

# Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled

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## I. Introduction

A multi-year negotiation at the World Intellectual Property Organization seeking to create a flexible exception from copyright protection for people who are blind, vision-impaired, or print-disabled has faced multiple challenges. Representatives from film, recording, publishing, and other IP industry groups have been concerned about codifying a globally enforceable exception to copyright that might become a template for additional limitations and exceptions that might benefit libraries, educators and students, researchers, and innovative businesses that hope for more flexible copyright rules.<sup>2</sup> These same industry groups, and a broader consortium of intellectual property rightholders, are simultaneously mobilizing against an IP-skeptic campaign that is challenging overly generous exclusive rights to knowledge and knowledge-based goods more broadly. In addition to trying to derail their opponents, IP industries are also seeking to secure greater intellectual property rights and enforcement measures through trade agreements and diplomatic pressures.<sup>3</sup> Within this fractious context, the United States and more recently the European Union have been the most recalcitrant negotiators on a Treaty for the Blind at WIPO, objecting historically both to language allowing easy cross-border trade of e-accessible versions of print material and to the adoption of a binding treaty.

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<sup>2</sup> Although most of the pro-IP lobbying on the Treaty for the Blind has come from publishing and film industries, other IP rightholder groups are also involved. For an example of publisher lobbying, see James Love, *Blog - UK IPO office releases emails that show close collaboration with publishers on WIPO treaty for the blind*, Knowledge Ecology International (May 11, 2013), available at: <http://keionline.org/node/1719>. For an example of other IP groups' lobbying, see Intellectual Property Owners Association, Letter to the Acting Under Secretary of Commerce for Intellectual Property and the Director of the U.S. Patent and Trademark Office (April 15, 2013), available at: <http://www.ipo.org/wp-content/uploads/2013/05/2013.4.15IPO-Letter-re-WIPO-VIP-Treaty.pdf> (saying that the proposed WIPO Treaty for the Blind created "a dangerous precedent for other areas of IP law, particularly patent law").

<sup>3</sup> An example is the U.S. Intellectual Property Chapter Proposal in the Trans-Pacific Partnership Agreement, which contains the most aggressive efforts to expand and strengthen substantive IP standards and enforcement measures to date. See Sean M. Flynn, Brook Baker, Margo Kaminski, & Jimmy Koo, *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105-202 (2012).

Although opposition to a binding instrument has finally been overcome, tense negotiations continue, including at a diplomatic conference to be held in Marrakesh, Morocco from June 17-28, 2013. Multiple disagreements over proposed language persist, most notably with respect to who can produce and distribute accessible content, whether such content can be distributed cross-border from where it is typically produced in the Global North to poor readers in the Global South, whether remuneration might be required, and whether technological protection measures may be disabled on digital platforms to allow unsighted or disabled readers access to digital content. There are further disagreement about terms that might condition access to verifiable circumstances where accessible content is not otherwise commercially available, limit access other than through authorized non-profit or educational in-country exchanges, and allow contractual restrictions on access rights. Legally, the most contentious issue is the fetishizing of the so-called three-step test, which ignores many existing limitations and exceptions to copyright and which places strict conditions on their use.<sup>4</sup>

What was originally a lean seven-page draft treaty in 2009<sup>5</sup> and which progressed to a six-page draft text with only one bracket in 2011<sup>6</sup> is now a twenty-two-page document with eighty-eight brackets and 17 “alternative” versions of text in April of 2013.<sup>7</sup> Earlier, in February of 2013, there had been some progress in narrowing disagreements about the three-part test, but that progress was reversed between February and April when industry groups, especially the Motion Picture Association of America and the Association of American Publishers mounted “an aggressive lobbying” campaign to reopen the February compromise.<sup>8</sup> There is substantial doubt whether the interests of persons who are blind, vision impaired, and print-disabled will prevail or whether the business interests of copyright industries will sap the eventual Treaty of most of its pragmatic benefits.

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4 The three-step test typically limits exceptions to copyright (1) to certain special cases, (2) that do not conflict with the normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the author. This test was first introduced in a 1967 revision of the Berne Convention, Article 9(2), that simultaneously created or expanded other listed copyright exceptions. Versions of this test are now found in the WTO TRIPS Agreement, bilateral, regional and plurilateral trade agreements, and in new copyright or related rights treaties, such as the WIPO Copyright Treaty.

