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**DEVELOPING COPYRIGHT EXCEPTIONS TO  
FACILITATE ACCESS TO COPYRIGHT WORKS FOR  
PERSONS WITH A PRINT DISABILITY**

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This thesis is submitted for the degree of  
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## Abstract

Persons who are blind, visually impaired, or otherwise print disabled commonly experience difficulties in accessing information as only a limited selection of books are published in Braille, audio or other accessible formats. This problem serves to then limit their fundamental human rights, including cultural, economic and political rights relating to knowledge and personal development. To resolve this issue, the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (2013) obligates Contracting Parties to provide limitations and exceptions in their national copyright laws to permit the production and communication of copyright works in accessible formats without the authorisation of copyright right holders. The objective of this thesis is to examine whether, and to what extent, the Marrakesh Treaty, and the national laws implemented to fulfil the obligations of the Treaty, effectively reconcile the conflict between the protection of copyrights and access to copyright works for print disabled persons. The thesis develops a theoretical framework to reconcile and balance copyright and human rights, and analyses a range of national law, with a special focus on Australia and China, in order to evaluate the effectiveness of current copyright exceptions and limitations. The thesis concludes that the Treaty significantly strengthens access to published works by print disabled persons as it provide mandatory and well-designed copyright exceptions and limitations that effectively calibrate personal proprietary rights with the fundamental human rights of print disabled persons. However, the thesis further submits that the effectiveness of the Treaty could be substantially enhanced by implementing provisions in relation to reasonable pricing, providing exemptions relating to remuneration, developing precise criteria for identifying qualified beneficiaries, and extending the obligations of the Treaty to information and communication technologies.

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## **Statement of Candidate**

I certify that the work in this thesis entitled “Developing Copyright Exceptions to Facilitate Access to Copyright Works for Persons with a Print Disability” has not previously been submitted for a degree, nor has it been submitted as part of requirements for a degree, to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research, and it has been written by me. Any help and assistance that I have received in this research have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in this thesis.

**Jingyi LI**

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# Introduction

## I Introduction

As economic progress and personal development become increasingly dependent on access to information and knowledge embedded in books and other reading materials, it is imperative that copyright laws facilitate appropriate access to such materials by print disabled people. Persons with a ‘print disability’ refers to persons who are blind, or have a visual impairment or a perceptual or reading disability, and are therefore unable to read printed works to substantially the same degree as persons without an impairment or disability.<sup>1</sup> Most literary, dramatic, artistic, scientific and other kinds of works are published and disseminated in visual formats, such as print books, print magazines or newspapers, or readable digital texts, pictures or films displayed on computer or television screens. Persons with a print disability are disadvantaged intellectually as they have limited access to information and knowledge conveyed by works published in print versions. Works have to be published in accessible formats such as large-print, Braille, audio and digital visions for print disabled persons to ‘read’. When a work has already been published in print versions, it is necessary to acquire authorisation from the copyright owner so as to reproduce, republish and disseminate the work in an accessible format for persons with a print disability. However, this business is not popular since the market is narrow and not profitable in a world with only 4% of its populations being visually impaired and most of them

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<sup>1</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WTO Doc VIP/DC/8 ( 27 June 2013) (hereafter called Marrakesh Treaty), art 3 (a) (b).

living in poverty.<sup>2</sup> With limited economic motivation, copyright holders are reluctant to authorise the production of their works in accessible formats. In this context, the copyright owner's exclusive control over the work has been a barrier for visually disabled people to get access to information and knowledge embodied in literary, dramatic, artistic and scientific works.

Copyright exceptions and limitations have been adopted to reconcile the conflict between the interests of copyright owners and users. The *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) allows the reproduction of literary and artistic works without the copyright owner's authorisation, provided that the reproduction does not conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the author.<sup>3</sup> Inspired by the Berne Convention, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)<sup>4</sup> and the *WIPO Copyright Treaty* (WCT)<sup>5</sup> adopted similar exceptions, and extend to include all exclusive intellectual property rights granted to

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<sup>2</sup> According to the World Health Organization, there are estimated 285 million visually impaired people worldwide, which account to 4% of the 7.3 billion populations. The World Health Organization also noted that about 90% of the world's visually impaired live in low-income settings. World Health Organization, *Visual Impairment and Blindness*, available at <http://www.who.int/mediacentre/factsheets/fs282/en/>.

<sup>3</sup> *Berne Convention for the Protection of Literary and Artistic Works, open for signature* 9 September 1886, amended on 28 September 1979 (hereafter called 'Berne Convention'), 9(2).

<sup>4</sup> 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder', TRIPS, art 13.

<sup>5</sup> (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. WCT, art10.

the owner. Instructed by the mentioned international instruments, a number of countries have adopted copyright exemptions in their national laws.<sup>6</sup> However, there are divergent views among countries as to whether or not, and to what extent, the national copyright law should provide exemptions or limitations in order to facilitate access to published works by the print disabled.<sup>7</sup>

In June 2013, the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Marrakesh Treaty)<sup>8</sup> was adopted. This treaty aims to facilitate access to published works in accessible format copies for persons with a print disability by requiring its member states to provide a limitation or exception in their national copyright law, by which the authorised entities shall be permitted, without the authorisation of the copyright right holder, to reproduce a published work in an accessible format, and distribute it nationally and internationally to persons who are blind or visual impaired or suffer from other print disabilities. The Marrakesh Treaty serves as a legislative framework providing an international standard of copyright exception for the print disabled to get access to published works.

The central objective of this thesis is to study the effectiveness of the current copyright exception mechanism facilitating access to copyright works for persons

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<sup>6</sup> See further on the third article: Jingyi Li, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty', (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law*, pp 740-767.

<sup>7</sup> Ibid.

<sup>8</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WTO Doc VIP/DC/8 ( 27 June 2013) (hereafter called Marrakesh Treaty).

suffering a print disability. It firstly acknowledges the conflicts between the protection of copyright and access to copyright works for print disabled persons. Since the discussed conflicts derive from the long lasting difficulty of resolving conflicts between intellectual property rights and human rights, this study adopts a theoretical framework governing the reconciling and balancing of intellectual rights and human rights to justify copyright exceptions and limitations in copyright laws. This framework is based on an integration of the writing of human rights scholars such as Helfer, Yu and Chon, and is refined by the thesis so as to apply to the specific conflict between copyright protection and access to works for persons with a print disability. After establishing a theoretical framework to determine the criteria for copyright exceptions or limitations for the print disabled, the thesis progresses to considering the merits of the Marrakesh Treaty and national copyright laws regarding exceptions or limitations for the print disabled. Notably the Marrakesh Treaty reflects the discussed theoretical framework, and emphasizes the significance of the ‘three-step’ test in reconciling and balancing the protection of copyright and access to works for print disabled persons. To evaluate the effectiveness of current national copyright exceptions or limitations for print disabled persons, the thesis provides an overarching analysis of a wide range of national copyright laws. In particular, this study examines Australian copyright laws and Chinese copyright laws in detail, because these two countries represent two classes of countries. Australia belongs to a class with well-designed copyright exceptions or limitations mechanisms for the print disabled, whereas China belongs to a class that has not yet sufficiently considered

copyright law's role in facilitating print disabled persons' access to information and knowledge. The study concludes that the Marrakesh Treaty effectively provides a comprehensive mechanism of copyright exceptions or limitations to facilitate access to published works for persons with a print disability. Such a mechanism would be even better at facilitating accessibility if the Marrakesh Treaty were to consider additional issues that were omitted in the current provisions, and if contracting parties of the treaty were to reform their national copyright laws and cooperate internationally to meet their obligations to the treaty.

## II Background

The present intellectual property regulation framework is conceived as independent and parallel to human rights because its profit-making merits do not comply with human rights values as to entitle all people to the freedom to pursue happiness and protect them from poverty and discrimination. The most frequently discussed conflicts are between intellectual property protection and the right to health,<sup>9</sup> the right to food,<sup>10</sup> the right to knowledge and proper education,<sup>11</sup> indigenous rights and

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<sup>9</sup> See further Winston P. Nagan, 'International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States' (2001) 14 *Florida Journal Of International Law* 85; James Thuo Gathii, 'Rights, Patents, Markets and the Global Aids Pandemic' (2001-2002) 14 *Florida Journal Of International Law*; Mirela V. Hristova, 'Are Intellectual Property Rights Human Rights: Patent Protection and the Right to Health' (2011) 93 *Journal of the Patent and Trademark Office Society* 33; World Health Organization, *Guidance on Ethics And Equitable Access to HIV Treatment and Care*, 2004 <[http://www.who.int/ethics/en/ethics\\_equity\\_HIV\\_e.pdf](http://www.who.int/ethics/en/ethics_equity_HIV_e.pdf)>; Human Rights Committee, Specific Groups and Individuals Mass Exoduses and Displaced Persons: Report of the High Commissioner for Human Rights on human rights and mass exoduses, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/80/Add.1 (31 January 2005).

<sup>10</sup> See further Geoff Tansey and Tasmin Rajotte (eds), *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*. (Earthscan, 2008); Lea Shaver, 'The Right to Science and Culture' (2010) *Wisconsin Law Review*.

<sup>11</sup> See further J. Michael Finger and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (The World Bank and Oxford University Press, 2004;

biodiversity,<sup>12</sup> and the collective right to development.<sup>13</sup> How to balance intellectual property rights and human rights has been a topic of extensive and intense academic deliberation. Efforts are made from both theoretical and normative perspectives to propose frameworks to balance intellectual property rights and human rights.<sup>14</sup>

The conflict between the protection of copyright and print disabled persons' access to copyright works demonstrates a typical incompatibility between intellectual property rights and human rights. Authors have the exclusive copyright to authorise publishing and disseminating their works in any manner or form.<sup>15</sup> Such a right is justified as an important tool to ensure an author's material and moral interests, and encourage them to create more works.<sup>16</sup> Authors can claim for royalties and share the benefits of the reproduction by authorising the reproduction. They can also secure the integrity of the work by avoiding alteration, distortion and mutilation. However, they are reluctant to authorise the publication of their works for markets that are not profitable, such as in accessible formats for print disabled persons to get access.<sup>17</sup> As Rose comments, copyright is a practice of securing marketable rights in texts that are created as

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Margaret Chon, 'Copyright and Capability for Education: An Approach 'From Below' in Tzen Wong and Dutfield Graham (eds), *Intellectual Property and Human Rights: Current Trends and Future Scenarios* (Cambridge University Press, 2011).

<sup>12</sup> See further Rosemary J. Commbe, 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998-1999) 6 *Global Legal Studies Journal*; Kuei-Jung Ni, 'Traditional Knowledge and Global Lawmaking' (2011) 10 *Northwestern University Journal of International Human Rights*.

<sup>13</sup> Ruth L. Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 *Law & Policy*.

<sup>14</sup> See further in Article 1 From Theoretical Deliberations to Implementation: The Reconciliation of Intellectual Property Rights and Human Rights in the Marrakesh Treaty.

<sup>15</sup> Berne Convention, art 9(1).

<sup>16</sup> Sheldon Light, 'Parody, Burlesque, and the Economic Rationale for Copyright' (1979) 11(4) *Connecticut Law Review*.

<sup>17</sup> Paul Harpur and Nicolas Suzor, 'Copyright protections and disability rights: turning the page to a new international paradigm' (2013) 36 *University of New South Wales* 745.

commodities.<sup>18</sup> Works are often published in print versions or, in contemporary society, in digital forms shown on computer screens, smartphones and other digital devices. The mentioned formats are not readable for persons with a print disability. This situation establishes a barrier for print disabled people to realise their basic human rights and fundamental freedoms based on knowledge, information and education conveyed by works.

It is crucial to facilitate access to information and knowledge embodied in works for persons with a print disability in the context of copyright protection hindering the production and dissemination of accessible works. Accessibility refers to the usability of a product, service, environment or facility by people with the widest range of abilities and situations.<sup>19</sup> To promote accessibility is a widely recognised way to ensure that persons with disabilities have access to facilities and are involved in the society.<sup>20</sup> It is believed that accessibility to the physical, social, economic and cultural environment is of vital importance in enabling persons with disabilities to ‘fully enjoy all human rights and fundamental freedoms’.<sup>21</sup> Particularly, access to copyright works conveying information and knowledge has a significant influence on the realisation of human rights for persons with a print disability. First of all,

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<sup>18</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993), 3.

<sup>19</sup> See further International Standards Organization, *Ergonomics of human-system interaction -- Part 171: Guidance on software accessibility*, ISO 9241-171:2008 (6 January 2012) <[http://www.iso.org/iso/home/store/catalogue\\_ics/catalogue\\_detail\\_ics.htm?csnumber=39080](http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=39080)>.

<sup>20</sup> See further Richard Church and James Marston, 'Measuring Accessibility for People with a Disability' (2003) 35(1) *Geographical Analysis* 8; Alison Adama and David Kreps, 'Disability and Discourses of Web Accessibility' (2009) 12(7) *Information, Communication & Society* 104; Paul Jaeger and Cynthia Bowman, *Understanding Disability: Inclusion, Access, Diversity, and Civil Rights* (Praeger Publishers, 2005).

<sup>21</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, Annex I (entered into force 3 May 2008) (hereafter called CRPD) Preamble V.

accessible learning materials and facilities are essential for a print disabled person to receive education. Further, updated information and education provide them with knowledge and skills so that they can have equal and non-discriminatory working opportunities with their counterparts. Being financially and intelligently independent further builds up their confidence and a sense of dignity. In terms of political rights, access to political policy and public welfare notifications are the basis for persons with a print disability to be involved in political life. It also helps them to participate effectively in society and make contributions to society so as to fully realise their potential.<sup>22</sup> In conclusion, access to copyright works guarantees equal opportunities and serves as the basis of social, economic and political inclusion for persons with a print disability.

The criticality of access is widely acknowledged because to ensure equal access to physical facilities and cultural life for persons with disabilities is noted in a number of human rights instruments. More specifically, rights relating to work, to social security, to an adequate standard of living, to physical and mental health, to education, and to take part in cultural life and enjoy the benefits of scientific progress, as recognised in the *International Convention on Economic, Social and Cultural Rights*,<sup>23</sup> inherently depend on equal access to facilities and resources for disabled persons.<sup>24</sup> What is

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<sup>22</sup> See further Brett Webb-Mitchell, *Beyond Accessibility: Toward Full Inclusion of People with Disabilities in Faith Communities* (Church Publishing, 2010); Heather Ritchie, 'The promise of the Internet for disability: a study of on-line services and web site accessibility at Centers for Independent Living' (2003) 21(1) *Behavioral sciences & the law* 5.

<sup>23</sup> Committee on Economic, Social and Cultural Rights, Persons with Disabilities, CESCR General comment 5, 11th sess (9 December 1994).

<sup>24</sup> United Nations, Committee on Economic, Social and Cultural Rights General comment No. 5: Persons with Disabilities. U.N. Doc. E/1995/22.



more, the pre-condition of freedom of thought, conscience and religion, and the freedom of expression for everyone including disabled persons claimed by Article 18 and Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), is that disabled persons have equal access to information, ideas, and thoughts. The *Convention on the Rights of Persons with Disabilities* (2006) (CRPD) in its Preamble recognises that access to the physical, social, economic and cultural environment enables persons with disabilities to fully enjoy human rights and fundamental freedoms.<sup>25</sup> Particularly, Article 9 urges States Parties to facilitate the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and to provide peer support and mentoring. Article 24 requires States Parties to establish an equal general education system and to offer special facilities appropriate for disabled persons.

To counter the potentially negative effects of copyright protection on access to works for persons with a print disability, exemptions and limitations of copyright protection have been adopted widely in intellectual property instruments. Fair use and compulsory licenses are the most commonly adopted kinds of copyright exception. Fair use allows users to exploit works protected by copyright law without authorisation of the right owner and without paying royalties in certain circumstances. The compulsory license also entitles users to exploit the work without the right owner's authorisation, but users have to pay copyright owners royalties or

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<sup>25</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, Annex I (entered into force 3 May 2008), art 30.

remuneration. Copyright exceptions or limitations apply to assure personal use,<sup>26</sup> freedom of speech,<sup>27</sup> and access to knowledge.<sup>28</sup> The Berne Convention provides that '[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in 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.'<sup>29</sup> This clause demonstrates a balance between right holders and right users. According to this provision, the copyright user's demands are met, with the copyright holder's right being confined. However, the right holder's exclusive right is only compromised when confronted with the right user's urgent demands and basic human rights, and these situations are confined to certain special cases, where such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Inspired by the Berne Convention, the TRIPS<sup>30</sup> and the WCT<sup>31</sup>

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<sup>26</sup> Deborah Tussey, 'From Fan Sites to Filesharing: Personal Use in Cyberspace' (2001) 35 *Georgia Law Review* 1129.

<sup>27</sup> See Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press, 2008); Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press, 2011); Claire Leonard, 'Copyright, Moral Rights and the First Amendment: The Problem of Integrity and Compulsory Speech' (2012) 35 *Columbia Journal of Law & the Arts*.

<sup>28</sup> See Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (MIT Press, 2010); Amy Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 *The Yale Law Journal* 80; Akhil Prasad and Aditi Agarwala, *Copyright Law Desk Book: Knowledge, Access & Development* (Universal Law Publishing, 2009); David Bradshaw, 'Making books and other copyright works accessible, without infringement, to the visually impaired : a review of the practical operation of the applicable, and recently enacted, UK legislation' (2005) (4) *Intellectual property quarterly* 335.

<sup>29</sup> Berne Convention, 9(2).

<sup>30</sup> 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.' TRIPS, art 13.

<sup>31</sup> (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or

adopted relevant clauses to regulate exemptions in a more general way, not limited to reproduction. The WTO expert panel reaffirmed these conditions as a ‘three-step test’, and this test is accepted by a great number of countries.<sup>32</sup>

The above mentioned intellectual property treaties, however, only permit, rather than encourage or obligate, contracting parties to provide copyright exceptions or limitations in their national laws. Individual countries have the autonomy to decide whether to adopt copyright exceptions or limitations according to their diverse cultural and economic backgrounds. Therefore, the existing mechanism provided by these instruments tends to favour intellectual property rights, without a concrete mechanism to ensure human rights. As criticised by the United Nations resolution 2000/7, TRIPS does ‘not adequately reflect the fundamental nature and indivisibility of all human rights.’<sup>33</sup>

To address the omission of obligatory copyright exceptions or limitations, in June 2013, the World Intellectual Property Organization made far-reaching progress by adopting the Marrakesh Treaty. The treaty aims to facilitate access to published works by obligating its member states to provide limitations or exceptions in their national

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exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. WCT, art10.

<sup>32</sup> See further Panel Report, *United States – Section 110(5) of The US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000), 6.97. Also see: Jane C. Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions' (2001) (January) *Revue Internationale du Droit d'Auteur* Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies Ltd, 2002; Nicole M. Thomas, 'An Education: The Three-Step Test for Development' (2012) 34(4) *European Intellectual Property Review* 244.

<sup>33</sup> Sub-Commission on Human Rights Res. 2000/7, Intellectual property rights and human rights, ESCOR, Commission on Human Rights, SubCommission on the Promotion and Protection of Human Rights, 52nd Sess., 25th mtg., U.N. Doc. E/CN.4/Sub.2/Res/2000/7, 2.

copyright laws. Beneficiaries and the authorised entities shall be permitted, without the authorisation of the copyright right holder, to reproduce a published work into accessible format copies, and distribute it nationally and internationally to persons who are blind, or visual impaired or suffer from other print disabilities. The treaty further promotes the cross-border exchange of accessible format copies, and requires contracting parties to provide an exception to the protection of technological measures. This treaty serves as an international legal framework balancing the interests of copyright holders and print disabled persons' access to works. The treaty recognises in its Preamble that 'copyright protection is an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits.'<sup>34</sup> Copyright exceptions and limitations are required by the treaty so as to ensure print disabled persons' rights to knowledge, to education, to participate in cultural life and to other fundamental human rights. The Marrakesh Treaty entered into force in September 2016 after receiving ratifications from 20 contracting parties. To date 82 parties have signed this treaty and 25 countries have ratified it.<sup>35</sup>

### III Central Research Question

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<sup>34</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WTO Doc VIP/DC/8 (27 June 2013) (hereafter called Marrakesh Treaty).

<sup>35</sup> Contracting parties includes 81 countries and the European Union. WIPO, Contracting Parties > Marrakesh VIP Treaty, available at < [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) >, accessed 9 December 2016.

The central question to be addressed in this dissertation is whether the Marrakesh Treaty, together with the national laws that have implemented the Treaty, have effectively reconciled the conflicts between the proprietary right of copyright holders and access to works for print disabled persons. This thesis will examine the present theoretical and legislative framework so as to provide recommendations for further refining the copyright exceptions and limitation mechanism. In order to address the principal question of this thesis, there are several issues to be addressed. These are as follows:

**A. What is an appropriate theoretical framework to reconcile the conflicts between copyright owners' interests and print disabled persons' access to copyright works?**

In order to examine the effectiveness of the copyright exception and limitation mechanism, it is necessary to consider whether there is an appropriate theoretical framework to evaluate the current mechanism and to provide guidelines for further refinement. The conflicts between copyright owners' interests and print disabled persons' access to copyright works can be traced back to the long existing conflicts between intellectual property rights and human rights because access to copyright works is essential to the realisation of human rights for persons with a print disability. There have been extended discussions on how to reconcile the conflicts between intellectual property rights and human rights, but to date there is still no consensus on this problem. The thesis needs an appropriate theoretical framework, based on

scholarly discussions and public policies, clarifying the relationship and hierarchy between copyright and access to copyright works for print disabled persons so as to provide guidance to resolve this conflict.

**B. How would the Marrakesh Treaty cooperate with its Contracting Parties' national laws?**

The effectiveness of the Marrakesh Treaty largely depends on whether it will be widely accepted by its contracting parties and whether it came into force with their support. The journey to the passing of the Marrakesh Treaty was by no means linear. Countries contributing to the discussion expressed a variety of views, displaying the divergence of views on this matter in the international context. This divergence of opinion reflected in the vastly varying levels of support for related copyright exceptions and limitations provided in the laws of nations. The gap between the Marrakesh Treaty and the copyright exceptions provided by national copyright laws helps to anticipate the likelihood of its ratification. Even though the treaty has been in effect since September 2016, there are still a number of countries that have not yet ratified the treaty. Countries choose not to ratify the treaty mainly because their national laws are dramatically divergent from the obligations required by the Marrakesh Treaty. Furthermore, countries that have already ratified the treaty still need to modify their national laws to some extent so as to comply with the requirements of the Marrakesh Treaty. It is therefore important to identify the gap between the Marrakesh Treaty and the national law of each individual country, and to

examine to what extent national laws need modification to comply with the Marrakesh Treaty.

**C. Has the Marrakesh Treaty, together with national laws that have implemented the Treaty, effectively balanced copyright owners' interests and access to works for print disabled persons?**

As discussed in Part I of the Introduction of this thesis, there have already been a number of international treaties and national laws governing exceptions to and limitations on copyright for the benefit of persons with a print disability. However, previous intellectual property treaties were criticised for only permitting, rather than obligating, contracting parties to provide copyright exceptions or limitations. National copyright laws are different from country to country, and it is difficult for countries with divergent copyright exception arrangements to cooperate. It is therefore important to examine whether the Marrakesh Treaty is able to resolve the mentioned problems, and whether it can cooperate effectively with national copyright laws so that the Marrakesh Treaty and national copyright laws can constitute appropriate regulatory frameworks to balance the interests of copyright holders and print disabled persons' access to copyright works.

**D. Does the Marrakesh Treaty properly consider new demands that have arisen in the information era?**

In order to determine the effectiveness of the current copyright exception and

limitation system, it is necessary to consider whether the Marrakesh Treaty properly considered new demands that have arisen in the information era. This question examines the effectiveness of the Marrakesh Treaty from a specific aspect. With the proliferation of information and communication technologies (ICTs), a wide range of ICTs' products are designed to facilitate print disabled persons to communicate and get access to information and knowledge. However, ICTs mainly produce and disseminate information on screens, which are difficult for persons with a print disability to 'read'. Persons with a print disability therefore face challenges as well as opportunities to equally participate in the information society. It is important to examine whether the Marrakesh Treaty has adapted to these changes and designed appropriate arrangements to facilitate the equal involvement of its beneficiaries in the digital era.

**E. How could the Marrakesh Treaty better fulfill its commitment to facilitate access to copyright works for persons with print disabilities?**

In order to effectively promote access to published works for persons with a print disability, the Marrakesh Treaty needs to be further refined so as to better serve its objective. The Marrakesh Treaty is undoubtedly a great achievement made by international joint efforts. However, the copyright exceptions and limitations mechanism designed by this treaty is not yet perfect. There are a number of good practices followed by international organisations and national copyright laws. What is more, some specific issues have not yet been discussed thoroughly in this treaty. It is



therefore important to discuss how to further polish this treaty so to better facilitate access to works for persons with a print disability.

#### **IV Literature review**

Scholars have, over the years, considered how to establish an effective copyright exception or limitation mechanism in order to balance the interests of copyright users against the interests of copyright holders. The discussion derived from the nexus and conflicts between human rights and intellectual property rights, with one school maintaining that intellectual property rights are human rights and another school strongly opposing this proposition. There is subsequently extensive discussion on how to apply copyright exceptions and limitations so as to reconcile the conflicts between copyright and human rights. The adoption of the Marrakesh Treaty narrows such a discussion to the merits of the treaty and whether it can effectively reconcile the conflicts between copyright protection and access to published works for persons with a print disability.

