions of terms, including “appropriate formats and technologies”<sup>51</sup> and “communication.”<sup>52</sup> For example, the CRPD defines “communication” as “includ[ing] languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology. . . .”<sup>53</sup> These definitions are employed to create broad and explicit protections of VIP rights to the three spheres of activity outlined in the ICCPR and ICESCR—cultural participation, political participation and educational access—and the right to work and access to information required for those activities.<sup>54</sup>

Regarding education, the CRPD directs states to go beyond previous treaty-based obligations to ensure that tertiary education is accessible to persons with disabilities,<sup>55</sup> that persons with disabilities receive education from teachers who can instruct in appropriate formats,<sup>56</sup> and that instruction for persons with disabilities is conducted in the “most appropriate languages and modes and means of communication for the individual.”<sup>57</sup> As compared to the protections of the ICESCR, the CRPD provides detailed benchmarks for ensuring that those countries party to the

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<sup>51</sup> See, e.g., *id.* art. 21(a)–(b) (listing “use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions” as “accessible formats and technologies appropriate to different kinds of disabilities”).

<sup>52</sup> *Id.* art. 2.

<sup>53</sup> *Id.*

<sup>54</sup> E.g., ICESCR, *supra* note 37, art. 9 (recognizing “the right of everyone to social security, including social insurance”); ICCPR, *supra* note 42, art. 17(1) (recognizing that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”); Janet E. Lord et al., *Lessons from the Experience of U.N. Convention on the Rights of Persons With Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564, 571–72 (2011).

<sup>55</sup> CRPD, *supra* note 50, art. 24(5).

<sup>56</sup> *Id.* art. 24(4).

<sup>57</sup> *Id.* art. 24(3)(c).

treaty realize VIP rights<sup>58</sup> and creates additional compliance requirements for those countries.

Moreover, with respect to political, cultural and national/community life, the CRPD echoes the ICCPR in generally protecting for all persons “the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. . . .”<sup>59</sup> The CRPD then broadens and further concretizes the rights provided in the ICESCR and ICCPR. Article 21(b), for example, spells out formats and technologies to which disabled persons have a right to access in order to participate in political life.<sup>60</sup> Article 21(b) also substantially increases the state compliance standard.<sup>61</sup> The CRPD further provides robust descriptions of VIP cultural rights, requiring that “cultural materials,” like “television programmes, films, theatre and other cultural activities,” and “cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services” be accessible to VIPs.<sup>62</sup>

Lastly, the right to work, a right referred to in the ICESCR but not strongly linked to VIP rights, is explicitly tied to the rights of persons with disabilities in the CRPD. Specifically with respect to VIP information access rights, the CRPD obligates states to

promote the realization of the right to work . . . by taking appropriate steps, including through legislation, to, *inter alia*:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of

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<sup>58</sup> Lord et al., *supra* note 54, at 571–72 (discussing the comparatively specific protections of the CRPD).

<sup>59</sup> CRPD, *supra* note 50, art. 21.

<sup>60</sup> *Id.* art. 21(b).

<sup>61</sup> The CRPD expands the direct object of those rights in Article 28, creating state obligations to provide persons with disabilities access to several aspects of political life, including participation in elections, non-governmental organizations (NGOs), and support and advocacy groups for persons with disabilities. *Id.* arts. 28, 29(a)(1) and (b)(2).

<sup>62</sup> *Id.* art. 30.

employment, career advancement and safe and healthy working conditions; . . .

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; . . . and

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace; . . .<sup>63</sup>

These rights, while not referencing “communication,” nonetheless suggest that states must provide appropriate-format training and employment materials to VIPs.

The specificity of these CRPD obligations is significant because it both makes avoidance of implementation on grounds of vagueness difficult to justify, and because it stands as a barrier to one of the arguments against a WIPO copyright-exemption treaty for VIPs: namely, that vaguely phrased obligations in the international sphere tend to create reticence and distrust among states.<sup>64</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> See *infra* pp. 54–55 (describing the “thin edge of the wedge” argument). Further support for this conclusion comes from the Special Rapporteur on the right to education. Special Rapporteurs are individual-based mechanisms through which the Office of the United Nations High Commissioner for Human Rights (OHCHR) monitors country-specific or thematic human rights issues. The Special Rapporteur on the right to education reported to the OHCHR in 2007 on the right of persons with disabilities to education. Special Rapporteur recommendations are non-binding, but they provide states and interested parties with direction on how to fulfill treaty obligations, and are therefore useful in understanding the current status of specific human rights from the perspective of the international governmental organizations and the international human rights law community. See OHCHR, *Special Procedures of the Human Rights Council* (2010), <http://www2.ohchr.org/english/bodies/chr/special/index.htm> (last accessed Dec. 16, 2010). The emphasis of the Special Rapporteur’s report is that states act according to the principle of “inclusive education,” which eschews differentiation between education of disabled and non-disabled students; while not stated explicitly, implementing the principle of “inclusive education” would also require significant conversion of school materials into VIP-accessible formats. Special Rapporteur Report, *supra* note 35, ¶¶ 81–85.

### C. VIP Rights under Multilateral Copyright Treaties

Exemptions to copyrights are a primary means through which VIPs might obtain ready and affordable access to the reading materials rightfully available to them under human rights treaties. Multilateral international copyright treaties such as the Berne Convention,<sup>65</sup> the WIPO Copyright Treaty (WCT) and other agreements all provide for such copyright exemptions. These exemptions, however, are based on the three-step test originally stated in the Berne Convention and reiterated in every subsequent copyright treaty, including the most recent instruments, the 1996 WCT and the WIPO Performances and Phonographs Treaty (WPPT).<sup>66</sup>

#### 1. VIP-Oriented Copyright Exceptions Under the Berne Convention

The 1967 Stockholm revision to the Berne Convention introduced to international copyright law the three-step test for exempting from illegality an otherwise rights-infringing reproduction of a person's work.<sup>67</sup> Exemptions are granted if three factors are met:

- (1) There is a "certain special case" or use

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<sup>65</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention]. The Berne Convention, as noted in the following discussion of the three-step test, has been frequently amended since its passage.

<sup>66</sup> Some of the recent international IP treaties in which the three-step test appears are Agreement on the Trade-Related Aspects of Intellectual Property Rights art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) [hereinafter TRIPs]; the WIPO Copyright Treaty (WCT) of 1996 art. 10, Dec. 20, 1996, WIPO WO033EN [hereinafter WCT]; and the WIPO Performances and Phonograms Treaty of 1996 (WPPT) art. 16, Dec. 20, 1996, WIPO WO034EN [hereinafter WPPT].

<sup>67</sup> As Sullivan notes, the Berne Convention either does not contemplate or does not grant several rights that would be helpful in understanding and broadening VIP rights to information in the absence of a comprehensive WIPO treaty. For example, there is no exemption for adaptation of a copyrighted work, which could prove useful in bringing works that would be difficult for VIPs to understand into a format that is more appropriate, and there is no exemption for distribution, which one can reasonably read into a right to reproduction, but which is nonetheless not explicitly provided for in the treaty. See *Sullivan Study*, *supra* note 3, at 17–19.

- (2) that does not “conflict with a normal exploitation of a work” and
- (3) that does not “unreasonably prejudice the legitimate interests of the author.”<sup>68</sup>

As Sullivan cautiously noted in reporting to WIPO on existing exemptions, a reading of the Berne Convention that provides sufficient production of materials to satisfy VIP needs “seems possible, but it is likely to need careful drafting to comply with the conditions.”<sup>69</sup> Perhaps most significantly, Sullivan stated that an exemption for VIP rights would likely only work if the use under the exemption does not conflict with existing and potential future markets for the rights holder, or otherwise create economic competition with the rights holder.<sup>70</sup> Recent cases have used the three-step test to give narrow interpretations to the realm of possible copyright violations, illustrating Sullivan’s analysis.<sup>71</sup> Additionally, prominent holders of copyrights, or rights-holders, have strongly opposed non-market solutions, such as a treaty-based mandatory copyright exemption for VIPs, even where markets have failed to develop solutions in any meaningful way.<sup>72</sup> Thus,

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<sup>68</sup> *Id.* at 17 (quoting Berne Convention, *supra* note 65, art. 9(2)).

<sup>69</sup> *Id.* Additionally, approximately 60 states, such as the United States and its Chafee Amendment, do have national statutory exemptions that at least arguably comport with the three-step test. *Sullivan Study*, *supra* note 3, at 28–29.

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

<sup>71</sup> *See, e.g.,* Copiepresse v. Google, Inc., Tribunal de Premiere Instance [Civ.] [Tribunal of the First Instance], Bruxelles, Feb. 15, 2007, No. 06/10.928/C, Wansart Magerman (Belg.). This footnote relies on the English translation. Note that this case is decided under European Community Directive 2001/29/EC, which provides the exact same three-step test as the international IP agreements in harmonizing copyright law within the EC. Community Directive 2001/29/CE, art. 5.5, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L167) 10, 22 (“5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”). The court noted that this test “appears to be such as to confirm the restrictive nature of the exceptions,” and ultimately issued an injunction against Google’s operation of its Google News service in Belgium because its publication via an accessible cache of plaintiff’s articles did not fall within any of the three applicable exceptions (citation; press review; and citations for the purposes of critique, polemic, teaching, review or in scientific works and insofar as justified by the intended aim) in Belgian copyright law.

<sup>72</sup> *See, e.g., infra* pp. 41–44 (discussing opposition to the WBU draft treaty introduced by Brazil to the WIPO SCCR in 2008).

neither the three-step test nor the Berne Convention have facilitated VIP information access.

## 2. VIP-Oriented Public-Interest Exceptions Under the Rome Convention

The Rome Convention, a 1980 treaty that protects performers, producers of phonograms and broadcasting organizations,<sup>73</sup> similarly offers limited opportunities for exempted use of copyrighted material to benefit VIPs. The Rome Convention contains two types of exemption authority: specific exemption types enumerated in the treaty, and exemptions of “the same kind” as those existing under a nation’s domestic laws given to literary and other authorial works.<sup>74</sup> Article 15(1) of the Rome Convention provides treaty-specific exemptions, allowing states to create national exemptions for four types of uses: private use, brief excerpted use for news reporting, “ephemeral fixation” of broadcast organization material by that organization and for its own use only, and scientific and “teaching” use.<sup>75</sup> The latter three exceptions by their terms do not provide access for VIPs, and the “private use” exception suggests non-public use incompatible with general VIP access.<sup>76</sup> Moreover, exemptions of “the same kind” is

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<sup>73</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 12, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]. While the Rome Convention obviously covers “neighboring rights” to copyright rather than copyright itself, it is included because such works are as useful and desirable to VIPs as they are to anyone else, and these works would require the same level of conversion and distribution as a copyrighted work would.

<sup>74</sup> Article 15(2) permits states to harmonize their national exemptions for the works covered under the Convention—performances, phonographic materials and broadcast-organization works—with any existing national copyright exemptions for literary and artistic works. *See id.* art. 15(2). However, Article 3(1) of TRIPs supersedes 15(2) of the Rome Convention, and provides most-favored-nation status, i.e., a state cannot treat foreign persons worse than it treats its own citizens, to all persons with respect to administration and enforcement of their IP rights. TRIPs, *supra* note 66, art. 3(1); VON LEWINSKI, *supra* note 9, at 10.36. Article 15(2) does not therefore add global copyright exemptions to Article 15(1), but rather only an exemption for any rights-holder in the world when dealing with national-level neighboring rights issues.

<sup>75</sup> Rome Convention, *supra* note 73, art. 15(1).

<sup>76</sup> *See* Sam Ricketson, *WIPO Study on Limitations and Exemptions of Copyright and Related Rights in the Digital Environment* 44-45, SCCR, SCCR/9/7 (Apr. 5, 2003), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf).

essentially no more than a reference to Berne, as these works are covered under Berne and most nations are bound by that treaty.<sup>77</sup>

### 3. VIP-Oriented Public-Interest Exceptions Under the WCT and WPPT

Along with the WPPT, the WCT is the most recent international IP treaty. Given the increasing importance of human rights protections in the years preceding ratification of the WPPT and WCT,<sup>78</sup> it is at least feasible that these treaties could grant broader rights than the Berne or Rome Conventions. However, the copyright exemption in both the WCT and the WPPT is none other than the three-step test from the Berne Convention.<sup>79</sup>

The nesting of WCT copyright exemptions within the Berne Convention and its three-step test is readily demonstrable. Article

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<sup>77</sup> See *id.* at 46 (noting that private use “is also a reference to the Berne Convention” because “such domestic laws will, as a matter of principle, need to be consistent with the provisions of that Convention” given that ratification of the Rome Convention requires ratification of the Berne Convention, and that nearly all nations are members of the Berne Convention). Contrast *Sullivan Study*, *supra* note 3, at 19–20 (discussing possible sources for VIP copyright exemptions in other Rome Convention articles while noting the overarching constraint imposed by the Berne Convention).

<sup>78</sup> See, e.g., UNESCO and WIPO, *Application of the Berne Convention for the Protection of Literary and Artistic Property and the Universal Copyright Convention to Material for the Visually and Auditorily Handicapped*, UNESCO/WIPO/WGHI/2 (1982), available at <http://unesdoc.unesco.org/images/0005/000507/050758eb.pdf>; W. M. Noel, *Copyright Problems Raised by the Access by Handicapped Persons to Protected Works*, Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union), IGC(1971)/VI/11 (May 30, 1985), available at <http://unesdoc.unesco.org/images/0006/000651/065169eb.pdf>.

<sup>79</sup> While beyond the scope of this Note, the Agreement on Trade Related Aspects of Intellectual Property Rights, commonly referred to as the TRIPs Agreement or simply TRIPs, also incorporates the three-step test of Berne. TRIPs is noteworthy because it is the predominant trade agreement in international IP law discourse today and has been the source of bitter conflict, most notably in the global response to HIV/AIDS and LDC access to medicine. The introductory article to TRIPs explicitly brings, among other intellectual property, copyright; trademark; performances, phonogram producers, and broadcast producers (i.e., the subject of the Rome Convention and the WPPT) into its ambit. See *supra* note 63 art. 3. Just as with the Rome Convention, WPPT and other treaties, TRIPs then incorporates the Berne Convention less Article 6bis, which provides for the rights of IP creators. *Id.* art. 14(1). Some scholars even argue that because Article 9(1) of TRIPs states that the treaty is an agreement within Article 20 of the Berne Convention, there is absolutely no argument that TRIPs provides for any exceptions not contemplated within VON LEWINSKI, *supra* note 9, at 10.84 (citing DANIEL GERVAIS, *THE TRIPs AGREEMENT: DRAFTING HISTORY AND ANALYSIS* nn. 1.11–1.12 (2d ed.) (2003)).



1(4) of the WCT unequivocally states that “[c]ontracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.”<sup>80</sup> Further, “[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form.”<sup>81</sup> For reproduction, adaptation, distribution, and wireless communication rights then, the WCT does not broaden VIP access to materials beyond the foundational Berne Convention.<sup>82</sup>

The WPPT updates the copyright protections and limitations established in the Rome Convention.<sup>83</sup> The WPPT differs from the WCT and many other international IP treaties in an important respect: it does not require compliance with the preceding treaty, in this case the Rome Convention.<sup>84</sup> However, this does not improve the realization of VIP information-access rights, as the only

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<sup>80</sup> WCT, *supra* note 66, art. 1(4).