5 Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), SCCR/18/5 (May 25, 2009), *available at*: [www.wipo.int/edocs/mdocs/copyright/en/sccr\\_18/sccr\\_18\\_5.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.doc).

6 See SCCR/22/15 Rev. 1 (June 22, 2011), *available at*: [www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_15\\_rev.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_15_rev.doc).

7 Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities, VIP/DC/3 Rev. (April 20, 2013), *available at*: [http://www.wipo.int/edocs/mdocs/copyright/en/vip\\_dc/vip\\_dc\\_3\\_rev.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_3_rev.pdf).

8 See James Love, Blog - Disney, Viacom and other MPAA members join book publishers to weaken the treaty for the blind, Huffington Post Politics (April 23, 2013), *available at*: [http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m\\_b\\_3137653.html](http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m_b_3137653.html).

## II. Background and context of the negotiations on a Treaty for the Blind

Access to the information and knowledge contained in print and online resources is essential to ensuring participation of people who are blind or print disabled in educational pursuits, scientific progress, democratic processes, cultural/recreational activities, and employment opportunities. However, international standards of copyright protection under the Berne Convention,<sup>9</sup> the WTO TRIPS Agreement,<sup>10</sup> and national legislation give authors and artists rights to prevent others from making copies of their works without their permission. Fortunately, many countries allow exceptions to copyrights or promote licensing exchanges that benefit vision-impaired readers, but these options often have complex procedural hurdles and don't work well in the millions of cases where authors have gone missing, producing what are called "orphan works." Although specialized charitable or government-run organization in rich countries support the high-cost creation of works in Braille, analogue audio books, and accessible digital formats, pursuant to national laws that support such services with or without payment of royalties, copyright owners can typically prevent the export of accessible resources to other countries.<sup>11</sup> So, for example, according to James Love, "What blind people have access to depends entirely on the country in which they live. Uruguay had 3000 books on tape for the whole country, whereas Argentina, just across the border, had hundreds of thousands - but they couldn't share because of copyright law."<sup>12</sup> Accordingly, only 7% of print materials are currently available to persons who are blind or print disabled in high-income countries and less than 1% is available in low- and middle-income countries (only .5% in South Africa) - producing what is aptly called a book famine for the blind. This famine is even more acute for language minorities, those who are learning to read or can only read in a non-dominant mother-tongue language, since copyright

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9 Berne Convention for the Protection of Literary and Artistic Works, *available at*: [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html).

10 Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (1994), *available at*: [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

11 Approximately 60 countries, including virtually all high-income countries have copyright exceptions allowing some degree of access for persons who are blind or have other disabilities. However, many of these laws do not cover new technologies nor do they typically permit the exportation of accessible content, which leads either to costly duplication of effort or to undersupply. See Judith Sullivan, A STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR THE VISUALLY IMPAIRED, WIPO SCCR/15/7 (Feb. 20, 2007), *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).

12 Mara Kada-Nel, *The rich turn a blind eye to poor readers*, MAIL & GUARDIAN (March 28, 2013) (quoting James Love), *available at*: <http://mg.co.za/article/2013-03-28-00-the-rich-turn-a-blind-eye-to-poor-readers>.

law and its exceptions routinely disallow translation without the consent of the copyright holder.<sup>13</sup>

Even in our more technological age when textual resources are available online, many electronic platforms do not have text-to-speech capability, essentially rendering internet text “soundproof.”<sup>14</sup> Even when text is speech-enabled, users are frequently required to buy cost prohibitive equipment, i.e. Kindles, and/or specialized software, like iBooks apps, and even then they may only be able to read pages instead of paragraphs and not be able to bookmark or insert comments. The intensity of soundproofing is raised in some countries like the U.S. where interfering with or disabling digital management systems<sup>15</sup> (DMR) is a criminal act.<sup>16</sup> Failing to adopt a treaty or watering it down to prevent circumvention of DMR would be a huge setback of the access of persons with disabilities to the fruits of the information age.