##### **A. The relationship between copyright and human rights**

The issue of the relationship between intellectual property rights and human rights is the subject of two distinct schools of thought. Goldsmith argued that intellectual property rights are a category of human rights because they are included in the mentioned human rights instruments.<sup>36</sup> Whitehouse<sup>37</sup> and Torremans<sup>38</sup> adopt this

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<sup>36</sup> Harry Goldsmith, 'Human Rights and Protection of Intellectual Property' (1968-1969) 12(2) *Trademark and Copyright Journal of Research and Education*.

argument when discussing the relationship between intellectual property rights and human rights. They both believe that being regulated under human rights covenants, intellectual property rights began, controversially, to interweave with human rights. To be more specific, Art 27(2) of the UDHR states that ‘everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’. The protection of intellectual property rights was emphasised further in subsequent human rights instruments such as Article 13 of the *American Declaration of the Rights and Duties of Man (1948)*, Article 15 of the ICESCR, and Article 1 of *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952)* (hereafter called Protocol 1 to ECHR). Goldsmith further believes that the intellectual property right ‘is a basic fundamental human right which should be universally and effectively recognized, observed and guaranteed.’<sup>39</sup> Belotsky<sup>40</sup> and Gana<sup>41</sup> both agree with Goldsmith that intellectual property rights should be protected as fundamental human rights and that the protection of intellectual property rights should be extended rather than restricted.

Chapman believes that intellectual property rights are a category of human rights because intellectual products have an intrinsic value as an expression of human

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<sup>37</sup> Guy Whitehouse, 'A New Clash Between Human Rights and Copyright: The Push for Enhanced Exceptions for Print-Disabled' (2009) 25(4) *Publishing Research Quarterly* 21.

<sup>38</sup> Paul Torremans (ed), *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* Information law series (Kluwer Law International, 2004).

<sup>39</sup> Goldsmith, above n 35.

<sup>40</sup> Lydia Belotsky, 'Human Rights and Intellectual Property' (1997) 13 *The Aviv University Studies in Law*.

<sup>41</sup> Gana, above n 15.

dignity and creativity.<sup>42</sup> The original Latin term for dignity is *dignitas hominis*, which indicates ‘worthiness, the outer aspect of a person’s social role which evokes respect, and embodies the charisma and the esteem presiding in office, rank or personality.’<sup>43</sup> Dignity requires the granting of honour and respect to someone who deserves it. Intellectual property rights closely connect to a person’s dignity because the right requires others to respect the creator by acknowledging the creator’s name, and it grants the creator economic interests. Since dignity is widely acknowledged as fundamental to human rights,<sup>44</sup> this is the reason why Chapman regards intellectual property rights as a category of human rights. Mirela holds a different view from Chapman. She argues that only those kinds of intellectual property which safeguard the personality of the creator are protected in human rights instruments, while others do not have a human rights basis.<sup>45</sup> She believes that personality is the key element to human dignity and to the realisation of human rights. Yu similarly divides intellectual property rights into two categories, and argues that copyright is a kind of human right, whereas patent rights and trademark are non-human rights.<sup>46</sup>

An alternative school, however, views intellectual property rights as dramatically

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<sup>42</sup> Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)' in Evgueni Guerassimov (ed), *Approaching Intellectual Property as a Human Right* (UNESCO Publishing, Digital version ed, 2001) vol Copyright Bulletin, 445.

<sup>43</sup> Hubert Cancik, "'Dignity of Man" and "personal" in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105–107' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002) 19.

<sup>44</sup> For example, UDHR in its Preamble declares that ‘whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ *Charter of the United Nations* in its Preamble ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...’ *European Convention for the Protection of Human Rights and Fundamental Freedoms* declares that ‘the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity...’

<sup>45</sup> Hristova, above n 11.

<sup>46</sup> Peter K. Yu, 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 *Florida Law Review*.

different from human rights. Nwauche argues that the right protected in the mentioned human rights instruments is the author's right to moral and material interests resulting from intellectual property, such as claims to the authorship or to making a living from collecting royalties, rather than intellectual property rights.<sup>47</sup> Shaheed argues that the human right protection of authorship under Art 27(2) is not a synonym for copyright protection, but only a related concept against which copyright law should be judged.<sup>48</sup> Torremans concludes that these two kinds of rights are different by reviewing the histories, values and justifications of intellectual property rights and human rights.<sup>49</sup> Human rights are regarded as fundamental and essential rights for all human beings to equally enjoy.<sup>50</sup> Human rights stand for universal fairness, justice and equality in natural law theory, existing independently from positive law.<sup>51</sup> Rather than being created by legislators or politicians, human rights are justified by natural law as rights to which human beings are entitled as an indispensable part of their human nature.<sup>52</sup> Intellectual property rights are exclusive, monopolistic rights in the sense that they exclude or prevent others from using or exploiting the subject matter of the right

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<sup>47</sup> E.S Nwauche, 'Human Rights-Relevant Considerations in Respect of IP and Competition Law' (2005) 2(4) *SCRIPTed*.

<sup>48</sup> Farida Shahee, "Copyright policy and the right to science and culture," Report of the Special Rapporteur in the field of cultural rights, United Nations Human Rights Council. Doc. A/HRC/28/57, 7.

<sup>49</sup> Paul Torremans, 'Is Copyright a Human Right?' (2007) 2007(Spring) *Michigan State Law Review* 287.

<sup>50</sup> See further R. M Luke, 'Fundamental Human Rights - The Product of Reason' (1970) 6 *Bracton Law Journal* 1; Jack Donnelly, *Universal human rights in theory and practice* (Cornell University Press, 2<sup>nd</sup> ed, 2003); David Weissbrodt and Kell Schoff, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7' (2003) 5 *Minnesota Intellectual Property Review*.

<sup>51</sup> David Reidy, 'Philosophy and Human Rights: Contemporary Perspectives' in Claudio Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer, 2012) 23.

<sup>52</sup> Luke, above n 49.

without the authorisation of its creator, usually for a specified period of time.<sup>53</sup> They are positive legal rights vested and created by statutory law.<sup>54</sup> Chapman believes that intellectual property rights are ‘instrumental rights’ which serve the realisation of fundamental rights, and should be consistent with the realisation of human rights.<sup>55</sup> The United Nations Committee on Economic, Social and Cultural Rights in its General Comments 17 has clarified the fundamental differences between intellectual property rights and human rights, and addressed the importance of not equating these two types of rights.<sup>56</sup>

A variety of scholars have also examined the merits of intellectual property rights and human rights, and held that these two kinds of rights are divergent. One of the leading scholars is Drahos who argues that ‘the exploitation of information through the exercise of intellectual property rights affects interests that are the subject of human rights claims.’<sup>57</sup> Drahos notes that property rights by their nature allow the rights holder to exclude others from utilising intellectual resources, including those with fundamental human rights interests, and therefore they are likely to produce conflicts between rights.<sup>58</sup> In detailed discussions, Nagan,<sup>59</sup> Dreyfuss<sup>60</sup> and Hristova<sup>61</sup>

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<sup>53</sup> David Price et al, *Intellectual Property: Commentary and Materials* (Thomson Reuters, 5<sup>th</sup> ed, 2012).

<sup>54</sup> Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Limited, 2007), 151.

<sup>55</sup> Chapman, above n 41.

<sup>56</sup> United Nations. 2005. General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant). UN Doc. E/C.12/GC/1712.

<sup>57</sup> Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, available online at <<http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>>.

<sup>58</sup> Ibid.

<sup>59</sup> Nagan, above n 11.

<sup>60</sup> Rochelle Cooper Dreyfuss, 'Patents and Human Right: Where is the paradox?' in Willem Grosheide

discuss the protection on patent drugs that prevents unauthorised medicine production and may sacrifice people's opportunity to receive effective medical treatment in developing countries.; Schutter,<sup>62</sup> and Tansey and Rajotte<sup>63</sup> express concern that the privatisation of patented agricultural resources results in higher costs and limited choice for farmers in developing countries to acquire seeds, which has implications for the right to food. Kapczynski,<sup>64</sup> and Finger and Schuler<sup>65</sup> realize that the author's exclusive control over artistic, literary and scientific works hinders other people's access to knowledge and right to education. The protection of copyright further prevents producing and distributing accessible format copies for persons with a print disability without acquiring the author's authorisation and paying them a royalty. This restriction constitutes a barrier for the print disabled to have equal access to information and knowledge, and to fully participate in the society.

## **B. Theoretical frameworks to reconcile intellectual property rights and human rights**

The issue of how to effectively resolve the conflict between the protection of intellectual property rights and the assurance of human rights has been a topic of extensive scholarly discussion. Helfer's theoretical model summarises three hypothetical frameworks, including a) using human rights to expand intellectual

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(ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010).

<sup>61</sup> Hristova, above n 11.

<sup>62</sup> Olivier De Schutter, 'Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation' (2009).

<sup>63</sup> Tansey and Rajotte, above n 12.

<sup>64</sup> Amy Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) *117 Yale Law Journal*.

<sup>65</sup> Finger and Schuler, above n 13.

property protection standards at the expense of other human rights and the interests of licensees, users, and consumers; b) using human rights to impose external limits on intellectual property by increasing the number of new treaties and soft law standards that contain precise, subject-specific limits on intellectual property; and c) achieving human rights ends through intellectual property means by firstly specifying the minimum outcomes that human rights law requires and secondly identifying different mechanisms available to achieve those outcomes.<sup>66</sup> Helfer believes that the first framework carries the risk that industries and interest groups will invoke the property provisions in human rights treaties to further augment existing standards of protection. In terms of the second framework, he worries that a surfeit of conflicting rules will further diminish the system's coherence. This might make international rules less amenable to incorporation into national law.<sup>67</sup> Helfer personally is in favour of the third framework, which emphasizes human rights values, and regards intellectual property as a tool to realise human rights outcomes.<sup>68</sup> Helfer's theory emphasises the importance of human rights, and requires intellectual property to sacrifice and safeguard human rights values.

In addition to Helfer's theory, the theory of Yu also assists in reconciling intellectual property rights and human rights. Yu discusses three complementary approaches to determine the extent to which the intellectual property right holder's interest should

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<sup>66</sup> Laurence R. Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 *University of California, Davis*,

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, see also Margaret Chon, 'Intellectual Property and the Development Divide' (2006) 27 *Cardozo Law Review* 75.

be compromised. These three approaches include a) the just remuneration approach, in terms of which the court grants free access to a work with paying economic compensation to right holders; b) the core minimum approach, in terms of which states will not violate human rights if the protection of intellectual property rights already exceeds what is required under their core minimum obligation for human rights, and if they can offer compelling evidence of the competing demands of other human rights obligations; and c) the progressive realisation approach, in terms of which states will undertake their best efforts based on the availability of resources to comply with all of their obligations under human rights instruments.<sup>69</sup> Yu believes that these three approaches are not mutually exclusive and can be applied together. Yu's approaches can assist the examination of the current practice of a specific country, and used to guide the reform of national law.

A number of scholars support Helfer and Yu, and prioritise human rights when resolving the conflicts between intellectual property rights and human rights. For example, Chon also believes that intellectual property rights and human rights can be reconciled, and that the goal of a truly inclusive international intellectual property law should be the enhancement of human freedom and capabilities through knowledge goods.<sup>70</sup> She argues that intellectual property instruments, rather than focusing strictly on utilities, income, growth, or even developing innovation capacity, should also consider how intellectual property play a role in facilitating access to basic

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<sup>69</sup> Peter K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40 *University of California, Davis*.

<sup>70</sup> Chon, above n 67.



education, food security and healthcare.<sup>71</sup> Specifically in the field of cultural rights to freely participate in cultural life, enjoy the arts and share scientific advancement, Farida Shaheed, the UN Special Rapporteur, believes that cultural rights can be reconciled with copyright and patent policy. She criticises copyright laws for unnecessarily limiting cultural freedom and participation. She argues that states have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations so as to honour their human rights obligations.<sup>72</sup> Farida suggests including human rights impact assessments in international copyright instruments so as to safeguard cultural rights.<sup>73</sup>

### **C. Copyright exceptions and limitations**

Existing literature does not at present disclose a universally adopted mechanism for the design of copyright exceptions or limitations to facilitate access to copyright works for persons with a print disability. Sullivan provides an overarching analysis of copyright exceptions and limitations embodied in international treaties and national laws for the visually impaired.<sup>74</sup> She has done far-ranging work in her research to collect and analyse national laws of 58 different countries. Her work reveals that countries have dramatically different arrangements in their national laws as to whether and to what extent a copyright exception or limitation applies. This work

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<sup>71</sup> *ibid*, 2828.

<sup>72</sup> Farida Shaheed, 'Copyright policy and the right to science and culture,' 2014 Report of the Special Rapporteur in the field of cultural rights, United Nations Human Rights Council. A/HRC/28/57, 10.

<sup>73</sup> *ibid*, 19.

<sup>74</sup> Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired,' (2007) WIPO Doc SCCR/15/7.

mainly serves as background information for WIPO's diplomatic meetings and discussions. It is predominantly empirical research with little attention being paid to theoretical analysis. Shaheed believes that copyright exceptions or limitation mechanisms could be used to reconcile copyright protection with the right to science and culture and other human rights.<sup>75</sup> Shaheed recognises the problem that most international copyright treaties treat copyright protection as mandatory, while treating exceptions and limitations as optional.<sup>76</sup>

The critical issue of the discussion is to what extent copyright exceptions and limitations should apply. Peltz observes that legal and technological developments have shifted the copyright balance to favour the property rights of copyright holders over the free expression rights of content users.<sup>77</sup> Peltz proposes to exploit present legal and technological circumstances, and to press for a well-crafted public interest doctrine that cuts across the now common array of context-dependent copyright exceptions.<sup>78</sup> Ku proposes to expand the scope of exceptions and limitations especially on encryption research area.<sup>79</sup> Dnes believes that it is possible to move the UK closer to a position allowing courts to accept a claim of fair use as a general defence to a claim of copyright infringement.<sup>80</sup> Syrtash however makes the criticism that the further expansion of the Canadian Copyright Act to radio broadcast would be

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<sup>75</sup> Shaheed, above n 71, 19.

<sup>76</sup> Ibid, 20.

<sup>77</sup> Richard Peltz, 'Global Warming Trend - The Creeping Indulgence of Fair Use in International Copyright Law' (2009) 17(2) *Texas Intellectual Property Law Journal* 267.

<sup>78</sup> Ibid, 268.

<sup>79</sup> Vicky Ku, 'Critique of the Digital Millennium Copyright Act's Exception on Encryption Research: Is the Exemption too Narrow' (2004) 7(2) *Yale Journal of Law and Technology* 465.

<sup>80</sup> Antony Dnes, 'Should the UK Move to a Fair-Use Copyright Exception?' (2013) 44(4) *IIC - International Review of Intellectual Property and Competition Law* 418.

in breach of Canada's international obligation to intellectual property treaties as well as the three-step test.<sup>81</sup>

The three-step test, widely accepted as the pre-condition for copyright exceptions and limitations, has been criticised. Howse thinks the test is overly restrictive in favour of copyright owners instead of benefiting the user.<sup>82</sup> Geiger, Gervais and Senftleben argue that the three-step test is insufficiently deferential to other societal and governmental interests.<sup>83</sup> Ayoubi further argues that the three-step test framed in current international law may not be fully conducive to the provision of access to copyright works for the print disabled.<sup>84</sup> Vezzoso specially raised the concern that the Marrakesh Treaty may be used either to expand or to reduce the reach of the 'still largely controversial test', and may impair the entire intellectual property system.<sup>85</sup>

#### **D. The Merits of the Marrakesh Treaty**

The Marrakesh Treaty has been the subject of extensive scholarly analysis both before and after its adoption. Prior to the finalisation and adoption of this treaty, Kongolo introduced issues and the progress of the proposed treaty under the negotiation in the

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<sup>81</sup> Veronica Syrtash, 'Supra-National Limitations on Copyright Exceptions: Canada's Ephemeral Exception and the "Three-Step Test"' (2006) 19(3) *Intellectual Property Journal* 521.

<sup>82</sup> Robert Howse, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2010) 3(4) *The Journal of World Intellectual Property* 493.

<sup>83</sup> Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *American University International Law Review* 581.

<sup>84</sup> Lida Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) *New Zealand Journal of Public and International Law* 255

<sup>85</sup> Simonetta Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 796.

WIPO.<sup>86</sup> Nwanko discussed the proposed treaty's compatibility with the three-step test and with the European Union Copyright Law.<sup>87</sup> Williams was positive on the final adoption of a copyright treaty for visually impaired persons and intellectual property.<sup>88</sup> Patrick, however, was worried that an international treaty was inadequate and unnecessary, and she suggested drafting a model law as an alternative solution.<sup>89</sup> Her worries were proved to be unfounded as the Marrakesh Treaty was adopted in 2013.

After the adoption of the Marrakesh Treaty, Lewis and Wechsler separately introduced this treaty for people to have a better understanding of its merits.<sup>90</sup> Scholars proposed amendments to their national copyright laws so as to fulfill their countries' obligations under the Marrakesh Treaty. For example, Cameron, Wood and Suzor submitted a consultation paper regarding the adoption of the Marrakesh Treaty to the Australian Attorney-General's department.<sup>91</sup> Fitzpatrick argues that the

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<sup>86</sup> Tshimanga Kongolo, 'Towards an International Legal Instrument on Exceptions and Limitations to Copyright for Visually Impaired Persons/Persons With Print Disabilities : Current International Negotiations' (2012) 34(12) *European Intellectual Property Review* 823.

<sup>87</sup> Iheanyi Samuel Nwanko, 'Proposed WIPO Treaty for Improved Access for Blind, Visually Impaired, and Other Reading Disabled Persons and Its Compatibility with TRIPS Three-Step Test and EU Copyright Law' (2011) 2 *jipitec*.

<sup>88</sup> Sean Williams, 'Closing in on the Light at WIPO: Movement towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements' (2012) 33(4) *University of Pennsylvania Journal of International Law* 1035.

<sup>89</sup> Patrick Hely, 'A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO' (2010) 43 *Vanderbilt Journal of Transnational Law* 1369.

<sup>90</sup> See further Hope Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2013) 52(6) *International Legal Materials* 130; Andrea Wechsler, 'WIPO's Global Copyright Policy Priorities: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2015) 6 *European Yearbook of International Economic Law* 391.

<sup>91</sup> Natalie Cameron, Suzannah Wood, and Nicolas Suzor, *Submission to the Attorney-General's Department consultation on "Marrakesh Treaty options for implementation" discussion paper*, available at <<http://eprints.qut.edu.au/79122/1/2014-QUTIP-AGD-Marrakesh.pdf>>.

Marrakesh Treaty is not a comprehensive solution, but that it can be used as a vehicle to modernise national copyright law in the United States.<sup>92</sup> Yang suggests that China should encompass related provisions of the Marrakesh Treaty during the ongoing amendment of its copyright law.<sup>93</sup> Bram discussed how the Marrakesh Treaty should be implemented in South African copyright law in his dissertation.<sup>94</sup>

Specific issues of the Marrakesh Treaty such as its enforceability, effectiveness and compliance with national laws have been discussed extensively. Kaminski and Yanisky-Ravid discuss the binding power of this treaty, and hold the view that the Marrakesh Treaty should be in the form of a treaty instead of being a soft law, because developing countries have to implement this binding instrument and visually impaired persons most in need will be benefitted.<sup>95</sup> Harpur and Suzor believe that countries may be influenced by their political interests to decide whether to adopt and ratify this treaty. They argue that it is no longer technology or cost, but political will, that prevents access.<sup>96</sup> Vezzoso introduced the debate on the controversial three-step test during the drafting of the Marrakesh Treaty and concludes that this test is capable

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<sup>92</sup> Shae Fitzpatrick, 'Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities' (2014) (37) *Boston College International & Comparative Law Review* 139.

<sup>93</sup> 曹阳 [Cao Yang, 'The Marrakesh Treaty and the Amendment of Chinese Copyright Law' , 2013(9) *Intellectual Property Journal*, 81.

<sup>94</sup> Bram Van Wiele, *The ratification and implementation of the Marrakesh Treaty: a look at the future of South African Copyright Law* (LL.M. Thesis, UNIVERSITY OF CAPE TOWN, 2014) <[https://open.uct.ac.za/bitstream/item/14069/thesis\\_law\\_2014\\_van\\_wiele\\_b.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14069/thesis_law_2014_van_wiele_b.pdf?sequence=1)>.

<sup>95</sup> Margot Kaminski and Shlomit Yanisky-Ravid, 'The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law' (2014) (75) *University of Pittsburgh Law Review* 255.

<sup>96</sup> Paul Harpur and Nicolas Suzor, 'Paradigm Shifts and Practical Benefits to Persons with Print Disabilities: Reforms to Anti-Discrimination and Copyright Laws' (2013) (3) *University of New South Wales Law Journal* 36.

of enough flexibility for the ‘Marrakesh miracle’ to take place.<sup>97</sup> Trimble discussed three possible sources for implementing the cross-border exchange provision, and concluded that a suitable method of implementing the cross-border exchange may consist of a combination of appropriately-selected rules for choice of applicable law and rules for labeling.<sup>98</sup> Cox discussed the impact the Marrakesh Treaty has on libraries, especially in a digital era.<sup>99</sup> Sloan and Horton proposed to create an organisational web accessibility policy so to promote print disabled persons’ access to the Internet.<sup>100</sup>

In conclusion, there has been extensive discussion on the conflicts between copyright and human rights, as well as the merits of copyright exceptions and of the Marrakesh Treaty. However, previous works have not properly exploited the theory of reconciling conflicts between human rights and copyright to evaluate the current copyright exception mechanism for persons with a print disability. Nor did the previous work provide a comprehensive analysis of the merits of the treaty and propose suggestions for further refinement of the treaty.

## **V Significance of the Thesis**

As discussed in the literature review, previous work does not comprehensively

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<sup>97</sup> Vezzoso, above n 84.

<sup>98</sup> Marketa Trimble, 'The Marrakesh Puzzle' ( 2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 768.

<sup>99</sup> Krista Cox, 'International Copyright Developments: From the Marrakesh Treaty to Trade Agreements' (2015) (285) *Research Library*.

<sup>100</sup> David Sloan and Sarah Horton, 'Global considerations in creating an organizational web accessibility policy' (Paper presented at the 11th Web for All Conference, 2014) <<http://dl.acm.org/citation.cfm?id=2596709>>.

analysis the merits and evaluate the effectiveness of the copyright exception mechanism for persons with a print disability. This thesis aims to fill this gap by examining the theoretical justification, conditions, scope and regulatory mechanism of copyright exceptions and limitations for persons with a print disability. The thesis analyses the stated issues under the mechanism established by a number of international intellectual property treaties, especially the Marrakesh Treaty. It accordingly provides a comprehensive evaluation of the treaties, and identifies the deficiencies of the existing international regulatory framework. The thesis provides an overarching analysis of national copyright laws, and recognises that the divergent national regulation on copyright exceptions or limitations constitutes a barrier to the implementation of the Marrakesh Treaty and cooperation among countries. Based on these findings, the thesis provides suggestions for refining the Marrakesh Treaty, as well as reforming national laws. The suggestions are directed to establishing an improved copyright exceptions or limitations mechanism that facilitates access to works for persons with a print disability. In particular, previous literature did not thoroughly discuss the impact digital technology has on the copyright exception and limitation system. This thesis devotes an article to discussing the challenges and opportunities brought by digital technology, and provides recommendations for refinements of the copyright exception regulatory framework in the digital era.

Apart from that, this thesis is distinctive in that it adopts the theoretical framework regarding reconciling and balancing intellectual property rights and human rights to justify, supervise and evaluate the discussed copyright exception and exception

mechanism. The theory of balancing and reconciling intellectual property rights and human rights indicates that the paramount value of the discussed copyright exception mechanism is to safeguard the access to copyright works for persons with a print disability as their human right. What is more, to correctly balance interests of copyright holders and access to works for the print disabled, the thesis for the first time tries to positively answer the question as to what extent copyright exceptions and limitations should apply. It considers three elements: the assurance of equal access to copyright works, the appropriate sacrifice of copyright holders' interests safeguarded by the three-step test, and the extent of national copyright law compliance with international standards. The mentioned criteria can assist in the evaluation of the effectiveness of the copyright exceptions and limitations mechanism for researchers in the future.

Another highlight of this thesis is that it provides an overarching analysis of national copyright laws regarding exceptions or limitations for persons with a print disability. The thesis examines and summarises the types and merits of copyright exceptions or limitations in around 58 countries, and identifies the gap between national copyright laws and the Marrakesh Treaty. The author also provides detailed examination of Australian and Chinese copyright laws. It will contribute to the existing literature because no study as yet has comprehensively analysed the discussed regulatory framework in these two countries. Studies on the two countries propose guidelines to which contracting parties of the Marrakesh Treaty can refer. The case study on the Australian *Copyright Act 1968* reveals that even when a country has already



established a well-designed mechanism of copyright exceptions or limitations for the print disabled, such a country may still need to review and reform their national laws so as to meet the requirements of the Marrakesh Treaty. The study of Chinese copyright laws demonstrates that a country should actively reform their national copyright laws using the Marrakesh Treaty as a template when copyright exceptions or limitations for the print disabled are substantially inadequate.

In addition to regulatory analysis, the thesis has socio-academic significance as it contributes to promoting equal access to information and knowledge embodied in copyright works for persons with a print disability. Intellectual property rights expand and contribute to social and cultural development.<sup>101</sup> However, a significant number of people, who are financially disadvantaged, cannot enjoy the benefit and welfare intellectual property products bring, because they cannot afford these products with their relatively high prices resulting from intellectual monopoly.<sup>102</sup> As the United Nations Committee on Rights of Persons with Disabilities states, '[p]ersons with disabilities are still often "invisible" in society...They are denied their rights to be included in the general school system... to participate in sport and cultural activities...to live in an accessible built and technological environment.'<sup>103</sup> In particular, persons with print disabilities are disadvantaged because of the insufficiency of reading and learning material. Only 7% of published books are made

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<sup>101</sup> D.J. Gervais, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007).

<sup>102</sup> Micheal Finger and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Oxford University Press, 2004).