<sup>81</sup> *Id.* at note 2. The endnotes to the WCT are “agreed statements of the Diplomatic Conference that adopted the Treaty (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions) concerning certain provisions of the WCT . . . .” *Id.* at note 1.

<sup>82</sup> The WCT also covers several materials that were not in existence at the time of the Berne Convention. Articles 4 and 5 of the WCT respectively cover computer programs and electronic databases, which are defined in Section 5 “which by reason of the selection or arrangement of their contents constitute intellectual creations.” Exemptions for use of these materials is governed under the same three-step test as materials covered by the Berne Convention. *Compare* WCT, *supra* note 66, art. 10(2) (“[C]ertain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”) *with* Berne Convention, *supra* note 65, art. 9(2) (“certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”). Moreover, some suggest that there is ambiguity as to whether or not a state must in fact apply *both* the WCT three-step test and the Berne Convention three-step test to any copyright covered under both treaties. *Sullivan Study, supra* note 3, at 17.

<sup>83</sup> The exception is the rights of broadcast organizations, which are not included in the WPPT and thus remain solely under the purview of the Rome Convention. *Compare* WPPT, *supra* note 66, pmb. *with* Rome Convention, *supra* note 73, pmb. (“[t]he [Rome Convention] Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and *broadcasting organizations*”) (emphasis added).

<sup>84</sup> *Compare* WPPT, *supra* note 66, art. 1 *with* WCT, *supra* note 66, art. 1(4) (requiring compliance with various articles of the Berne Convention).

exemption in the WPPT is the “same kind” test,<sup>85</sup> which, as noted previously, does not address this problem.<sup>86</sup>

Simply stated, the three-step test only marginally recognizes information-access rights and thus provides insufficient support for those rights.<sup>87</sup> Furthermore, the three-step test is not a mandatory test: states are free to reject copyright exemptions for VIPs or any other population, regardless of whether those exemptions are statutory or policy-based. Thus, although some commentators believe that the three-step test can in fact be the vehicle of meaningful assistance to VIPs,<sup>88</sup> multilateral IP treaties only minimally support VIPs’ right to access appropriate-format materials.

*D. The WIPO Standing Committee on Copyright and Related Rights’ Debate on Copyright-Exemptions Treaty for VIPs*

1. WIPO SCCR Treaty Negotiations in Brief: November 2004 to December 201

In November 2004, the WIPO Standing Committee on Copyright and Related Rights (SCCR) took up discussions on a potential copyright-exemptions treaty for VIP information access, yielding several proposals and evidencing the vast negotiating

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<sup>85</sup> See discussion *supra* notes 74–77 and accompanying text.

<sup>86</sup> *Supra* note 79 and accompanying text. Arguably, by not adopting any other exemptions from its basic governing terms, the WPPT restricts VIP information-access rights for performers’ works and phonograms as compared to the Rome Convention. See *supra* note 78 and accompanying text.

<sup>87</sup> See, e.g., Silke von Lewinski, Fordham Eighteenth International IP Conference, Session 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind 49 (Apr. 9, 2010) [hereinafter von Lewinski, Fordham Conference] (transcript on file with author) (noting that the Berne Convention, and generally the three-step test, is restrictive, and that States Parties are “even free theoretically not to provide for any limitations,” and were states “obliged to provide for limitations mandatorily, this would be a restriction, and I believe therefore against Article 20”).

<sup>88</sup> E.g., Guy Pessach, *Reciprocal Share-Like Exemptions in Copyright Law*, 30 CARDOZO L. REV. 1245, 1275 (2008); Pamela Samuelson, *The US Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 404–05 (1997) (discussing 1996 WIPO copyright treaty negotiations). See also Dr. Guido Westkamp, *The “Three-Step Test” and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. COPYRIGHT SOC’Y U.S.A. 1, 26 (2008) (discussing the European Union version of the three-step test).

space separating rights-holders and those seeking greater access to protected works.<sup>89</sup> The proposal to begin discussions partially stalled on the question of whether these discussions involved information sharing or norm setting,<sup>90</sup> i.e., whether discussions would involve a restatement of existing international law principles or a propounding of new principles. At the next SCCR meeting in November 2005, discussion continued on the merits of engaging in treaty discussions. Non-state parties such as the International Publishers Association were firmly against a treaty, stating that copyright exemptions were “the crudest and the bluntest tool in a large toolbox and were 19th century solutions to 21st century problems,” and that creative solutions developed pursuant to the three-step test are the only way to balance access rights and copyright-holder rights.<sup>91</sup> State parties also expressed concern that discussion would result in new principles. Benin and Morocco, among other countries, stated that a treaty should not harm rights-holders’ interests.<sup>92</sup> While many other states parties expressed moderate<sup>93</sup> or strong<sup>94</sup> support for an exemptions-based treaty, discussion was tabled without a concrete workplan for subsequent meetings.<sup>95</sup>

Over the next six years, discussions have continued at each of the SCCR tri-annual meetings.<sup>96</sup> There are currently four draft

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<sup>89</sup> VON LEWINSKI, *supra* note 9, at 22.15 (2008) (citing Standing Committee on Copyright and Related Rights, *Twelfth Session of the SCCR*, SCCR/12/3 (Nov. 2, 2004) [hereinafter Twelfth Session Report]).

<sup>90</sup> *Id.*

<sup>91</sup> SCCR Secretariat, *Thirteenth Session of the SCCR*, ¶ 32, SCCR/13/6 (June 9, 2006) [hereinafter Thirteenth Session Report].

<sup>92</sup> *Id.* ¶¶ 37 and 49 (respectively, Benin and Morocco).

<sup>93</sup> *Id.* ¶¶ 36, 39 and 44 (respectively, statements of United States, Australia and the European Community).

<sup>94</sup> *Id.* ¶¶ 40, 47 and 50 (respectively, statements of New Zealand, Iran and Bangladesh).

<sup>95</sup> *Id.* at ¶ 214.

<sup>96</sup> E.g., SCCR Secretariat, *Standing Committee on Copyright and Related Rights: Seventeenth Session—Meeting Documents*, WIPO, [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=16828](http://www.wipo.int/meetings/en/details.jsp?meeting_id=16828) (last visited Oct. 26, 2011) (noting the *Study on Copyright Limitations and Exceptions for Libraries and Archives* as one of the meeting documents); SCCR Secretariat, *Standing Committee on Copyright and Related Rights: Nineteenth Session—Meeting Documents*, WIPO, [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=17462](http://www.wipo.int/meetings/en/details.jsp?meeting_id=17462) (last visited Oct. 26, 2011) (noting the *Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa* and the *Study on*

instrument proposals before the SCCR—separate treaties drafted by the World Blind Union (WBU)<sup>97</sup> and the African Group, a “consensus instrument” introduced by the U.S., and a joint recommendation introduced by the European Union delegation.<sup>98</sup> As indicated by the session reports of the SCCR Secretariat, treaty negotiations are continuing, but these discussions have ended either in general statements of principles by groups of nations or statements of disagreement on what type of international instrument, if any, the SCCR should adopt and present to the WIPO General Assembly for ratification.<sup>99</sup> Some nations, primarily LDCs, either support the WBU proposal explicitly or support a multilateral treaty broadening VIP information-access rights.<sup>100</sup> At the Twentieth Session in June 2010, for example, Thailand spoke on behalf of the Asian Group<sup>101</sup> and, along with the

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*Limitations and Exceptions for Copyright for Educational Purposes in the Arab Countries* as two of the meeting documents).

<sup>97</sup> This proposal was formally introduced by the Group of Latin American and Caribbean States (GRULAC).

<sup>98</sup> SCCR Secretariat, *Comparative List of Proposals Related to Copyright Limitations and Exceptions for the Visually Impaired Persons and Other Persons with Print Disabilities* 2, SCCR/22/8 (Mar. 16, 2011), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_8.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_8.pdf) [hereinafter *Comparative List of Proposals*].

<sup>99</sup> Compare SCCR Secretariat, *Eighteenth Session of the SCCR*, SCCR/18/7 (Dec. 1, 2010), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_18/sccr\\_18\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_7.pdf) (“The Committee reconfirmed its commitment to work on the outstanding issues of the limitations and exceptions . . . . Likewise, the Committee reaffirmed its commitment to continue without delay its work in a global and inclusive approach, including the multifaceted issues affecting access of the blind, visually impaired and other reading-disabled persons to protected works”) with SCCR Secretariat, *Twentieth Session of the SCCR*, ¶ 18, SCCR/20/13 Annex 1 (Dec. 7, 2010) [hereinafter *Twentieth Session Report*], available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_20/sccr\\_20\\_13.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_13.pdf) (“The Committee agreed to work towards an appropriate international legal instrument or instruments, taking into account the four proposals currently tabled or any additional submissions.”) and SCCR Secretariat, *Comparative List of Proposals*, *supra* note 98 (contrasting four different instruments proposed through the SCCR).

<sup>100</sup> See *Twentieth Session Report*, *supra* note 99, ¶¶ 17–43 and 95–123 (statements of member states expressing support or disapproval of the WBU proposal and a treaty generally); SCCR Secretariat, *Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives*, SCCR/22/12 (June 3, 2011), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_12.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf) (proposal by the African Delegation covering VIP exemptions, among other topics).

<sup>101</sup> The Asian Group is a regional grouping of some 30 SCCR member states. See *Asian Group’s Opening Statement at WIPO’s Standing Committee on Copyright and Related*

Group of Latin American and Caribbean States (GRULAC),<sup>102</sup> strongly supported a treaty.<sup>103</sup> In contrast, other nations, like Switzerland and the Group B bloc of developed nations,<sup>104</sup> “noted with interest the two new proposals put forward by the United States and the European Union and its 27 Member States,” neither of which would create binding authority on signatory nations to fashion exemptions.<sup>105</sup>

At the twenty-second session of the SCCR, held in June 2011, it was revealed that a diverse group of nations and regional entities, comprising the United States, the European Union, the African Group, Argentina, Brazil, Mexico, Ecuador and Paraguay, had been meeting informally since February 2011 to bridge the gap between the four draft instrument proposals.<sup>106</sup> These discussions yielded a non-SCCR document (a “non-paper”),<sup>107</sup> that appeared to present a significant set of compromises between these divergent groups.<sup>108</sup> However, the announcement of this document, and these compromises, was immediately followed by statements of disagreement about the ultimate instrument to be advanced,<sup>109</sup> suggesting that a complete consensus is still not on the horizon.

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*Rights*, KNOWLEDGE ECOLOGY INTERNATIONAL (“KEI”) (June 21, 2010, 10:04 AM), <http://keionline.org/node/872>.

<sup>102</sup> See *Presiding GRULAC, Panama Hosts Farewell Lunch for the Permanent Representative of Dominica*, PERMANENT MISSION OF PANAMA TO THE UNITED NATIONS (Mar. 25, 2010), <http://www.panama-un.org/en/News/29-2010-03-25-Presiding-GRULAC,-Panama-hosts-farewell-lunch-for-the-Permanent-Representative-of-Dominica.html> (spelling out acronym and listing member states).

<sup>103</sup> Twentieth Session Report, *supra* note 99, ¶ 17.

<sup>104</sup> See James Love, *The WIPO SCCR 19 Begins Its Work*, KNOWLEDGE ECOLOGY INTERNATIONAL (Dec. 14, 2009, 3:54 AM), <http://keionline.org/node/721>. The Group B bloc is a “group of high income countries that includes . . . the members of the European Union, Australia, Canada, Japan, New Zealand, Norway, Switzerland and the Vatican.” *Id.* These are the nations that also typically hold copyrights.

<sup>105</sup> Twentieth Session Report, *supra* note 99, ¶ 18.

<sup>106</sup> SCCR Secretariat, *Twentieth Session of the SCCR*, ¶ 112, SCCR/22/18 (July 15, 2011), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_18.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_18.pdf) (statement of the United States). See *infra* Part I.D.2 for a very brief explanation of these proposals.

<sup>107</sup> SCCR Secretariat, *Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities*, SCCR22/15 Rev. 1, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_15\\_rev.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_15_rev.pdf).

<sup>108</sup> *Id.* at ¶¶ 113–15.

<sup>109</sup> See *id.* at ¶¶ 116–17 (noting back-to-back statements by Brazil and the European Union delegation immediately following the “non-paper” statements, and respectively

## 2. The Four Current Proposals and State Reactions

The first proposed instrument was a draft treaty developed by the WBU and formally introduced in May 2009 by Brazil, Uruguay and Paraguay.<sup>110</sup> This treaty grants an exemption for VIPs (covered by the treaty's definition of "visual impairment") to access copyrighted works without the rights-holder's consent, provided certain conditions are met.<sup>111</sup> LDC/South countries, including representatives from South America, Africa, and Asia where the vast majority of VIPs live, generally favored the proposal.<sup>112</sup> Many nations additionally "welcomed" the treaty, but did not express explicit support for it, concentrating instead on statements supporting the stakeholders' platforms<sup>113</sup> or the need to move forward with treaty discussions in a neutral manner.<sup>114</sup>

In contrast, developed/North countries, the nations that possess the vast majority of copyright holders, generally disfavored the draft treaty. These countries responded by presenting numerous alternatives including, draft agreements,<sup>115</sup> draft joint recommendations for agreements,<sup>116</sup> consensus instruments<sup>117</sup> and

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noting that Brazil favored a treaty while the European Delegation was "interested in results in the real world").

<sup>110</sup> SCCR Secretariat, *Proposal by Brazil Ecuador and Paraguay, Related to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, SCCR18/5, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_18/sccr\\_18\\_5.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf).

<sup>111</sup> *Comparative List of Proposals*, *supra* note 98, at Annex pp. 17–18 (quoting Article 4 of the WBU draft treaty).

<sup>112</sup> SCCR Secretariat, *Nineteenth Session of the SCCR*, ¶¶ 36, 86, and 89, SCCR/19/15 (Aug. 6, 2010), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_19/sccr\\_19\\_15.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_15.pdf) (respectively the statements of Indonesia, Uruguay, and Morocco) [hereinafter Nineteenth Session Report].

<sup>113</sup> *See e.g., id.* at ¶ 81.

<sup>114</sup> *Id.* at ¶ 78 (statement of Senegal that "the key issue in dealing with limitations and exceptions was to find a balance between rightholders and users but also, at the same time, a balance among the users themselves," and that therefore the African group preferred "a global approach to address the needs of all persons with disabilities").

<sup>115</sup> Twentieth Session Report, *supra* note 99, ¶ 6 (noting discussion of the draft agreement proposed by Brazil, Ecuador, Mexico and Paraguay at the Eighteenth Session of the SCCR in May 2009).

<sup>116</sup> *Id.* (noting "draft joint recommendation" put forth by the E.U.).