Regrettably, audio-visual works and thus accessibility for hearing-impaired persons – typically in the form of subtitles for audio-visual films and broadcast programming – has already been written out of the proposed treaty. But the exclusion of audio-visual works also adversely impacts of people who are blind or print disabled from accessing many embedded online materials such as powerpoints and other visual aids that are increasingly used for distance education and training purposes.<sup>17</sup>

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13 Berne Convention, *supra* note 8, Article 8: “Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.” There are Special Provisions Regarding Developing Countries in the Appendix to the Berne Convention, including in a provision allowing compulsory licensing of translation rights, but only for the purpose of teaching, scholarship or research. Articles II. The Appendix procedures are so burdensome that they have virtually never been used either for translation rights or for reproduction rights. Calestous Juma, *Intellectual Property Rights and Globalization: Implications for Developing Countries*, Science, Technology and Innovation Discussion Paper No. 4, Center for International Development, Harvard University, 5 (1999), available at: [http://m.iatp.org/files/Intellectual\\_Property\\_Rights\\_and\\_Globalization.pdf](http://m.iatp.org/files/Intellectual_Property_Rights_and_Globalization.pdf).

14 Some of these soundproof texts are available in audio version, but often are significantly more expensive, abridged, or impossible to navigate through searches, bookmarking, etc.

15 Digital rights management involves a class of technologies used by hardware manufacturers, publishers, copyright holders, and other individuals with technologies that control the use of digital content and devises after sale. These measures are also called technical protection measures.

16 See Digital Millennium Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Public Law 105-304, 112 Stat. 2860, amending 17 U.S.C. section 1201 et seq.

17 See James Love, *Blog – Distance education for blind people opposed by a White House responsive to MPAA*, Knowledge Ecology International (Nov. 21, 2012), available at: <http://keionline.org/node/1600>.

### III. Thirty years of delay, generations of blind and print-disabled readers left behind

Negotiations on a so-called Treaty for the Blind began at the World Intellectual Property Organization and UNESCO in 1981 when they agreed to create a Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright.<sup>18</sup> Although those negotiations faltered, beginning in 2001, the World Blind Union and the International Federation of Library Associations began a renewed effort to push WIPO into responding to the information access needs of blind and print disabled people. These efforts were reinvigorated in 2006 with the passage of the Convention on the Rights of Persons with Disabilities.<sup>19</sup> Renewal of formal negotiations at WIPO on a Treaty for the Blind began in 2008 with the distribution of a draft text by the World Blind Union, later formally introduced by Brazil, Ecuador and Paraguay as a treaty proposal in 2009.<sup>20</sup> However, the political context had by then become more contentious because of the broader WIPO Development Agenda adopted in 2007,<sup>21</sup> which was vigorously opposed by the IP rights owners lobby. In the aftermath of the Development Agenda, IP right holders became even more concerned that a robust Treaty for the Blind would open the door to a broader, sustained attack on exclusive rights.<sup>22</sup> Rightholders are also reportedly concerned that copyrighted content could circulate freely on the internet and work its way back into lucrative rich country markets. The 280 million people who are blind or

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<sup>18</sup> It issued a report that included Proposed Model Provisions in 1982, available at <http://unesdoc.unesco.org/images/0005/000539/053955eb.pdf>. Three years later, the Executive Committee for the Berne Convention and the Intergovernmental Committee on the Universal Copyright Convention published a report by Wanda Noel entitled "Problems Experienced by the Handicapped in Obtaining Access to Protected Works" that recommended adoption of an international treaty establishing a firm copyright exception to allow production of accessible content and free circulation of that accessible content amongst contracting States, available at <http://unesdoc.unesco.org/images/0006/000651/065169eb.pdf>.

<sup>19</sup> Available at <http://www.un.org/disabilities/convention/conventionfull.shtml>. Articles 21, 30, and 32 are particularly relevant as they discuss: (1) providing information in accessible formats and via appropriate technologies in a timely manner and without additional costs, (2) taking steps to ensure that intellectual property rights did not erect unreasonable or discriminatory barriers to access by persons with disabilities to cultural resources, and (3) undertaking international cooperation to support realization of the purposes and goals of the Convention.

<sup>20</sup> Proposal, *supra* note 5.

<sup>21</sup> See <http://www.wipo.int/ip-development/en/agenda/>. THE 45 ADOPTED RECOMMENDATIONS OF THE WIPO DEVELOPMENT AGENDA, available at: <http://www.wipo.int/ip-development/en/agenda/recommendations.html>.