<sup>103</sup> United Nations Committee on the Rights of Persons with Disabilities, *Human Rights of persons with disabilities* United Nations Human Rights  
<<http://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx>>.

in accessible formats in developed countries, and the number is less than 1% in developing countries.<sup>104</sup> This thesis provides recommendations to refine the copyright exception and limitation mechanism so as to facilitate access to copyright works. It therefore will benefit 39 million blind people, as well as 246 million people with other visual impairments in the world.<sup>105</sup> What is more, access to information and knowledge conveyed in copyright works is the basis for persons with print disabilities to equally enjoy freedom of speech, to receive proper education, to participate in cultural life and to realise other basic human rights. This thesis therefore contributes to ensuring the equal entitlement to human rights, and assists in providing equal opportunities for persons with a print disability.

## **VI Methodology**

This study primarily takes the form of doctrinal research, which involves analysing legal doctrine, judging terms, provisions and mechanisms established by the Marrakesh treaty and other international instruments, as well as examining national legal frameworks so as to evaluate the effectiveness of the current copyright exceptions for the print disabled and provide suggestions for further copyright reforms.

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<sup>104</sup> World Blind Union, *June 17 Press Release for WIPO Book Treaty* (20 April 2013) <<http://www.worldblindunion.org/English/news/Pages/June-17-Press-Release-for-WIPO-Book-Treaty.aspx>>.

<sup>105</sup> World Health Organization, *Universal Access to Eye Health Can Save Millions from Losing Their Sight and Can Boost the Global Economy - World Sight Day 11 October 2012* (9 October 2012) <<http://www.emro.who.int/press-releases/2012/world-sight-day-2012.html>>.

Article 1<sup>106</sup> establishes the theoretical framework of this thesis. It introduces and analyses legal theories concerning the relationship between copyright and human rights and how to reconcile the conflicts between them. This part of the thesis is interdisciplinary in that it combines and evaluates theories of both intellectual property rights and human rights. Scholarship derived from monographs, edited books, theses and journal articles is introduced to analyse the existence and justifications of intellectual property rights and human rights, as well as the theoretical hierarchy of these two types of rights. The study concludes that the optimal way of balancing intellectual property rights and human rights is to adopt the three-step test to evaluate these two interests, and in most cases to sacrifice intellectual property rights and assure the realisation of the most fundamental human rights when there is a conflict. The “three-step test” balancing copyright protection and access to works for persons with a print disability and the extensive scholarly literature discussing the test is used as the basis for the theoretical framework of the thesis. The framework is applied to evaluate the effectiveness of the Marrakesh Treaty and the current national regulatory practices in reconciling the copyright holder’s interests and the access to copyright works by persons with a print disability.

These evaluations are then discussed in detail in Article 2, Article 3, Article 5 and Article 6.

After establishing the theoretical framework, the thesis then provides a thorough

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<sup>106</sup> From Theoretical Discourse to Practice: Marrakesh on Balancing Intellectual Property Rights and Human Rights.

analysis on the Marrakesh Treaty and national copyright exceptions and limitations. Article 3<sup>107</sup> is primarily a descriptive introduction regarding the international copyright exception mechanism established by the Marrakesh Treaty and a number of international intellectual property instruments. It involves analysing the background, and legal doctrine of the Marrakesh treaty. It then provides an explanation and examination of the terms, provisions and mechanisms of the treaty. In addition, international instruments of the United Nations, the World Trade Organization and the World Intellectual Property Organization are presented as important sources for argument.

The comparative element is highlighted in this study. By comparing the Marrakesh Treaty with other international treaties, it is indicated that the Marrakesh Treaty is in compliance with the existing international copyright exceptions system, and that it improves on the previous mechanism by a more nuanced and explicit design. Article 2<sup>108</sup> focuses on comparing the Marrakesh Treaty with national legislation and legal practices in a number of countries. It provides an overview of copyright exceptions currently over the world. Special attention is given to China and Australia. The divergencies between different countries, as well as the gap between the Marrakesh Treaty and its Member States' national practices could demonstrate the willingness of

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<sup>107</sup> Jingyi Li, Niloufer Selvadrai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) *European Intellectual Property Review* 653.

<sup>108</sup> Jingyi Li, Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty, (2014) 45(7) *International Review of Intellectual Property and Competition Law* 737.

countries to ratify the treaty. More specifically, Article 5<sup>109</sup> and Article 6<sup>110</sup> study Australian copyright law and Chinese copyright law respectively, and compare the two countries' copyright exception systems with that of the Marrakesh Treaty. These two articles will contribute to evaluating the effectiveness of the Marrakesh Treaty in relation to its Member States from a more detailed and explicit perspective. The Australian *Copyright Act 1968* provides a relatively comprehensive legal system to assist persons with a print disability to have access to works protected by copyright. A study of Australian copyright law could reflect the influence of the Marrakesh Treaty on a developed country with an already well-designed legal mechanism to assure print disabled persons' access to copyright works, as well as the reaction of such a country to accepting and ratifying this treaty. In contrast, China has a huge print disabled population with limited copyright exception for them. Chinese Copyright Law only provides a single provision, stipulating that 'transliteration of a published work into Braille and publication of the work so transliterated' falls under the fair use regime.<sup>111</sup> A study of Chinese copyright laws reveals the difficulties a developing country could possibly encounter, and indicates the reaction such a country could have to the Marrakesh Treaty. Another reason to choose these two jurisdictions is that the author has conducted her Ph.D. research by cotutelle in an Australian University and a Chinese University. She has an in-depth understanding of the copyright exceptions provided by these two legal systems, which contributes to a critical analysis and a

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<sup>109</sup> Copyright Exceptions for the Print Disabled: Ensuring Australia's Compliance with the Marrakesh Treaty.

<sup>110</sup> Amending the Chinese Copyright Exception to Fulfil the Obligations of the Marrakesh Treaty.

<sup>111</sup> 《中华人民共和国著作权法》 [Copyright Law of the People's Republic of China] (People's Republic of China) National People's Congress, 1 June 1991, art 22.

thorough evaluation of the effectiveness of their respective legal practices.

This thesis also has a normative aspect, in so far as it articulates recommendations for the reform and refinement of the regulatory framework governing copyright exceptions and limitations. Based on the existing international treaties and human rights values, as well as the experiences and achievements of some countries, the author proposes recommendations to refine the Marrakesh Treaty so as to better facilitate access to copyright works by the print disabled. Article 4<sup>112</sup> specifically considers the influence of information and communication technologies on promoting the print disabled's access to copyright works. It proposes the inclusion of additional provisions regarding assisting the print disabled persons with new technologies. In Article 5 the thesis analyses provisions in the Australian *Copyright Act 1968* regarding copyright exceptions and limitations for the use of persons with a print disability, and provides suggestions for law reforms so as to better implement the Marrakesh Treaty in light of Australia having ratified the Treaty. Article 6 examines provisions of Chinese Copyright Law and relevant regulations regarding fair use for blind persons. The article recognises the gaps between the Marrakesh Treaty and the current Chinese mechanism, and suggests that China should make substantial amendments to the Chinese Copyright Law and relevant regulations so as to meet its signatory obligations to the Marrakesh Treaty and to ratify the treaty in the near future.

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<sup>112</sup> Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: Changes and opportunities in ICT era.

## **VII Structure of the Thesis**

This thesis devotes six articles to resolving the issue of how to effectively reconcile the copyright holder's interests and the access to works subject to copyright by persons with a print disability. The introduction offers a general introduction to the background, central research question, methodology and the structure of the thesis. In this chapter, what is accessibility and how to establish accessibility for disabled persons are introduced. The conflict between the copyright holder's interests and the print disabled persons' access to copyright works is generalised as a typical issue of the conflicts between intellectual property rights and human rights.

### **Article 1: From Theoretical Deliberations to Implementation: The Reconciliation of Intellectual Property Rights and Human Rights in the Marrakesh Treaty**

*This article has been submitted for publication and is awaiting the editor's decision at the time of submission of the thesis.*

Article 1 is devoted to evaluating the theoretical framework for reconciling and balancing copyright protections and print disabled persons' access to published works, thus answering the first sub-question of the thesis. This article provides a detailed literature background and establishes the theoretical framework for the following articles.

This article serves as a theoretical framework of the thesis. It develops a theoretical framework that uses the three-step test to balance the conflicts between copyright and

access to copyright works for persons with a print disability. This framework provides means for prescribing and evaluating solutions to research problems. The article analyses how the Marrakesh Treaty, based on a certain maturation in the discussion about human rights and intellectual property, reconciles these two kinds of rights by embracing human rights considerations in an intellectual property treaty, and how it tries to balance these two kinds of rights correctly and justly through the ‘three-step test’ when solving specific conflicts between copyright protection and the print disabled’s right to have access to published works. To this end, the article first examines the copyright exceptions and limitations provided in the Marrakesh Treaty. It then describes the extent to which access to information and knowledge embodied in published works affects the realisation of human rights of print disabled persons. The article discusses the nexus between intellectual property rights and human rights, as well as theoretical frameworks from different schools of thought on how to reconcile and balance intellectual property rights and human rights. Based on existing theoretical frameworks, this article examines how the Marrakesh Treaty translates the theoretical framework into an enforceable international treaty, and discusses whether it can effectively balance intellectual property rights and human rights in its particular area.

**Article 2 Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty**



This article has been published at *IIC-International Review of Intellectual Property and Competition Law*.<sup>113</sup>

This Article answers the second sub-question regarding how the Marrakesh Treaty cooperates with national copyright laws. It overviews the copyright laws of a great number of countries regarding exceptions or limitations for persons with a print disability, and defines the gap between national laws and the obligations imposed by the Marrakesh Treaty. Identifying the gaps also contributes to set up background knowledge for Article 5 and Article 6 to further discuss specific gaps between the Treaty and copyright laws in China and Australia.

The effectiveness of the copyright exception system largely depends on whether the Member States of the Marrakesh Treaty will ratify it so as to make it come into force. The journey to the passing of the *Marrakesh Treaty* was by no means linear and involved the expression of a variety of views by the member countries, displaying the divergence of views on this matter in the international context. This divergence of opinion is reflected in the vastly varying levels of support for related copyright exceptions and limitations provided in the laws of nations around the world. The *Marrakesh Treaty* will not enter into force until it has received 20 ratifications. As attention now moves to the ratification and implementation of the treaty by Member States, it will be useful to examine the nature of the gap that presently exists between national laws and the standards required by the treaty, and to thereby evaluate

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<sup>113</sup> Jingyi Li, Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty, (2014) 45(7) *International Review of Intellectual Property and Competition Law* 737.

whether and to what extent the provisions of the treaty are likely to be implemented in the national laws of the Member States.

To this end, this article begins by providing a global overview of the copyright exemptions presently in operation in various nations. Thereafter, some specific issues concerning the treaties reflected in the drafts proposed by different countries are discussed. These issues are the subject of the first two parts of the discussion. The third part outlines the ambit of the *Marrakesh Treaty* and points out issues needing further clarification. The conclusion analyses the prospects of final ratification by reference to the willingness of Member States to adapt their national copyright law to the *Marrakesh Treaty* – a willingness which may be indicated by their current legal practices and their contributions to the treaty.

**Article 3 Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled<sup>114</sup>**

*This article is co-authored with Niloufer Selvadurai and has been published in European Intellectual Property Review. Selvadurai mainly contributed to the section 'the nature and merits of the Marrakesh Treaty'.*

This article tries to answer the third sub-question, and examines whether the

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<sup>114</sup> Jingyi Li, Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) *European Intellectual Property Review* 653.

Marrakesh Treaty, together with national copyright laws that have implemented the Treaty, effectively balance copyright and accessibility. This article adopts the core theories discussed in Article 2 to evaluate the effectiveness of the Marrakesh Treaty. It also provides detailed analysis on the treaty itself for the discussion of its implement in the following articles.

This article therefore examines whether the Marrakesh Treaty effectively reaches an international consensus on designing limitations to national copyright laws and exceptions regarding accessible format copies to reconcile the enforcement of intellectual property rights and the maintenance of fundamental human rights. To begin with, the article shortly discusses the theoretical and regulatory basis of the Marrakesh Treaty. The article then outlines the nature and merits of the treaty, followed by an examination and evaluation of the merits of the treaty. After a detailed discussion, this article reveals a number of problems with the Marrakesh Treaty and provides recommendations for refinement. The article concludes that the Marrakesh Treaty articulates international minimum standards for access to published works for persons with a print disability. The range of obligations imposed by the Treaty on contracting parties, as well as the comprehensive and detailed governance framework created for the provision of material in accessible formats, will significantly enhance the well-being of the beneficiaries to the Treaty.

#### **Article 4 Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: Changes and opportunities in the ICT Era**

*This article has been published in Intellectual Property Journal.* <sup>115</sup>

This article answers Sub-question 4 concerning whether the Marrakesh Treaty responds to the opportunities and challenges brought by the digital era. The article also contributes to answering Sub-question 5, as to how to further refine the treaty so as to better fulfill its commitment to facilitate access to copyright works for persons with a print disability.

As copyright law has evolved with the development of the information and communication technologies, the effectiveness of the copyright exception mechanism is significantly affected by whether it considers new demands arising in the information era. The purpose of Article 4 is to consider whether, and if so to what extent, the omission of digital content influences the utility of the *Marrakesh Treaty* in a digital era in which information dissemination and exchange are heavily reliant on the Internet and related computer, telecommunications and broadcasting technologies. The article analyses the Marrakesh Treaty and relevant international intellectual property treaties, as well as national copyright laws that expressly confer a right on the print disabled to access digital content. It also provides a review of the debates during the protracted negotiation process of the Marrakesh treaty. This article reveals the absence of consideration in the Marrakesh Treaty to copyright works distributed through information and communication technologies. It suggests that such omissions represent significant limitations on the operation of the Treaty, and

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<sup>115</sup> Jingyi Li, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: Changes and opportunities in ICT Era', 2015(27) *Intellectual Property Journal* 355.

substantially compromise the Treaty's utility in the digital age. The article proposes that the Marrakesh Treaty could further facilitate access to copyright works for the print disabled by incorporating ICTs into its mechanisms.

## **Article 5 Copyright Exceptions for the Print Disabled: Ensuring Australia's Compliance with the Marrakesh Treaty**

*This article is co-authored with Niloufer Selvadurai. Selvadurai contributes to Section II Australian Copyright Act Governing Access to Copyright Materials for Persons with a Print disability. The article has been accepted for publication in Monash University Law Review.*<sup>116</sup>

This article tries to answer the second sub-question by examining the exceptions and limitations provided by the *Copyright Act 1968* so as to evaluate its compliance with the Marrakesh Treaty. It provides further discussion on the gaps between the Marrakesh Treaty and national copyright laws. This article also discusses possible legal reforms to the *Copyright Act 1968* so that Australia can meet its obligations under the Marrakesh Treaty. Australia is chosen because it has actively taken part in negotiating and ratifying the Marrakesh Treaty. It also demonstrates what to expect from a contracting country with an already well-designed mechanism for persons with a print disability to get access to copyright works.

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<sup>116</sup> Jingyi Li, Niloufer Selvadurai, 'Copyright Exceptions for the Print Disabled: Ensuring Australia's Compliance with the Marrakesh Treaty', 43(3) *Monash University Law Review* (upcoming).

This paper provides an overview of current copyright exceptions for the print disabled in the Australian legal system, identifies the gap between Australian copyright exceptions and the Marrakesh Treaty, analyses proposals for copyright law reform aimed at filling the gap, and presents options for further reforms to more effectively facilitate access by the print disabled to copyright works. Overall, the *Copyright Act 1968* has already provided a well-designed mechanism for persons with a print disability to get access to copyright works. Nevertheless, the current copyright exception system has a number of problems impeding its effectiveness. To overcome these problems, as well as to fulfill Australia's international obligations under the Marrakesh Treaty, the ALRC and the Attorney-General's Department have proposed reforms to the Copyright Act. It is contended that the copyright exception mechanism for the print disabled will be dramatically improved by adopting the law reform proposals suggested by the ALRC and the Attorney-General's department. The article further suggests that the blueprint for a copyright exception scheme would better serve the print disabled if additional issues were considered.

#### **Article 6 Amending the Chinese Copyright Exception to Fulfil the Obligations of the Marrakesh Treaty**

*This article has been submitted for publication and is awaiting the editor's decision at the time of thesis submission.*

This article tries to answer the second sub-question by comparing the Marrakesh Treaty with the exceptions and limitations provided by Chinese Copyright Law and

relevant regulations. It furthers the discussion on Article 2 and Article 5 by demonstrating a large gap between the Chinese copyright exception mechanism and the requirements of the Marrakesh Treaty. It concludes that legal reform is necessary for China to meet its signatory obligation to the Marrakesh Treaty. This article demonstrates that a Marrakesh Contracting Country currently with insufficient consideration to persons with a print disability should substantially reform its national copyright law so as to fulfil the obligation imposed by the Marrakesh Treaty.

China became a signatory party to the Marrakesh Treaty in 2013. It would be significant if China were to ratify the Marrakesh Treaty because China has a huge population with print disabilities. In China, there are 75.512 million people with visual impairment, including 8.248 million who are blind and 67.246 million who have low vision.<sup>117</sup> The present copyright exception available for persons with a print disability in Chinese Law is, however, extremely restricted and old-fashioned, leaving a gigantic gap for China to fulfill its obligation as a signatory country of the Marrakesh Treaty. The objective of this article is to evaluate the effectiveness of Chinese copyright exceptions for the print disabled, and propose options for amendments for China so as to fulfil its signatory obligation. To this end, the paper firstly provides an overview of China's copyright exception arrangements for the print

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<sup>117</sup> World Health Organization, Global Data on Visual Impairments 2010, p 5, available at <<http://www.who.int/blindness/GLOBALDATAFINALforweb.pdf?ua=1>>. According to the statistics provided by the Chinese government, there are 12.63 million visually disabled persons in China by the year 2010. 中国残疾人联合会 [The China Disabled Persons' Federation], 《2010 年末全国残疾人总数及各类、不同残疾等级人数》 [Populations of People with Disabilities by 2010], 中国残疾人联合会网站 [The China Disabled Persons' Federation Website], 26 June 2012 <[http://www.cdpf.org.cn/sytj/content/2012-06/26/content\\_30399867.htm](http://www.cdpf.org.cn/sytj/content/2012-06/26/content_30399867.htm)>. Both of the two data are estimated based on sample surveys.

disabled, and identifies the gap between Chinese copyright laws and the Marrakesh Treaty. It then analyses previous proposals on copyright law reform., Based on the discussion above, the paper proposes options for legal reform of Chinese copyright laws.



## References

《中华人民共和国著作权法》 [Copyright Law of the People's Republic of China]

(People's Republic of China) National People's Congress, 1 June 1991

*Charter of the United Nations* Preamble.

Committee on Economic, Social and Cultural Rights, *Persons with Disabilities*, CESCR General comment 5, 11<sup>th</sup> sess (9 December 1994).

*Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, Annex I (entered into force 3 May 2008)

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 as amended by Protocols Nos. 11 and 14 (entered into force on 3 September 1953)(ECHR).

*Disability Discrimination Act 1992* (Cth) s 4.

Human Rights Committee, *Specific Groups and Individuals Mass Exodus and Displaced Persons: Report of the High Commissioner for Human Rights on human rights and mass exodus*, 61<sup>st</sup> sess, UN Doc E/CN.4/2005/80/Add.1(31 January 2005).

International Standards Organization, *Ergonomics of human-system interaction -- Part 171: Guidance on software accessibility*, ISO 9241-171:2008 (6 January 2012)

<[http://www.iso.org/iso/home/store/catalogue\\_ics/catalogue\\_detail\\_ics.htm?csnumber=39080](http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=39080)>

*Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WTO Doc VIP/DC/8 ( 27 June 2013)

Panel Report, *United States – Section 110(5) of The US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000)

United Nations Committee on the Rights of Persons with Disabilities, *Human Rights of persons with disabilities* United Nations Human Rights  
<<http://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx>>

World Blind Union, *June 17 Press Release for WIPO Book Treaty* (20 April 2013)  
<<http://www.worldblindunion.org/English/news/Pages/JUNE-17-Press-Release-for-WIPO-Book-Treaty.aspx%3E>.

World Health Organization, *Guidance on Ethics And Equitable Access to HIV Treatment and Care*, 2004  
<[http://www.who.int/ethics/en/ethics\\_equity\\_HIV\\_e.pdf%3E](http://www.who.int/ethics/en/ethics_equity_HIV_e.pdf%3E).

World Health Organization, *Universal Access to Eye Health Can Save Millions from Losing Their Sight and Can Boost the Global Economy - World Sight Day 11 October 2012* (9 October 2012)

<<http://www.emro.who.int/press-releases/2012/world-sight-day-2012.html>%3E.

Adama, Alison and David Kreps, 'Disability and Discourses of Web Accessibility' (2009) 12(7) *Information, Communication & Society* 1041

Aufderheide, Patricia and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press, 2011)

Ayoubi, Lida 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) *New Zealand Journal of Public and International Law* 255

Bradshaw, David 'Making books and other copyright works accessible, without infringement, to the visually impaired : a review of the practical operation of the applicable, and recently enacted, UK legislation' (2005) (4) *Intellectual property quarterly* 335

Brownlee, Kimberley and Adam Cureton (eds), *Disability and Disadvantage* (Oxford University Press, 2009)

Cancik, Hubert, "'Dignity of Man" and "personal" in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105–107' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002) 19

Chapman, Audrey R. , 'Approaching Intellectual Property as a Human Right:

Obligations Related to Article 15 (1) (c)' in Evgueni Guerassimov (ed), *Approaching Intellectual Property as a Human Right* (UNESCO Publishing, Digital version ed, 2001) vol Copyright Bulletin, 4

Church, Richard and James Marston, 'Measuring Accessibility for People with a Disability' (2003) 35(1) *Geographical Analysis* 83

Cox, Krista, 'International Copyright Developments: From the Marrakesh Treaty to Trade Agreements' (2015) (285) *Research Library*

Dnes, Antony, 'Should the UK Move to a Fair-Use Copyright Exception?' (2013) 44(4) *IIC - International Review of Intellectual Property and Competition Law* 418

Donnelly, Jack, *Universal human rights in theory and practice* (Cornell University Press, 2<sup>nd</sup> ed, 2003)

Duncan, Alan and Alfred Michael Dockery, 'Falling through the cracks: Poverty and disadvantage in Australia' (2014)

<[http://espace.library.curtin.edu.au/webclient/StreamGate?folder\\_id=0&dvs=1440118944756~724&usePid1=true&usePid2=true](http://espace.library.curtin.edu.au/webclient/StreamGate?folder_id=0&dvs=1440118944756~724&usePid1=true&usePid2=true)>

Finger, Micheal and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Oxford University Press, 2004)

Fitzpatrick, Shae, 'Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilitie' (2014) (37) *Boston*

Foster, Deborah and Victoria Wass, 'Disability in the Labour Market: An Exploration of Concepts of the Ideal Worker and Organisational Fit that Disadvantage Employees with Impairments' (2012) 47(4) *Sociology*

Geiger, Christophe, Daniel Gervais and Martin Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *American University International Law Review* 581

Ginsburg, Jane C., 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' (2001) (January) *Revue Internationale du Droit d'Auteur*

Golledge, Reginald, 'Disability, disadvantage, and discrimination: An overview with special emphasis on blindness in the USA' in Antoine Bailly and Lay Gibson (eds), *Applied Geography A World Perspective* (Springer Science+Business Media, 2004) vol 77, 213

Hely, Patrick, 'A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO' (2010) 43 *Vanderbilt Journal of Transnational Law* 1369

Howse, Robert, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2010) 3(4) *The Journal of World Intellectual Property* 493

Jaeger, Paul and Cynthia Bowman, *Understanding Disability: Inclusion, Access, Diversity, and Civil Rights* (Praeger Publishers, 2005)

Jenkins, Stephen and John Rigg, 'Disability and Disadvantage: Selection, Onset, and Duration Effects' (2004) 33(3) *Journal of Social Policy*

Kaminski, Margot and Shlomit Yanisky-Ravid, 'The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law' (2014) (75) *University of Pittsburgh Law Review* 255

Kapczynski, Amy 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 *The Yale Law Journal* 804

Krikorian, Gaëlle and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (MIT Press, 2010)

Ku, Vicky, 'Critique of the Digital Millenium Copyright Act's Exception on Encryption Research: Is the Exemption too Narrow' (2004) 7(2) *Yale Journal of Law and Technology* 465

Leonard, Claire 'Copyright, Moral Rights and the First Amendment: The Problem of Integrity and Compulsory Speech' (2012) 35 *Columbia Journal of Law & the Arts*

Lewis, Hope, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2013) 52(6) *International Legal Materials* 1309

Luke, R. M, 'Fundamental Human Rights - The Product of Reason' (1970) 6 *Bracton Law Journal* 13

Netanel, Neil Weinstock *Copyright's Paradox* (Oxford University Press, 2008)

Peltz, Richard, 'Global Warming Trend - The Creeping Indulgence of Fair Use in International Copyright Law ' (2009) 17(2) *Texas Intellectual Property Law Journal* 267

Prasad, Akhil and Aditi Agarwala, *Copyright Law Desk Book: Knowledge, Access & Development* (Universal Law Publishing, 2009)

Price, David et al, *Intellectual Property: Commentary and Materials* (Thomson Reuters, 5<sup>th</sup> ed, 2012)

Reidy, David, 'Philosophy and Human Rights: Contemporary Perspectives' in Claudio Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer, 2012) 23

Ricketson, Sam, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies Ltd, 2002)

Ritchie, Heather, 'The promise of the Internet for disability: a study of on-line services and web site accessibility at Centers for Independent Living' (2003) 21(1)

Schutter, Olivier De 'Seed policies and the right to food: Enhancing agrobiodiversity, encouraging innovation' (2009)

Sloan, David and Sarah Horton, 'Global considerations in creating an organizational web accessibility policy' (Paper presented at the 11th Web for All Conference, 2014)  
<<http://dl.acm.org/citation.cfm?id=2596709>>

Syrtash, Veronica, 'Supra-National Limitations on Copyright Exceptions: Canada's Ephemeral Exception and the "Three-Step Test"' (2006) 19(3) *Intellectual Property Journal* 521

Thomas, Nicole M., 'An Education: The Three-Step Test for Development' (2012) 34(4) *European Intellectual Property Review* 244

Torremans, Paul (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Limited, 2007)

Torremans, Paul, 'Is Copyright a Human Right?' (2007) 2007(Spring) *Michigan State Law Review* 287

Trimble, Marketa 'The Marrakesh Puzzle' ( 2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 768

Tussey, Deborah, 'From Fan Sites to Filesharing: Personal Use in Cyberspace' (2001)



Van Wiele, Bram, *The ratification and implementation of the Marrakesh Treaty: a look at the future of South African Copyright Law* (LL.M. Thesis, UNIVERSITY OF CAPE TOWN, 2014)

<[https://open.uct.ac.za/bitstream/item/14069/thesis\\_law\\_2014\\_van\\_wiele\\_b.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14069/thesis_law_2014_van_wiele_b.pdf?sequence=1)>

Vezzoso, Simonetta 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 796

Webb-Mitchell, Brett, *Beyond Accessibility: Toward Full Inclusion of People with Disabilities in Faith Communities* (Church Publishing, 2010)

Wechsler, Andrea 'WIPO's Global Copyright Policy Priorities: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2015) 6 *European Yearbook of International Economic Law* 391

Williams, Sean 'Closing in on the Light at WIPO: Movement towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements' (2012) 33(4) *University of Pennsylvania Journal of International Law* 1035

Yang, Cao, 'The Marrakesh Treaty and the Amendment of Chinese Copyright Law'

Belotsky, Lydia, 'Human Rights and Intellectual Property' (1997) 13 *The Aviv*

Chon, Margaret, 'Intellectual Property and the Development Divide' (2006) 27

*Cardozo Law Review*

Commbe, Rosemary J., 'Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998-1999) 6 *Global Legal Studies Journal*

Gana, Ruth L., 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 *Law & Policy*

Gathii, James Thuo, 'Rights, Patents, Markets and the Global Aids Pandemic' (2001-2002) 14 *Florida Journal Of International Law*

Goldsmith, Harry, 'Human Rights and Protection of Intellectual Property' (1968-1969) 12(2) *Trademark and Copyright Journal of Research and Education*

Helfer, Laurence R., 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 *University of California, Davis*

Hristova, Mirela V., 'Are Intellectual Property Rights Human Rights: Patent Protection and the Right to Health' (2011) 93 *Journal of the Patent and Trademark Office Society* 339

Nagan, Winston P., 'International Intellectual Property, Access to Health Care, and

Human Rights: South Africa v. United States' (2001) 14 *Florida Journal Of International Law*

Ni, Kuei-Jung, 'Traditional Knowledge and Global Lawmaking' (2011) 10 *Northwestern University Journal of International Human Rights*

Nwauche, E.S 'Human Rights-Relevant Considerations in Respect of IP and Competition Law' (2005) 2(4) *SCRIPTed*

Shaver, Lea 'The Right to Science and Culture' (2010) *Wisconsin Law Review*

Weissbrodt, David and Kell Schoff, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7' (2003) 5 *Minnesota Intellectual Property Review*

Yu, Peter K., 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 *Florida Law Review*

Yu, Peter K., 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40 *University of California, Davis*

Chon, Margaret, 'Copyright and Capability for Education: An Approach 'From Below' in Tzen Wong and Dutfield Graham (eds), *Intellectual Property and Human Rights: Current Trends and Future Scenarios* (Cambridge University Press, 2011)

Dreyfuss, Rochelle Cooper, 'Patents and Human Right: Where is the paradox?' in

Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010)

Finger, J. Michael and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (The World Bank and Oxford University Press, 2004)

Gervais, D.J., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007)

Tansey, Geoff and Tasmin Rajotte (eds), *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*. (Earthscan, 2008)

Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, available online at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf%3E>.