<sup>117</sup> *Id.* (noting the document put forth by the United States delegation, which it called a "draft consensus instrument").

timetables for drafting agreements.<sup>118</sup> Ultimately, the United States offered a consensus instrument at the Twentieth Session in June 2010 recommending that states allow for importation and exportation—but not explicitly intra-state production—of VIP-accessible works, but permitting states to refuse to do so when they believe that the work at issue is available in the other nation “at a reasonable time and at a reasonable of price.”<sup>119</sup> The United States proposal is the only proposal to specifically reference Article 9(2) of Berne.<sup>120</sup> The European Union also offered a proposal, which similarly calls on, but does not obligate, states to provide a national statutory exemption.<sup>121</sup> The European Union proposal is particularly noteworthy because it explicitly conditions these exemptions on meeting the three-step test and on there existing no “sufficient and adequate market solutions for” VIPs, as defined in the E.U. proposal.<sup>122</sup>

Finally, the African Group also proposed a treaty for a mandatory copyright exemption for covered VIPs.<sup>123</sup> In contrast to the WBU treaty, the African proposal contains no exemptions when a for-profit entity disseminates the materials, nor any additional exemption for a covered VIP further copying a work for personal use.<sup>124</sup> Thus, all proposals remain open for negotiation and potential passage in subsequent WIPO SCCR meetings; whether the SCCR will pass a VIP copyright exemptions treaty is an open question. The arguments for and against this treaty are the subject of Part II.

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<sup>118</sup> *Id.* (noting proposed timetable for treaty put forth by Brazil, Ecuador, Mexico, and Paraguay).

<sup>119</sup> *Comparative List of Proposals*, *supra* note 98, at Annex pp. 7, 25 (respectively quoting the preamble and Article 2 of the U.S. proposal).

<sup>120</sup> *Id.* at Annex p. 7. This could suggest that the U.S. proposal is essentially a treaty-based interpretation of the three-step test.

<sup>121</sup> *Id.*, at Annex p. 19 (quoting Article 2 of the E.U. proposal).

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

<sup>123</sup> SCCR Secretariat, *Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives*, SCCR20/11, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_20/sccr\\_20\\_11.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.pdf).

<sup>124</sup> *Id.* at Annex p. 17 (quoting Article 4 of the African Group proposal).

## II. SHOULD THERE BE A MULTILATERAL VIP COPYRIGHT EXEMPTIONS TREATY?

As noted in the preceding section, there is no shortage of binding and non-binding proposals for further activity by the WIPO SCCR. SCCR members have taken numerous actions, all in the course of developing points of agreement on a multilateral and global treaty of copyright exemptions for VIP access to information.<sup>125</sup> But why a treaty? Part II of this Note surveys some of the most commonly used and persuasive reasons why a WIPO copyright-exemption treaty for VIPs should or should not be adopted.

### A. *Arguments for a WIPO Copyright-Exemption Treaty for VIP Information-Access Rights*

Some international human rights scholars note that human rights-based arguments can be unpersuasive, because the obligations set forth in treaty documents and other binding agreements are so clearly recognized and necessary that they paradoxically have no effect on state action.<sup>126</sup> However, despite the clear treaty obligations compelling state action, the status of VIP information access has not improved in recent years.

#### 1. Human Rights-Based Concerns

##### a) States Have Not Acted Sufficiently to Provide VIPs With Meaningful Access to Information<sup>127</sup>

States and even regional organizations have developed formal legal copyright exemptions to provide VIPs within their political

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<sup>125</sup> See *supra* notes 115–18.

<sup>126</sup> See HESTERMEYER, *supra* note 48, at 124 (quoting Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1946–47 (1990)).

Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because . . . noncompliance would shock[] . . . the conscience of mankind and be contrary to elementary considerations of humanity.

*Id.* (internal quotation marks omitted).

<sup>127</sup> See discussion *infra* Part I.D.1–2 (discussing statements by rights-holding and developing nations about the need for providing VIP access to information).



control with access to information.<sup>128</sup> Yet even in these countries, the problem of access to information still exists.<sup>129</sup> A treaty providing increased and explicit protection of VIP rights to access appropriate-format information would ideally, therefore, do what national and regional programs do not: recognize an obligation by trade representatives and intellectual property experts, rather than human rights defenders, to provide VIPs with access to currently unavailable materials.

Some might posit that the WIPO treaty is needed at least in part because the elite members of society who represent nations at these negotiations do not have any desire to otherwise assist VIPs in accessing appropriate-format materials. This argument springs from the concern that elites in LDCs frequently trade intellectual property rights for things that they believe are more beneficial to their “constituencies.”<sup>130</sup> With respect to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), for example, many elites who represented their LDC accepted the agreement trading intellectual property rights because they believed it would lead to access to agricultural, apparel and other markets in developed nations.<sup>131</sup> A treaty for the blind becomes desirable, then, to protect VIP rights against the limitations of these representative elites.

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<sup>128</sup> *Sullivan Study*, *supra* note 3, at 28–45.

<sup>129</sup> The United States in particular has a robust copyright exemption statute in the Chafee Amendment, 17 U.S.C. § 121, and yet just as in other developed nations, only five percent of works are translated into VIP-accessible formats. *Infra* note 135 (statement of Michele Woods of the US Copyright Office accepting the five-percent figure for developed and less-developed nations alike).

<sup>130</sup> JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 21 (2001) (“Many developing countries agreed to this text, believing that they could limit the negotiations primarily to trade in counterfeit goods and other such trade-related aspects. This was a misreading not only of the text but also of the writing on the wall.”) [hereinafter WATAL]; Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 215, 221 (Lorand Bartels & Federico Ortino eds., 2006) (“[M]any developing countries do not hesitate to trade off IPRs [i.e., IP rights] in exchange for market access.” Property rights that they believe are more beneficial to their “constituencies.” This is why the TRIPs agreement is a useful example: LDC representatives, the story goes, traded intellectual-property rights for other, non-IP rights).

<sup>131</sup> WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES* 129 (2002), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/02/16/000094946\\_0202020411334/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/02/16/000094946_0202020411334/Rendered/PDF/multi0page.pdf).

Some observers argue that under existing human rights and copyrights treaties, nations are already subject to sufficient obligations to provide VIPs with information access.<sup>132</sup> Critics of a treaty for the blind could claim that because the CRPD was only passed in 2005 and fulfilled human rights treaty obligations are slow to realize,<sup>133</sup> a treaty for the blind is premature. However, compliance data gathered by the SCCR Secretariat indicates that the passage of the CRPD has had a negligible effect on national copyright exemptions.<sup>134</sup> Absent analysis which suggests that substantial compliance with the CRPD has been delayed by some

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<sup>132</sup> Hon. Weerawit Weeraworawit, Fordham Eighteenth International IP Conference, Session 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind 29 (Apr. 9, 2010) [hereinafter Weeraworawit, Fordham Conference] (transcript on file with author) (“Even the conventions and the agreements on intellectual property rights have paved the way, have allowed the member countries to do something for people with disabilities. They do not need to wait for the international treaty. They can do it now, especially people who are high-minded with the protection of human rights. They’ve got to lead the way.”); KEI, *Interview with David Hammerstein Regarding Negotiations on WIPO Treaty for Persons Who Are Blind or Have Other Disabilities* ¶ 6 (Mar. 4, 2011), <http://keionline.org/node/1087> (“Question 3. How does the European Commission respond to the argument that the UN Convention on the rights of disabilities, including in particular Articles 21 and 30, obligate governments to change laws to provide more equal access to copyrighted works?”).

<sup>133</sup> ICESCR, *supra* note 37, art. 2(1) (“Each State Party to the [ICESCR] undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized”). It should be noted that this implementation timeframe is of course not restricted to human rights treaties; treaty implementation generally takes several years.

<sup>134</sup> According to a 2006 WIPO SCCR survey—predating treaty discussions at the SCCR but contemporaneous with the passage of the CRPD—at least 30% of WIPO member states provided for national statutory exemptions for VIP information access. Pooley, Fordham Conference, *supra* note 8, at 4. In an updated November 2010 survey by the SCCR Secretariat, that number had risen, but by as little as 3 percent. See SCCR Secretariat, *Updated Report on the Questionnaire on Limitations and Exceptions*, 37 SCCR/21/7 (Oct. 2, 2010), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_21/sccr\\_21\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_21/sccr_21_7.pdf).

National statutes of 40 Member States include limitations and exceptions for the visually impaired. . . . Nineteen Member States have general limitations and exceptions which in most cases cover any uses for the benefit of persons with any disability where the work is used in a manner directly related to the disability and to the extent required by the disability.

*Id.* However, only 61 of the 184 Member States responded to the questionnaire, so it possible that several states with national statutory exemptions are not included in this total. *Id.* at 6.

other condition then, this argument does not appear relevant to the treaty for the blind.

Similarly, one can argue that a treaty is superior to an international agreement, joint resolution or other type of non-binding document because national state exemptions and consensus statements have not resolved the issue. In developed nations, only five percent of books have been translated into VIP-accessible formats; in LDCs, only one percent of books are accessible to VIPs.<sup>135</sup> These statistics suggest that current national efforts are inadequate.

b) The Optional Protocol to the CRPD Does Not Sufficiently Encourage Cross-Border Information Sharing

A WIPO treaty could provide the missing incentive for nations to comply with existing international obligations to provide VIPs with information. The Optional Protocol to the CRPD offers a mechanism for state accountability of non-compliance with CRPD provisions. In theory, anyone who is dissatisfied with the efforts of a State Party to provide its citizen/VIPs with meaningful access to materials can complain to the CRPD Committee, which can then help move a state toward compliance.<sup>136</sup> However, the

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<sup>135</sup> See Michele Woods, Fordham Eighteenth International IP Conference, Session 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind, 11 (Apr. 9, 2010) [hereinafter Woods, Fordham Conference] (transcript on file with author); Catherine Saez, *World Blind Union Won't be Sidetracked in Quest for Treaty on Reading Access*, IP Watch, (Mar. 10, 2011), <http://www.ip-watch.org/weblog/2011/03/10/world-blind-union-won't-be-sidetracked-from-quest-for-treaty-on-reading-access/> (citing WBU President Maryanne Diamond for proposition that in developed countries only five percent of written works are VIP-accessible, while in LDCs only one percent of works are VIP-accessible). While developed nations have not questioned these data from the WBU, one may disagree with the WBU's characterization of this situation as a "book famine." See Dr. William Rowland, WBU President, Address on the Occasion of WBU's Press Conference Launching the WBU Global Right to Read Campaign (Apr. 23, 2008), available at [g3ict.com/download/p/fileId\\_783/productId\\_124](http://g3ict.com/download/p/fileId_783/productId_124).

<sup>136</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex II art. 1(a), U.N. Doc. A/61/611 (Dec. 6, 2006). Presently only 66 states are parties. United Nations Treaty Collection, *15.a. Optional Protocol to the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS, (Feb. 13, 2011), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en).

CRPD Committee is akin to other treaty bodies in that it cannot enforce rigorous compliance with obligations.<sup>137</sup>

Assuming a state party has not rejected the CRPD Committee's competence,<sup>138</sup> and that the submission made to the Committee complies with its stated conditions,<sup>139</sup> Articles 6 and 7 of the Protocol permit of the CRPD Committee to investigate "grave or systematic violations by a State Party of the rights set forth in the [CRPD]".<sup>140</sup> However, the extent of the Committee's powers are limited; the investigatory power is suggested, not mandatory,<sup>141</sup> and is in part contingent on permission by the state.<sup>142</sup> Thus, while non-compliance with treaty obligations can open states to national and international political pressure,<sup>143</sup> a state may violate its obligations under the CRPD without necessary consequence.

This is important because the lack of negative consequences to treaty violations is a common ground for criticizing international human rights treaties.<sup>144</sup> Scholars, for example, often contrast the

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<sup>137</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities art. 6(1), May 23, 2008 ("If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee *shall invite that State Party to cooperate* in the examination of the information and to this end *submit observations with regard to the information concerned.*") (emphasis added).

<sup>138</sup> *Id.* at art. 8. ("Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.")

<sup>139</sup> *Id.* at art. 2.

<sup>140</sup> *Id.* at art. 6. Articles 6 and 7 lay out the extent of the enforcement and punitive powers of the CRPD Committee.

<sup>141</sup> Respectively, Articles 6(3), 6(4) and 7(2) permit the Committee to submit "comments and recommendations" to investigated States Party, require those States Party to "submit its observations" concerning those comments and recommendations, and "invite the State Party concerned to inform it of the measures taken in response to" Article 6 actions. *Id.* art. 6(3), 6(4), and 7(2).

<sup>142</sup> Article 6(2) states that the CRPD Committee, although it can rely on reports by third parties, may not itself conduct in-state investigations without the consent of the investigated State Party. *Id.* art. 6(2).

<sup>143</sup> HESTERMEYER, *supra* note 48, at 196.

<sup>144</sup> *Id.* Hestermeyer offers an excellent explanation of this criticism in the context of conflicts between international legal regimes:

[S]ome regimes boast strong enforcement mechanisms with the possibility of sanctions, others are enforced by shaming states into compliance, yet other regimes do not have an enforcement or adjudication mechanism. . . . Even though technically it is correct to state that this does not change the relationship of the [different legal

ineffectiveness of human rights treaties with the IP and trade treaties administered by the WTO and the General Agreement on Trade and Tariffs (GATT), which are generally hailed as successful in large part because of their strong non-compliance disincentives and robust enforcement mechanisms.<sup>145</sup> The CRPD, by contrast, lacks robust enforcement mechanisms,<sup>146</sup> and the other treaties on which VIPs might rely, i.e., the ICCPR and ICESCR, are not much stronger.<sup>147</sup> Additionally, because human rights treaty bodies generally scale state compliance relative to the varying economic power of states to fulfill their treaty obligations, these treaties generally involve recommendations rather than obligations.<sup>148</sup> Given this lack of full respect among states and

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regimes and enforcement mechanisms of international law] under general international law and that under general international law the outcome might be different, it is unrealistic to leave it at that. If a state will abide by the solutions imposed by the regime with the strong enforcement mechanism and it is this mechanism that determines what will happen in fact, *peu importe* what doctrine holds dear.

*Id.*

<sup>145</sup> *Id.* at 214–15. Hestermeyer notes that some commentators have actually suggested that WTO dispute-resolution bodies should be able to apply other international law, and specifically international human rights law, so that human rights advocates can take advantage of the power and respect for these bodies.

<sup>146</sup> See *supra* at notes 140–47 and accompanying text.

<sup>147</sup> See ICCPR, *supra* note 42 (providing in Articles 40–42 for mandatory national reporting on progress in implementing ICCPR provisions, but providing for no enforcement mechanism beyond “friendly solution[s],” a “Conciliation Commission,” and referral to the ICESCR Committee Chair); ICESCR, *supra* note 37 (providing in Articles 16–23 for mandatory national reporting on progress in implementing ICESCR provisions, but including no enforcement mechanism). However, it is at least true that states, and to a limited degree non-states, could choose to enforce the provisions of these treaties through their own use of sanctions, shaming and coopting. Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689–716 (2008) (arguing that shaming by states and non-states is an effective, albeit incomplete, enforcement mechanism); Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT’L REL. 157, 179–80 (1995) (arguing that Europe has developed an effective human rights regime by “‘shaming’ and ‘coopting’ domestic lawmakers, judges and citizens, who pressure governments from within for compliance,” although this requires an underlying respect for democracy and the rights at issue).