<sup>22</sup> See, e.g., *Joint Position: Copyright Exceptions and Limitations, addressed to WIPO Standing Committee of Copyright and Related Rights, 17<sup>th</sup> Session*, available at: [http://www.internationalpublishers.org/images/pdf/PP\\_Copyright/wipo\\_sccr\\_joint\\_position\\_10\\_29\\_2008\\_en.pdf](http://www.internationalpublishers.org/images/pdf/PP_Copyright/wipo_sccr_joint_position_10_29_2008_en.pdf).

visually impaired worldwide are also allegedly viewed as a potential market for for-profit sales.<sup>23</sup>

The U.S. initially signaled a more open attitude on a Treaty for the Blind. In 2009, it said:

First, the United States believes that the time has come for WIPO Members to work toward some form of international consensus on basic, necessary limitations and exceptions in copyright law for persons with disabilities. This international consensus could take multiple forms, including a model law endorsed by the SCCR, a detailed Joint Recommendation to be adopted by the WIPO General Assemblies, and/or a multilateral treaty. The United States is open to all these options. ...

We believe that a solution to the problem of cross-border distribution of special format materials, properly delineated to prevent abuses, would solve the foremost problems identified by the print disabled and visually-impaired communities.<sup>24</sup>

Unfortunately, the U.S. position since then has deteriorated badly, largely as a result of lobbying by the publishing and movie industries. The European Commission has been equally dogmatic in opposing a pro-active treaty and instead insists on poison-pill provisions that threaten the very existence of the Treaty. The World Blind Union, fed up with what was going on at WIPO and disillusioned with parallel, industry dominated consultations in the WIPO Stakeholder Platform and EU Stakeholder Dialogue suspended its participation in the non-Treaty consultations pending a properly binding legal framework at WIPO.<sup>25</sup>

As reported by James Love of Knowledge Ecology International, negotiations in the spring of 2011 began to focus on the following issues:

**One or two stages:** Will WIPO work toward a diplomatic conference to consider a binding treaty, or adopt a "two stage" process whereby WIPO considers first something other than a treaty as a possible step towards a treaty? ...

**Role of for-profit suppliers:** The WBU proposal provides for the

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<sup>23</sup> William New, *Mixed Reactions Among Participants in WIPO Talks on Treaty for the Blind*, IP-WATCH (April 22, 2013), available at: <http://www.ip-watch.org/2013/04/22/mixed-reactions-among-participants-in-wipo-talks-on-treaty-for-the-blind/>.

<sup>24</sup> *Statement on Copyright Exceptions and Limitations for Persons with Print Disabilities*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights (SCCR), Nineteenth Session (December, 2009), available at: <http://www.copyright.gov/docs/sccr/statement/us-intervention12-15-09.pdf>.

<sup>25</sup> See James Love, *Blog - WBU suspends participation in WIPO & EU Stakeholder discussing, pending agreement at WIPO on legal framework*, Knowledge Ecology International (Feb. 27, 2011), available at: <http://keionline.org/node/1082>.

possibility of a limited exception for for-profit suppliers of accessible works. The US and the EU would not. The practical importance of this is illustrated by the fact that commercial firms will play a role in the digitalization of millions of orphaned books and other copyrighted works. If for-profit companies are left out, persons with disabilities will have to rely upon governments and charities to make works available.

**Remuneration:** Publishers are pushing for a right to remuneration for works created under exceptions, even by non-profit entities.

**Market alternatives.** The US has proposed, contrary to US legal traditions, that even in the case of non-profit entities, the exception may be limited to cases where "the applicable special format, cannot be otherwise obtained in the country of importation within a reasonable time and at a reasonable price." In practice, some disabilities groups say such provisions can lead to delays, legal uncertainty, and burdensome administrative costs, in resolving disputes over the equivalence of formats, or the reasonableness of pricing. The WBU position is to provide an exception for non-profit services without such a market test, but to have such a market alternatives test for for-profit companies providing a for-profit service under an exception.

**Authorized, responsible or trusted entities:** Publishers want to define, regulate and control trusted entities through contracts. The EU seems to favor this approach, and the US has pushed in this direction. Disabilities groups want suppliers of accessible formats to operate outside of publisher permissions and with government or statutory authority rather than publisher oversight.

**TPM/DRM:** Disabilities groups want guarantees that they can circumvent DRM/TPM technologies to make works accessible. Publishers oppose such provisions.