*Berne Convention for the Protection of Literary and Artistic Works*, open for signature 9 September 1886, amended on 28 September 1979 ('Berne Convention')

*Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (10 December 1948) (UDHR)

# **From Theoretical Deliberations to Implementation: The Reconciliation of Intellectual Property Rights and Human Rights in the Marrakesh Treaty**

*Abstract: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled obliged its contracting parties to provide limitations or exceptions complied with the “three-step test” in their national copyright law to facilitate access to published works for people with print disabilities. The present paper analyses how the Marrakesh Treaty, based on a certain maturation in the discussion about human rights and intellectual property, reconciles these two kinds of rights by embracing human rights consideration in an intellectual property treaty, and how it tries to balance these two kinds of rights correctly and justly through the “three-step test” when solving specific conflicts between copyright protection and the print disabled’s right to have access to published works.*

**Keywords:** Intellectual property rights; human rights; print disability; copyright exceptions; three-step test

## **I INTRODUCTION**

The present intellectual property regulation framework is largely conceived as independent of human rights. Intellectual property rights are granted largely based on public policy of supporting innovation and reward for creativity.<sup>1</sup> Different from the intellectual property rights which grant privilege to right owners that excluding or

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<sup>1</sup> Gregory Mandel, 'To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity' (2011) 86(5) *Notre Dame Law Review* 1999.

preventing others from using or exploiting the subject matter of the right without the authorization of its creator,<sup>2</sup> human rights are regarded as fundamental and essential rights for all human beings to equally enjoy.<sup>3</sup> As such the design and enforcement intellectual property rights are not commonly conceived as requiring the consideration of human rights.

Due to their underlying divergences in their values, intellectual property rights and human rights consistently conflict with each other in many aspects. For example, patent rights on drugs prevent unauthorized medicine production that may sacrifice people's opportunity to receive effective medical treatment in developing countries;<sup>4</sup> the privatization of patented agricultural resources results in higher costs and limited choice for farmers in developing countries to acquire seeds, and have implications for the right to food;<sup>5</sup> author's exclusive control over artistic, literary and scientific works hindering other people's access to knowledge and right to education between copyright and the right to acquire knowledge and a proper education.<sup>6</sup> The question of how to reconcile intellectual property rights and human rights has been a topic of

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<sup>2</sup> David Price et al, *Intellectual Property: Commentary and Materials* (Thomson Reuters, 5<sup>th</sup> ed, 2012).

<sup>3</sup> R. M Luke, 'Fundamental Human Rights - The Product of Reason' (1970) 6 *Bracton Law Journal* 13.

<sup>4</sup> See further James Thuo Gathii, 'Rights, Patents, Markets and the Global Aids Pandemic' (2001-2002) 14 *Florida Journal Of International Law*; Winston P. Nagan, 'International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States' (2001) 14 *Florida Journal Of International Law* .

<sup>5</sup> See further Lea Shaver, 'The Right to Science and Culture' (2010) *Wisconsin Law Review*; Geoff Tansey and Tasmin Rajotte (eds), *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*. (Earthscan, 2008).

<sup>6</sup> See further Margaret Chon, 'Copyright and Capability for Education: An Approach 'From Below' in Tzen Wong and Dutfield Graham (eds), *Intellectual Property and Human Rights: Current Trends and Future Scenarios* (Cambridge University Press, 2011); Micheal Finger and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Oxford University Press, 2004).

extensive and intense academic deliberation.<sup>7</sup> It is suggested that the formulation of intellectual property right must integrate and consider human rights.<sup>8</sup>

Instead of demanding the primacy of human rights, the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (2013) (hereafter called the Marrakesh Treaty) forms a remarkable attempt to build a practical framework to reconcile intellectual property rights and human rights. The treaty is widely accepted and entered into force on 30 September 2016.<sup>9</sup> It successfully translates academic scholarship into a particular present context by obligating its contracting parties to provide limitations or exceptions in their national copyright laws to facilitate access to published works for people with print disabilities. The Marrakesh Treaty hence sets an example to achieve integration by considering human rights demands as part of the design in an intellectual property treaty.

The present paper analyses how the Marrakesh Treaty, based on a certain maturation in the discussion about human rights and intellectual property, seeks to reconcile these two kinds of rights by embracing human rights consideration in an intellectual property treaty, and examines how it tries to balance these two kinds of rights

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<sup>7</sup> See further Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar Publishing Limited, 2010); Razeen Sappideen, 'Property Rights, Human Rights, and the New International Trade Regime' (2011) 15(7) *The International Journal of Human Rights* 1103.

<sup>8</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property : Mapping the Global Interface* (Cambridge University Press, 2011); Peter K. Yu, 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 *Florida Law Review* .

<sup>9</sup> WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled Entry into Force, available at <[http://www.wipo.int/treaties/en/notifications/marrakesh/treaty\\_marrakesh\\_21.html](http://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_21.html)>.

correctly and justly through the “three-step test” when solving specific conflicts between copyright protection and the print disabled’s right to have access to published works. To this end, the article first evaluates copyright exceptions and limitations in the Marrakesh Treaty. It then describes to what extent access to information and knowledge embodied in published works affects the realization of human rights of print disabled persons. The paper discusses the nexus between intellectual property rights and human rights, as well as theoretical frameworks from different schools of thought on how to reconcile and balance intellectual property rights and human rights. Based on existing theoretical frameworks, this article examines how the Marrakesh Treaty translates the theoretical framework into an enforceable international treaty, and discusses whether it can effectively balance intellectual property rights and human rights in its particular area.

## **II THE NATURE OF THE TENSION BETWEEN PROVIDING ACCESS TO PUBLISHED WORKS FOR PEOPLE WITH PRINT DISABILITIES AND PROTECTING COPYRIGHT**

The Marrakesh Treaty is premised on an understanding of the importance of access to published works in realising human rights. Accessibility is a precondition for persons with disabilities to live independently, and participate fully and equally in society with available, conceivable, understandable and manipulable products, services, environments and facilities.<sup>10</sup> Accessibility was first introduced as a standard for

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<sup>10</sup> United Nations, Committee on the Rights of Persons with Disabilities General Comment No. 2. UN Doc. CRPD/C/GC2.



physical infrastructure so as to make buildings and public transportation feasible for disabled persons to utilize.<sup>11</sup> Later it was extended to involve disabled persons to participate in social and cultural life with accessible resources, knowledge and information.<sup>12</sup> The Marrakesh Treaty in its Preamble recalling human rights principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society. More specifically, rights relating to work, social security, the right to an adequate standard of living, the right to physical and mental health, the right to education, the right to take part in cultural life and enjoy the benefits of scientific progress recognized in *International Convention on Economic, Social and Cultural Rights* inherently depend on equal access to facilities and resources for disabled persons.<sup>13</sup> What is more, the pre-condition of freedom of thought, conscience and religion, and the freedom of expression for everyone including disabled persons claimed by Article 18 and Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) is that disabled persons have equal access to information, ideas, and thoughts. The *Convention on the Rights of Persons with Disabilities* (2006) (CRPD) in its Preamble recognises that access to the physical, social, economic and cultural environment enables persons with disabilities to fully enjoy human rights and fundamental freedoms. In particular, Article 9 urges States Parties to facilitate the learning of Braille, alternative script, augmentative and

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<sup>11</sup> Anna Lawson, 'Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v. Hungary' (2014) 30(2) *South African Journal on Human Rights* 380.

<sup>12</sup> Inger Marie Lid, 'Accessibility as a Statutory Right' (2010) 28(1) *Nordic Journal of Human Rights* 20.

<sup>13</sup> United Nations, Committee on Economic, Social and Cultural Rights General comment No. 5: Persons with Disabilities. U.N. Doc. E/1995/22.

alternative modes, means and formats of communication and orientation and mobility skills, and to provide peer support and mentoring. Article 24 requires States Parties to establish an equal general education system, and to offer special facilities appropriate for disabled persons.

The objective of the Marrakesh Treaty is to realize the mentioned basic human rights for persons with a print disability by providing them equal access to published works. Print disabled persons are unable to read works or other reading materials in print format, and therefore unable to receive information and knowledge embodied in these resources. It is further difficult for them to receive education, to create literary and artistic work, or to express their ideas with print reading materials. Therefore, ensuring access to copyright works is essential for print disabled persons to realize their human rights to education, to work, to information and to exercise freedom of opinion and expression; to take part in society, to participate in cultural life and to enjoy the benefit of scientific progress.<sup>14</sup> Specifically, the right to receive proper education and participate in cultural life can only be realized when persons with a print disability have access to learning and reading materials.<sup>15</sup> After being facilities with knowledge and skills, print disabled persons can find a job and realize their economic rights. In terms of political rights, being informed of political policies,

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<sup>14</sup> United Nations Development Programme, Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific. Available at: [http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/our-right-to-knowledge--legal-reviews-for-the-ratification-of-th.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/our-right-to-knowledge--legal-reviews-for-the-ratification-of-th.html) (20 September 2016).

<sup>15</sup> Jagdish Chander, 'The Role of Residential Schools in Shapping the Nature of the Advocacy Movement of the Blind in India' in Susan Lynn Gabel and Scot Danforth (eds), *Disability & the Politics of Education: An International Reader* (Peter Lang, 2008) 201, 212.

public welfare, and voting information in accessible formats is important for the print disabled to be involved in political life.<sup>16</sup>

Protection of copyright sometimes prevents production and communication of works in accessible formats, and therefore presents conflicts with the value of promoting access to works for persons with a print disability. Works have to be published in accessible formats such as large-print, Braille, audio and digital versions for print disabled persons to “read”. Whereas most literary, dramatic, artistic, scientific and other kinds of works are published and disseminated in visual formats, such as print books, print magazines or newspapers, or readable digital texts, pictures or films displayed on computer or television screens. Copyright owners have exclusive control over their works, preventing others from converting works published in print formats into accessible formats for print disabled persons. As a result, only 7% of published books are made in accessible formats in developed countries, and the number is less than 1% in developing countries.<sup>17</sup> Therefore, the CRPD in Article 30 specifically requires States Parties to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

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<sup>16</sup> European Union Agency for Fundamental Rights, The right to political participation for persons with disabilities: human rights indicators, 2014, available at <[http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities_en.pdf)>, 8.

<sup>17</sup> World Blind Union, *June 17 Press Release for WIPO Book Treaty* (20 April 2013) <<http://www.worldblindunion.org/English/news/Pages/June-17-Press-Release-for-WIPO-Book-Treaty.aspx>>.

Copyright exception or limitation can be used to solve the conflicts between copyright protection and access to works. Exceptions or limitations have been recognized in a number of intellectual property treaties, and permits to exploit a work protected by intellectual property rights without the right owner's authorization, provided that the exploitation does not conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the author.<sup>18</sup> It is believed that copyright exception or limitation mechanism could be used to reconcile copyright protection with the right to science and culture and other human rights.<sup>19</sup> Instructed by international instruments, a number of countries have adopted copyright exemptions in their national legislations.<sup>20</sup> However, there are divergent views among countries as to whether or not, and to what extent, the national copyright law should provide exemption or limitation in order to facilitate access to published works by the print disabled.<sup>21</sup>

When solving the discussed conflicts, copyright exceptions or limitations should be carefully designed. The theoretical basis for protection on copyright is to protect the creator's proprietary right and encourage them to create more literacy, artistic and

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<sup>18</sup> See further *Berne Convention for the Protection of Literary and Artistic Works*, open for signature 9 September 1886, amended on 28 September 1979 (hereafter called 'Berne Convention'), 9(2); *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), art 13; *WIPO Copyright Treaty* (WCT), art10.

<sup>19</sup> Farida Shaheed, 'Copyright policy and the right to science and culture,' 2014 Report of the Special Rapporteur in the field of cultural rights, United Nations Human Rights Council. A/HRC/28/57, 19.

<sup>20</sup> Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired,' (2007) WIPO Doc SCCR/15/7.

<sup>21</sup> Jingyi Li, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty', (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law*, 740-767.

scientific works.<sup>22</sup> The protection of copyright therefore serves as an incentive for creation, and benefits the whole society including persons with a print disability.<sup>23</sup> Therefore, exceptions or limitations on copyright protection should be confined to certain extent which does not unreasonably prejudice the interests of the copyright owners, and does not impair their incentive of creation.

### **III THE EXCEPTIONS AND LIMITATIONS TO COPYRIGHT CREATED BY THE MARRAKESH TREATY**

The Marrakesh Treaty aims to resolve the discussed conflicts between copyright protection and access to copyright works through the copyright exceptions and limitations mechanism it designed. This mechanism seeks to achieve the fundamental right to access to information and knowledge embodied in published works for persons with a print disability facilitate. It also tries to protect the copyright owner's interests by setting restrictions on providing copyright exceptions or limitations.

In order to facilitate access to works, the treaty in Article 4 requires its contracting parties in their national laws to provide limitations and exceptions to the right of reproduction, the right of distribution, and the right of making available to the public, so as to empower its beneficiary persons to produce and communicate published works in accessible formats without the prior permission of copyright owners.

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<sup>22</sup> See further Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing Company Limited, 1996); Edwin C. Hettinger, 'Justifying Intellectual Property' (1989) 18(1) *Philosophy & Public Affairs*.

<sup>23</sup> Paul Harpur and Nicolas Suzor, 'Copyright protections and disability rights: turning the page to a new international paradigm' (2013) 36 *University of New South Wales* 745.

Beneficiary persons are defined in Article 3 which includes a person who is blind; has a visual impairment or a perceptual or reading disability; or 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. It provides a wide coverage for disabled persons to benefit from copyright exceptions and limitations. In addition, someone acting on behalf of the beneficiary, including the primary caretakers or caregivers, as well as authorized entities can also make an accessible format copy of a work, without the prior permission of copyright owners, and supply those copies exclusively to beneficiary persons by any means.

Conversely, to ensure the continued upholding of copyright rights this provision also requires that the making and communicating of accessible format copies must be “on a non-profit basis”. What is more, authorized entities empowered by such an exception are strictly defined in Article 2 of the treaty encompassing those that are authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as well as a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations. Other individuals or entities are not allowed to employ the mentioned exceptions or limitations to exploit copyright works without authorization. The treaty further allows a Contracting Party confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.

The treaty provides a mechanism allowing accessible format copies to freely exchange among countries so as to multiply choices available for beneficiary persons. Specifically, Article 5 requires contracting parties to permit authorized entities to export accessible format copies to a beneficiary person or another authorized entity. Article 6 permits authorized entities and beneficiary persons to import accessible format copies from other contracting parties. Article 9 encourages contracting parties to share information to assist authorized entities in identifying one another so as to foster cross-boarder exchange of accessible format copies.

To protect the copyright owner's interest, Article 5 requires that exporting of accessible format copies by an authorized entity shall be limited to members of the WIPO Copyright Treaty, or otherwise limits 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 rightholder, known as the "three-step test". It also requires that after receiving accessible format copies under Article 5, a Contracting Party, which has no obligation under the Berne Convention to undertake "three-step test" before reproducing copyright without authorization of the copyright owner, shall ensure that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party's jurisdiction.

Additionally the Marrakesh Treaty provides a number of ancillary provisions to facilitate the access. To be more specific, Article 7 requires contracting parties to provide an exception to technological protection measures so as to ensure that

anti-circumvention regulations do not present a barrier to the implementation of this Treaty. Article 8 requires protecting the privacy of beneficiary persons. Article 10 of the Marrakesh Treaty provides flexibilities for contracting parties to implement the treaty in their jurisdiction. It is noted that Article 11, to protect the copyright owner's interests, requires that the flexibility of implementation shall comply with obligations under existing treaties, particularly with the three-step test under Berne Convention and the formulations of the "three-step test" found in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the WIPO Copyright Treaty (WCT).

#### **IV THEORETICAL FRAMEWORKS TO RESOLVE THE CONFLICT BETWEEN PROVIDING ACCESS TO COPYRIGHT WORKS FOR PEOPLE WITH PRINT DISABILITY AND PROTECTING COPYRIGHT**

##### **A. The Nexus between Human Rights and Intellectual Property Rights**

The idea of reconciling copyright protection and access to copyright works in the Marrakesh Treaty derives from the long existing conflicts between human rights and intellectual property rights. The nexus between human rights and intellectual property rights was created by Art 27(2) of the UDHR, which states that 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. The protection of intellectual property rights was emphasized further in subsequent human rights instruments such as Article 13 of the *American Declaration of the Rights and Duties of Man (1948)*, Article 15 of the ICESCR, and Article 1 of *Protocol 1 to the European Convention*



*for the Protection of Human Rights and Fundamental Freedoms (1952)* (hereafter called Protocol 1 to ECHR). Being regulated under human rights covenants, intellectual property rights began, controversially, to interweave with human rights. Goldsmith interprets intellectual property rights as a category of human rights because they are included in these human rights instruments.<sup>24</sup> His point of view was supported by Belotsky<sup>25</sup> and Gana<sup>26</sup> in the 1990s.

The idea that intellectual property rights being a category of human rights has become less popular over the years. Nwauche argues that the right protected in mentioned human rights instruments is author's right to moral and material interests resulting from intellectual properties, such as claim the authorship and make a living from collecting royalty, rather than intellectual property rights.<sup>27</sup> In particular, Farida Shaheed argues that the human right protection of authorship under Art 27(2) is not a synonym for copyright protection, but only a related concept against which copyright law should be judged.<sup>28</sup> Human rights and intellectual property rights are two kinds of different rights considering their histories, values and justifications. To be more specific, human rights are regarded as fundamental and essential rights for all human beings to equally enjoy.<sup>29</sup> Human rights stand for universal fair, equal and justice.

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<sup>24</sup> Harry Goldsmith, 'Human Rights and Protection of Intellectual Property' (1968-1969) 12(2) *Trademark and Copyright Journal of Research and Education*.

<sup>25</sup> Lydia Belotsky, 'Human Rights and Intellectual Property' (1997) 13 *The Aviv University Studies in Law*.

<sup>26</sup> Ruth L. Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 *Law & Policy*.

<sup>27</sup> E.S Nwauche, 'Human Rights-Relevant Considerations in Respect of IP and Competition Law' (2005) 2(4) *SCRIPTed*.

<sup>28</sup> Shaheed, above n 19, 7.

<sup>29</sup> Luke, above n 3.

Rather than being created by legislators or politicians, human rights are justified by natural law as rights to which human beings are entitled as an indispensable part of their human nature.<sup>30</sup> Intellectual property rights however are considered as privilege granted to right owners to exclude or prevent others from using or exploiting the subject matter of the right without the authorization of its creator.<sup>31</sup> They are positive legal rights vested and created by statutory law.<sup>32</sup> The United Nations Committee on Economic, social and Cultural Right has clarified the fundamental differences between intellectual property rights and human rights, and addressed the importance not to equate these two types of rights.<sup>33</sup>

When human rights and intellectual property rights are distinguished, it has been acknowledged that these two kinds of rights consistently conflict with each other. Intellectual property rights frequently exclude people from utilizing intellectual resources, including those with fundamental human rights interests. As discussed in the introduction section, the commonly discussed conflicts are between patent rights and the right to receive medical treatment, and the right to food; copyright and access to knowledge and right to education. Specifically, copyright is a practice of securing marketable rights in texts that are created as commodities.<sup>34</sup> Only limited works are

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<sup>30</sup> Anthony Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy' (2003) 31(2) Political Theory 171.

<sup>31</sup> Price, David et al, *Intellectual Property: Commentary and Materials* (Thomson Reuters, 5th ed, 2012).

<sup>32</sup> Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Limited, 2007), 151.

<sup>33</sup> United Nations. 2005. General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant). UN Doc. E/C.12/GC/1712.

<sup>34</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993).

produced in Braille, large print, audio versions and other accessible formats because these versions are considered as not profitable.<sup>35</sup> However, efforts to convert works in print versions are often prohibited, because the protection of copyright prevents reproduction and distribution without acquiring the author's authorization and paying them royalty.<sup>36</sup>

## **B. Balancing intellectual property rights and human rights**

When dealing with conflicts between intellectual property rights and human rights, it is frequently proposed that a 'balance' should be achieved as a solution.<sup>37</sup> It is therefore important to understand what is a "balance" status, and how to achieve the "balance" through a reflection of scholarly debate and legislative mechanism.

'Balance' has been mentioned a number of times in international intellectual property treaties regarding the protection on intellectual property rights and other demands. Article 7 of the TRIPS states that '[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, ... in a manner conducive to a *balance* of rights and obligations.' A later reaffirmation can be found in the WCT and the *World Intellectual Property Organization Performance and Phonograms Treaty*, both

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<sup>35</sup> Kaya Köklü, 'The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 737

<sup>36</sup> Harpur and Suzor, above n 23.

<sup>37</sup> Sharon Foster, 'Prelude to Compatibility between Human Rights and Intellectual Property' (2008) 9(1) *Chicago Journal of International Law* 17; D.J. Gervais, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007; Grosheide, above n 7; Kell Schoff and David Weissbrodt, 'The Sub-commission's Initiative on Human Rights and Intellectual Property' (2004) 22(2) *Netherlands Quarterly of Human Rights* .

emphasize the need to maintain a balance between the right of authors and the larger public interest, particularly education, research, and access to information.

The general definition of ‘balance’ can be used to assist to explore the true meaning of balance between intellectual property rights and human rights. ‘Balance’ when used as a noun means ‘a condition that exist when two opposites are equal or in correct proportions’.<sup>38</sup> When being used as a verb, “balance” means to keep or put in a state of balance.<sup>39</sup> In the discussion on solving conflicts between intellectual property rights and human rights, ‘balance’ could either refer to a state in which intellectual property rights and human rights are of equal weight, or a state in which they are of unequal weight, but where the inequality is correct or just. The key issue for balancing intellectual property rights and human rights is whether these two kinds of rights should be protected equally or with a particular priority, and if there is a priority, how to award the priority correctly and justly.