<sup>148</sup> See CESCR, General Comment No. 5 (1994), available at <http://www.unhcr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>. E.g., TRIPs, *supra* note 66, art. 66(1).

scholars for human rights obligations and evidence of non-compliance, a WIPO treaty would arguably advance VIP rights by underscoring the significance of VIP rights in international political discourse.

Both human rights advocates and WIPO treaty opponents respond that a WIPO treaty is superfluous because the rights at issue already exist.<sup>149</sup> Therefore, they argue, efforts are better spent in creating compliance with existing agreements to respect these rights, such as through consensus-building with the most influential states and other international actors.<sup>150</sup> These same human rights advocates however also note that this rebuttal does not fully answer the evidence that with human rights and even with

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In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

*Id.* This does not mean that developed nations are required to immediately fulfill to the highest imaginable standard their human rights obligations. All states are on the road of “progressive realization,” and in any case obligations at the international level are cast in rights language, not specific standards. *See* CESCR, General Comment No. 5, (1994), available at <http://www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>.

<sup>149</sup> Weeraworawit, Fordham Eighteenth International IP Conference, *supra* note 132, at 30–31 (transcript on file with author).

There have been so many conventions which have stressed the need to eliminate all forms of discrimination, especially discrimination against people with disabilities. All these conventions oblige Member States to take actions, not just to sign the agreement and do nothing. . . . Even the conventions and the agreements on intellectual property rights have paved the way, have allowed the member countries to do something for people with disabilities. They do not need to wait for the international treaty. They can do it now, especially people who are high-minded with the protection of human rights.

*Id.*

<sup>150</sup> *See* von Lewinski, Fordham Conference, *supra* note 87, at 23 (“First, let us save the time, effort, and money that you would otherwise need to get a treaty in order to fund, for example, the production of costly special-format editions — money spent otherwise for many meetings, documents, translations of documents, WIPO meetings, travel, et cetera, and especially time.”).

international intellectual property treaties that provide for some VIP information-access rights, states have not even engaged in “progressive realization” of these rights.<sup>151</sup> This is, in effect, why treaty advocates are pushing specifically for mandatory exemptions: they cannot compel their governments to fulfill VIP information-access rights.<sup>152</sup> It seems clear that if neither the CRPD’s efforts under the Optional Protocol nor VIP advocates’ efforts have fostered even progressive realization, restating those rights in an international IP treaty will be more effective than working within these aforementioned existing channels.

## 2. Arguments about Economic Efficiency

### a) States and NGOs Waste Significant Resources in Multiplicative Efforts to Provide Materials in VIP-Accessible Formats<sup>153</sup>

Economic arguments offer a second ground for supporting a WIPO VIP treaty. States should support a WIPO treaty for VIP copyright exemptions because the existing system is not only ineffective, but inefficient. Existing efforts are duplicated because each nation creates its own appropriate-format materials and does not share them (in addition to the fact that many countries cannot create any materials because of the high cost of doing so). A WIPO treaty would therefore create greater access given existing expenditures and likely create efficiencies in national governments by centralizing and streamlining exemption-policy activities.

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<sup>151</sup> Weeraworawit, *supra* note 132, at 31 (speaking of state compliance with VIP treaty obligations, “[b]ut evidence [shows] that they haven’t done it.”).

<sup>152</sup> See Love, Fordham Conference, *supra* note 1 (“Now, there is a second reason people want the harmonization, and that is that they don’t think they can implement the exception within their own parliament if they think their consumer interests, or in some cases the right owner interests, are weak”).

<sup>153</sup> Woods, Fordham Conference, *supra* note 135. Other commentators also suggest that countries can incur enormous costs in understanding international copyright regimes and limiting the force of their laws for fear of violating international law. Margot E. Kaminski & Dr. Shlomit Yanisky-Ravid, *Addressing the Proposed WIPO International Instrument on Limitations and Exceptions for Persons with Print Disabilities: Recommendation or Mandatory Treaty?*, at 18 (Nov. 14, 2011), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1959694](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959694) (working paper).

Beyond the cost of negotiating copyright licenses to actually provide materials and the administrative cost of running copyright-exemption programs,<sup>154</sup> VIPs in many countries lack access to appropriate-format materials because it is expensive to produce these materials. An instructive example both of the efforts needed to produce VIP-accessible formats and the overwhelming need for VIP-appropriate digital media is the production of a Braille version of a Harry Potter book. The version, produced by the National Braille Press, had a production cost of \$63 per copy.<sup>155</sup> Assuming that these producers sell at production cost, a non-VIP can still purchase a box set of all seven standard-print Harry Potter books in hardcover format for less than the cost of two Braille books.<sup>156</sup> More importantly, even in a developed country like Australia, the economies of scale in providing Braille works are daunting: providing the cost equivalent of a Braille Harry Potter series to its 300,000 VIPs who suffer from correctable visual impairment would cost the government \$133 million.<sup>157</sup>

Moreover, when alternatives to physical works are available, there is often little demand for these materials anyway, because

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<sup>154</sup> See, e.g., U.K. INTELLECTUAL PROP. OFFICE, COPYRIGHT AND VISUALLY IMPAIRED PEOPLE: CONSULTATION PAPER ON AN EXCEPTION TO COPYRIGHT FOR THE BENEFIT OF VISUALLY IMPAIRED PEOPLE (2001), available at <http://www.ipo.gov.uk/benefit.pdf> (noting administration and licensing-negotiation costs, among other costs, as not being included in the bare act of reproducing a work in an accessible format as being substantial for producers).

<sup>155</sup> *Harry Potter in Braille: Press Information*, NAT'L BRAILLE PRESS (Oct. 10, 2011, 10:10 AM), [http://www.nbp.org/ic/nbp/publications/potter\\_press.html](http://www.nbp.org/ic/nbp/publications/potter_press.html) (noting the production cost of the Braille format).

<sup>156</sup> As of November 2010, a discounted price for the box set was \$114. See, e.g., *Harry Potter Hardcover Boxed Set (Books 1–7)*, BARNES & NOBLE (Oct. 12, 2011), <http://search.barnesandnoble.com/Harry-Potter-Hardcover-Boxed-Set/J-K-Rowling/e/9780545044257>.

<sup>157</sup> See CERA, *supra* note 20 (referencing Australia's VIP population at 430,000, with 300,000 suffering from correctable visual impairment); ACCESS ECON. PTY. LTD., *Clear Insight: The Economic Impact and Cost of Vision Loss in Australia*, EYE RESEARCH AUSTRALIA, 11–12 (2004), [http://www.cera.org.au/uploads/CERA\\_clearinsight.pdf](http://www.cera.org.au/uploads/CERA_clearinsight.pdf); see also James Love, *Why Is the Obama Administration Not Standing up for People with Disabilities?* ¶¶ 4–5, HUFFINGTON POST (June 18, 2010), [http://www.huffingtonpost.com/james-love/on-treaty-for-the-blind-o\\_b\\_617451.html](http://www.huffingtonpost.com/james-love/on-treaty-for-the-blind-o_b_617451.html) (referencing example of Uruguay, which can only produce approximately 50 VIP-accessible works annually due to production costs).



translated, longer-length works are very difficult to transport,<sup>158</sup> especially in comparison to modern technologies such as e-readers.<sup>159</sup> The \$63 Braille version of the Harry Potter book, for instance, is fifty-six one-foot-tall volumes.<sup>160</sup> Instead, many VIPs tend to use digital technologies,<sup>161</sup> as these are far more mobile and dynamic devices than Braille books.<sup>162</sup> To a large degree, the challenge that VIPs face is gaining access to these new technologies available to non-disabled persons.

Noteworthy here is the work of the DAISY Consortium, a Swiss-based international organization that has established open-source standards and other information-sharing practices to facilitate global sharing.<sup>163</sup> The U.S. Library of Congress and its counterparts in Sweden, Japan, and other nations all utilize the DAISY standard in creating VIP-accessible formats.<sup>164</sup> While translation costs are still an issue for countries that do not speak the languages into which an accessible work has been translated,<sup>165</sup>

<sup>158</sup> Rachel Aviv, *Listening to Braille*, N.Y. TIMES, Dec. 30, 2009, at MM42, available at <http://www.nytimes.com/2010/01/03/magazine/03Braille-t.html>.

<sup>159</sup> Contrast, for example, the fifty-six one-foot-tall volumes of a VIP-accessible Harry Potter book with an e-reader such as the Amazon Kindle, which can hold three thousand or more books in a device that is roughly half the size of a sheet of paper and only one-third of an inch thick. Compare Aviv, *supra* note 158, with Kindle Wireless Reading Device, AMAZON.COM, <http://www.amazon.com> (select “Kindle” and “Kindle \$79” from upper left-hand menu; product size is at bottom of page).

<sup>160</sup> See Aviv, *supra* note 158; National Braille Press, *supra* note 155.

<sup>161</sup> See Aviv, *supra* note 158.

<sup>162</sup> See, e.g., *id.* For example, the knfbReader Mobile combines a cellular telephone and visual-to-speech text recognition technology in a cellular telephone device size. *KnfbReader Mobile*, READING TECH., INC. (Oct. 20, 2011, 12:50 PM), <http://www.knfbreader.com/products-mobile.php>.

<sup>163</sup> *About Us*, DAISY CONSORTIUM (Oct. 20, 2011, 12:58 PM), [http://www.daisy.org/about\\_us](http://www.daisy.org/about_us). DAISY stands for Digital Accessible Information System, and is essentially a standardized process for creating audiobooks.

<sup>164</sup> See *id.* (listing some prominent nations that utilize DAISY standards).

<sup>165</sup> As national and non-profit entities generally create audiobooks only in the languages that they need, additional translation work would still be required. See *id.* This cost, however, would be comparatively less than the current costs required to license a work for a specific translation:

There is a major problem with the translation of materials. This is particularly serious as many African countries have more than ten languages.(various e-mails and interviews) . . . There are also few translations of works from one African language into another (e.g., from Bantu (South Africa and elsewhere) into Edo, Yoruba or Hausa

there are generally no technological compatibility issues inhibiting regional and global sharing, and nations sharing a common language could begin providing works to VIPs immediately.<sup>166</sup>

However, many countries, and particularly LDCs with the majority of VIPs, do not have the resources to produce these materials. They also cannot obtain these materials, regardless of price, from other nations and their exemption-program representatives, as states generally do not share these materials.<sup>167</sup>

The lack of an international treaty that supports the copyright exception to export and the import of titles developed by libraries serving persons with disabilities has meant that it is impossible for organizations working under the Chafee [A]mendment [in the United States] to move titles across the national boundary. Additionally, it has been impossible to use titles developed in other countries in the [United States].<sup>168</sup>

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(Nigeria) or vice versa.) Generally the right to make a translation must be individually acquired for each translation into a different language. The overall situation reinforces the inequality of languages, privileges European languages, and means that tens of millions of Africans are unable to get access to or read books and articles published in languages other than their own.

ALAN STORY, STUDY PAPER 5: STUDY ON INTELLECTUAL PROPERTY RIGHTS, THE INTERNET, AND COPYRIGHT, COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 48, available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp5\\_story\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf) (quoting *Sustainable Book Provision—Chapter 5: How to Do It*, United Nations Educational, Scientific and Cultural Organization (UNESCO) Basic Learning Materials Initiative, (Oct. 24, 2011, 10:05 AM), [http://www.unesco.org/education/blm/chap5\\_en.php](http://www.unesco.org/education/blm/chap5_en.php)).

<sup>166</sup> See Love, *supra* note 1 (“The U.S. does not export to Canada, Jamaica, Kenya, South Africa, England, Australia, India or the many countries where people speak English as a [primary or] second[ary] language.”). As others have noted, however, DAISY technology utilizes the LAME mp3 encoder, which is subject to patent issues in some countries, and the DAISY technology itself is patented in the United States. *But see* Patrick Hely, Note, *A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO*, 43 VAND. J. TRANSNAT’L L. 1369, 1404 (2010); *Save as DAISY—Microsoft Word Add-In*, DAISY CONSORTIUM (Sep. 16, 2011), <http://www.daisy.org/project/save-as-daisy-microsoft-word-add-in>.

<sup>167</sup> Love, *supra* note 1.

<sup>168</sup> GEORGE KERSCHER, RESPONSE TO COPYRIGHT OFFICE QUESTIONS ON THE TOPIC OF FACILITATING ACCESS TO COPYRIGHTED WORKS FOR THE BLIND OR PERSONS WITH OTHER

High costs and state practice create virtually insurmountable barriers for most VIPs. In sum, as with the vast difference in the price of works from LDCs to developed nations, VIPs, and the national actors who would help them, lack the financial resources to produce or gain access to materials.<sup>169</sup> Without a WIPO treaty for the blind, inefficient production of VIP-accessible materials virtually ensures that the five percent figure remains the best case scenario for VIPs.<sup>170</sup>

### 3. Arguments About Conflicts Between Legal Paradigms

#### a) Broad Consensus Supports Berne's Three-Step Test and Prohibition Against Broader Copyright Exemptions

Presently, the vast weight of authority from IP scholars, international IP business leaders, and national IP representatives is that the three-step test is the best, and should remain the only,

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DISABILITIES 9 (2009), <http://www.copyright.gov/docs/sccr/comments/2009/kerscher.pdf>.

As Kerscher additionally notes:

the example of the last Harry Potter book, which was produced by most libraries serving persons with disabilities[, was] a huge duplication of effort. With only approximately 5% of titles ever being made accessible to persons with disabilities, having to produce the same book in different jurisdictions is most frustrating.

*Id.* at 9. The Chafee Amendment, 17 U.S.C. § 121 (2004), provides to the “blind or other persons with disabilities” access through select, named, trusted intermediaries to any “previously published, nondramatic literary work” on the condition that “such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.” 17 U.S.C. § 121(a)-(b)(1)(A). “Specialized formats” generally are “braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.” *Id.* at § 121(d)(4)(A).

<sup>169</sup> Additionally, textbooks are one of the most impactful areas of a potential WIPO treaty, “[i]n its Basic Learning Materials Initiative, UNESCO states [that] ‘In poor countries, with untrained teachers, the textbook becomes the most important, if not the only vehicle for the curriculum.’” Story, *supra* note 165, at 47 (quoting *Sustainable Book Provision—Chapter 5: How to Do It*, UNESCO Basic Learning Materials Initiative (Oct. 24, 2011, 10:05 AM), [http://www.unesco.org/education/blm/chap5\\_en.php](http://www.unesco.org/education/blm/chap5_en.php)).

<sup>170</sup> As stated previously, the vast majority of VIPs are nationals of less-developed countries, nations have several priorities ahead of VIP access-to-information rights. Each of the types of rights at issue in this discussion, for example, can be broadened to a general population right that is in many of the nations acute. The chances of substantial policy and financial resources being brought to bear on this problem, therefore, are slim.

means of protecting copyright rights-holders.<sup>171</sup> This position is reasonable, given the importance accorded to the three-step test in the Berne and Rome Conventions, the WCT and WPPT, and TRIPs. However, given the failure of voluntary action by private actors and national information-sharing programs to provide VIPs with meaningful access to appropriate-format technologies, it can be argued that at least for the proposed treaty, it is exactly the three-step test that the WIPO SCCR must dispense with if states are to fulfill VIP information-access rights.