**Contracts:** Disabilities groups do not want contracts to override statutory rights. Publishers want contracts to trump statutory rights.

**Right to privacy:** The WBU proposals includes, consistent with the UN Convention on disabilities, a right to privacy. Publishers are opposed to such provisions in copyright treaties.<sup>26</sup>

Unfortunately, two years later most of these disputes are still represented in the latest draft text of April 20, 2013, with the exception of a commitment to a binding treaty.<sup>27</sup> There are still disputes whether the final agreement will be in the form of a binding treaty or not, whether for-profit suppliers will be

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<sup>26</sup> James Love, *Blog - April 2011 report on negotiations for a WIPO copyright treatment for persons who are blind or have other disabilities*, Knowledge Ecology International (April 6, 2011), available at: <http://keionline.org/node/1089>.

<sup>27</sup> See Draft Text note 6, *supra*.

covered or not, whether accessible content can cross-borders easily or not, whether DRMs can be circumvented or not, whether theoretical commercial availability will prevent use of the exception or not, and on and on.

In more detail, the content of the Preamble has been agreed to with the exception of a reference to the three-step test.<sup>28</sup> The introductory General Clause states that “Nothing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties,”<sup>29</sup> but there are suggested revisions to that clause in the Annex.<sup>30</sup> In Article A addressing definitions, the definitions of covered “works” and “accessible format copies” has been agreed to,<sup>31</sup> but there is disagreement over the definition of “reasonable price for developed countries,” which focuses on the difference between affordability and comparability of prices.<sup>32</sup> A workable definition of “authorized entities” has been agreed upon, which

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28 Draft Text, *supra* note 7, at 2-3.

29 *Id.* at 4.

30 *Id.* Annex, at 1, Note on General Clause: Suggested Revisions.

31 *Id.* at 5.

"work" means literary and artistic works within the meaning of Article 2.1 of the Berne Convention, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media<sup>3</sup> [An Interpretative Understanding/Agreed Statement will be drafted to clarify that audiobooks are included in the definition of “work” .].

"accessible format copy" means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment/print disabilities. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

32 *Id.* at 6.

"reasonable price for developed countries" (Proposed in SCCR/23/7)

means that the accessible format copy of the work is available at a similar or lower price than the price of the work available to persons without print disabilities in that market.

"reasonable price for developing countries" (Proposed in SCCR/23/7)

means that the accessible format copy of the work is available at prices that are affordable in that market, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities.

Alternative A - Delete both definitions.

Alternative B - Keep both definitions.

Alternative B.1

“Reasonable price for developing countries” is a price at which the accessible format copy of the work is available at prices that reflect national economic realities.

Alternative B.2

“Reasonable price for developing countries” is a price at which the accessible format copy of the work is available at prices that reflect national economic realities, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities.

covers both organizations authorized or recognized by governments and government institutions or non-profits providing services for beneficiary persons.<sup>33</sup> Likewise, Article B includes an agreed upon broad definition of a beneficiary person, which includes those who are blind or vision impaired, who have a functional perceptual or reading disability, and whose physical disability adversely impacts their ability to read.<sup>34</sup>

Article C is the main provision dealing with allowable national law limitations and exceptions on accessible format copies within national borders. Although it broadly allows a Member State/Contracting Party to provide an exception or limitation in its national copyright law to the rights of reproduction, distribution, and making-available-to-the-public, including public performances, in order to facilitate the availability of accessible format copies for beneficiary persons, the inclusion of a right of translation is contested.<sup>35</sup> Article C also allows authorized entities within the same country to make accessible format copies of works and to obtain the same from other authorized entities and to supply them a beneficiary person by any means including non-commercial lending or electronic communication. These rights are conditioned on the covered entity having lawful access to the work, conversion of the work to accessible form, supply only for use by beneficiary persons, and operation on a non-profit basis.<sup>36</sup> Article C also allows primary

33 *Id.* at 7.

Authorized entity means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary<sup>4</sup> activities or institutional obligations.

establishes and follows its own practices

- i) to establish that the persons it serves are beneficiary persons;
- ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies;
- iii) to discourage the reproduction, distribution and making available of unauthorized copies; and
- iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article H.

34 *Id.* at 9.