In theory, it is widely acknowledged that human rights are the most fundamental and basic inherited rights, and therefore should have priority over intellectual property rights. Chapman argues that intellectual property rights are ‘instrumental rights’ for realizing the fundamental human rights, and therefore should be consistent with the realization of human rights.<sup>40</sup> The *United Nations Resolution 2000/7* confirmed its position that human rights have a primary status when conflicting with intellectual

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<sup>38</sup> *Oxford Advanced Learner’s Dictionary of Current English* (Oxford University Press, Encyclopedic edition ed, 1992), 62.

<sup>39</sup> *ibid*, 63.

<sup>40</sup> Audrey R. Chapman, ‘Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)’ in Evgueni Guerassimov (ed), *Approaching Intellectual Property as a Human Right* (UNESCO Publishing, Digital version ed, 2001) vol Copyright Bulletin, 4.

property rights.<sup>41</sup> This resolution suggests countries to build necessary infrastructure to promote the protection of human rights before the adoption of new regulations for intellectual property protection. Schoff and Weissbrodt recognize the need to call for increased awareness and integration of human rights norms into intellectual property protection regimes. They interpret the resolution as to promote a human rights approach to international intellectual property protection by encouraging investigations into the human rights implications of international intellectual property protection and trade liberalisation.<sup>42</sup> The resolution was followed by the *Economic, Social and Cultural Rights: Intellectual Property Rights and Human Rights Report of the Secretary-General Addendum* reaffirming human rights' predominant position when conflicts occur.<sup>43</sup>

Another school however observes that practically human rights rarely have their priority realized. It is believed that human rights conventions usually impose 'minimal standards' and 'aim at avoiding the terrible rather than achieving the best'.<sup>44</sup> The 'minimal standards' are sometimes not guaranteed because human rights instruments are often recommendatory instead of being legally enforceable. Therefore human rights rules are criticized as 'soft law', existing in 'twilight zone of normativity'.<sup>45</sup> Additionally, although it is implausibly to assume that international

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<sup>41</sup> United Nations. 2000 Intellectual property rights and human rights, ESCOR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. U.N. Doc. E/CN.4/Sub.2/Res/2000/7.

<sup>42</sup> Schoff and Weissbrodt, above n 37.

<sup>43</sup> United Nations. 2001 Economic, Social and Cultural Rights: Intellectual Property Rights and Human Rights Report of the Secretary-General Addendum. UN Doc. E/CN.4/Sub.2/2001/12/Add.1, 3.

<sup>44</sup> James Nickel, *Making Sense of Human Rights* (Wiley-Blackwell, 2<sup>nd</sup> edition ed, 2007), 26.

<sup>45</sup> Sol Picciotto, 'Defending the Public Interest in TRIPS and the WTO' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave

human rights take priority over all other national interests, human rights sometimes are sacrificed to other interests.<sup>46</sup> Politics often have priority when conflicts with human-right ideals and law. International human rights law is made by political process, and political campaign play an important role in human rights implementation.<sup>47</sup> Freeman raised an example that the centre of international action for human rights shifted from more legalistic UN institutions to the highly politicalized Security Council, resulting in rare and selective agreement on action due to political divisions.<sup>48</sup> What is more, states only occasionally give human rights priority over economic interests.<sup>49</sup> It is further believed that human rights will not be realized without an economic policy that is geared to achieving that end.<sup>50</sup> Specifically, Boyle observes that as intellectual property protection is expanding exponentially, the balance between the public domain and the realm of property rights has been lost.<sup>51</sup> It is also worried that intellectual property holders and their supporters in developed countries are rich, powerful and organized, and may be able to capture the human rights forum to the detriment of less developed countries and the disadvantaged persons.<sup>52</sup>

### **C. Reconciling intellectual property rights and human rights**

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Macmillan, 224.

<sup>46</sup> Jack Donnelly, *Universal human rights in theory and practice* (Cornell University Press, 2<sup>nd</sup> ed, 2003), 162.

<sup>47</sup> Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press, 2<sup>nd</sup> ed, 2011), p 157.

<sup>48</sup> Ibid, 158.

<sup>49</sup> Ibid, 163.

<sup>50</sup> Foster, above n 37, 183.

<sup>51</sup> Robert Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property' (2004) 9 *Duke Law & Technology Review*.

<sup>52</sup> Peter K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40 *University of California, Davis*.

Reconciling is another commonly raised solution to deal with the conflicts between intellectual property rights and human rights.<sup>53</sup> “Reconcile” refers to efforts to make aims, statements, ideas, etc agree when they seem to conflict.<sup>54</sup> “Reconcile” is slightly different from “balance” in that there is no need to identify a priority. Scholars upholding the reconciling approach believe that these two types of rights are not incompatible, and could coexist through a tweaking of intellectual property law that better respects, reflects, and integrates human rights concerns.

Helfer is one of the scholars that attempt to reconcile intellectual property rights and human rights. He proposes three hypothetical frameworks to deal with the discussed conflicts, including: (a) using human rights to expand intellectual property protection standards at the expense of other human rights and the interests of licensees, users, and consumers; (b) using human rights to impose external limits on intellectual property by increasing the number of new treaties and soft law standards that contain precise, subject-specific limits on intellectual property; (c) achieving human rights ends through intellectual property means by firstly specifying the minimum outcomes that human rights law requires and secondly by identifying different mechanisms available to achieve those outcomes.<sup>55</sup> Helfer believes that the first framework runs the risk that industries and interest groups may invoke the property provisions in human rights treaties to further augment existing standards of protection. The second

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<sup>53</sup> Laurence R. Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 *University of California, Davis*; Margaret Chon, 'Intellectual Property and the Development Divide' (2006) 27 *Cardozo Law Review*; Farida Shaheed, 'Copyright policy and the right to science and culture Report of the Special Rapporteur in the field of cultural rights' (United Nations Human Rights Council, 2014).

<sup>54</sup> Oxford Advanced Learner's Dictionary, above n 38, 754.

<sup>55</sup> Helfer, above n 53, 1017.

framework is in fact the “balancing approach”, which prioritizes the human rights value, and restrain intellectual property rights to a certain extent. Helfer worries that a surfeit restriction on intellectual property rights will further diminish the coherence of international law, and make international rules less amenable to incorporation into national law. He personally is in favour of the third framework, which reconciles human rights values with intellectual property. Helfer believes with the reconciling approach, human rights ends can be achieved through intellectual property means by firstly specifying the minimum outcomes that human rights law requires, and secondly by identifying different mechanisms available to achieve those outcomes.<sup>56</sup>

Chon also believes that intellectual property rights and human rights could reconcile, and that the goal of a truly inclusive international intellectual property law should be the enhancement of human freedom and capabilities through knowledge goods.<sup>57</sup> She argues that intellectual property instruments, rather than a focus strictly on utilities, income, growth, or even developing innovation capacity, should also consider how intellectual property can play a role in facilitating access to basic education, food security and healthcare.<sup>58</sup> International intellectual property treaties are often formal equality principles, which decreases national policy space and flexibility for both developed and developing countries.<sup>59</sup> Chon thinks that limitations and exceptions provide countries flexibility to employ international intellectual property treaties. A

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<sup>56</sup> Ibid, 1019.

<sup>57</sup> Chon, above n 53.

<sup>58</sup> Margaret Chon, 'Substantive Equality In International Intellectual Property Norm Setting And Interpretation' in D.J. Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007) , 2828.

<sup>59</sup> Denis Borges Barbosa, Margaret Chon and Andrés Moncayo von Hase, 'Slouching Towards Development in International Intellectual Property' (2007) (Spring) *Michigan State Law Review*.



country could, according to its level of development, grant an exclusive right over intellectual property, or withhold an exception or limitation of that exclusive right.<sup>60</sup>

Specifically in the field of cultural rights as to freely participate in the cultural life, enjoy the arts and share scientific advancement, Farida Shaheed, the UN Special Rapporteur, believe that cultural rights could reconcile with copyright and patent policy. She criticizes that copyright laws unnecessarily limit cultural freedom and participation. Shaheed believes that copyright exception or limitation mechanism could be used to reconcile copyright protection with the right to science and culture and other human rights.<sup>61</sup> Meanwhile, Shaheed recognizes the problem that most international copyright treaties treat copyright protections as mandatory, while treating exceptions and limitations as optional.<sup>62</sup> She argues that states have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations so as to honour their human rights obligations.<sup>63</sup> Farida further suggests including human rights impact assessments in international copyright instruments so as to safeguard cultural rights.<sup>64</sup> Similarly in patent law area, Shaheed argues that exclusions, exceptions and flexibilities are used to reconcile patent protection with human rights, and States have a human rights obligation not to

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<sup>60</sup> Chon, above n 58.

<sup>61</sup> Shaheed, above n 19, 19.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid, 20.

<sup>64</sup> Ibid, 19.

support, adopt or accept intellectual property rules that would impede them from applying such exceptions and flexibilities.<sup>65</sup>

#### **D. Exceptions to and limitations on intellectual property rights**

In practice, exceptions and limitations are commonly adopted to resolve the conflicts between intellectual property rights and human rights. TRIPS affirms the human rights values by acknowledging that protection and enforcement of intellectual property rights ‘should contribute to the promotion of technological innovation’ and to the ‘social and economic welfare.’ In Article 13 TRIPS permits ‘limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’ The right holder’s exclusive right might compromise to public welfare and the maintenance of a free environment in which creative genius can flourish. However exceptions and limitations should only apply in ‘certain special cases’ where ‘such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’. The World Trade Organization believes that in this way TRIPS attempts to “strike a balance” between the long-term social objective of providing incentives for future inventions and creation, and the short-term objective of allowing people to use existing inventions and creations.<sup>66</sup> Specifically, in copyright area, the *Berne*

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<sup>65</sup> Farida Shaheed, 'Report of the Special Rapporteur in the field of cultural rights' (United Nations General Assembly, 2015), 23.

<sup>66</sup> World Trade Organization, 'Fact Sheet: Trips And Pharmaceutical Patents Philosophy: Trips Attempts To Strike A Balance' (2006) <[http://www.wto.org/english/tratop\\_e/trips\\_e/factsheet\\_pharm01\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm01_e.htm)>.

*Convention for the Protection of Literary and Artistic Works (1886)* in Article 9 permits contracting countries to adopt exception for reproduction in 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.’ Inspired by the Berne Convention, the *WIPO Copyright Treaty* permits copyright exceptions in a more general way, not limited to reproduction. The *World Intellectual Property Organization Performance and Phonograms Treaty (1996)* additionally permits limitation or exception with regard to the protection of performers and producers of phonograms in connection with the protection of copyright in literary and artistic works.

Exceptions to and limitations on the protection of intellectual property rights reflect the theoretical discourse of balancing approach as well as reconciling approach. From the perspective of a balancing approach, considering the fundamental importance of human rights, intellectual property rights are compromised and restrained by exception arrangements. Meanwhile, exceptions and limitations are subject a number of conditions, such as “three-step test”, so as to protect legitimate interests of intellectual property rights owners, and make sure these two types of rights are correctly and justly balanced. From the reconciling perspective, the arrangement of exception or limitation is a specific method to integrate human rights ends with intellectual property instruments. The realization of basic human rights could coexist with upholding the value of intellectual property rights.

The mentioned intellectual property treaties only permit, rather than encourage or obligate contracting parties to provide copyright exception or limitation in their national laws. Individual countries have the autonomy to decide whether or not, and to what extent such exception or limitation would be adopted according to their diverse cultural and economic backgrounds. Therefore, the existing mechanism provided in these instruments tends to favour intellectual property rights, without a concrete mechanism to ensure human rights. As criticized by the United Nations resolution 2000/7, TRIPS does ‘not adequately reflect the fundamental nature and indivisibility of all human rights.’<sup>67</sup>

## **V THE MECHANISM PROVIDED BY THE MARRAKESH TREATY**

Marrakesh treaty reflects maturation in the debate about human rights and intellectual property. Instead of simply complaining conflicts and demanding the primacy of human rights, the Marrakesh Treaty has established a mechanism that embodies both the “reconciling” framework and the “balancing” framework to resolve the conflicts.

### **A. Marrakesh Treaty reconciling copyright with human rights**

The Marrakesh Treaty represents a significant shift from previous intellectual property instruments in that it integrating human rights requirements into an intellectual property treaty, and obligates contracting parties to adopt mandatory copyright exception or limitation so as to reconcile these two types of rights. The

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<sup>67</sup> Resolution 2000/7, above n 41.

Preamble to the Marrakesh Treaty affirms the principles of non-discrimination, equal opportunity, accessibility and effective participation in society proclaimed in the Universal Declaration of Human Rights and the CRPD, and meanwhile emphasizes the importance of copyright protection as an incentive and reward for literary and artistic creations. This dual objective expresses the inherent tension between the demands of protecting proprietary intellectual property rights and the need to uphold fundamental human rights, especially the rights of persons with visual impairment, to have appropriate access to intellectual materials. In this sense, the central aim of the Marrakesh Treaty can be seen as that of reconciling the protection of intellectual property rights with the maintenance of fundamental human rights.

The Marrakesh Treaty reflects the “reconciling” theory in that it tries to achieve human rights ends through intellectual property means as proposed by Helfer.<sup>68</sup> The treaty is an intellectual property treaty governed by the World Intellectual Property Organization. The ultimate objective of the treaty is to ensure access to copyright works for persons with a print disability, so as to ensure their basic human rights. To achieve the objective, contracting parties are obligated to provide limitations or exceptions in their national copyright laws to permit designated authorized entities and individuals to reproduce published works in Braille, audiobooks and other accessible formats without the authorization of the copyright right holder, and then distribute and cross-broader exchange such copies to beneficiary persons.

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<sup>68</sup> Helfer, above n 53.

The Marrakesh Treaty also satisfies the theoretical criteria for the ‘truly inclusive international intellectual property law’ defined by Chon.<sup>69</sup> As discussed previously the treaty is inclusive in that it contains two values as to human rights concerns and copyright protection. The copyright exceptions or limitations mechanism promote access to works while protecting copyright owner’s legitimate interests through a number conditions applied to the exceptions or limitations. The inclusive nature of the treaty is also reflected on the flexibility it provides for contracting parties. Copyright exceptions and limitations have already been adopted by a number of countries in their domestic copyright laws, but the national laws are in extensive variation.<sup>70</sup> The Marrakesh Treaty acknowledges these differences, and allows contracting parties to adjust national laws based on the circumstances in each individual country. For example, the treaty permits contracting parties to freely determine whether to adopt commercial availability test or collect remuneration in their national laws, and Article 12 specifically leaves flexibility for countries to provide limitation or exception other than specified in the treaty.

What is more, the accessibility promoted by the Marrakesh Treaty closely integrates with expanding opportunities for participation in cultural life. As proposed by Shadeed, this copyright treaty provides a mechanism of exceptions and limitations promoting cultural freedom and participation instead of limiting them. Different from previous intellectual property treaties which only provide mandatory protection for

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<sup>69</sup> Chon, above n 53.

<sup>70</sup> Jingyi Li, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 740.

copyright and meanwhile treat exceptions and limitations as optional, the Marrakesh Treaty obligates contracting parties to adopt mandatory copyright exception or limitation for the print disabled. In this way, states will have a positive obligation to provide copyright exceptions and limitations that fulfilling their human rights obligations. The Marrakesh Treaty therefore ensures copyright laws contain adequate exceptions to facilitate access to works for persons with a print disability so as to safeguard their cultural rights.

### **B. Three-step test to achieve balance correctly and justly**

The “three-step tests” has been widely accepted in intellectual property laws. As discussed previously, a number of intellectual property treaties such as the *Berne Convention*, TRIPS and WCT require copyright exceptions or limitations do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right owner. A significant number of countries have adopted this test to test the legitimacy of intellectual property exceptions or limitations.<sup>71</sup> The most widely accepted account of the ‘three steps’ could be found in the WTO Panel Report. On this account, exceptions (a) must be confined to certain special cases, (b) must not conflict with a normal exploitation of the work, and (c) must not unreasonably prejudice the legitimate interests of the right holder.<sup>72</sup> The Panel advises that these three conditions apply on a cumulative basis, and each one is a

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<sup>71</sup> Nicole Thomas, 'An Education: The Three-Step Test for Development' (2012) 34(4) *European Intellectual Property Review* 244.

<sup>72</sup> 'Panel Report: United States – Section 110(5) of The US Copyright Act' (World Trade Organization, 2000), WT/DS160/R, 6.97.

separate and independent requirement that must be satisfied.<sup>73</sup> This test serves to balance the protection of intellectual property rights and other important interests. Particularly, the three-step test provides guidance on deciding whether to prioritize the protection of copyright right or access to works for persons with a print disability when conflicts arise. What is more, some scholars have noted that “three-step test” requires a comprehensive overall assessment, rather than the step-by-step application,<sup>74</sup> And that the test should not be interpreted in a narrow way that restricts the application of copyright exceptions and limitations. Instead, it should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms.<sup>75</sup> In this case, the interests of persons with a print disability to have access to works are more likely to be acknowledged under such a test.

“Three-step test” is a significant mechanism in the Marrakesh Treaty to “maintain a balance” between effective protection of the copyright holders and the larger public interest of accessibility as acknowledged in the Preamble. The treaty emphasizes this test in multiple provisions of the Marrakesh Treaty. Specifically, in Preamble the treaty reaffirms the importance and flexibility of the three-step test for limitations and exceptions established in existing international instruments. In Article 11, three-step

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<sup>73</sup> Panel Report, n 14, at 6.229.

<sup>74</sup> Max Planck Institute for Intellectual Property, Declaration A Balanced Interpretation of the “Three-step test” in Copyright Law, available at <[http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/01\\_balanced/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf)>.

<sup>75</sup> *ibid.*



test is emphasized as a general obligation for the implementation of this Treaty. The three-step test also governs the production and distribution of accessible format copies regulated in Article 4 and Article 5. The United Nations Development Programme in its report acknowledges that if a contracting party's implementation "closely follows the provisions of the Treaty...the implementation would satisfy the requirements of the three-step test."<sup>76</sup> The three-step test serves as an umbrella restriction on copyright exceptions to and limitations. The test demonstrates a practical approach to achieving a just and correct balance when prioritizing human rights and compromising intellectual property rights.

First, the Marrakesh Treaty confines exceptions and limitations to "certain special cases". The first step of the test requires a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach.<sup>77</sup> The Marrakesh Treaty clearly frames the situation of copyright exception or limitation, and make sure that the scope is limited and narrow. Only authorized entities, beneficiary persons and people assisting the beneficiary persons can reproduce and disseminate copies of accessible format for the beneficiaries without authorization. Accordingly beneficiary persons and authorized entities are strictly defined in this treaty, and authorized entities must be not-for-profit institutions or governmental institutions. What is more, reproduced and distributed copies must be exclusively

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<sup>76</sup> United Nations Development Programme (2015). Our right to knowledge: Legal reviews for the ratification of the Marrakesh Treaty for persons with print disabilities in Asia and the Pacific. Available at: [http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/our-right-to-knowledge--legal-reviews-for-the-ratification-of-th.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/our-right-to-knowledge--legal-reviews-for-the-ratification-of-th.html) (20 September 2016), 22.

<sup>77</sup> WTO Panel Report, above n 72, 6.112.

made for and offered to beneficiary persons being those with a print disability. In addition, activities under this treaty must be on a non-profit basis. Therefore, the exception or limitation for the print disabled would almost certainly be compatible with the first step of the test.<sup>78</sup>

Second, the Marrakesh Treaty presents no conflict with a normal exploitation of the copyright work. Exploitation refers to the copyright owner's activities of employing exclusive rights to extract economic value.<sup>79</sup> The idea of 'normal' is employed to confine the 'exploitation' to a scope or degree 'of considerable or practical importance'.<sup>80</sup> Therefore, conflicts only occur when an exception or limitation enters into economic competition with non-exception uses to a degree of considerable or practical importance. The author's normal exploitation usually relate to publication and communication of a work in a print version. Print disabled persons generally have visual impairments or other disabilities preventing them from reading works in print format. Even if there is no book in an accessible format for them to choose, they still will not purchase a work published in print versions. Meanwhile, people other than the print disabled will not choose a braille or large print version if they want to read certain work, because they normally do not know how to read braille, and the large-print version is either abbreviated or being too thick and heavy to carry.

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<sup>78</sup> Patrick Hely, 'A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO' (2010) 43 *Vanderbilt Journal of Transnational Law* 1368, p 1379.

<sup>79</sup> Staniforth Ricktson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies Ltd, 2002), 32.

<sup>80</sup> *Ibid*, 37.

Therefore to reproduce and disseminate works in braille and large-print formats normally do not compete with such exploitations.

However, some types of accessible formats, such as audio and digital version, can be used may constitute to competition with author's commercial exploitation of a work. Audiobooks and eBooks present an 828.4 million industry in the United States in 2013.<sup>81</sup> To produce and communicate these two formats are profitable for copyright holders. If audio and digital copies of a work, made by authorized institutions without paying royalty to the author, are released into an open market with competitive prices or even for free, it will constitute a competitive replacement to the licensed audio and digital versions, and may also compete with the licensed print version. To avoid such situation, the Marrakesh Treaty in its Article 4(2) strictly restrains the accessible format copies to be exclusively used by the print disabled. People other than the beneficiary of the treaty still need to purchase a copy of a work in the open market published with the authorization of the copyright holder.

Third, exceptions and limitations provided in the Marrakesh Treaty do not unreasonably prejudice the right holder's legitimate interests. The third step judges to what extent the right holder's lawful economic interests could be harmed, or potentially harmed, by the effects of the exception, and whether the harm is reasonable.<sup>82</sup> As discussed above, most authors create literary and artistic works only

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<sup>81</sup> Nate Hoffelder, "eBook Sales Down Almost 4% in the First Half of 2013," 2013 AAP Reports: <http://www.the-digital-reader.com/2013/09/19/ebook-sales-almost-4-first-half-2013-aap-reports/#.UkDP2Gx--70>.

<sup>82</sup> WTO Panel Report, above n 72, 6.220.

for ordinary people, and publish the work in the print version. Therefore, producing accessible format copies do not create a competition for the author's for-profit market. However, authors targeting 'blind markets' sometimes have the braille editions published together with the print edition. In this case, the making and distributing accessible format copies of the same book will probably create a competition, and constitute an economic loss for the copyright owner. The Marrakesh Treaty therefore in Article 4.4 provides a commercial availability test permitting contracting countries to confine limitations or exceptions to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.

Even if a loss would occur in discussed circumstance, the amount of the loss will generally not be huge. People who are blind or have a visual impairment, although there are a concerning number of them, are still a minority group in society. Among the 7 billion people in the world, the beneficiaries of the Marrakesh Treaty, including the 285 million people who are blind or have other visual disabilities, only account for 4% of the total population.<sup>83</sup> What is more, print disabled people are relatively lacking in purchasing power. Most of them are struggling to earn a living, and will therefore probably not be buying pricey books in an open market.<sup>84</sup> So the likelihood of disproportionate economic loss for the copyright holder is minimal.

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<sup>83</sup>World Health Organization. 2012 Universal Access to Eye Health Can Save Millions from Losing Their Sight and Can Boost the Global Economy - World Sight Day 11 October 2012: <http://www.emro.who.int/press-releases/2012/world-sight-day-2012.html> (accessed September 3 2015).

<sup>84</sup> According to the World Health Organization, about 90% of the world's visually impaired live in

Copyright exceptions or limitations in the Marrakesh Treaty can be justified by a legitimate reason as to uphold human rights value even when a substantial or material loss occurs. The blind and visually disabled are vulnerable, and their basic human rights are a compelling factor as a basis of legislation. During the draft procedure, a unique note was provided in the 2012 Draft Text of the Marrakesh Treaty (WIPO, 2012), suggesting that the “three-step test” should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms and other public interests.<sup>85</sup> It is a pity that this interpretation was not adopted in the final version of the Treaty, though it is still thought provoking and reflects the idea of balance. Interests deriving from human rights are the paramount issue to be considered, and intellectual property rights are to give way to fundamental human rights when conflict occurs. Additionally, remuneration, serving as the economic remedy for the copyright holder, can be used counterweigh and strike the balance along with the imposition of conditions on the usage.<sup>86</sup> The Marrakesh Treaty therefore in Article 4 leaves it to individual countries to determine whether such limitation or exception is subject to remuneration.

## VI CONCLUSION

The Marrakesh Treaty is emblematic of a modern and mature approach to solve the longstanding debate over how to deal with the conflicts between intellectual property

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low-income settings. See further World Health Organization, *Visual Impairment and Blindness*, available at <http://www.who.int/mediacentre/factsheets/fs282/en/>.

<sup>85</sup> World Intellectual Property Organization. 2012. Draft Text of An International Instrument/Treaty on Limitations: and Exceptions for Visually Impaired Persons/Persons With Print Disabilities. WIPO Doc. SCCR/25/2.

<sup>86</sup> Rickson, above n 77.

and human rights. It is unprecedented in that it translates the balancing and reconciling frameworks discussed previously in theoretical discourse into a practical enforceable international treaty. The treaty is the first formal integration of human rights into an intellectual property treaty so as to reconcile these two kinds of rights. It applies pre-existing theoretical frameworks and legislative practices, and facilitate access to published works for the print disabled through copyright exception mechanism. While obligating mandatory copyright exception so as to assure the priority of human rights, it adopts the “three-step test” offering a detailed and practical assessment to make sure that the exception or limitation be confined to certain special cases which do not conflict with a normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the right holder. In this particular case, copyright and human rights seem to reach a just and correct balance. Now that the Marrakesh Treaty has come into force in September 2016, it stands as an inspirational example of how to reconcile intellectual property rights with human rights, and how to balance them correctly and justly in a broader way.