It is worth noting that not every aspect of every international IP treaty relies on the three-step test exclusively. Mandatory exceptions, in other words, do exist in international IP and trade law.<sup>172</sup> For example, Article 27 of the Convention on International Civil Aviation provides a mandatory exception for patent infringement protections,<sup>173</sup> as does Article 5ter of the Paris Convention.<sup>174</sup> These examples are, however, limited to very specific circumstances of patent law, whereas the three-step test is valid for, among other areas of law, all of international copyright law.<sup>175</sup> One could argue that these exceptions are exactly the sort of “certain special cases”<sup>176</sup> the three-step test contemplates.

Nonetheless, this limited instance of mandatory exemptions provides some support for similar exemptions in the case of VIP rights. Additionally, while in the human rights context the VIP population of several hundred million is a population eminently worthy of protection, in the context of “certain special cases” that

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<sup>171</sup> See, e.g., *infra* notes 180–86 and accompanying text (quoting official positions and statements of the U.S. Chamber of Commerce, the Recording Industry Association of America, the United States Copyright Office, and IP professors); *supra* Part I.D.2 (noting the opposition of the SCCR delegates from the United States and European Union member states, among others, to a treaty that would appear to depart from the Berne three-step test).

<sup>172</sup> The following two examples come from statements made by James Love. Love, Fordham Conference, *supra* note 1.

<sup>173</sup> Convention on International Civil Aviation art. 27, 2006 (9th ed.), 15 U.N.T.S. 295, available at [http://www.icao.int/icaonet/arch/doc/7300/7300\\_9ed.pdf](http://www.icao.int/icaonet/arch/doc/7300/7300_9ed.pdf).

<sup>174</sup> Paris Convention for the Protection of Industrial Property art. 5<sup>ter</sup>, Mar. 20, 1833, 828 U.N.T.S. 305, available at [http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf).

<sup>175</sup> *Supra* Part I.C.

<sup>176</sup> Berne Convention, *supra* note 65, art. 9(2).

might be afforded an exemption under the three-step test, an exemption that would affect at most less than five percent of the population is arguably that type of instance.<sup>177</sup> This position can be contrasted with that of a general education exemption, which, potentially affecting all school-age children, would be a far more infeasible exception.<sup>178</sup>

#### 4. Arguments about Practical Political Concerns

##### a) Public and Private Entities Perceive the Treaty as a “Gateway Drug” to Global-Scale Copyright Infringements<sup>179</sup>

Beyond current resistance by the United States, the European Union nations, and other rights-holder states, industry associations in the United States have voiced deep opposition to a WIPO VIP treaty. Based on public statements, this opposition stems from the belief that a WIPO treaty that provides exemptions for VIP rights will undermine existing respect for current norms of global copyright law. These statements are made in opposition to the 2009 draft treaty proposal introduced by Brazil, Ecuador and Paraguay, but they notably lack support—binding (i.e., a treaty) or not—for these arguments.<sup>180</sup>

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<sup>177</sup> See discussion *supra* Part I.A (detailing the prevalence of treatable visual impairment).

<sup>178</sup> See, e.g., Letter from Michael Mabe, Chief Exec. Officer, Int’l Ass’n of Scientific, Technical and Med. Publishers (STM), to Hon. James Moore, Minister of Canadian Heritage and Official Languages, Canadian Heritage and Official Languages, Canadian House of Commons, and Hon. Tony Clement, Minister of Indus., Indus. Canada (Sep. 28, 2010), available at [http://www.stm-assoc.org/2010\\_09\\_28\\_STM\\_Submission\\_Bill\\_C32\\_the\\_Copyright\\_Modernization\\_Act.pdf](http://www.stm-assoc.org/2010_09_28_STM_Submission_Bill_C32_the_Copyright_Modernization_Act.pdf) (“STM notes that ‘education’ is not clearly defined in the Bill which makes the scope of the exception overly broad and therefore fails to define a special case under the three-step test.”).

<sup>179</sup> Many experts note that a substantial barrier to the passage of robust WIPO treaty for VIP rights is the issue of “precedent,” or alternatively stated, that permitting broad exemptions that foster access to materials will both erupt into global piracy of these works and other intellectual property. See Love, *supra* note 1, at 18–19 (transcript on file with author).

<sup>180</sup> The copyright industry organizations and Chamber of Commerce letters respectively advocate for WIPO “initiatives” and a “work stream.” Letter from Steven J. Metalitz, counsel to RIAA and other copyright-related industry associations, to Maria Pallante, Associate Register, Policy and Int’l Affairs, US Copyright Office 5 (Nov. 13, 2009), available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/steven-j->

Publishing and entertainment industry associations such as the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA), and general business associations such as the United States Chamber of Commerce, oppose the treaty on two grounds: first, that mandatory exemptions are categorically disruptive of the delicate balance between IP protections and human rights (in this case, VIP information needs), and second, that mandatory exemptions will drive rampant piracy of copyrighted works.<sup>181</sup> Rights-holder representative groups argue that exemptions are too rigid, or too categorical, to respect rights-holders' legal entitlements. This argument includes assertions that: (1) mandatory exceptions are incompatible with the international law practice of permitting states to implement treaties over several years;<sup>182</sup> (2) mandatory exceptions are incompatible with the consensus long-term goal of fostering a market solution for VIP rights (arguably the most cost-effective and efficient solution);<sup>183</sup> and (3) over the even longer term, "mandatory exception[s] could be more difficult to tailor to changing circumstances."<sup>184</sup> These groups further claim that exemptions are particularly inappropriate for VIP rights because in situations where "resources are already scarce, the existence of copyright-exemptions further reduces incentives to invest in the production and distribution of works in accessible formats to market."<sup>185</sup> For all of these reasons, group representatives argue, a

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metalitz-aap-ifta-mpaa-nmpa-riaa.pdf (opposing the draft agreement proposed by Brazil, Ecuador, and Paraguay) [hereinafter Metalitz Letter]; Letter from Brad Huther, Senior Director, US Chamber of Commerce, to Maria Pallante, Associate Register for Policy and Int'l Affairs, Copyright Office, Library of Congress 3 (Oct. 13, 2009), available at <http://www.copyright.gov/docs/sccr/comments/2009/reply-2/4-brad-huther.pdf> [hereinafter Huther Letter].

<sup>181</sup> Metalitz Letter, *supra* note 180, at 2–5; Huther Letter, *supra* note 180, at 2–5.

<sup>182</sup> See HESTERMEYER *supra* note 48, at 108 (noting that ICESCR Article 2(1) requires states to take steps to effect ICESCR rights, and "the 'obligation to take steps' means that States Parties have to establish a reasonable action programme towards the full realization of the rights and to start its implementation within a reasonably short time" (internal citations omitted)).

<sup>183</sup> See *infra* note 135 (discussing US perspective that a market solution is the optimal solution to conflicts between copyright and human rights, and other copyright-related issues (statement of Michele Woods)).

<sup>184</sup> Metalitz letter, *supra* note 180, at 4.

<sup>185</sup> Huther Letter, *supra* note 180, at 2.

treaty is inadvisable, and other initiatives such as collaborative work plans oriented toward increasing international information sharing are preferable.<sup>186</sup>

While many of these rights-holder representative associations support expanding VIP access to some degree,<sup>187</sup> they worry that mandatory treaty exemptions would drive global piracy of copyright materials.<sup>188</sup> The weight of the “gateway drug” argument is grounded in the fear that the proposed treaty is the “thin edge of the wedge” to the users’ rights movement.<sup>189</sup> In other words, piracy would not be driven by VIPs themselves, but rather that the treaty exemptions would indirectly cause those individuals and entities who believe that international copyright law restricts consumers’ rights too strongly to begin disregarding copyright law altogether. Thus, because a treaty would likely

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<sup>186</sup> Metalitz Letter, *supra* note 180.

<sup>187</sup> *See, e.g., id.* at 2 (“We strongly endorse and support reasonable efforts to increase the practical and functional access of blind and visually impaired persons to works protected by copyright.”).

<sup>188</sup> As Steven J. Metalitz, counsel to RIAA and other copyright-related industry associations, argues:

Furthermore, there is serious risk that the likely impact of the draft treaty will not be confined to the four corners of the document, widely spaced though they be. Viewed in context, the draft treaty appears to many as the not-so-thin edge of a wedge to be driven into the longstanding structure of global copyright norms. It advocates a U-turn in the approach to global copyright norms that would almost certainly not be restricted to the issue of access for the visually impaired, or even for the disabled community generally. Adoption of this proposal would be used to justify its radical approach—mandating in national law exceptions and limitations that reach far beyond what would be even permissible under global norms today—in many other fields of copyright law.

Metalitz Letter, *supra* note 180, at 5 (opposing the draft agreement proposed by Brazil, Ecuador, and Paraguay). *See also* Huther Letter, *supra* note 180:

If a ‘minimum flexibilities’ approach were adopted, even in an agreement limited in scope to accessibility of copyrighted works for persons with certain disabilities, this approach could be adopted in other areas as well. Such a precedent could have a broad impact in international organizations beyond WIPO, such as the World Trade Organization (WTO) and other UN agencies.

*Id.*

<sup>189</sup> *See generally* Interview by Carrie Russell with Ray Patterson, Professor, Univ. of Ga. (2010), available at <https://www.ala.org/ala/issuesadvocacy/copyright/copyrightarticle/usersrightscopyright.cfm>.

boost piracy and upset the balance between the rights of copyright holders and the rights of the public, a treaty for the blind is impossible.

One answer to this argument is that there is no way to legally interpret a VIP copyright exemptions treaty beyond the “four corners of the document” according to the Vienna Convention on the Interpretation of Treaties. Article 31(1) clearly states that treaties may only be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>190</sup> Whatever the fears of rights-holders that a treaty may be misinterpreted by persons who are not party to it, this is not a reason to not pass a treaty at all, but rather to ensure, as with TRIPs and the WTO dispute resolution mechanism, that there is robust enforcement of treaty violations.<sup>191</sup> Thus, piracy concerns, or the ‘thin edge of the wedge’ argument, are fodder for discussing how enforcement of international copyright law on the whole is to be increased to protect rights holders.

### *B. Arguments Against a WIPO Copyright-Exemption Treaty for VIP Information Access Rights*

#### 1. Arguments about Human Rights-Based Concerns

##### a) An Irreconcilable Conflict Between IP Rights-Holders and VIPs Precludes the Desired Mandatory Copyright Exemptions

The UDHR and ICESCR both contain clear statements of human rights protections for creators of intellectual property. The UDHR states that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>192</sup> This

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<sup>190</sup> Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>191</sup> *Supra* notes 141–46 and accompanying text (discussing the power of TRIPs and other WTO-administered agreements as relying in large part on their robust enforcement mechanisms).

<sup>192</sup> UDHR, *supra* note 35.



phrasing is echoed in the ICESCR, which protects the author's rights to "moral and material interests resulting from any scientific, literary or artistic production of which he is the author."<sup>193</sup> Beyond the economic incentive for a strong international copyright protection regime, then, human rights treaties themselves arguably create a conflict between creator rights and VIP rights that cannot be resolved through a WIPO treaty for the blind, and a treaty is therefore inadvisable.

Evidence of human rights protections for intellectual property is available in three forms. First, while IP human rights is admittedly not within mainstream IP law discourse, several IP scholars have lent weight to the argument that IP human rights are of the same level as cultural or political rights.<sup>194</sup> Second, human rights-based protection is a desire of international IP elites is evidenced by inclusion in the Berne Convention of a moral duty to protect creations.<sup>195</sup> Third, the Committee on Economic, Social and Cultural Rights (CESCR), which is charged with administering and interpreting the ICESCR,<sup>196</sup> issued interpretive rules on Article 15(1)(c) in 2001 and 2005 that include some rights protection for intellectual property.<sup>197</sup>

These rules, while non-binding, create human rights for creators of intellectual property that are both more expansive and

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<sup>193</sup> ICESCR, *supra* note 37.

<sup>194</sup> See Laurence Helfer, *Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited*, in COLLECTIVE MANAGEMENT OF COPYRIGHTS AND RELATED RIGHTS 75–104 (Daniel Gervais ed., 2d ed. 2008) [hereinafter Helfer, *Collective Management*].

<sup>195</sup> Berne Convention, *supra* note 65, art. 6<sup>bis</sup>.

<sup>196</sup> OHCHR, *Committee on Economic, Social and Cultural Rights: Monitoring the Economic, Social and Cultural Rights*, <http://www2.ohchr.org/english/bodies/cescr/> (last visited Oct. 26, 2011).

<sup>197</sup> CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Follow-up to the day of general discussion on article 15.1 (c), Monday, November 2001*, (Dec. 14, 2001) E/C.12/2001/15, available at <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf> [hereinafter *IP Creator and Consumer Human Rights*]; CESCR, *General Comment No. 17 (2005): 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 or she is the author (article 15, paragraph 1 (c), of the Covenant)*, E/C.12/GC/17 (Jan. 12, 2006) [hereinafter *General Comment No. 17*].

more limited than traditional national IP protections.<sup>198</sup> These differences are not merely of degree, but rather in kind:

The fact that the human person is the central subject and primary beneficiary of human rights distinguishes human rights, including the right of authors to the moral and material interests in their works, from legal rights recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals, and in some situations groups of individuals and communities. Human rights are fundamental as they derive from the human person as such, whereas intellectual property rights derived from intellectual property systems are instrumental, in that they are a means by which States seek to provide incentives for inventiveness and creativity from which society benefits.<sup>199</sup>

Specifically, then, IP human rights protect the rights of natural persons who create intellectual property to maintain their creative autonomy and enjoy the material benefits resulting from that property.<sup>200</sup> They do not protect the profit motive, they are inalienable—especially with respect to non-natural persons—and are fundamental rather than instrumental.<sup>201</sup> In sum then, as the moral human rights of IP authors and creators appear to be on an equal plane with the human rights of VIPs,<sup>202</sup> there is a conflict

<sup>198</sup> Helfer, *Collective Management*, *supra* note 194, at 86–87.

<sup>199</sup> *IP Creator and Consumer Human Rights*, *supra* note 197, ¶ 6.

<sup>200</sup> Helfer, *Collective Management*, *supra* note 194, at 86.

<sup>201</sup> *IP Creator and Consumer Human Rights*, *supra* note 197, ¶ 6; HESTERMEYER, *supra* note 48, at 157–58.

<sup>202</sup> HESTERMEYER, *supra* note 48, at 157–58 (explaining that ICESCR article 15(1) protects inventors' moral rights as a "true human right"). As Hestermeyer further notes, some commentators do differentiate among the rights propounded in global human rights treaties; for example, scholars may reject the equality of social, economic and cultural rights with civil and political rights because the former are progressive and goal-oriented and the latter are basic and immediately mandatory and binding. *Id.* at 88. However, this creates a distinction in the justiciability of these norms, but it does not create a difference in the equality of these types of rights. *Id.* All human rights carry with them the same obligation to protect, respect and fulfill. *Id.* at 108–10 (citing Asbjørn Eide, *The New International Economic Order and the Protection of Human Rights: Report on the Right to Adequate Food as a Human Right*, ¶¶ 66–115, U.N. Doc. E/CN.4/Sub.2/1987/23

between VIPs who need access to information to enjoy their rights, and intellectual property creators who may need to withhold that access in order to enjoy their rights.