A beneficiary person is a person who

- (a) is blind;
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or<sup>5</sup> [In brackets: Interpretative Understanding: Nothing in this language implies that “cannot be improved” requires the use of all possible medical diagnostic procedures and treatments.]
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities.

35 *Id.* at 10, Article C.1(A) and (B).

36 *Id.* at 10, Article C.2(A).

caretakers to assist beneficiary persons in the use of accessible format materials.<sup>37</sup> Article C permits, but does not require, Member States/Contracting Parties to “confine the limitations or exceptions to circumstances where the accessible format work cannot be obtained commercially under reasonable terms for the beneficiary persons in that market.”<sup>38</sup> Likewise, the issue of whether reasonable remuneration to the copyright holder is required or not is left to national law.<sup>39</sup>

The highly contentious issue of cross-border exchange of accessible format copies is discussed in Article D. Article D initially allows countries to adopt provisions allowing cross-border export of accessible format copies, but only from an authorized entity in one Member State/Contracting Party to an authorized entity in another Member State/Contracting Party.<sup>40</sup> Direct cross-border to a beneficiary person, on the other hand, is contested.<sup>41</sup> As a condition of export, the originating authorized entity must not “know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.”<sup>42</sup> Although the idea of cross-border transfer is agreed to, the pragmatics of it are in dispute, mainly because of alternative textual proposals requiring that the accessible format work might not otherwise be commercially available in the importing countries.<sup>43</sup> This

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37 *Id.* at 10, Article C.2(B).

38 *Id.* at 11.

39 *Id.* at 11, Article C.5.

40 *Id.* at 12, Article D.1 and 2(A).

41 *Id.* at 12, Article D.2(B).

42 *Id.* at 12, Article D.2.

43 *Id.* at 12, Article D.3.

Alternative A: [The Member State/Contracting Party may limit said distribution or making available of published works which, in the applicable accessible format, cannot be otherwise obtained within a reasonable time and at a reasonable price, in the country of importation.]

Alternative B: [A Member State/Contracting Party should/shall[/may] prohibit said distribution or making available to published works where the exporting authorized entity, prior to making available or distribution, knew or should have known that a copy in the particular accessible format could have been obtained through the distribution channels customary to the beneficiary persons, [under reasonable terms, including] at prices that take account of the needs and incomes of beneficiary persons in the country of importation[, as well as the cost of producing and distributing the work].]10 [See Annex]

Alternative C: [A Member State/Contracting Party [should/shall/may] limit distribution and making available under this Article in cases where the exporting authorized entity, prior to the distribution or making available, [knew/knew or should have known/knew or had reason to believe] that the work, in the particular accessible format, could be obtained commercially under reasonable terms for beneficiary persons in the receiving country.]11 [Proposed Agreed Statement to Alternative C: [It is understood that reasonable terms also take in to account the needs and incomes of beneficiary persons in the receiving country. Furthermore, it is understood that this Article does not imply any duty on the exporting authorized entity to investigate whether the work in the particular accessible format can be obtained commercially in the receiving country or any action

contested issue is discussed in additional depth in the draft Annex.<sup>44</sup> Article E addresses the complementary right of importation of accessible format copies and has only one relatively minor area of disagreement in the main text<sup>45</sup> though there are alternative texts in the Annex.<sup>46</sup> Article J would require cooperation to facilitate cross-border exchange but it too is contested.<sup>47</sup>

Another highly contentious issue, obligations concerning technological measures, is addressed in Article F. The key disputed issue is whether Member States/Contracting Parties may allow routine circumvention of “locks” on digital information, whether complex administrative procedures requiring credible evidence and transparency are interposed, or even whether Article F should be deleted in its entirety.<sup>48</sup> On a less contentious note, Article H contains a brief reference to respect for privacy.<sup>49</sup> Article S addresses the mundane issue of implementation, the contested issue of “respect for copyright provisions,” and development issues affecting low- and middle-income countries.<sup>50</sup>

At the conclusion of even this brief discussion of the areas still in dispute, it should be obvious that the Diplomatic Meeting in Marrakesh will face a nearly insuperable task of reaching agreement in order to produce an effective and viable agreement. It may well be that IP industries and the U.S. and E.U. hope that the sheer volume of unresolved issues will wear proponents down,

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that will delay the distribution or making available of the accessible format copy to beneficiary persons.]]