## References

*Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press, Encyclopedic edition ed, 1992)

'Panel Report: United States – Section 110(5) of The US Copyright Act' (World Trade Organization, 2000)

Ayoubi, Lida, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) *New Zealand Journal of Public and International Law* 255

Boyle, Robert, 'A Manifesto on WIPO and the Future of Intellectual Property' (2004) 9 *Duke Law & Technology Review*

Chander, Jagdish, 'The Role of Residential Schools in Shapping the Nature of the Advocacy Movement of the Blind in India' in Susan Lynn Gabel and Scot Danforth (eds), *Disability & the Politics of Education: An International Reader* (Peter Lang, 2008) 201

Chapman, Audrey R. , 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)' in Evgueni Guerassimov (ed), *Approaching Intellectual Property as a Human Right* (UNESCO Publishing, Digital version ed, 2001) vol Copyright Bulletin, 4

Donnelly, Jack, *Universal human rights in theory and practice* (Cornell University Press, 2<sup>nd</sup> ed, 2003)

Drahos, Peter, *A Philosophy of Intellectual Property* (Dartmouth Publishing Company Limited, 1996)

Finger, Micheal and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Oxford University Press, 2004)

Foster, Sharon, 'Prelude to Compatibility between Human Rights and Intellectual Property' (2008) 9(1) *Chicago Journal of International Law* 171

Freeman, Michael, *Human Rights: An Interdisciplinary Approach* (Polity Press, 2nd ed, 2011)

Geiger, Christophe, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12(3) *Vanderbilt Journal of Entertainment and Technology Law* 515

Harpur, Paul and Nicolas Suzor, 'Copyright protections and disability rights: turning the page to a new international paradigm' (2013) 36 *University of New South Wales* 745

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

Hely, Patrick, 'A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO' (2010) 43 *Vanderbilt Journal of Transnational Law* 1368

Hettinger, Edwin C., 'Justifying Intellectual Property' (1989) 18(1) *Philosophy & Public Affairs*

Howse, Robert, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2010) 3(4) *The Journal of World Intellectual Property* 493

Köklü, Kaya, 'The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 737

Lawson, Anna, 'Accessibility Obligations in the Un Convention on the Rights of Persons with Disabilities: Nyusti & Takacs v. Hungary' (2014) 30(2) *South African Journal on Human Rights* 380

Li, Jingyi, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 740



Luke, R. M, 'Fundamental Human Rights - The Product of Reason' (1970) 6 *Bracton Law Journal* 13

Mandel, Gregory, 'To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity' (2011) 86(5) *Notre Dame Law Review* 1999

Marie Lid, Inger, 'Accessibility as a Statutory Right' (2010) 28(1) *Nordic Journal of Human Rights* 20

Organization, World Trade, 'Fact Sheet: Trips And Pharmaceutical Patents Philosophy: Trips Attempts To Strike A Balance' (2006)  
<[http://www.wto.org/english/tratop\\_e/trips\\_e/factsheet\\_pharm01\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm01_e.htm)>

Pagden, Anthony, 'Human Rights, Natural Rights, and Europe's Imperial Legacy' (2003) 31(2) *Political Theory* 171

Picciotto, Sol, 'Defending the Public Interest in TRIPS and the WTO' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan, 224

Price, David et al, *Intellectual Property: Commentary and Materials* (Thomson Reuters, 5<sup>th</sup> ed, 2012)

Rickson, Staniforth, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies Ltd, 2002)

Rose, Mark, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993)

Sappideen, Razeen, 'Property Rights, Human Rights, and the New International Trade Regime' (2011) 15(7) *The International Journal of Human Rights* 1103

Shaheed, Farida, 'Copyright policy and the right to science and culture Report of the Special Rapporteur in the field of cultural rights' (United Nations Human Rights Council, 2014)

Shaheed, Farida, 'Report of the Special Rapporteur in the field of cultural rights' (United Nations General Assembly, 2015)

Thomas, Nicole, 'An Education: The Three-Step Test for Development' (2012) 34(4) *European Intellectual Property Review* 244

Torremans, Paul (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Limited, 2007)

Barbosa, Denis Borges, Margaret Chon and Andrés Moncayo von Hase, 'Slouching Towards Development in International Intellectual Property' (2007) (Spring) *Michigan State Law Review*

Belotsky, Lydia, 'Human Rights and Intellectual Property' (1997) 13 *The Aviv University Studies in Law*

Chon, Margaret, 'Intellectual Property and the Development Divide' (2006) 27 *Cardozo Law Review*

Gana, Ruth L., 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 *Law & Policy*

Gathii, James Thuo, 'Rights, Patents, Markets and the Global Aids Pandemic' (2001-2002) 14 *Florida Journal Of International Law*

Goldsmith, Harry, 'Human Rights and Protection of Intellectual Property' (1968-1969) 12(2) *Trademark and Copyright Journal of Research and Education*

Helfer, Laurence R., 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 *University of California, Davis*

Nagan, Winston P., 'International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States' (2001) 14 *Florida Journal Of International Law*

Nwauche, E.S 'Human Rights-Relevant Considerations in Respect of IP and Competition Law' (2005) 2(4) *SCRIPTed*

Schoff, Kell and David Weissbrodt, 'The Sub-commission's Initiative on Human Rights and Intellectual Property' (2004) 22(2) *Netherlands Quarterly of Human Rights*

Shaver, Lea 'The Right to Science and Culture' (2010) *Wisconsin Law Review*

Yu, Peter K., 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 *Florida Law Review*

Yu, Peter K., 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2006) 40 *University of California, Davis*

Chon, Margaret, 'Copyright and Capability for Education: An Approach 'From Below' in Tzen Wong and Dutfield Graham (eds), *Intellectual Property and Human Rights: Current Trends and Future Scenarios* (Cambridge University Press, 2011)

Chon, Margaret, 'Substantive Equality In International Intellectual Property Norm Setting And Interpretation' in D.J. Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007)

Gervais, D.J., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007)

Grosheide, Willem (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar Publishing Limited, 2010)

Nickel, James, *Making Sense of Human Rights* (Wiley-Blackwell, 2<sup>nd</sup> edition ed, 2007)

Tansey, Geoff and Tasmin Rajotte (eds), *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*. (Earthscan, 2008)



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# **Facilitating Access to Published Works for Persons with a Print Disability: Amending Australian Copyright Laws to Ensure Compliance with the Marrakesh Treaty**

*Abstract: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled was ratified by Australia in December 2015 and came into force in September 2016. In March 2017, Australia introduced the Copyright Amendment (Disability Access and Other Measures) Bill 2017 to fulfil its obligations under the Treaty by creating new exceptions to copyright to support access to published works by persons with a print disability. The objective of this article is to precisely identify areas of divergence between the Marrakesh Treaty and the Copyright Act 1968 (Cth) and analyse the operation of the 2017 Bill in order to determine whether the proposed reforms will enable Australia to fulfil its obligations under the Treaty. The article suggests that whilst the Bill addresses certain critical concerns, further reforms need to be undertaken in order to ensure full compliance with the Treaty. Specifically, the article recommends that the Bill be amended to remove the commercial availability test in the new fair use mechanism, retain the print disability radio licence, introduce an extended exception for the circumvention of TPMs, and establish a mechanism for free cross-broader exchange in order to enhance the value of the Treaty to the print disabled.*



Keywords: Marrakesh Treaty; Copyright law; Disability law; Exceptions to copyright;

Print disability

## I. INTRODUCTION

*The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Marrakesh Treaty)<sup>1</sup> seeks to strengthen the rights of access to knowledge and information embodied in published works by persons with a print disability by creating exceptions to copyright laws.<sup>2</sup> The Marrakesh Treaty was adopted by the World Intellectual Property Organization (WIPO) in June 2013, was ratified by Australia in December 2015 and entered into force on 30 September 2016. In March 2017, Australia introduced the *Copyright Amendment (Disability Access and Other Measures) Bill 2017* (Amendment Bill)<sup>3</sup> to enact new exceptions to copyright law to support access to published works by

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<sup>1</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WIPO Doc VIP/DC/8 (27 June 2013) (hereafter called the Marrakesh Treaty).

<sup>2</sup> Andrea Wechsler, 'WIPO's Global Copyright Policy Priorities: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' in *European Yearbook of International Economic Law 2015* (Springer, 2015) vol 6, 391; Lida Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) *New Zealand Journal of Public and International Law* 255; Kaya Köklü, 'The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 737.

<sup>3</sup> Parliament of Australia, *Copyright Amendment (Disability Access and Other Measures) Bill 2017* (2017)

<[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5832](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5832)>.

persons with a print disability and ensure that Australia's domestic law complies with the obligations imposed by the Treaty. The Treaty requires Member States to enact limitations or exceptions in their national copyright law to permit designated authorised entities to reproduce published works in Braille, audiobooks and other accessible formats for persons with print disabilities without the authorisation of the copyright right holder. In the Treaty, "persons with print disabilities" is expansively defined to include those who are unable to read printed works due to blindness or visual impairment, as well as persons who suffer a perceptual or reading disability which prevents them from reading printed works to the same degree as a person without such an impairment.<sup>4</sup> The Treaty further creates a framework for the distribution of such works to relevant beneficiaries. The aim of the present paper is to consider to what extent the rights and obligations created by the Treaty are fulfilled by the *Copyright Act 1968* (Cth), and the extent to which present areas of non-compliance are effectively addressed by the *Copyright Amendment (Disability Access and Other Measures) Bill 2015*. To this end, the paper will identify the gap between the international standards of equitable support to persons with a print disability embodied in the Treaty and Australian copyright law, analyse the effects of such divergence, and consider the law reform discourse to date. The paper will conclude by recommending further reforms to Australian copyright law to ensure full compliance with the Treaty.

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<sup>4</sup> Marrakesh Treaty, art 3. The Treaty also extends to persons with a reading disability which prevent the person from reading printed works to substantially the same degree as a person without an impairment or disability.

The problem of inadequate access to knowledge by persons with a print disability is a critical matter of global concern. According to the World Health Organisation, there is an estimated 285 million blind and visually impaired people worldwide, accounting for 4% of the 7.3 billion populations, with about 90% of them living on low-incomes.<sup>5</sup> In Australia, there are 357,000 people who are blind or have low vision, and the number is projected to grow up to 564,000 by 2030.<sup>6</sup> In such a context, the Treaty has been widely commended by scholars around the world for enhancing access to knowledge by persons with a print disability. Cameron, Wood and Suzor for example argue that access to information and cultural works is fundamentally important to enable people with disabilities to fully participate in economic, social, and political life, and that it is therefore both a pressing moral imperative and a legal requirement in international law.<sup>7</sup> Similarly, Wang acknowledges the significance of the Marrakesh Treaty in dealing with the “book famine”, and suggests that China should encompass relevant provisions of Marrakesh Treaty as part of its ongoing process of copyright law reform.<sup>8</sup> Bram further analyses South African copyright law and its ability to facilitate access to copyright works for the print disabled persons, and provides a proposal on how the Marrakesh Treaty could be implemented in South

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<sup>5</sup> World Health Organization, *Visual Impairment and Blindness* (August 2014) <<http://www.who.int/mediacentre/factsheets/fs282/en/>>.

<sup>6</sup> Australia Network on Disability, *Disability Statistics* <<http://www.and.org.au/pages/disability-statistics.html>>.

<sup>7</sup> Natalie Cameron, Suzannah Wood, and Nicolas Suzor, *Submission to the Attorney-General's Department consultation on "Marrakesh Treaty options for implementation" discussion paper* (2014) <<http://eprints.qut.edu.au/79122/1/2014-QUTIP-AGD-Marrakesh.pdf>>.

<sup>8</sup> Qian Wang, *The Influences of the Marrakesh Treaty on Chinese Copyright Legislation*, 2013(10) *Science of Law* 51.

African copyright law to enhance social equity while also taking into account possible domestic policy barriers.<sup>9</sup> Thus, there is growing international interest for contracting parties to amend their national copyright laws so as to comply with the requirement of the Marrakesh Treaty and facilitate access to published works by persons with a print disability.

## II. THE OBLIGATIONS IMPOSED BY THE MARRAKESH TREATY

The Marrakesh Treaty is premised on an understanding that access to published works is critical to the realisation of human rights. The *Universal Declaration of Human Rights*<sup>10</sup> declares that everyone is equally entitled to basic human rights as to enjoy the freedom of speech, to get proper education and to participate in cultural life.<sup>11</sup> The *Convention on the Rights of Persons with Disabilities* (the CRPD), in its Preamble, further recognises that access to the physical, social, economic and cultural environment enables persons with disabilities to fully enjoy human rights and fundamental freedoms.<sup>12</sup> Specifically, Article 30 of the CRPD requires States Parties to ensure that laws protecting intellectual property rights do not constitute an

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<sup>9</sup> Bram Van Wiele, *The ratification and implementation of the Marrakesh Treaty: a look at the future of South African Copyright Law* (LL.M. Thesis, UNIVERSITY OF CAPE TOWN, 2014) <[https://open.uct.ac.za/bitstream/item/14069/thesis\\_law\\_2014\\_van\\_wiele\\_b.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14069/thesis_law_2014_van_wiele_b.pdf?sequence=1)>.

<sup>10</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (10 December 1948).

<sup>11</sup> *Ibid*, art 19, art 26, art 27.

<sup>12</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, Annex I (entered into force 3 May 2008).

unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. Shaheed in her report to the United Nations points out that copyright exception or limitation mechanism could be used to reconcile copyright protection with the right to science and culture and other human rights.<sup>13</sup> In such a context, the Marrakesh Treaty seeks to provide a well-designed exception to copyright law in order to reconcile the enforcement of copyright law with the upholding of fundamental human rights.<sup>14</sup>

The Marrakesh Treaty imposes an obligation on its contracting parties to enact in their national laws copyright limitations or exceptions to facilitate access to published works in accessible formats for designated beneficiaries. Such access can be provided to the beneficiaries themselves or to authorised entities acting on behalf of such beneficiaries. Article 3 of this Treaty defines “beneficiary” to include a person who is blind, has a visual impairment or a perceptual or reading disability, or 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. Such a beneficiary can produce accessible format copies of a work for his/her personal use. Someone acting on behalf of the beneficiary person, including a primary caretaker or

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<sup>13</sup> Farida Shaheed, ‘Copyright policy and the right to science and culture,’ 2014 Report of the Special Rapporteur in the field of cultural rights, United Nations Human Rights Council. A/HRC/28/57, p 19. See further Paul Harpur, *Discrimination, Copyright and Equality: Opening the Ebook for the Print Disabled* (Cambridge University Press, 2017).

<sup>14</sup> Jingyi Li and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) *European Intellectual Property Review* 653.

caregiver, may also assist the beneficiary to make and use accessible format copies where the beneficiary has lawful access to that work or a copy of that work.<sup>15</sup> In addition, “authorised entity” is defined to be an institution authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as well as a government institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities or institutional obligations. Such an authorised entity is permitted to reproduce and communicate published works in accessible formats for print disabled persons without the authorisation of the copyright owner.<sup>16</sup> Pursuant to Article 2, “accessible format copy” is further defined to mean 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 or other print disability. Hence, copies of a work in Braille, large-print, audio and digital formats that can be apprehended by persons with a print disability are recognised as accessible format copies. In addition to creating a mechanism for the reproduction and communication of accessible format copies, the Treaty facilitates the free exchange of accessible format material among countries so as to expand the choices available to beneficiaries. Specifically, Article 5 requires contracting parties to permit authorised entities to export accessible format copies to a beneficiary person or another authorised entity whilst Article 6 permits authorised entities and beneficiary persons to import

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<sup>15</sup> Marrakesh Treaty, art 4(2)(b).

<sup>16</sup> *Marrakesh Treaty*, art 4(1)(a).

accessible format copies from other contracting parties. Finally, Article 9 encourages contracting parties to share information to assist authorised entities in identifying one another so as to foster cross-border exchange of accessible format copies.

The Treaty does however create a variety of restrictions on reproduction and communication so as to protect the legitimate interests of copyright proprietors. Firstly, an authorised entity wishing to produce and communicate accessible format copies of a copyright work without the permission of the copyright holder must have lawful access to that work or a copy of that work.<sup>17</sup> Secondly, when converting a work into an accessible format copy, no changes can be made in the work apart from introducing necessary means to navigate information in the accessible format.<sup>18</sup> Thirdly, accessible format copies must be supplied exclusively for the use of the beneficiary person.<sup>19</sup> Fourthly, the activity must be undertaken on a non-profit basis.<sup>20</sup> Fifthly, the Marrakesh Treaty provides that a contracting party may adopt a commerciality availability test, which means production and distribution of accessible format copies of a work can only be allowed when copies of a particular accessible format of such a work cannot be obtained commercially under reasonable terms for beneficiary persons in that market.<sup>21</sup> Finally, the Treaty empowers national

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<sup>17</sup> Ibid, art 4(2)(a)(i).

<sup>18</sup> Ibid, art 4(2)(a)(ii).

<sup>19</sup> Ibid, art 4(2)(a)(iii).

<sup>20</sup> Ibid, art 4(2)(a)(iv).

<sup>21</sup> Ibid, art 4(4).

lawmakers to determine whether the discussed limitations or exceptions are subject to remuneration to protect the economic interests of copyright owners.<sup>22</sup>

Therefore, by creating express provisions to support access to published works by print disabled persons and also creating express limitations to such provisions, the Marrakesh Treaty seeks to carefully calibrate the right of print disabled persons to access information and knowledge with the proprietary interests of copyright owners.

### **III. THE AUSTRALIAN COPYRIGHT LAW GOVERNING ACCESS TO COPYRIGHT MATERIALS BY PERSONS WITH A PRINT DISABILITY**

At present, the *Copyright Act* has a variety of provisions relating to fair dealing, format shifting, disability exceptions and statutory licences which enable designated parties to access copyright material for purposes of use by persons with a print disability.

#### **A. Fair dealing**

Australia's present fair dealing provisions provide a measure of access to published works by persons with a print disability. Copyright material may be used without permission of the proprietor if the use is a fair dealing for the purpose of research or

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<sup>22</sup> Ibid, art 4(5).



study, criticism or review, parody or satire, reporting news or the provision of professional advice by a lawyer.<sup>23</sup> Accordingly, anyone, including those with a print disability, can reproduce and communicate a literary, dramatic, musical or artistic works, or an adaption of literary, dramatic musical work, freely if it is for the above purposes. However, on the basis of *De Garis v Neville Jeffress Pidler*, this exception is restricted to the user's own fair dealing purposes. It cannot extend to the supply of a copyright work to other persons for their fair dealing purposes.<sup>24</sup> Therefore, unlike the more expansive provisions of the Treaty, Australia's fair dealing provision does not entitle persons with a print disability to access materials for private use.

## **B. Format shifting**

In addition to the fair dealing exception, reproducing books, newspapers and periodical publications in a different form for private and domestic use is recognised as a copyright exception pursuant to s 43C of the Act. In order for works of the above versions to be accessible to persons with print disabilities, they need to be reproduced in large print, audio, digital and other accessible formats. Section 43C covers this contingency by enabling users to make accessible format copies for private and domestic use, including lend to a family or household member who is print disabled. It should be noted however that this exception is restricted to private and domestic use, and that use is forbidden if the reproduced work is sold, let for hire by way of trade,

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<sup>23</sup> *Copyright Act 1968* (Cth), s 40, s 41, s 41A, s 42. See also Australian Copyright Council, *Fair Dealing*, Information Sheet No G079v06 (February 2012).

<sup>24</sup> *De Garis v Neville Jeffress Pidler* (1990) 95 ALR 625.

offered or exposed for sale or hire, or distributed for the purpose of trade.<sup>25</sup> Further, whilst exceptions for format shifting for private and domestic use extend to photographs<sup>26</sup> and videotapes,<sup>27</sup> these two formats demand visual functions on the part of the beneficiary and hence do not cover the core of exceptions and limitations that used to assist persons with a print disability to have access to published works.

### **C. Uses for persons with a disability**

Finally, s 200AB(4) specifically stipulates that a use made by a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form, or a use made by someone else for the purpose of the disabled person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces the difficulty is not an infringement of copyright. The provision is subject to the condition that the use is not made wholly or partly for the purpose of obtaining a commercial advantage or profit.

<sup>28</sup> Section 200AB applies to uses that do not conflict with a normal exploitation of the work, where the use does not unreasonably prejudice the legitimate interests of the owner of the copyright. <sup>29</sup> The Australian Law Reform Commission (ALRC) noted that the conditions provided in this section are to be interpreted in the same way as the

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<sup>25</sup> *Copyright Act 1968* (Cth), s 43C(3).

<sup>26</sup> *Copyright Act 1968* (Cth), s 47J.

<sup>27</sup> *Copyright Act 1968* (Cth), s 110AA.

<sup>28</sup> *Copyright Act 1968* (Cth), s 200AB(4).

<sup>29</sup> *Copyright Act 1968* (Cth), s 200AB(1)(c), (d).

“three-step test” of the TRIPS.<sup>30</sup> TRIPS in art 13 provides that “[M]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”<sup>31</sup> It is also relevant to note that the WTO Expert Panel stipulated that a legitimate copyright exception should be: (a) clearly defined in national legislation, and should be narrow in its scope and reach;<sup>32</sup> (b) confined in scope and degree so as not to conflict with a normal exploitation of the work;<sup>33</sup> and (c) not unreasonably prejudice the legitimate interests lawfully protected and justifiable in the light of the overall objectives that underlie the protection of exclusive rights.<sup>34</sup> The Panel holds that these three conditions apply on a cumulative basis, and each one is a separate and independent requirement that must be satisfied.<sup>35</sup> Scholars have noted that “three-step test” requires a comprehensive overall assessment, rather than the step-by-step application,<sup>36</sup> And that the test should not be interpreted in a narrow way that restricts the application of copyright exceptions and limitations. Instead, it should be interpreted in a manner that respects the legitimate

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<sup>30</sup> Australian Law Reform Commission, *Copyright and the Digital Economy (Discussion Paper)*, Report No DP 79 (2013) 223.

<sup>31</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), art 13. The “three-step test” is also regulated in art 9(2) of *Berne Convention for the Protection of Literary and Artistic Works* and art 10 of *WIPO Copyright Treaty*.

<sup>32</sup> Panel Report, *United States – Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000), 6.112.

<sup>33</sup> Jane Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions' (2001) 37(1) *Revue Internationale du Droit d'Auteur* 17.

<sup>34</sup> Panel Report, n 14 at 6.220, 6.224.6.229.

<sup>35</sup> Panel Report, n 14 at 6.229.

<sup>36</sup> Max Planck Institute for Intellectual Property, Declaration A Balanced Interpretation of the “Three-step test” in Copyright Law, available at <[http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/01\\_balanced/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf)>.

interests of third parties, including interests deriving from human rights and fundamental freedoms.<sup>37</sup> Whilst there has been extensive consideration of the three-step test, the precise application of s 200AB(4) remains unclear.

#### **D. Statutory Licences**

Supplementing these exceptions from liability, the *Copyright Act* also creates a statutory licence for institutions assisting persons with a print disability. Such institutions may be granted a licence to copy, reproduce and communicate literary and dramatic works in an accessible format pursuant to Part VB, Division 3 of the *Copyright Act*.<sup>38</sup> Relevant institutions include educational institutions, and any other institution, which has as its principal function or one of its principal functions, the provision of literary and dramatic works to persons with a print disability.<sup>39</sup> Section 10A establishes an administrative declaration procedure for institutions assisting persons with a print disability pursuant to which the Attorney-General may declare such an institution by publishing a written notice in the Gazette and must also give notice to each House of Parliament.<sup>40</sup> Pursuant to 135ZP there is no copyright infringement when an institution assisting persons with a print disability makes or communicates one or more records embodying a sound recording of a literary or dramatic work, or part of the work solely for the purpose of providing assistance to persons with a print disability, provided that a remuneration notice given by or on

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<sup>37</sup> *ibid.*

<sup>38</sup> *Copyright Act 1968* (Cth), Part VB, Division 3.

<sup>39</sup> *Copyright Act 1968* (Cth), s 10.

<sup>40</sup> *Copyright Act 1968* (Cth), s 10A.

behalf of the body to the relevant collecting society.<sup>41</sup> Further, the copyright in a published literary or dramatic work is not infringed when an institution makes or communicates a version in Braille, large-print, photographic or electronic format solely for the purpose of providing assistance to persons with a print disability, and a remuneration notice is in force.<sup>42</sup> Hence, once a literary or a dramatic work has been published, it could be produced and communicated in a broader scope of formats, including Braille, large-print, photographic or electronic versions, by such an institution. In the above two cases, a remuneration notice specifying the amount of equitable remuneration payable to the collecting society by the administering body is to be assessed on the basis of an agreed system.<sup>43</sup> In most cases, collecting societies collect royalty payments from users of copyright works and distribute them to copyright owners.<sup>44</sup> For example, the Copyright Agency is appointed by Australian Government to manage the print disability statutory licence for text materials and images.

Additional provisions have been facilitating the prescribed institutions to produce and communicate works in accessible formats for the print disabled. Section 135ZQ permits relevant reproduction and communication by such institutions under s 135ZP. In this case, a notice is required to be given to the collecting society.<sup>45</sup> Additionally, s135ZN allows institutions assisting persons with a print disability to make necessary

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<sup>41</sup> *Copyright Act 1968* (Cth), s 135ZP(1).

<sup>42</sup> *Copyright Act 1968* (Cth), s 135ZP(2).

<sup>43</sup> *Copyright Act 1968* (Cth), s 135A.

<sup>44</sup> *Copyright Act 1968* (Cth), s 135P.

<sup>45</sup> *Copyright Act 1968* (Cth), ss 135ZQ 4A, 4B.

facsimile copies of a published edition of a work in the course of making a reproduction of the work. Apart from that, s 116AN(9)(c) provides an exception to the circumvention of access control technological protection measures where the doing of the act by the person is prescribed by the regulations. Access control technological protection measure means a device, product, technology or component, a computer program that is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter in connection with the exercise of the copyright, and in the normal course of its operation, controls access to the work or other subject-matter.<sup>46</sup> According to Item 3 of Sch 10A of the *Copyright Regulations 1969* (Cth) (*Copyright Regulations*), the reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material is a prescribed action that does not infringe copyright. However, an institution must comply with the record keeping and notice requirements as provided in s 135ZX or s 135ZXA.