The powerful protection of human rights is not available to copyright holders in all instances, however, because most copyright holders are corporations. Some scholars therefore dispute the existence of such a conflict. These scholars argue that there is no intent among treaty drafters or in contemporary state practice to create a human rights obligation for IP protection that extends to corporations or other non-natural persons,<sup>203</sup> and further that the materiality standard articulated within these treaties readily coexists with the rights of VIPs to access appropriate-format information.<sup>204</sup> As regards the treaties themselves, “[t]he situation with respect to Article 15(1)(c) of the ICESCR is . . . [that] the language of the provision . . . fails to mention corporations as possible beneficiaries [and that] the history of international human rights law indicates that the provision was meant for the benefit of individuals.”<sup>205</sup> The ICESCR Committee has explicitly noted that “legal entities are included among the holders of intellectual property rights” under the human rights treaties, but that “their entitlements, because of their different nature, are not protected at the level of human rights.”<sup>206</sup>

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(1987)). These IP-protection rights in the ICESCR would therefore be granted the same significance as other economic, social and cultural rights, and as civil, political, and other basic human rights.

<sup>203</sup> Helfer, *Collective Management*, *supra* note 194, at 80 n.15 (quoting Paul Torremans, *Copyright as a Human Right*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY* 181 (P. Torremans ed. 2004))

What we know is that the initial strong criticism that intellectual property was not properly speaking a Human Right or that is already attracted sufficient protection under the regime of protection afforded to property rights in general was eventually defeated by a coalition of those who primarily voted in favour because they felt that the moral rights deserved and needed protection and met the Human Rights standard . . . .

*Id.* In other words, copyright as a human right exists according to broad agreement only insofar as the moral rights, i.e., the rights of individual creators to have their name attached to the publication of the work and the right to derive a reasonable standard of living from that publication, are the rights at issue.

<sup>204</sup> HESTERMEYER, *supra* note 48, at 154–55.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 155 (quoting *General Comment No. 17*, *supra* note 197, ¶ 5).

Still, there are wrinkles as to how this argument limiting the applicability of human rights to intellectual property rights-holders plays out in the realm of copyright. In the case of pharmaceuticals, the impact is clear: patent-holders are invariably corporations (and generally corporations whose GDP and global political influence rivals that of states).<sup>207</sup> Patent rights may be human rights to protect the moral and material interests of individual inventors,<sup>208</sup> but there is little advocacy<sup>209</sup> for extending that protection to all patent holders. For copyright holders, this distinction is less clear. Authors of literary works, for example, do not sell all rights to the work to the publishing houses that produce and market the work.<sup>210</sup> Nor do musical artists.<sup>211</sup> Many individual copyright holders, then, have a material interest that is potentially infringed if reproductions of their work are made, and pursuant to human rights arguments, no remuneration is made to those individuals, as the global copyright regime requires.

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<sup>207</sup> *Id.* at 95. Merck, for example, had \$46 billion in sales for the 2010 calendar year. Merck, *Merck Announces Fourth Quarter and Full Year 2010 Financial Results* (Feb. 3, 2011), available at [http://www.merck.com/newsroom/news-release-archive/financial/2011\\_0203.html](http://www.merck.com/newsroom/news-release-archive/financial/2011_0203.html). If one equates sales with national production as measured by Gross National Income (GNI), Merck would be approximately the 102<sup>nd</sup> wealthiest nation. See World Bank, *Indicators: GNI (current \$US)*, [http://data.worldbank.org/indicator/NY.GNP.MKTP.CD?order=wbapi\\_data\\_value\\_2010+wbapi\\_data\\_value+wbapi\\_data\\_value-last&sort=asc](http://data.worldbank.org/indicator/NY.GNP.MKTP.CD?order=wbapi_data_value_2010+wbapi_data_value+wbapi_data_value-last&sort=asc) (last visited Jan. 13, 2012) (using 2010 data).

<sup>208</sup> HESTERMEYER, *supra* note 48, at 155–58.

<sup>209</sup> Hestermeyer notes that pharmaceutical companies and other patent rights-holders could pursue claims in national and regional courts based on regional human rights treaties such as the Charter of Fundamental Rights of the European Union, which specifically mentions intellectual property rights as generally protected property rights. *Id.* at 158.

<sup>210</sup> For example, the rights of authors publishing through Elsevier, authors retain the right to publish derivative works (such as books), the right to present copies of the work at a conference or other meeting, and the right to publish on one's personal or institution website a post-publication revised version of the work to reflect the peer review process. *Authors' Rights & Responsibilities*, ELSEVIER, <http://www.elsevier.com/wps/find/authorsview.authors/rights> (last visited Oct. 10, 2011).

<sup>211</sup> For example, while a standard contract between a songwriter and publisher would transfer all or virtually all rights to the publisher, co-publishing and administration agreements provide songwriters with many rights; in any case, songwriters may retain the contractual right to license their music for dramatic performances, or at least retain the right to withhold consent for such use. AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 100–01, 1465–67 (4<sup>th</sup> ed. 2010).

One potential rebuttal to this counterargument is that the global market for works in formats required by VIPs is insufficient to stimulate creation of these particular works, either by corporate rights-holders or individual creators. In the absence of market activity, arguably no actual rights conflict exists between copyright-as-human-right and information-access-as-human-right.<sup>212</sup> The best example of this market failure is in the realm of audiobooks, the VIP-appropriate format with the greatest mass-market appeal. The U.S. Chamber of Commerce specifically notes that audiobooks are the most significant convergence of VIP-appropriate and mass-market formats, stating that “in recent years publishers have been able to produce market-ready, accessible versions of their copyrighted books, in forms such as audiobooks.”<sup>213</sup> But advocacy organizations, such as the WBU, challenge the sufficiency of this market solution because only five percent of U.S. annually published works are translated into VIP-accessible formats, which of course includes audiobooks.<sup>214</sup>

One may additionally look to audiobook publishers and sellers to gauge the quality of the audiobooks produced. Audible, the largest seller of audiobooks on the internet, makes some 100,000-plus works available to consumers.<sup>215</sup> These 100,000-plus works comprise the greatest selection of audiobooks available out of all the literary and other creative works ever published, at least according to Audible itself.<sup>216</sup> But if one takes the figure of 100,000 as a fair estimate of all audiobooks ever published and compares it to annual book production, this figure is still not much

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<sup>212</sup> In the context of corporate rights-holders, a lack of marketplace activity would indicate that VIP access would neither impair corporate property rights nor non-existent corporate moral rights. In the case of individual rights-holders, moral rights could become a significant issue if individuals believed that VIP information access infringed a non-economic right, but such cases would seem to be the strong exception.

<sup>213</sup> Huther Letter, *supra* note 180.

<sup>214</sup> See discussion *supra* note 4 and accompanying text (discussing the five percent estimate for VIP-accessible formats).

<sup>215</sup> *About Audible*, AUDIBLE, <http://about.audible.com> (last visited Nov. 9, 2011).

<sup>216</sup> At least according to Audible itself. *What is Audible?*, AUDIBLE, <http://www.audible.com/whatis?> (last visited Nov. 9, 2011). It is noteworthy here that audiobooks may be a ‘new’ product in terms of mass-market appeal, but the concept of an audiobook dates to the production of mass-market audio recordings, or at minimum to the invention of the audio cassette, which can hold up to an hour of recording per cassette.

more than 1 in 3 books annually published in the United States.<sup>217</sup> Additionally, Audible “audio content” includes radio programs, magazines, and other material not included in estimates of U.S. annual book production, and Audible’s content is, as one might surmise, oriented toward entertainment rather than the subjects of educational study.<sup>218</sup>

More significantly, many scholars—whether desirous of protecting attacks against human rights in any field or satisfied with national and international IP legal regimes—question whether there are any actual human rights obligations related to intellectual property. Of note in this regard is the position of the United States with respect to copyright and human, or moral, rights. In contrast to Europe, those who champion indigenous rights in the area of international copyright law, and indeed most of the rest of the world, the United States does not recognize moral rights as necessary to or inhering in copyright law.<sup>219</sup> Rather, the essential

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<sup>217</sup> *Bowker Reports Traditional US Book Production Flat in 2009*, BOWKER (Apr. 14, 2010), <http://www.bowker.com/index.php/press-releases/616-bowker-reports-traditional-us-book-production-flat-in-2009>. Bowker is the exclusive vendor in the US for International Standard Book Number (ISBN) and Standard Address Numbering (SAN) processing and thus handles all new printed titles and editions of books. *See id.*

<sup>218</sup> *About Audible*, *supra* note 215 (noting 85,000 “audio programs” figure and that content providers include “broadcasters, entertainers, [and] magazine and newspaper publishers”). As magazines, newspapers, and any audio “performance” do not receive ISBNs, the 85,000 figure does not match up exactly with the Bowker figure, making the 1 in 4 estimate a charitable one to treaty opponents and advocates of a market solution to the VIP information-access problem. *See Products/Entities Eligible for ISBNs*, BOWKER, <http://www.isbn.org/standards/home/about/faqs2.html> (last visited Dec. 5, 2010). With respect to the works available through Audible, standard textbooks covering basic subjects such as geography, world history, and social sciences are absent from Audible’s offerings. *About Audible*, *supra* note 215. Indeed, even literary classics are generally unavailable in audiobook format; most published works tend to be current bestsellers. Of course, this discussion is in no way meant as a criticism of Audible. Rather, the example of Audible is clear evidence of what the market will produce in the way of appropriate-format technologies. Following the example of access to medicines—in particular, HIV/AIDS anti-retroviral therapy (ARV)—and the global pharmaceutical industry, the reasonable conclusion from the current lack of a sufficient market across the globe is that there is no economic incentive for creators and third parties to make works available in appropriate-format technologies at a price the world’s VIPs can afford. If that were the case, the market would produce those products, and it quite simply has not.

<sup>219</sup> Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, in *US INTELLECTUAL PROPERTY LAW AND POLICY* 164, 167 (Hugh Hansen ed., 2006).

bargain between authors of copyrightable works, who need to earn a living, and the government, that wishes to promote the creative arts, is held to be a sufficient and complete protection of the creator's economic interests.<sup>220</sup>

b) The Treaty for the Blind Embodies Rights-Based Rather than Rights-Infringing Treaty Exemptions

As noted, copyright holders generally oppose a WIPO treaty for the blind that includes broad exemptions because it is either inconsistent with the current paradigm of the global copyright regime or it infringes the rights of copyright holders to profit from their work. Additionally, a WIPO treaty for the blind may be undesirable because although the proposed treaty language is limited to VIP rights and treaty advocates have not proposed such an extension, it is difficult to distinguish VIP information-access rights from other arguably basic rights. Specifically, if VIPs are granted broad copyright exemptions so that they may have access to materials to realize their rights to education, employment, and other essential spheres of personhood, on what principle would one continue to refuse copyright exemptions to provide educational materials to all those who cannot afford them?<sup>221</sup> This argument is what experts refer to as the “thin edge of the wedge,”<sup>222</sup> and essentially what opponents to a treaty with broad exemptions highlight when they criticize broad exemptions as inconsistent with the global copyright regime.<sup>223</sup> Broad exemptions might be used

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<sup>220</sup> See U.S. CONST. art. 1 § 8 cl. 8; *Campbell v. Acuff-Rose Inc.*, 510 U.S. 569, 574–75 (1994).

<sup>221</sup> As James Love, the director of KEI, characterizes this argument,

[t]he problem, on the right, is that it is felt to be opening a door to a wide range of new initiatives involving education, access to knowledge, across-the-board in other areas, because if you can do it for the blind, you can do it for these other groups. So the idea is to have a cross-border exception—it has to be stopped is kind of that theory.

Love, Fordham Conference, *supra* note 1, at 18.

<sup>222</sup> E.g., Coenraad Visser, Fordham Eighteenth Annual Conference on International Intellectual Property Law and Policy, Session 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind 34 (Apr. 9, 2010) (transcript on file with author).

<sup>223</sup> Von Lewinski, Fordham Conference, *supra* note 87, at 43; Mark Seeley, Elsevier, Fordham Eighteenth Annual Conference on International Intellectual Property Law and Policy, Session 8, Part A: Trade/Copyright: IP Trade Policy; WIPO Treaty for the Blind

to provide materials, particularly in LDCs, to children with learning disabilities, assuming that such provision does not violate the three-step test.<sup>224</sup> In this way, while broad piracy would not be on the horizon, this sort of gradual erosion could collapse substantial portions of international copyright protections.<sup>225</sup>

## 2. Arguments about Economic Efficiency

As discussed throughout this Note, the cost to nations and VIPs of coping with visual impairedness is significant.<sup>226</sup> For VIPs, that

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44–46 (Apr. 9, 2010) [hereinafter Seeley, Fordham Conference] (transcript on file with author). Of note, Professor von Lewinski is not an opponent of broad exemptions *per se*; rather, she is opposed to the content of the proposed exemptions as illegally expanding the three-step test of Berne and other international copyright treaties.

<sup>224</sup> *E.g.*, Woods, Fordham Conference, *supra* note 135, at 51 (noting discussions in the US on this issue). However, it is also important to note that this concern largely derives from a philosophical difference between member states and various stakeholder groups. Immediately after the cited remark it is noted that:

[o]n the other hand, in the United States, where that population [of learning disabled children] has been put at perhaps 23 million, that starts to look like a market, and a market that could be served. Maybe you need to look at some government role there in terms of funding to serve that market. . . . [T]here could be a market place solution there, and some other legislative solutions, perhaps licensing solutions, that could be facilitated by WIPO or by individual governments. *But it is something where we want to be very careful to keep the balance. What we are talking about here essentially is addressing marketplace failures.*

*Id.* at 53 (emphasis added).

<sup>225</sup> *See* Woods, Fordham Conference, *supra* note 135, at 52 (noting that expanding copyright exemptions in this matter would overturn the three-step test specifically, and that where such a solution involved million of individuals a marketplace solution that protects copyright is preferable generally to a statutory or treaty exemption). Other proposals may have a more precipitous, rather than gradual, effect. The proposal offered by Brazil, Ecuador, Mexico, and Paraguay, for example, represents a significant change in international copyright law norms. Article 4(a) of the Brazil, Ecuador, Mexico and Paraguay proposal states that “[i]t shall be permitted without the authorisation of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to a visually impaired person by any means. . . .” WIPO Secretariat, *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, art.4(a), SCCR/18/5 (May 25, 2009). This proposal would create copyright exemptions beyond the will of national legislatures, which no previous treaty does. *See* Von Lewinski, Fordham Conference, *supra* note 87, at 26–27.