Article D.4:

Alternative A: A Member State/Contracting Party may fulfill Article D(1) by providing any other exception or limitation in its national copyright law that is limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Alternative B: [A Member State/Contracting Party may fulfill Article D(1) by providing any other limitation or exception in its national copyright law pursuant to [cross reference to be determined].

44 *Id.* at Annex at 1-2, Note on Article D.

45 *Id.* at 14.

To the extent that national law of a Member State/Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Member State/Contracting Party should/shall also permit [them/authorized entities] to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder.<sup>12</sup> [See Annex],<sup>13</sup> [See Annex]

46 *Id.* at Annex at 2, Note on Article E.

47 *Id.* at 17; Annex at 3, Note on Article J.

48 *Id.* at 15; Annex at 2-3, Notes on Article F.

49 *Id.* at 16. “In the implementation of these exceptions and limitations, Member States/Contracting Parties should/shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.”

50 *Id.* at 19.

thereby producing a greatly watered down Treaty. Marcus Low, editor of Equal Treatment and NSP Review, the magazines of the Treatment Action Campaign and Section27, who is visually impaired, presents the contrast in approaches in dramatic terms:

If the right clauses make it into the final treaty, we'll see something like this: A blind student at the University of Venda logs on to a U.S. library site. She enters her credentials and downloads the books she needs in the formats she needs. It is seamless and makes it easier for her to compete equally with her peers and get her degree.

However, if U.S. and E.U. negotiators have their way, the scenario looks something like this: The same student applies to the University of Venda's library. The library then puts in a request with say the South African Library for the Blind. Maybe a few days later the SA library for the blind forwards the request to one or two U.S. or U.K. based libraries. A week or two later they get back to the SA Library for the blind saying they want more guarantees that the student actually has a disability. More documentation is exchanged. Then, maybe another week later the U.S. library says they cannot provide the book since an 'accessible' version is already available on the commercial market in South Africa. The student will then be forced to buy a Kindle - after which she might be able to read the book in a manner of speaking, but would find it extremely difficult to quote from the book or to reference given the Kindle's poor accessibility. Of course, none of this will matter since she would have already missed her essay deadlines and be having second thoughts about her University degree.<sup>51</sup>

#### **IV. Conclusion**

The book famine in the Global South continues and text on the internet is frequently soundproof. Rather than address the pragmatic human rights needs of people who are blind and print-disabled by crafting a low-cost, easy-to-use solution, copyright and other IP industries, and their proxies in U.S. and E.U. trade offices, are holding a Treaty for the Blind hostage in order to build higher bulwarks to protect their monopoly right kingdoms. A treaty with minimum economic impacts - 40% of people who are blind in the entire world are poor people living in India - is being treated by industry as if it is the litmus test for intellectual property protections for the rest of the 21<sup>st</sup> century. It's true that exclusive rights are being questioned, but they are being questioned for good reasons. Why do textbooks written essentially for free by leading academic cost \$180 in the U.S. and 800 rands in South Africa? Why do paperback novels cost €20 and cost even more as audiobooks? Why do antiretroviral medicines cost \$28,000 per patient per

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<sup>51</sup> Marcus Low, *Ending the book famine for the blind*, GROUNDUP (April 10, 2013), available at: <http://www.groundup.org.za/content/ending-book-famine-blind>.

year in the U.S. when generic versions are available for \$120 per patient per year in India?

It is the relentless pursuit of profits and the closing of the information commons that is forcing readers, patients, and consumers to question the international intellectual property regime and the poverties of content and access that it produces. As important as this larger debate is, the issue before WIPO is quite a bit simpler - is the Convention of the Rights of the Disabled to be actualized in a workable Treaty for the Blind or not? Will the chains around books (and tablets, computers, and cellphones) be cut or will blind and print disable people be cut off from the global interchange of knowledge?



And, even if proponents of a strong treaty win, will rich countries sign on or boycott the Treaty because of the demands of their IP industries. And, even if they do sign, will global leaders continue to pursue the interests that have been excluded in the current Treaty: the need to ensure access to knowledge and knowledge-based goods for persons with other disabilities, the need to have access to textual material embedded in audio-visual materials, and the need to have translation rights for language minorities? The answers to these questions should be easy, but unfortunately they are not.