Whilst this statutory licence mechanism provides a measure of support to persons with a print disability, it can be argued that it is insufficient to meet the demand for converting printed works into accessible formats. Empirical studies show that Australian universities are not ensuring students with print disabilities have timely access to textbooks required for their university studies.<sup>47</sup> The reasons for the failure results from a combination of factors including inefficiencies caused by the statutory

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<sup>46</sup> *Copyright Act 1968* (Cth), s 10(1)

<sup>47</sup> Paul Harpur, 'Ensuring Equality in Education: How Australian Laws are Leaving Students with Print Disabilities Behind' (2010) 15 *Media and Arts Law Review* 70.

agency which regulates copyright.<sup>48</sup> What is more, institutions assisting persons with a print disability are not well adapted to developments in ICTs. A recent study conducted by Curtin University shows that students with visual impairment were noticeably more likely than average to have experienced problems accessing online learning platforms due to their disability.<sup>49</sup> The study found that being unable to access digital content online easily positions vision impaired students at a disadvantage status than their peers in Australian universities.<sup>50</sup> In such a context a more comprehensive and efficient statutory licence is required to facilitate access to works for persons with a print disability.

In addition to the licence created by Part VB, Division 3 of the Act, print disability radio licences also support access to information and knowledge for print disabled persons. “Broadcasting” in the *Copyright Act* refers to ‘a communication to the public delivered by a broadcasting service.’<sup>51</sup> Section 47A provides that sound broadcasting of a published literary or dramatic work made by a holder of a print disability radio licence does not constitute copyright infringement upon payment of equitable remuneration.<sup>52</sup> The beneficiaries of the broadcast licence is not limited to disabled people but also include persons who, by reason of old age or literacy problems, are

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<sup>48</sup> Paul Harpur and Rebecca Loudoun, 'The barrier of the written word: analysing universities' policies to students with print disabilities' (2011) 33(2) *Journal of Higher Education Policy and Management* 153.

<sup>49</sup> Mike Kent, 'Access and Barriers to Online Education for People with Disabilities' (2016) <<https://www.ncsehe.edu.au/wp-content/uploads/2016/05/Access-and-Barriers-to-Online-Education-for-People-with-Disabilities.pdf>> , p 106.

<sup>50</sup> Ibid.

<sup>51</sup> *Copyright Act 1968* (Cth), s 10.

<sup>52</sup> *Copyright Act 1968* (Cth), s 47A.

unable to handle books or newspapers, or to read or comprehend written material.<sup>53</sup>

Thus the print disability radio licence benefits a wide range of people including the print disabled persons so that they could enjoy a published literary or dramatic work timely and conveniently via radio without the restriction of copyright protection.

#### **IV. THE COMPLIANCE GAP - COMPARING THE MARRAKESH TREATY AND AUSTRALIAN COPYRIGHT LAW**

While the *Copyright Act* has established mechanisms to support access to copyright works for print disabled persons, the Act does not wholly fulfil Australia's obligations under the Marrakesh Treaty. It is hence useful to compare the provisions of the Treaty and the *Copyright Act* in order to precisely identify the nature and extent of this compliance gap.

##### **A. Scope of Beneficiaries**

Australia copyright law also encompasses a broader range of potential beneficiaries than those covered under the Marrakesh Treaty. Under the Marrakesh Treaty, a "beneficiary" is defined as a person who: (a) is blind, (b) has a visual impairment or a perceptual or reading disability, or (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

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<sup>53</sup> *Copyright Act 1968* (Cth), s 47A(11)(b).



normally be acceptable for reading.<sup>54</sup> This definition includes visual and all other possible physical disabilities that impede a person in reading, and does not confine the concept of disability by referring to specific types of disability. In Australia however, different types of copyright exceptions have different scopes of operation dependent on the nature of the beneficiary. For example, exceptions for using a work for certain purposes under s 200AB(4) applies to the use of works ‘by or for a person with a disability that causes difficulty in reading, viewing or hearing’ copyright material.<sup>55</sup> ‘A disability that causes difficulty in reading’ covers all kinds of disabilities that potentially affect a person’s ability in reading. Further s 200AB benefits both persons with a disability that cause reading difficulties and persons with disabilities that involve viewing or hearing difficulties. Pursuant to the *Copyright Act* the beneficiaries of print disability statutory licences include a person without sight, a person whose sight is severely impaired, a person unable to hold or manipulate books or to focus or move his or her eyes or a person with a perceptual disability.<sup>56</sup> Whilst the definition of “perceptual disability” is almost identical to that of the Marrakesh Treaty, the Australian law does not specifically mention “reading disability.” The latter term is typically interpreted as encompassing reading difficulties with spelling, phonological processing and rapid visual-verbal responding which result from neurological factors which cause individuals to read at levels significantly lower than

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<sup>54</sup> Marrakesh Treaty, art 3.

<sup>55</sup> *Copyright Act 1968* (Cth), s 200AB.

<sup>56</sup> *Copyright Act 1968* (Cth), s 10.

expected despite having normal intelligence.<sup>57</sup> This creates a divergence between the Treaty and Australian copyright law because a person with a “reading disability” is covered by the Treaty whilst they cannot necessarily seek access to copyright works under the statutory licence.

In Australia, the beneficiaries of print disability radio licences include persons who by reason of old age, disability or literacy problems are unable to handle books or newspapers or to read or comprehend written material.<sup>58</sup> As this provision gives consideration to persons who have no disability but still may have difficulties in reading, it is significantly wider than the scope of the exceptions provided by the Marrakesh Treaty. The Australian Act hence supports access by old-aged persons suffering from presbyopia, cataracts, glaucoma and other optical diseases who may find it difficult to hold a book for a long time because their arms are getting weak. The Act also extends to persons who are illiterate cannot understand the meaning of printed words despite having no physical problems. Thus as the *Copyright Act* provides for a wider range of eligible beneficiaries than does the Marrakesh Treaty.

## **B. Works Subject to Exceptions**

The scope of works subject to copyright exceptions in Australia is slightly different to that of the Treaty. The Marrakesh Treaty includes “literary and artistic” works among those that can be made and communicated in accessible formats, within the meaning

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<sup>57</sup> Joel B Talcott, 'Reading Disabilities: Genetics and Neurological Influence' (1994) 107(2) *The American Journal of Psychology* 305.

<sup>58</sup> *Copyright Act 1968* (Cth), s 47A(11)(b).

of Article 2(1) of the *Berne Convention*.<sup>59</sup> The *Berne Convention* protects literary and artistic works, which include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expressions, such as books, paintings, architecture, sculpture, photographic works, dramatic or dramatico-musical works, musical compositions, illustrations, and maps.<sup>60</sup> Additionally, the Marrakesh Treaty specifically notes that works subject to copyright exceptions include works in audio form, such as audiobooks.<sup>61</sup> The only restriction is that works subject to copyright limitations and exceptions in the Marrakesh Treaty need to be ‘published works’ or works ‘publicly available in any media’.

In comparison, fair dealing applies to literary, dramatic, musical or artistic work, and use by or for persons with a print disability regulated s 200AB and generally applies to a work without any restriction or condition. These two types of exceptions comply with the requirements of the Marrakesh Treaty. Whilst s 135ZP of the *Copyright Act* creates a statutory licence granting authorised institutions assisting persons with a print disability to make and communicate “literary and dramatic” works to persons with a print disability, it does not specifically extend to artistic works and scientific works. Moreover, whilst the omission of scientific works can be overcome by the expansive interpretation of “literary works” under Australian copyright law that cover works constitute productions falling within the scientific domain, artistic works such

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<sup>59</sup> Marrakesh Treaty, art 2.

<sup>60</sup> Berne Convention, art 2(1).

<sup>61</sup> WIPO, *Agreed Statements concerning the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (2013) <[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=301036](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301036)>.

as paintings, photographs and sculptures are not unequivocally excluded from access. Similarly, the print disability radio licence only permits a holder to make a sound broadcast of a “literary or dramatic” work.<sup>62</sup> Format shifting applies to books, newspapers and periodical publications, which is even narrower in scope when compared with the ambit of the Marrakesh Treaty.

Additionally, in contrast to the Marrakesh Treaty which requires the relevant work to be “published” or “otherwise made publicly available in any media”,<sup>63</sup> the *Copyright Act* does not strictly require being “published” as a pre-condition for a work to be subject to exceptions. Section 135ZP of the *Copyright Act* provides two kinds of exceptions, depending on whether a work has been published or not. First, to make sound recordings as accessible copies of a work for the print disabled, there is no need for that work to be published.<sup>64</sup> Second, if a work is to be made or communicated in the Braille, large-print, photographic or electronic versions, such a work is deemed to be published.<sup>65</sup> Thus the *Copyright Act* provides a wider regime of works subject to copyright exception in that a work need not to be published before produced into the format of sound recording.

Finally, under Australian law a precondition to obtaining a statutory licence for institutions assisting persons with a print disability is a finding that the relevant material is not commercially available. Specifically, s 135ZP provides that when a

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<sup>62</sup> *Copyright Act 1968* (Cth), s 47A

<sup>63</sup> Marrakesh Treaty, art 2(a).

<sup>64</sup> *Copyright Act 1968* (Cth), s 135ZP(1).

<sup>65</sup> *Copyright Act 1968* (Cth), s 135ZP(2).

sound recording, or Braille, or large-print or photographic version of a work has already been published, the same kind of accessible format cannot be made or communicated by the qualified institutions unless copies in such format cannot be obtained within a reasonable time at an ordinary commercial price after reasonable investigation. Such an evaluation of accessibility is not however a general requirement pursuant to the Marrakesh Treaty. Whilst Article 4(4) stipulates that a contracting party *may* confine limitations or exceptions to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market, it is not a mandatory requirement. Contracting parties are hence free to choose whether to apply this restriction in their national copyright law or not. If a country chooses to avail itself of this possibility, it is required to declare this in a notification deposited with the Director General of WIPO.<sup>66</sup> As Australia has lodged such a declaration at the time of ratification, compliance with the Treaty does not require amendment to its commercially availability provision.<sup>67</sup> Thus, there are at present a variety of divergences between the Treaty and Australian law as to the scope of works subject to copyright exceptions or limitations to enable access to published works for the print disabled.

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<sup>66</sup> Marrakesh Treaty, art 4(4).

<sup>67</sup> In Australia's instrument of ratification of the Marrakesh Treaty, it is noted that "under paragraph 4 of Article 4 of the Treaty, [that] limitations and exceptions applying to authorised entities, as defined in Article 2(c), provided for in Australia's national copyright law in accordance with paragraph 1 of Article 4 shall be confined, for Australia, to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons." WIPO, *Marrakesh Notification* No. 12 (2015) <[http://www.wipo.int/treaties/en/notifications/marrakesh/treaty\\_marrakesh\\_12.html](http://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_12.html)>.

**Table 1: Works, uses, accessible formats and restrictions to exceptions in the Marrakesh Treaty**

<b>Exception</b>	<b>Works subject to exception</b>	<b>Types of use</b>	<b>Accessible formats</b>	<b>Restriction</b>
<b>Authorised Entities</b>	<b>Literary, artistic, scientific and audio</b>	<b>Reproduction and communication</b>	<b>Any alternative manner that is feasible and comfortable for the print disabled</b>	<b>Published or publicly available. Commercial availability test (optional)</b>
<b>Individuals</b>	<b>Literary, artistic, scientific; Audio</b>	<b>Reproduction</b>	<b>Any alternative manner feasibly and comfortably for the print disabled</b>	<b>Published or publicly available. Commercial availability test (optional)</b>

**Table 2: Works, uses, accessible formats and restrictions to exceptions in *Copyright Act 1968***

<b>Exception</b>	<b>Works subject to exception</b>	<b>Types of use</b>	<b>Accessible formats</b>	<b>Restriction</b>
<b>Print disability licence</b>	<b>Literary &amp; dramatic</b>	<b>Reproduction  Communication</b>	<b>Audio, braille, large print, photographic and electronic</b>	<b>Published (except recordings);  Commercial availability test</b>
<b>Radio licence</b>	<b>Literary &amp; dramatic</b>	<b>Broadcasting</b>	<b>Radio broadcast</b>	<b>Published</b>
<b>s 200AB</b>	<b>All</b>	<b>Reproduction</b>	<b>No requirement</b>	<b>Three-step test</b>
<b>Fair dealing</b>	<b>Literary, dramatic, musical or artistic</b>	<b>Reproduction</b>	<b>No requirement</b>	<b>No</b>

<b>Format shifting</b>	<b>Books, newspapers, periodical publications</b>	<b>Reproduction</b>	<b>Any different form</b>	<b>No</b>
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### **C. Provisions as to a Non-profit Operations and Remuneration**

The Marrakesh Treaty places a strong emphasis on the “non-profit” nature of a potential use by a print disabled person when delineating the ambit of operation of its exceptions and limitations. The Treaty requires that authorised entities should undertake activities on a non-profit basis, whereas copyright exceptions for the print disabled in Australian copyright law are not limited to non-profit activities. Hence, under the Marrakesh Treaty, the “authorised entity” is authorised or recognised by the government only when it provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, or being a government institution or non-profit organisation.<sup>68</sup> Furthermore, when authorised entities make or supply accessible format copies, these activities must be undertaken on a non-profit basis.<sup>69</sup>

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<sup>68</sup> Marrakesh Treaty, art 2(c).

<sup>69</sup> Marrakesh Treaty, art 4(2).



In contrast, the *Copyright Act* does not expressly require all the regulated copyright exceptions or limitations for persons with a print disability to be for non-profit. Only section 200AB(4) specifically requires the use of a work by or for a person with a disability not to be ‘partly for the purpose of obtaining a commercial advantage or profit’. Some exceptions do however imply that “making a profit” should not be a legitimate purpose. For example, s 40 requires the use of a work under the fair dealing exception to be “for purpose of research or study”. Section 43C provides that a lawful format shifting of a work needs to be “for private and domestic use”. Section 135ZP requires an authorised institution carry out its activities “solely for the purpose of assistance to persons with a print disability”. The non-profit requirement is further confirmed by the Copyright Agency announcing that selling or supplying accessible copies for a financial profit is not an authorised use of the statutory licence.<sup>70</sup> There is no implication that the holder of a print disability radio licence has to conduct activities on a non-profit basis. The licence holder is therefore required to pay equitable remuneration to the owner of the copyright. The amount of such remuneration is as agreed upon between the owner of the copyright and the licence holder. In default of such an agreement, it determined by the Copyright Tribunal.<sup>71</sup> It is to be noted that s 152(8) of the *Copyright Act* provides a cap remuneration being 1% of the amount determined by the Tribunal to be the gross earnings of the broadcaster for the broadcasting of published sound recordings. However, as the Treaty leaves it to contracting parties’ national laws to determine whether and how to collect

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<sup>70</sup> Australia Copyright Council, *Print Disability Copyright Guidelines* (2007) Doc No A07n08, 14.

<sup>71</sup> *Copyright Act 1968 (Cth)*, s 47A(8).

remuneration,<sup>72</sup> and as Australia has lodged a notification that it will impose a requirement to remunerate, this divergence in provisions governing non-profit uses will not hinder Australia's compliance with the Treaty.

**Table 3: Provisions as to Profit and Remuneration**

<b>Exception</b>	<b>Entities/individuals</b>	<b>Profit purpose</b>	<b>Remuneration</b>
<b>Marrakesh Treaty Entities</b>	<b>Non-profit authorised institutions</b>	<b>Non-profit activities</b>	<b>Parties Self-determination</b>
<b>Marrakesh Treaty Individuals</b>	<b>Beneficiaries; Someone on behalf of beneficiaries</b>	<b>Personal use</b>	<b>Parties Self-determination</b>
<b><i>Copyright Act 1968</i> Institution licence</b>	<b>Declared institutions</b>	<b>Solely for the purpose of assisting print disabled</b>	<b>Yes In fact no collection</b>
<b><i>Copyright Act 1968</i> Radio licence</b>	<b>Licence holders</b>	<b>No requirement</b>	<b>Yes</b>

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<sup>72</sup> Ibid, art 4(5).

<b><i>Copyright Act 1968 s 200AB</i></b>	<b>Individuals</b>	<b>Non-profit</b>	<b>No</b>
<b><i>Copyright Act 1968 Fair dealing</i></b>	<b>Individuals</b>	<b>Research/study</b>	<b>No</b>
<b><i>Copyright Act 1968 Format shifting</i></b>	<b>Individuals</b>	<b>Private/domestic use</b>	<b>No</b>

#### **D. Cross-border Exchange**

Whilst the Marrakesh Treaty establishes a mechanism for international exchange of copies in accessible formats, Australian copyright law merely provides restrictions on parallel importation of books ‘first published in Australia’ unless certain conditions are met. Specifically, Article 5 of the Marrakesh Treaty allows an authorised entity in a Member State to export accessible format copies of a work to beneficiary persons or authorised entities in another Member State, and Article 6 further permits the beneficiary persons and authorised entities to import works in accessible formats from other countries. Further, Article 9 of the Marrakesh Treaty encourages contracting

parties to share information between authorised entities so as to foster the cross-border exchange. Although the implementation of cross-border exchange provision is not explicitly outlined and agreed upon countries, it is suggested that possible sources for implementation tools could include the adoption of choice of law rules, the exhaustion doctrine, and labeling.<sup>73</sup>

At present, the *Copyright Act* partially adopts the exhaustion doctrine by preventing parallel importation and providing exceptions under certain designated circumstance. Section 37 and s 102 of the Australian *Copyright Act* forbid the unauthorised importation of copies of literary, dramatic, musical or artistic works for the purpose of selling or letting for hire, or for distributing for the purpose of trade or for any other purpose that would prejudice the copyright owner.<sup>74</sup> Exceptions of the restriction of parallel importation are provided by s 44A and s 112A. First, there is no restriction on the importation of books first published in a foreign country. If a book ‘first published in Australia’, being a book released in the Australian market within 30 days of being published overseas, parallel importation is only allowed if it is to provide a single copy for a customer, or to provide one or more copies for a non-profit library, or after making written orders for copies of a work which have been unfilled for more than 90 days. However, the permission of parallel importation does not extend to institutions assisting persons with a print disability to import more than two copies of a book ‘first published in Australia’ and distribute them to persons with a print disability. Such

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<sup>73</sup> Marketa Trimble, 'The Marrakesh Puzzle' ( 2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 768.

<sup>74</sup> *Copyright Act 1968 (Cth)*, s 37.

institutions can only legally import copies of a book after making a written order to the copyright owner and receiving no response in 90 days. Neither does the current exception covers the importation and distribution of reading materials other than books for the use of persons with print disability. Institutions assisting persons with a print disability still need to acquire licence to import books or other copyright works before importing and distributing copyright works in accessible format copies. Additionally, s 44D provides that generally parallel importation of sound recording does not infringe copyright in works recorded. This exception can benefit persons with a print disability in that they can have access to sound recordings imported from other countries.

In conclusion, works subject to copyright exceptions under the *Copyright Act* are narrower in scope than under the Marrakesh Treaty and their use is subject to more restrictions. In order to fulfill its obligations under the Marrakesh Treaty, Australia needs to address these areas of divergence.

## **V. THE LAW REFORM DISCOURSE TO DATE**

### **A. ALRC Reports**

The ALRC has issued a number of papers identifying differences between the obligations imposed by the *Copyright Act* and the Marrakesh Treaty. It is useful to

examine this discourse and to consider the extent to which these discussions can shape laws to achieve full compliance with the Treaty.

The Australian Law Reform Commission's (ALRC) *Copyright and the Digital Economy - Discussion Paper*<sup>75</sup> notes that the existing fair dealing is only available for the print disabled to research and study, and not, for example, for the purpose of leisure and entertaining. The ALRC argues that whilst format shifting permits a person to shift the format of a work when he/she legally owns the original copy, it is not clear whether another person could assist the original copy owner to convert the format of such a work. Further, it notes that s200AB(4) has rarely been used as the alternative exceptions of fair dealing, format shifting and statutory licences have been more useful in providing access to copyright materials by persons with a print disability.<sup>76</sup> This notion is echoed by Harpur and Suzor who argue that this provision has forms a "timid legislative approach" as it largely overlaps with other existing copyright exceptions.<sup>77</sup>

The ALRC's *Copyright and the Digital Economy - Final Report* (Final Report)<sup>78</sup> extends this analysis by identifying three specific problems with the existing print disability statutory licence. Firstly, the ALRC notes that the scope of authorised

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<sup>75</sup> Australian Law Reform Commission, *Copyright and the Digital Economy (Discussion Paper)*, Report No DP 79 (2013).

<sup>76</sup> Discussion Paper, 223.

<sup>77</sup> Paul Harpur and Nicolas Suzor, 'Copyright protections and disability rights: turning the page to a new international paradigm' (2013) 36 *University of New South Wales* 745.

<sup>78</sup> Australian Law Reform Commission, *Copyright and the Digital Economy (Final Report)*, Report No 122 (2014), (hereafter called the Final Report).

institutions under the s 135ZP statutory licence is restricted, and it does not consider the uses of institutions participating in facilitating access to the print disabled, but not as their principal function, such as libraries and archives. Whilst libraries and archives may under s 49 reproduce and supply a periodical publication or a published work without authorisation to a private user, including the person with a print disability, for the purpose of research or study,<sup>79</sup> the requirement that they must then destroy such copies after a single use results in significant expense for the library or archive. It also results in delay for the second user. Secondly, the ALRC observes that publishers are not legally obliged to supply digital files for an authorised entity, resulting in dramatic costs in terms of time and money for an authorised institution to reproduce a work in accessible formats. Thirdly, although institutions assisting persons with print disabilities are allowed to circumvent a technology measure according to *Copyright Regulations 1969* (Cth) (*Copyright Regulations*),<sup>80</sup> manufacturing, importing or distributing a circumvention device are still forbidden by *Copyright Act*.<sup>81</sup> Technological measures are technological devices or tools that prevent unauthorised or illegal access to, or copying or reproduction of, copyright materials. Special expertise and devices are always needed to facilitate the circumvention. Institutions assisting persons with a print disability cannot obtain the necessary devices or services because there has not yet exception for the restriction on manufacturing, importing or distributing a circumvention device.

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<sup>79</sup> *Copyright Act 1968* (Cth), s 49(7A).

<sup>80</sup> *Copyright Regulations 1969* (Cth), Sch 10A.

<sup>81</sup> *Copyright Act 1968* (Cth), s 132APC.

In light of the above concerns, the ALRC's Final Report recommends repealing s 200AB(4), together with a variety of other specific exceptions, and replacing it with a general "fair use" exception.<sup>82</sup> The Commission notes that the integration of the three-step test into copyright exceptions makes such exceptions both narrow and uncertain application. The ALRC's view echoes wider scholarly dissatisfaction with the test. Howse notes that the incorporation of the three step test in copyright exceptions means that such provisions becomes overly restrictive in favour of copyright owners instead of benefiting the user.<sup>83</sup> Geiger, Gervais and Senftleben further note that it can cause a copyright exception to be insufficiently deferential to other societal and governmental interests.<sup>84</sup> More relevant for the present discussion, Ayoubi argues that as the three-step test was framed in general public international law, it may not be fully conducive to the provision of access to copyright works for the print disabled.<sup>85</sup> In such a context, Vezzoso advocates that the Marrakesh Treaty

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<sup>82</sup> The ALRC suggests to repealing the existing "fair dealing" and other specific exceptions such as s 40, s 41, s 43C and s 200AB because the proposing "fair use" exception will cover the regime of these exceptions, Final Report, p 158. The repealing of such exceptions was also proposed by a number of stakeholders, for example, Cricket Australia, Submission 700 and Australian Copyright Council, Submission 654. However, others were opposed and submitted that the fair dealing exceptions should be retained alongside any fair use exception: Free TV Australia, Submission 865.

<sup>83</sup> Robert Howse, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2010) 3(4) *The Journal of World Intellectual Property* 493.

<sup>84</sup> Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *American University International Law Review* 581.

<sup>85</sup> Lida Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) *New Zealand Journal of Public and International Law* 255.



should be used to reduce the reach of this controversial test.<sup>86</sup> In the Final Report, the ALRC recommends that the three-step test be replaced by a case-by-case determination of “fairness”.<sup>87</sup> Significant for the present discussion, the ALRC expressly advocates designing the fair use exception to include the use for the benefit of people with a disability. A non-exhaustive list of illustrative purposes is suggested to be included in the new fair use provision, containing the purposes “research or study”, “non-commercial private use” and “access for people with disability”.<sup>88</sup> The ALRC recommends that the fair use exception should contain “fairness factors” which are “sufficiently flexible to accommodate new uses” and to have “enough detail to provide valuable guidance to both copyright owners and users”.<sup>89</sup> Thus, if Australia were to adopt the expansive fair use exception recommended by the ALRC, it would significantly enhance compliance with the Marrakesh Treaty.

## **B. The Attorney-General’s Implementation Options Paper**

In 2014, Attorney-General’s Department published the ‘Marrakesh Treaty Implementation Options Paper’ to discuss potential law reforms to ensure compliance with the Treaty. The Paper outlines three possible options for law reform, namely, a

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<sup>86</sup> Simonetta Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 796.

<sup>87</sup> Final Report, 25.

<sup>88</sup> Final Report, 151.

<sup>89</sup> Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998), 6.08.

minor amendment, a moderate amendment and a flexible amendment.<sup>90</sup> The minor amendment maintains the current scheme. Institutions assisting persons with a print disability must appeal to s 200AB(4), instead of the statutory licence, to reproduce and communicate scientific works as well as artistic works other than dramatic works. The moderate option suggests extending the statutory licensing scheme in Division of Part VB to cover artistic works, rather than only literary and dramatic works. It suggests extending types of accessible formats, not limiting it to the currently nominated five formats—namely, audio, braille, large print, photographic and electronic versions. The flexible approach further proposes a stand-alone fair dealing or fair use provision similar to the one proposed in the Final Report. Additionally, all the three options affirm the need to ensure cross-border exchange as required by the Marrakesh Treaty. However, whilst the paper outlines the public policy basis for such laws, it does not outline how to amend the current law governing the importation and exportation of a work with copyright in order to ensure compliance with the Treaty.