<sup>226</sup> *E.g.*, notes 20–23 and accompanying text (discussing the economic cost to Australia of preventable visual impairment).



cost is born in rights delayed.<sup>227</sup> Yet however strong support for a treaty for the blind may be, the push to realize and implement this instrument is not without its own costs: while some knowledgeable experts believe that a treaty is possible in the “relatively short term,”<sup>228</sup> others believe that a treaty could be a decade or more away from adoption.<sup>229</sup> The prospect of this delay and its effect on actualizing VIP rights presents one practical and theoretical objection to a WIPO copyright-exemption treaty for the blind.

a) Copyright Exemptions Will Drive Further Global Piracy and Loss of Profits

Just as treaty proponents argue that state practice clashes with the economic principle of efficiency, treaty opponents argue that treaty exemptions clash with the economic principle of incentivization. International copyright exemptions, in other words, will drive rampant global piracy, which will remove the financial incentive to create and disseminate copyrighted works. Thus, beyond even immediate losses to rights-holders, the rationale underpinning artistic creation will be to some degree imperiled should a WIPO treaty pass.

As was noted previously, treaty opponents do not suggest that it will be VIPs or trusted intermediaries who will drive this piracy. Rather, the treaty itself, by providing a wrinkle to the otherwise clean sheet of international copyright protection, will allow advocates of greater consumer or user rights to pirate from rights

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<sup>227</sup> *Supra* Part I.A-B.

<sup>228</sup> Pooley, Fordham Conference, *supra* note 8 at 3. Some opponents of a VIP copyright exemption treaty argue that a treaty is undesirable because it is an inefficient way to realize VIP rights. These and other individuals note that even a treaty as relatively uncontentious as the proposed treaty could take up to fifteen years from the commencement of negotiations to finalize. *See* von Lewinski, Fordham Conference, *supra* note 87, at 26 (transcript on file with author).

<sup>229</sup> Von Lewinski, Fordham Conference, *supra* note 87, at 23–24 (discussing the 1996 WCT and WPPT treaties, both of which, despite the political will to adopt a treaty, required a “twenty-year guided development period” and six years of negotiations, and noting that no such political will currently exists to adopt a VIP rights treaty). Professor von Lewinski also prudently notes that in addition to the years and resources required to draft and adopt the treaty, there will still be delays in rights realization while VIPs await the necessary number of ratifications and at the least initial implementation phases. *Id.* at 25–26. For the WCT and WPPT, ratification took six years, despite significant pushes from the United States and other influential stakeholders to achieve ratification. *Id.*

holders.<sup>230</sup> This pirating, broad in geographical and societal scope, will ultimately erode the financial incentive that creators of copyrighted materials need to continue to create.<sup>231</sup> Therefore, the WIPO treaty for the blind will “begin to dismantle the existing global treaty structure of copyright law, through the adoption of an international instrument at odds with existing, longstanding and well-settled norms.”<sup>232</sup>

Treaty opponents cite the presence of users rights advocates, like the Electronic Frontier Foundation and Public Knowledge,<sup>233</sup> at WIPO SCCR meetings as evidence for the probability of this happening. The presence of these groups at negotiations suggests to treaty opponents that passage of a treaty with broad exemptions will lead these groups to begin infringing copyrights on the basis of locating a broad users-rights principle in the treaty. Additionally, the treaty terms are arguably vague enough to include variability in interpretation that brings the scope of the treaty beyond VIPs.<sup>234</sup> This concern is further driven by the fact that it will be applied internationally; without a consensus of common meanings and strong working relationships between the implementing nations, anyone could push to have the treaty

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<sup>230</sup> See *supra* notes 191–93 and accompanying text (describing the “thin edge of the wedge” argument).

<sup>231</sup> *Id.*; James Manon, *Who on Earth Would Oppose a Treaty to Facilitate Access to Information and Knowledge to People with Reading Disabilities?*, KNOWLEDGE ECOLOGY INT’L (Nov. 19, 2009, 10:04 AM), <http://keionline.org/node/693>.

<sup>232</sup> Manon, *supra* note 251 (quoting Steven J. Metalitz, counsel for the MPAA and RIAA, among others).

<sup>233</sup> Nineteenth Session Report, *supra* note 112.

<sup>234</sup> Seeley, Fordham Conference, *supra* note 223, at 46–47

I think, in terms of national exceptions that have developed over the years in many countries, there is greater comfort with those exceptions because, even if the statutory language starts off in a somewhat vague way, as they often do, they are then implemented through regulation, through legislation, and through practice. So you build up that experience and that knowledge base. I think what is of concern is the idea that some of the definitions that have been discussed would be so vague and would cover so many potential exceptions, plus they would be applied in a cross-border nature, which sort of means the potential for a race to the bottom in terms of what those exceptions might cover, so that the exceptions essentially take away the rule, in essence.

*Id.*

exemptions pushed far beyond their agreed-upon scope and further erode the existing legal structure.<sup>235</sup>

### 3. Arguments about Conflicts Between Legal Paradigms

#### a) Exemptions Subvert the Dominant Trend in Copyright Law and the History of International Human Rights Law

Seeking to protect potential remuneration for VIP-accessible materials markets, treaty opponents level a third type of argument: the treaty subverts international copyright law and, insofar as it seeks to enforce positive human rights obligations against private actors, subverts human rights law. In claiming that a treaty for the blind would overturn international copyright law, treaty opponents rely heavily on two claims. First, the three-step test is bedrock international copyright law.<sup>236</sup> As previously discussed, the three-step test has a long history and has been incorporated into all subsequent copyright treaties.<sup>237</sup> Providing for mandatory copyright exemptions that do not explicitly meet the three-step test would, at minimum, conflict with the test and the Berne Convention's emphasis on permissive exceptions.<sup>238</sup> Second, treaty opponents also claim that the three-step test is sufficiently flexible to accommodate VIP information-access needs.<sup>239</sup>

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<sup>235</sup> *Id.* It is notable in this regard that the exact same concerns could be raised against TRIPs, which, based on the dearth of criticism in this vein from rights-holders and their representatives, was satisfactorily implemented.

<sup>236</sup> *See, e.g.,* Metalitz Letter, *supra* note 180, at 3; Huther Letter, *supra* note 180, at 3–4 (noting that beginning with the Berne Convention, “[t]he current international intellectual property framework is based on harmonizing national laws or establishing “minimum standards” of protection subject to flexibilities that permit limited exceptions.”).

<sup>237</sup> *See supra* Part I.C.

<sup>238</sup> Von Lewinski, Fordham Conference, *supra* note 87, 25–26.

<sup>239</sup> GWEN HINZE AND JANICE PILCH, REPLY COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE, THE ELECTRONIC FRONTIER FOUNDATION, THE INTERNET ARCHIVE, AND THE CHIEF OFFICERS OF STATE LIBRARY AGENCIES 3 (Dec. 4, 2009), *available at* <http://www.copyright.gov/docs/sccr/comments/2009/reply-2/23-gwen-hynze-and-janice-pilch.pdf>.

Eminent international copyright experts agree that it is possible to frame exceptions or limitations to national copyright laws for the benefit of the visually impaired and those with reading disabilities in a way that complies with the parameters of the international copyright framework, and specifically the three-step test, embodied

Specifically, treaty opponents do not believe that treaty proponents have shown that three-step test is incapable of meeting VIPs needs, and therefore there is no reason to work outside of the test to further information access.<sup>240</sup> Thus, the treaty would overturn foundational principles of international law absent a clear indication that existing frameworks are inadequate.

Additionally, treaty opponents argue that a WIPO treaty for the blind is impermissible because it would essentially force private actors to act positively toward other private actors, which is beyond the scope of international human rights law. These obligations, as the preambles to all of these treaties clearly indicate, concern State-to-State conduct.<sup>241</sup> Even if one accepts that some human rights obligations are clearly directed toward private persons as well as States Parties,<sup>242</sup> those obligations are negative—a claim on private persons to refrain from doing something. Providing one's creations to another free of charge, in contrast, is a positive act, and international human rights law does not obligate private actors in such a way.<sup>243</sup> Therefore, a treaty for

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in Article 9(2) of the Berne Convention, concerning the reproduction right, and expanded for rights recognized in TRIPs (Article 13), and in Article 10 of the WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonograms Treaty.

*Id.* (citing *Sullivan Study*, *supra* note 3, at 97–132).

<sup>240</sup> *E.g.*, Metalitz Letter, *supra* note 180, at 3 ([T]here has been no demonstration that this authorization for the recognition of exceptions and limitations is too limited or too rigid to advance this goal.”).

<sup>241</sup> *E.g.*, ICESCR, *supra* note 37, pmb1.

<sup>242</sup> Hestermeyer, for example, cites the prohibition against slavery in ICCPR Article 8(1) as an example of a treaty obligation that is ostensibly between States Parties only, but which clearly applies to private actors as well. HESTERMEYER, *supra* note 48, at 95.

<sup>243</sup> One counter argument to this line of reasoning is that international human rights law, in the form of treaties and state practice, has extended its power to private actors. With respect to state practice, Portuguese, American and German laws bind corporations to positively act to respect human rights. *Id.* at 94–96 (citing Constituição da República Portuguesa a [Port.] (1993; 3rd rev. ed. 1993.), art. 18V (Port.); Civil Rights Act of 1964, 42 U.S.C. § 2000d to d-7 (1964); and Deutscher Bundestag: Allgemeines Gleichbehandlungsgesetz [BT] 833/06 (Ger.)). Some commentators further argue that because corporations are economically more powerful than many nations, human rights obligations are fairly applied to them as well. *Id.* at 95 (2007) (citing Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965, 971-73, 978-86 (2003)). Corporate responsibility, with respect to access to medicine in particular, is currently a hot topic among human rights lawyers. *See, e.g.*, Lissett Ferreira, Note, *Access to Affordable HIV/*

the blind would similarly contravene international human rights law principles.

#### 4. Arguments about Practical Political Concerns

##### a) A Treaty Is Premature Because Many Nations Lack Sufficient Negotiating Resources and Expertise

One of the primary criticisms of TRIPs is that it is a fundamentally unfair agreement, given the fact that many LDCs and even developing nations lacked the expertise at the negotiating table, to fully represent their interests.<sup>244</sup> Similarly, although

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*AIDS Drugs: The Human Rights Obligations of Multinational Pharmaceutical Corporations*, 71 *FORDHAM L. REV.* 1133, 1172 (2002) (advocating a “soft law” obligation under the multilateral corporate codes of conduct to respect developing states’ efforts to protect the right to affordable HIV/AIDS treatment).

<sup>244</sup> Aside from the United States and the other select developed nations that increased their intellectual property rents through TRIPs, the only consensus around TRIPs seems to be that it harms LDCs. World Bank, *Global Economic Prospects and the Developing Countries: Making Trade Work for the World’s Poor*, 133 at Table 5.1 (2002), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/02/16/000094946\\_0202020411334/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/02/16/000094946_0202020411334/Rendered/PDF/multi0page.pdf) (noting that based on a 2000 model assuming full TRIPs implementation, only developed countries would experience a significant increase in patent payments, although ultimately the selected LDCs would see a comparatively minor benefit from implementation through an increase in foreign direct investment (FDI)). Commentators and NGOs who believe that TRIPs definitively and strictly harms LDCs argue, *inter alia*, that TRIPs siphons billions of dollars from LDCs to rights-holder states, drives lower life expectancies and health-related quality of life among persons in LDCs by disincentivizing pharmaceutical companies to invest in drugs that would help eradicate preventable diseases and preventing death in LDCs. Lawrence O. Gostin, *Redressing the Unconscionable Health Gap: A Global Plan for Justice*, 4 *HARV. L. & POL’Y REV.* 271, 282 (2010) (“The issuance of patents often allows companies to charge monopoly prices that developing countries cannot afford, and rich states have actively pursued increasingly restrictive intellectual property rules through multilateral treaties such as TRIPs and bilateral agreements such as the TRIPs amendments commonly referred to as TRIPs-plus. As a result, private drug companies have little incentive to invest in research that will reduce the disease burden in poor countries.”). For this perspective with respect to indigenous rights, see Michael H. Davis, *Some Realism about Indigenism*, 11 *CARDOZO J. INT’L & COMP. L.* 815, 824 (2003) (“Surely, TRIPS is the biggest disaster faced by the Third World since the end of the territorial-based colonial era.”). For an argument that TRIPs creates problems because of its lack of controls on enforcing agents, see Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 *HARV. INT’L L.J.* 357 (1998). In particular, commentators criticize TRIPs because according to them, many LDC representatives were not capable of adequately representing their interests during negotiations,

nearly fifteen years have passed since TRIPs was signed, a treaty for the blind arguably risks repeating the same failure, as some LDCs still lack the requisite expertise to protect and advance their interests in complex, multilateral, and extended treaty discussions.<sup>245</sup>

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particularly when faced with the combined and coordinated power of the United States, the European Union, and other Northern representatives. WATAL, *supra* note 130, at 19–21.

<sup>245</sup> Commentators do generally agree that in the fifteen years since TRIPs, there is enough maturity across nations to have general-level discussion on international copyright law. Pooley, Fordham Conference, *supra* note 8, at 7. This statement should be contrasted with the consensus among academics that, especially at the time of the negotiations in the mid-1980s that laid the foundation for the TRIPs agreement, developing countries had little to no IP expertise and were not sophisticated enough to understand the importance of seemingly innocuous language in agreements formed out of those discussions. See Matthew Turk, Note, *Bargaining and Intellectual Property Treaties: The Case for a Pro-Development Interpretation of TRIPs but not TRIPs Plus*, 42 N.Y.U. J. INT'L L. & POL. 981, 993 n. 48 (quoting J.P. SINGH, NEGOTIATION AND THE GLOBAL INFORMATION ECONOMY 87 (2008) (“In the case of IPRs [referring to the Ministerial Declaration], the developed countries had slipped in an agenda without the developing countries taking much notice.”)); WATAL, *supra* note 130, at 21 (“Many developing countries agreed to this text, believing that they could limit the negotiations primarily on trade in counterfeit goods and other such trade-related aspects. This was a misreading not only of the text but also of the writing on the wall.”). Singh also notes that because of a superior use of tactics by the U.S., the EU and Japan; the aforementioned lack of sophistication in international IP negotiations among developed countries; and the lack of coordination—especially relative to the ‘North’—among developing countries, representatives for the developing countries were often in the position of choosing between the lesser of two evils: the restrictive positions of TRIPs or economic sanctions through Section 301 of the United States Trade of 1974. Turk, *supra*, at 994–95 (citing J.P. SINGH, NEGOTIATION AND THE GLOBAL INFORMATION ECONOMY 78 (2008)). There is no consensus, however, on whether the requisite level of experience and knowledge that permits broad principles to be applied according to the parties’ understanding is present among all WIPO member states. Seeley, Fordham Conference, *supra* note 223, at 47 (“[I]n terms of national exceptions that have developed over the years in many countries, there is greater comfort with those exceptions because, even if the statutory language starts off in a somewhat vague way, as they often do, they are then implemented through regulation, through legislation, and through practice. So you build up that experience and that knowledge base.”). The implication of this quote is that copyright holders are comfortable with vague exemption-granting language because they are comfortable with the legal environment in which these vague words become the realized intentions of the parties. By extension, at least some significant rights-holders feel that this level of comfort simply does not exist in the international arena. However, one may respond that this is one benefit to lengthy treaty discussions: parties will over time come to basic understandings, and eventually bases of knowledge, that assure the rights-holder that exemptions will not be abused via vague treaty language. Moreover, international NGOs that can serve as trusted intermediaries are likely to be more familiar

The content of this treaty is not of the magnitude of TRIPs, however, so the ramifications for an unfavorable agreement are comparatively less severe.<sup>246</sup> Moreover, a WIPO treaty for the blind may be the only proverbial “bite at the apple” for remedying a basic human rights deficiency. If this proverb holds true and the representatives of the nations where the vast majority of VIPs reside cannot represent their interests, it is reasonable to assume that those interests may be prejudiced during the present negotiations, and a treaty should not be created.<sup>247</sup>

b) A Treaty Would Waste Valuable Political Capital on Rights That are Not as Important to Developing States<sup>248</sup>

Beyond arguments about the appropriateness of using a treaty versus non-binding obligations versus deployment of resources in other areas, a WIPO treaty for the blind might be inadvisable because it wastes WIPO SCCR consensus resources on *any* treaty or international agreement, not merely a VIP rights agreement. Recognizing this, representatives of LDCs, particularly in African nations, have voiced some displeasure with the prospect of other states pushing hard for this treaty.

As with any political body, there is limited negotiating capital among all state parties for any given topic of discussion, and smaller and/or resource- or politically-poor nations are even further constrained, as they possess even less negotiating capital.<sup>249</sup>

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with the legal environment of the nations in which most rights-holders are found, and so may be a practical way for wary rights-holders to become more comfortable with expanded copyright exemptions.

<sup>246</sup> TRIPs covers copyright, trademarks, industrial designs, patents, and many other areas of intellectual property, whereas the treaty under debate is limited to copyright only. TRIPs, *supra* note 66, arts. 9–39.

<sup>247</sup> One interesting question is whether the compulsory licensing scheme that TRIPs provides for patents may be fairly and effectively applied to copyright law in order to provide VIPs with appropriate-format materials. Denise Nicholson, a major stakeholder in South Africa’s copyright-law discussions, has stated that at least for her nation, advocating for a solution based on compulsory licenses would be of no help at all. STORY, *supra* note 165, at 48.

<sup>248</sup> See, e.g., Love, Fordham Conference, *supra* note 1, at 19 (recalling an SCCR national delegate’s characterization of VIP rights as a “‘miniscule’ development”).

<sup>249</sup> E.g., Jane Kelsey, *World Trade and Small Nations in the South Pacific Region*, 14 KAN. J.L. & PUB. POL’Y 247, 263 (Winter 2005) (quoting Cancun Ministerial Conference,

Because the proposed treaty would address a violation that affects only a minority of any nation's citizens, some representatives believe that the WIPO SCCR should concentrate its efforts on more basic and immediately development-oriented agreements. As one human rights commentator noted when speaking of his nation's and continent's priorities, "when most schools across Africa do not have anywhere near enough books or a photocopier or even a single computer, copyright is not really an issue. I wish it was."<sup>250</sup>

Noteworthy in this regard is the work of the SCCR stakeholders group, composed of VIP advocates and other interested parties. In less than a year after its founding in January 2009, the Stakeholders' Platform for NGOs and other interested parties has been able to forge licensing deals with several rights-holder parties.<sup>251</sup> Licensing deals with major copyright holders arguably are a feasible alternative, especially where states can

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Fiji: Statement by the Honourable Kaliopate Tavola on Behalf of Small Vulnerable Economies, par. 4, WT/MIN(03)/ST/87 (Sept. 12, 2003)

The WTO claims to be a multilateral trading organisation, which addresses the circumstances of all its Members, and whose rules provide a balance of advantage for all its constituents. However, this is unfortunately not true for the small, vulnerable economies whose limited negotiating capital and small size limit their ability to cope with the complex multilateral rules, does not allow for effective bargaining to secure specific measures which address our development needs, and thus has prevented us from participating effectively in the negotiation of WTO provisions more suited to enhancing our welfare..

*Id.*

<sup>250</sup> STORY, *supra* note 165, at 13 (quoting Colin Darch). See also Matthew Turk, Note, *Bargaining and Intellectual Property Treaties: The Case for A Pro-Development Interpretation of TRIPs but not TRIPs Plus*, 42 N.Y.U. J. INT'L L. & POL. 981, 1009 (noting that many LDCs treat IP negotiations as "little more than a bargaining chip as part of broader negotiation" and a "costless choice [because f]or those countries, the harm that may result from excessive copyright controls pales in comparison to more fundamental development concerns." (quoting Michael Geist, *Why We Must Stand on Guard Over Copyright*, TORONTO STAR, Oct. 20, 2003, at D3)). However, other African nations have strongly supported a robust treaty. Angola, for example, stated at the November 2010 SCCR meeting that "the issue on limitations and exceptions [is] critical for Africa. Access to information and communication for people with disabilities and other persons in the educational, political, economic, cultural and social arenas was important for development." Twentieth Session Report, *supra* note 99, at ¶ 21.

<sup>251</sup> Nineteenth Session Report, *supra* note 112, at ¶ 75.



negotiate deals with rights-holder representatives or agents,<sup>252</sup> which would decrease negotiating costs to VIPs. Depending on the strength of these licensing deals and the path of treaty negotiations over the next several meetings, advocates for this line of argument could amass additional evidence that negotiating capital is better utilized on other topics.

### III. YES, THERE SHOULD BE A TREATY FOR THE BLIND: WHY THE WIPO SCCR SHOULD RECOGNIZE THE HUMAN RIGHTS OBLIGATIONS OF THE INTERNATIONAL IP COMMUNITY VIS-A-VIS VIP RIGHTS

Contrary to the opinions of both many proponents and opponents of a treaty for the blind, the issue is not best captured in rights language; it is best captured in the numbers. No national scheme, nor any international coalition of the willing, has been able to provide meaningful access to VIPs. For the United States, the Chafee Amendment and market solutions have at best yielded no more than five percent of available works in an appropriate format.<sup>253</sup> European Union nations have not been able to achieve greater gains.<sup>254</sup> In other words, developed nations have not done much better than LDCs in providing accessible works to VIPs.

In the face of such facts, it becomes clear that what is important is that a consensus be reached.<sup>255</sup> Even if the exact

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<sup>252</sup> The EUAIN has been successful in this regard, for example, negotiating with the Federation of European Publishers, holder of the copyrights to approximately 85 percent of European publications. See WIPO Vision IP, *Best Practices—European Accessible Information Network (EUAIN)* (2010), [http://visionip.org/vip\\_resources/en/best\\_practices/euain.html](http://visionip.org/vip_resources/en/best_practices/euain.html).

<sup>253</sup> See *supra* notes 138 (acceptance of the five-percent figure for the United States) and 227 (arguing for market-based solutions for the information-access problem whenever possible). Of note here, other sources indicate that the U.S. actually does no better than the LDCs. NAT'L FED'N FOR THE BLIND, REGARDING THE RIGHT TO INFORMATION, THE WORLDWIDE BOOK FAMINE, AND THE NEED AND URGENCY TO ADOPT AN INTERNATIONAL TREATY THEREON, 2011–16 (2011), available at <http://www.nfb.org/images/nfb/Publications/bm/bm11/bm1108/bm110816.htm> (stating that only one percent of works are available in a VIP-accessible format).

<sup>254</sup> See *supra* note 4 (noting the five percent figure for the Netherlands and generally).

<sup>255</sup> See Tobin, *supra* note 36, at 6–7 (2010); see also *supra* Part I.B for perspective on the range of legal frameworks, or absence thereof, for providing VIPs with accessible works.

meanings of the words memorializing the consensus are ambiguously and somewhat variously interpreted,<sup>256</sup> the value of a treaty for the blind is not just in the treaty language. The value lies in the expression of political consensus.<sup>257</sup>

Moreover, the strength of such an expression of consensus depends on the creation of a binding document. While precatory instruments such as those advanced by the European Union and the United States can of course be an expression of consensus, in this case a precatory instrument is insufficient. The reasons are manifold, including the fact that treaty opponents state that the Berne Convention permits sufficient copyright exemptions yet fewer than half of WIPO nations have any such statutory exemption,<sup>258</sup> that LDCs have traditionally been unsuccessful in negotiating beneficial international IP instruments and often are willing to bargain away IP rights for other developmental concerns anyway,<sup>259</sup> and that human rights treaties that would seem to do the work of a treaty for the blind have not improved the situation.<sup>260</sup> All of these reasons strengthen the belief that a non-binding agreement would not preserve any consensus to improve VIP

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<sup>256</sup> Tobin, *supra* note 36, at 3.

[I]n practice there is rarely, if ever, universal agreement as to where . . . boundaries should be placed. Instead of offering the stability necessary [to establish strict objective meanings], the rules themselves remain constantly in need of interpretation . . . This does not mean that the meaning of a human right under an international treaty is radically indeterminate in the sense of never being capable of holding a meaning. Instead, the accepted meaning of any term at a particular point in time will be that which attracts and achieves dominance over all other alternative understandings within the relevant interpretive community. When seen from this perspective, the act of interpretation is more than simply the attribution or communication of a meaning. It is ultimately an act of persuasion—an attempt to convince the relevant interpretive community that a particular meaning from within a suite of potential meanings is the most appropriate interpretation to adopt.

*Id.*

<sup>257</sup> *Id.* at 7.

<sup>258</sup> *Supra* note 71.

<sup>259</sup> *Supra* notes 255 (discussing the comparative unimportance of IP rights for LDCs) and accompanying text, and 133–34 and accompanying text (discussing the failure of LDCs in the TRIPs treaty negotiations).

<sup>260</sup> *Supra* Parts I.C. and II.A.1.b.

information access. It is only when the overall relationship is defined in terms of binding nations to commitments supporting the right of access that a lasting consensus can be forged,<sup>261</sup> and the situation can begin to improve for VIPs.

This is not to say that the actual language of the treaty itself is unimportant. Indeed, if the treaty language is vague, or mirrors what already exists, or is insufficient to persuade national actors of what now needs to be implemented in order to establish compliance, then the international consensus of the document would be relatively meaningless.<sup>262</sup>

Regardless of whether or not the WIPO achieves a treaty for the blind, the strong tension that persists in rights language between intellectual property rights-holder and holders of human rights needs to be addressed. This tension may be resolved in two ways. First, there is a substantial difference between the moral rights of creators and the economic incentives to foster production that many nations call intellectual property protection.<sup>263</sup> Moral rights of creators can be considered human rights without the

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<sup>261</sup> See Tobin, *supra* note 36, at 49–50 (“[U]nity and an agreed meaning can be achieved when the ‘participants in the enterprise share an interest in preserving the overall relationship.’” (quoting Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT’L L. 371, 407 (1991))). This can be seen in the debate, begun virtually as soon as TRIPs was passed, over the meaning of the emergency provision of Article 31, which allowed nations to bypass the voluntary license negotiating stage, in times of “national emergencies” or “other circumstances of extreme urgency.” HESTERMEYER, *supra* note 49, at 239–52. It can also be seen in the failure of both developed and less-developed nations to improve access to visually impaired works, even though, as some experts argue, existing international treaties do provide for far higher levels of access than currently exist. “[E]ven the [current] conventions and the agreements on intellectual property rights have paved the way, have allowed the member countries to do something for people with disabilities. They do not need to wait for the international treaty. They can do it now, especially people who are high-minded with the protection of human rights.” Weeraworawit, Fordham Conference, *supra* note 149, at 31.

<sup>262</sup> See discussion *supra* notes 238–42 and 258–78, and accompanying text (discussing the pitfalls of overly broad, overly vague, and non-consensus-based international instruments). Tobin also notes that “[i]t is by no means certain that agreement on a text in any way implies agreement as to intentions.” Tobin, *supra* note 36, at 23.

<sup>263</sup> This follows from the definition of moral rights. Helfer, *Collective Management*, *supra* note 163.

obligations attendant thereto conflicting with consumer rights.<sup>264</sup> That is, these moral rights are in fact far more flexible than legal copyright protections, as they guarantee an inalienable relation to a creator's works and a reasonable profit therefrom.<sup>265</sup> Thus, in many instances these human rights can be reconciled with the rights of consumers to access information to ensure social and political participation. Second, as the CESCR Committee has noted, "a human rights-based approach focuses particularly on the needs of the most disadvantaged and marginalized individuals and communities."<sup>266</sup> That is, casting the conflict as between two human rights oversimplifies the issue. The conflicts do not exist outside of their context, which in this case is the need of persons in developing nations with comparatively few resources.

It may be that the best solution, in terms of resource efficiency and consistency in global copyright law, is to transition production of these services to traditional copyright holders, i.e., Western/Northern corporations. To advocate for market stimulation or the existence of a rapidly developing and soon-sufficient market solution, however, when a market solution has not presented itself in the several decades in which there has been a need for these materials and the technology with which to produce and deliver them, falls flat.<sup>267</sup>

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<sup>264</sup> See *supra* notes 208–35 and accompanying text (noting that the failure of market solutions generally does not implicate creators' rights in the VIP copyright exemption).

<sup>265</sup> HESTERMEYER, *supra*, note 48, at 84–85.

<sup>266</sup> The committee continues,

Because a human right is a universal entitlement, its implementation is evaluated particularly by the degree to which it benefits those who hitherto have been the most disadvantaged and marginalized and brings them up to the mainstream level of protection. Thus, in adopting intellectual property regimes, States and other actors must give particular attention at the national and international levels to the adequate protection of the human rights of disadvantaged and marginalized individuals and groups, such as indigenous peoples.

CESCR., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Follow-up to the day of general discussion on article 15.1 (c), Monday, 26 November 2001*, ¶ 8 E/C.12/2001/15 (Dec. 14, 2001), available at <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf>.

<sup>267</sup> See discussion *supra* notes 4 and 138 (noting that the five percent estimate is widely cited and relatively undisputed). See also *supra* note 218 and accompanying text

## CONCLUSION

As Martti Koskeniemi suggests, a human rights obligation such as providing VIPs with access to information that reasonably approximates mainstream availability may not inspire state action precisely because it seems obvious that this should be done.<sup>268</sup> When one asks the question “who could possibly be against a treaty for the blind?,” the answer seems similarly obvious: VIPs ought not, especially when the political will, financial resources and requisite technology all appear to exist, go without up to ninety-nine percent of the written information that the world produces. But as this Note endeavored to show, a solution to this problem is anything but easy, and agreeing on and implementing one brings into play powerful competing interests.

The arguments of the opponents of the WIPO treaty for the blind are insufficient to overcome the simple facts of VIP harm. Certain human rights treaties attempt to provide VIP protection from this very harm, but states have inadequately implemented such protection. Thus there is a need for private action, because states give private actors the right to own and profit from their intellectual property—the very property to which VIPs deserve access. If private actors holding the copyrights to these materials have not made them available at a reasonable price to VIPs, they have clearly stated that the appropriate-format market is not a market worth pursuing. And if this is true, rights-holders suffer little actual harm by extending copyright to VIPs, most of whom could not purchase protected works at any price anyway. If a WIPO treaty for the blind ultimately means that there is one more wrinkle in what ideally would be a smooth sheet of international copyright law, then the appropriate response should be: so be it.

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(discussing the number of audiobooks available and their quality with respect to realizing the rights at issue).

<sup>268</sup> HESTERMEYER, *supra* note 48, at 124.