### **C. Consideration of issue by the Parliamentary Joint Standing Committee on Treaties**

Finally, in September 2015, shortly before ratifying the Marrakesh Treaty, the Parliament published *Report 153: Treaties tabled on 16 June and 23 June 2015* providing a final evaluation of the *Copyright Act* in terms of its compliance with the

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<sup>90</sup> Australian Government Attorney-General's Department, *Marrakesh Treaty Implementation Options Paper* (1 Nov 2014). It is noted that now the Department of Communication and the Arts has responsibility for issues regarding copyright amendment for print disabled.

requirement of the Treaty.<sup>91</sup> The Report begins by acknowledging that a number of stakeholders have claimed that the commercial availability test is too prescriptive.<sup>92</sup> The report further addressed issues concerning the liability of circumventing technological measures as discussed in ALRC Final Report. The Report indicates that the Attorney-General's Department opines that the Australian law is largely compliant with the Marrakesh Treaty but recognises that there is room for improvement.<sup>93</sup> In order to address remaining areas of concern, the Report recommends that the existing print disability statutory licence mechanism be replaced by a print disability exception or a fair dealing exception for disability access.

## **VI. THE NATURE AND SCOPE OF THE 2017 AMENDMENT BILL**

Following Australia's ratification of the Treaty in December 2015 and building upon the analysis of the law reform in the above reports, the Australian Government released an Exposure Draft of the *Copyright Amendment (Disability Access and Other Measures) Bill* (Exposure Draft) in 2016.<sup>94</sup> After consulting and receiving submission from stakeholders for over one year, the *Copyright Amendment (Disability Access and Other Measures) Bill 2017* (the Amendment Bill) was introduced and read a first time

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<sup>91</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Report 153: Treaties tabled on 16 June and 23 June 2015* (2015).

<sup>92</sup> Ibid, 6.

<sup>93</sup> Mr Andrew Walter, Assistant Secretary of Attorney-General's Department, Committee Hansard, *Civil Law Division, Commercial and Administrative Law Branch* (10 August 2015) 3.

<sup>94</sup> *Copyright Amendment (Disability Access and Other Measures) Bill* (2016) (Cth), *Exposure Draft*.

in the House of Representatives in March 2017. The Amendment Bill remains essentially the same as the Exposure Draft. It inserts a new Part IVA into the *Copyright Act* to regulate uses for the print disabled that do not infringe copyright. The new Part includes a new s 113E that recommends the use of a fair dealing provision for the purpose of access to copyright materials by persons with a disability. Further, s 113F creates an express exception to use of copyright material by institutions assisting persons with a disability. Given the divergences between the Marrakesh Treaty and Australian copyright law discussed above, it is instructive to consider the nature and effect of the proposed Amendment Bill to determine whether and to what extent they would ensure full compliance with the Treaty.

#### **A. Beneficiaries Expanded to Persons with All Types of Disability**

It is useful to begin by noting that the scope of beneficiaries in the Amendment Bill is far wider than under both the Marrakesh Treaty and the existing *Copyright Act*. The beneficiary of the proposed Part IVA, Division 2 is “person with a disability”, defined as ‘a person with a disability that causes the person difficulty in reading, viewing or hearing copyright material in a particular form’.<sup>95</sup> This is different from the Marrakesh Treaty which benefits “persons with a print disability”, the proposed scope of beneficiaries would be expanded so as to include all kinds of disabilities that potentially affect a person’s ability to have access to copyright material. In this way, the exception covers all kinds of disabilities that potentially influence a person’s

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<sup>95</sup> The Amendment Bill, sch 1, Part 1.1.

ability to have access to copyright works. Thus this exception can effectively benefit more persons and enhance equity by supporting accessibility.

The proposed provisions have merged the previous statutory licences regarding copyright exceptions and limitations for intellectually disabled and print disabled persons. The “institution assisting persons with a disability” is not limited to assisting persons with a print disability, but expanded to include: (a) an educational institution; or (b) an institution that has as its principal function, or one of its principal functions, the provision of assistance to persons with a disability.<sup>96</sup> Intellectual disability can be characterized by significant limitations in intellectual function, as well as in adaptive behavior, relating conceptual, social, and practical adaptive skills.<sup>97</sup> Print disabilities are mainly physical disabilities that negatively affect a person to “read” a work expression, whereas intellectual disabilities are normally mental problems that hinder a person to comprehend the content of a work. The Australian Copyright Council in its guidance paper illustrates uses for the intellectually disabled as including translations and picture version of literary and dramatic works.<sup>98</sup> Although the means of using a work to assist the print disabled are different from means to assist the intellectually disabled, having general exceptions clarifies the operation of the legislation by identifying the needs of people with different forms of disabilities. A

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<sup>96</sup> Ibid.

<sup>97</sup> Robert Schalock et al, *Intellectual Disability: Definition, Classification, and Systems of Supports*, (American Association on Intellectual and Developmental Disabilities 2010) 3.

<sup>98</sup> Australian Copyright Council, *Disabilities: Copyright Provisions Information Sheet*, Doc. No G060v09 (May 2014) 5.

general exception also enable more institutions to be involved in assisting disabled persons to have access to copyright works.

Additionally, the current definitions for ‘person with a print disability’, and ‘institution assisting persons with a print disability’ are proposed to be repealed.<sup>99</sup>

Provisions regarding persons with an intellectual property disability and persons with a print disability in s 200AB(4) and Part VB are also proposed to be repealed.<sup>100</sup> Thus, the proposed provisions of the Amendment Bill significantly expand the scope of beneficiary of copyright exceptions to ensure full compliance with the Treaty.

## **B. Introduction of a New Fair Dealing Exception**

The Amendment Bill, s 113E, contains a new fair dealing exception for the purpose of assisting persons with a disability to have access to copyright material. Works subject to this exception are proposed to be “copyright materials” meaning “anything in which copyright subsists”. The Amendment Bill proposes four factors to be used in determining whether a dealing is a fair in s 113E. These are: (a) the purpose and character of dealing; (b) the nature of the copyright material; (c) the effect of the dealing upon the potential market for, or value of, the material; (d) if only part of the material is dealt with, the amount and substantiality of the party dealt with, taken in relation to the whole material. When compared with s 200AB(4), the mentioned four factors would provide a useful guidance for the court to decide whether a use falls

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<sup>99</sup> Ibid, sch 1, Part 2.9

<sup>100</sup> Ibid, sch 1, Part 2.56, Part 2.39.

within the scope of fair dealings. This provision would provide criteria for the case-by-case determination, and would help to overcome the uncertainty of s 200AB(4). It would also comply with the three-step test as required generally by TRIPS. As discussed in the previous section, the *Copyright Act*, when compared with the Marrakesh Treaty, has a narrow scope of works subject to the exception for the print disabled. The new “copyright materials” would contain almost every kind of work with a copyright, and hence would dramatically expand the scope of works subject to copyright exception to strengthen compliance with the Treaty. Furthermore, s 113D specifically notes that if a use falls into the new fair dealing regime, the exception to circumvent an access control technological protection measure under 116AN(9)(c) may apply. Thus, persons with disabilities hence can enjoy more types of works in accessible formats in Australia than under the Marrakesh Treaty. This is a significant achievement and Australia’s law in this area can form a useful template for nations around the world who are not merely seeking to satisfy the minimum requirements of the Treaty but are seeking to introduce laws that effectively support access to copyright materials by the print disabled.

### **C. Exception of Uses by Institutions Assisting Persons with a Disability**

The Amendment Bill proposes to transfer the current statutory licence under s 135ZP into a new exception of uses by institutions assisting persons with a disability. In the proposed s 113F, a new definition of “institution assisting persons with a disability” is provided. The new provision is widely defined to include an educational institution, or

an institution that has its principal function, or one of its principal functions, the provision of assistance to persons with a disability.<sup>101</sup> Pursuant to the proposed s 113F, such an institution, as well as persons acting on behalf of such an institution, may use works without infringing copyright if: (a) the use is for the sole purpose of assisting one or more persons with a disability to access the material in a format that the person or persons require because of the disability (whether the access is provided by or on behalf of the organisation or by another body or person); and (b) the organisation, or the person acting on behalf of the organisation, is satisfied that the material (or a relevant part of the material) cannot be obtained in that format within a reasonable time at an ordinary commercial price.

Unlike the statutory licence mechanism, institutions assisting persons with a disability under the proposed s 113F would have no obligation to pay remuneration to the copyright owner. To ensure that the copyright owner's interests would not be unreasonably prejudiced, the proposed s 113F would require a use for a pure and sole purpose of assisting persons with a disability. What is more, it would set up a test of commercial availability to confirm that no new copy of a similar accessible version of the work can be obtained within a reasonable time at an ordinary commercial price before apply to this exception. As discussed before, a policy of not seeking remuneration from institutions assisting persons with a print disability under s 135ZP of the *Copyright Act* has been widely applied by the Copyright Agency. The proposed s 113F would acknowledge this practice and codify it so as to mitigate costs of the

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<sup>101</sup> The Amendment Bill, sch 1, Part 1.1.



prescribed institutions. Further, the proposed s 113F would significantly expand the exceptions of uses of a copyright work by prescribed institutions. Firstly, beneficiaries in this section would be extended to persons with a wider scope of disabilities that may cause difficulties to have access to copyright materials. Secondly, unlike the present s 135ZP only permitting the reproduction of literary and dramatic works, the proposed s 113F does not confine types of works subject to copyright exceptions. Thirdly, whilst the present s 135ZP specifically lists five types of accessible forms that may be reproduced and communicated, the proposed s 113F provides a flexibility to adopt a wider choice of accessible formats. A more inclusive scope of accessible formats in the proposed s 113F further helps to simplify the requirement of commercial availability test into one subsection, instead of being six subsections in the present 135ZP requiring the mentioned institutions to check before making a work into a particular type of accessible format. Thus, the proposed s 113F provides more opportunities for persons with a print disability to get access to copyright materials.

Thus, the Amendment Bill refines the copyright exceptions mechanism for the *Copyright Act* by expanding the scope of beneficiaries, tailoring the fair dealing exceptions and rendering statutory licences more practicable. If the amendments in the Amendment Bill are enacted it will enable the *Copyright Act* to better facilitate access to published works for persons with a print disability and comply with international standards of access.

## VII. RELEVANT ISSUES NOT FULLY ADDRESSED BY THE 2017 BILL

However, beyond the above issues effectively addressed by the Amendment Bill, there are a number of areas of continuing concern and uncertainty that need to be considered.

### A. The Commercial Availability Test

There are serious concerns as to the workability and effect of the commercial availability test which is included in the proposed s 113F by the Amendment Bill. The Copyright Council has commented that the commercial availability test leads to significantly increased costs to potential users as substantial time and financial resources are required to investigate the availability of a particular work.<sup>102</sup> Further, Universities Australia, in its submission to Implantation Options Paper<sup>103</sup>, argues that the commercial available test is preventing universities from making copies in a format that is actually accessible to their stud The Copyright Council The Copyright Council ents.<sup>104</sup> In light of such cost concerns, the Australian Digital Alliance recommends removing the need for such a check, and proposes instead that rights

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<sup>102</sup> Australia Copyright Council, above n 63, 24.

<sup>103</sup> Attorney-General's Department, *Marrakesh Treaty Implementation Options Paper* (1 Nov 2014) <[file:///Users/KD/Downloads/Marrakesh%20Treaty%20implementation%20options%20paper%20\(1\).pdf](file:///Users/KD/Downloads/Marrakesh%20Treaty%20implementation%20options%20paper%20(1).pdf)>.

<sup>104</sup> Universities Australia, *Submission to Marrakesh Treaty Implementation Options Paper* (24 Dec 2015) <<https://www.communications.gov.au/sites/g/files/net301/f/submissions/MarrakeshSubmissionUniversitiesAustralia.pdf>>.

holders should be required to protect their interests by lodging the information as to the availability of accessible copies in a central notification system.<sup>105</sup>

In light of these concerns, an alternative and more effective option would be to combine the lodgment of the works available in accessible format with the operation of the Masters Catalogue already established by the Copyright Agency for institutions assisting the visually impaired to share information about accessible-format master copies. At present, the Copyright Agency Masters Catalogue enables authorised institutions and persons with print disabilities to upload and search for copyright works in alternate formats such as Braille, large print, digital and audio. The function of the catalogue could be extended to enable copyright owner to provide relevant information as to their works, and upload works in accessible formats into this database.<sup>106</sup> In this way, institutions could easily find the available copies, and help persons with a print disability to access to such a work. Moreover, even if a work has audio or digital format commercially available, such formats may not necessarily be accessible for the print disabled because they lack sufficient navigation information for print disable persons. Additionally, technological measures attached to such works may prevent the use of screen readers.<sup>107</sup> Thus, the above option could support greater accessibility to appropriate formats for the print disabled.

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<sup>105</sup> Australian Digital Alliance's Submission, 4.

<sup>106</sup> Nic Suzor, Paul Harpur and Dylan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media and Arts Law Review*

<sup>107</sup> Ibid.

A further matter that is inadequately addressed by the Amendment Bill is how to support the economic well-being of print disabled persons who commonly experience below average levels of income. As discussed above, disability commonly leads to greater needs which increases the risk of poverty.<sup>108</sup> The United Nations General Assembly noted that 80 percent of persons with disabilities live in developing countries, and that the majority of them live in conditions of poverty.<sup>109</sup> In Australia, statistics show that people with a disability face a significantly higher risk of poverty than the average. Australian Bureau of Statistics indicates that people with disability are twice as likely to be in the bottom 20% of gross household incomes.<sup>110</sup> In 2009, 27.4% of the disabled population is living in poverty. It is dramatically high when compared with 12.8% for the total population.<sup>111</sup> Hence, a “reasonable price” on the market for average person may well not be affordable for persons with a print disability. In the present regime, if there is disagreement as to what constitutes a “reasonable price” it is often necessary to seek judicial intervention. In such a context, it would be valuable for the *Copyright Act* to more finely delineate the factors to be taken into account in determining a reasonable price and include factors which specifically includes consideration of the income level of the person with a print disability.

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<sup>108</sup> Peter Saunders, 'The Costs of Disability and the Incidence of Poverty' (2007) 42(4) *Australia Journal of Social Issues* 461.

<sup>109</sup> United Nations General Assembly, *Realizing the Millennium Development Goals for persons with disabilities through the implementation of the World Programme of Action concerning Disabled Persons and the Convention on the Rights of Persons with Disabilities*, 3rd Comm, 63 rd sess, Agenda Item 55(e), UN Doc A/RES/63/150 (18 December 2008).

<sup>110</sup> Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers 2012* (1 December 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0>>.

<sup>111</sup> Australian Council of Social Service, *Poverty in Australia* (2014), <[http://www.acoss.org.au/images/uploads/ACOSS\\_Poverty\\_in\\_Australia\\_2014.pdf](http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf)>, 10.

## **B. The Print Disability Radio Licence**

A significant change proposed by the Amendment Bill is to repeal s 47A regarding the print disability radio licence.<sup>112</sup> As a result, a radio station would have to rely on fair dealing clause embodied in s 113F or to prove it as an institution assisting persons with a disability defined in s 113E so as to receive the benefit of the copyright exception in the proposed Amendment Bill. It is suggested that the Print Disability Radio Licence should be retained because it is different from the proposed fair dealings and uses by prescribed institutions in the Amendment Bill, and it provides meaningful supplement to the proposed copyright exception mechanism. First, if a radio station is to rely on the new fair dealing exception, it would have to prove that its use complies with the four proposed fairness factors in s 113E. It would be almost practically impossible for these stations given that a great number of works are used on daily basis. Second, if a radio station proves itself fit in the scope of institutions assisting persons with a disability, being an institution that has its principal function, or one of its principal functions, the use still need to pass the commercial available test required by the proposed s 113F. What is more, neither s 113E nor s 113F require the user to pay remuneration to the copyright owner, and it may harm the copyright holder's legitimate interests if the free use applies to a radio station. For example, RPH Australia, a group of radio stations providing news and information for the print disabled, declared that its radio programs are available in every state and territory of

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<sup>112</sup> Ibid, sch 1, Part 2, 17.

Australia, and are broadcasting to 70% of the Australian population.<sup>113</sup> What is more, some radio stations may involve in profit-making activities such as broadcasting commercials. Considering the wide-scope audience and the profit-making merits, sound broadcasting a work without paying the copyright holder equitable remuneration would unreasonably prejudice the right holder's economic interests. Therefore, the use of copyright works by a radio station is divergent from the merit of the proposed fair dealing and the use by the prescribed institutions. It is thus important to retain a separate and different mechanism for print disability radio stations.

In its current form, the Amendment Bill fails to place adequate consideration on the issue of remuneration. Under the present scheme in s 47A, the copyright owner or their agent can claim equitable remuneration from the licence holder for the making of a sound broadcast.<sup>114</sup> In contrast to what applies in the case of statutory licences for institutions assisting persons with a print disability, the collecting society has not officially announced to remove the obligation of the holder of a print disability radio licence to pay for copyright material. As discussed above, the mechanism of remuneration is legitimate to uphold copyright holder's economic interests in the absence of the non-profit purpose requirement and when copyright works are made available to persons without a disability. However a concern in the present context is that broadcasting is unable to be made without engaging in time-consuming

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<sup>113</sup> RPH Australia, *About RPH* <<http://www.rph.org.au/>>.

<sup>114</sup> *Copyright Act 1968* (Cth), 47A(8).

negotiations with individual publishers regarding the amount of remuneration.<sup>115</sup> Another controversial issue is that the 1% cap on remuneration placed on uses under statutory licences.<sup>116</sup> This has been challenged by a number of stakeholders submitted to repeal the cap. Specifically, the Phonographic Performance Company of Australia Limited in its submission argue that the cap to be ‘inequitable, completely arbitrary and does not involve any analysis of economic efficiency.’<sup>117</sup> It further argued that removing the caps would increase income of recording artists and companies, provide a greater economic incentive for creativity and investment and enhance cultural opportunities so as to bring benefits to the sound recording industry and Australian.<sup>118</sup> Therefore *Copyright Act* or *Copyright Regulations* should provide clear guidance for the criteria calculating and collecting the remuneration so as to minimise time-consuming negotiations.

Additionally, it is submitted that the administrative requirement of record keeping should be simplified. Currently, the *Copyright Act* requires licence holders keep a detailed record of the making of the broadcast, including: (a) time and date of the information of the making of the broadcast, (b) identifies the work; and (c) contains particulars of such other matters in relation to the work or in relation to the broadcast as are prescribed.<sup>119</sup> Such records need to be provided to the owner of the copyright of a literary or dramatic work, or the agent of such an owner, for inspection upon

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<sup>115</sup> Final Report, 416.

<sup>116</sup> *Copyright Act 1968* (Cth), s 152(8).

<sup>117</sup> Final Report, 424.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid, s 47A(1)(b).

request.<sup>120</sup> These requirements however require substantial labour and financial resources and add difficulties for the print disabled to access to copyright works. The ALRC Final Report suggests the repeal of the requirement for record keeping for statutory licence under Part VB, and recommends that parties be left to come to an agreement, or, if failing agreement, seek a determination by the Copyright Tribunal.<sup>121</sup> Similar consideration should also be put to the radio print disability licence because its recording keeping requirement is similarly complicated. It might be preferable for the licence holder and the copyright owner to negotiate an agreement on how to protect their own interests. If adopted, this change can potentially reduce the expenditure of a licence holder and provide flexibility for the broadcaster and the copyright holder to negotiate the terms of their cooperation.

### **C. Digital Access**

Perhaps most significantly, the *Copyright Act* and Amendment Bill does not provide an adequate mechanism to promote digital access to works by print disabled persons. The present *Copyright Act* complies with the requirement of the Marrakesh Treaty by including digital accessible formats and permitting circumvention of technological measures. Despite such schemes, critics have noted that it is in practice difficult for blind people to gain access to a wide selection of electronic texts in Australia as there is no scheme that facilitates such access.<sup>122</sup> Harpur, Suzor and Thampapillai argue

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<sup>120</sup> *Copyright Act 1968* (Cth), s 47A(6).

<sup>121</sup> Final Report, 208.

<sup>122</sup> Paul Harpur, Nicolas Suzor and Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 *Media and Arts Law Review* 1.



that Australia's anti-circumvention law still prevents blind people from accessing the materials in an accessible form, and a broader exception needs to be created for liability for the circumvention for the purposes of assisting people with disabilities to utilise copyright material in an accessible form.<sup>123</sup> Specifically, Harpur and Suzor found that legal and practical critical barriers exist for people with disabilities full accessibility of ebooks.<sup>124</sup> Cameron, Wood, and Suzor therefore propose that is vitally important, in order to achieve equality, that Australia ensure that works that are currently being published electronically, and works that will be published in the future, are made available in an accessible form.<sup>125</sup>

Whilst overcoming the problems of digital dissemination has been partially addressed by the Amendment Bill, it is recommended that additional provisions to mitigate the problems generated by digital dissemination and satisfy its obligations under the Marrakesh Treaty. Firstly, it is noted in s 113D of the Amendment Bill that a person may persuade to s 116AN(9)(c) of the Copyright Act to circumvent an access control technological protection measure to enable the person to do an act that, under the proposed Part IVA, does not infringe copyright. However, the Amendment Bill fails to consider providing the exception to institutions assisting persons with a disability. The prescribed action noted in Item 3 of Sch 10A of the *Copyright Regulations* is by an institution assisting persons with a *print* disability, not the newly introduced

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<sup>123</sup> Ibid, 10.

<sup>124</sup> Paul Harpur and Nicolas Suzor, 'The paradigm shift in realising the right to read : how ebook libraries are enabling in the university sector' (2014) 29(10) *Disability and Society* 1658. See further Harpur, above n 13.

<sup>125</sup> Cameron, Wood, and Suzor, above n 7, 3.

actions by institution assisting persons with a disability. Therefore, a special note should be added in the Amendment Bill or the Copyright Regulations to permit the institutions assisting persons with a disability to circumvent technological measures.

Secondly, the exception of circumventing technological measures should extend to area relates to the manufacturing, importation and distribution of a circumvention device and to provision and the offering of services to circumvent technological measures for the print disabled. Currently, the provision of devices and services to overcome technological measures attached to a copy of copyright materials is illegal pursuant to s 116AP and s 116AP of the *Copyright Act*. However, a practical problem is that print disabled persons, as well as individuals and institutions assisting them, are lack of expertise to circumvent technological measures without the help of professional devices or services. It is therefore necessary to expand the scope of the exception for circumvention, and allow the importation, manufacture and use of devices to circumvent the technological measures.

#### **D. Cross-border Exchange**

Finally, the Amendment Bill fails to adequately address the issue of cross-border exchange and the importation of works in accessible formats. The Marrakesh Treaty promotes the cross-border exchange of accessible formats so as to avoid unnecessary duplication of efforts and resources in creating accessible copies. The Amendment Bill however did not mention cooperation with other relevant contracting parties of the Marrakesh Treaty to exchange works in accessible formats.

A technical amendment could be made to s 44A and s 112A of the *Copyright Act* so as to more effectively promote the cross-border exchange of works in accessible formats. It is suggested that an exception be introduced into s 44A and s 112A permitting an institution assisting persons with a print disability to import and distribute more than two accessible copies of a book, as well as other copyright works first published in Australia. Additionally, a legislative framework needs to be introduced to govern cross-border exchange. A government agency may be needed to promote the exchange of copies between countries. This agency could monitor the distribution so as to ensure no one other than the beneficiary would benefit from the exchange. Another related issue is that if Australia has a broader scope of beneficiary persons than another party to the Marrakesh Treaty, that country may refuse to export accessible copies to Australia so as to ensure the copyright holder's interests. Therefore it would be useful to amend the *Copyright Act* so as to enable Australia to exchange accessible copies with other nations.

## VIII. CONCLUSION

When Australia ratified the Marrakesh Treaty in December 2015, it was envisaged that only minor technical amendments to the domestic *Copyright Act* would be required to comply with the Treaty's obligations.<sup>126</sup> This has not proven to be correct. Whilst Australia has a complex mechanism for persons with a print disability to gain

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<sup>126</sup> Andrew Walter, above n 93, 1.

access to copyright works, a detailed examination of the nature and ambit of both the Marrakesh Treaty and Australia's current copyright exceptions has revealed that substantial reforms are required. Further, whilst the Australian law reform discourse, culminating in the release of the Amendment Bill, has raised a number of critical matters that need to be addressed, there are further unaddressed issues which preclude Australia's full compliance with the Treaty. Hence, further amendments are necessary to facilitate effective access to copyright works for persons with a print disability. In this regard, it is suggested that the implementation of the Treaty would be strengthened by the retention of a separate arrangement for persons with a print disability, the removal of the commercial availability test for the proposed new fair use mechanism, and the retention of the print disability radio licence scheme subject to the introduction of simplified administrative and remuneration collection scheme. Finally, it is advisable to support digital access to published works by introducing an extended exception arrangement for circumvention of TPMs and a framework for cross-broader exchange. If such a matrix of law reforms were introduced, Australia would fully comply with its obligations under the Marrakesh Treaty and enact an equitable and efficient copyright law that would properly calibrate the needs of the print disabled with the rights and commercial interests of copyright proprietors.

## References

Ayoubi, Lida, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) *New Zealand Journal of Public and International Law* 255

Fitzpatrick, Shae, 'Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities' (2014) (37) *Boston College International & Comparative Law Review* 139

Ginsburg, Jane, 'Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions' (2001) 37(1) *Revue Internationale du Droit d'Auteur* 17

Hua, Jerry Jie, *Toward A More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer, 2014)

Harpur, Paul, *Discrimination, Copyright and Equality: Opening the Ebook for the Print Disabled* (Cambridge University Press, 2017)

Harpur, Paul, 'Ensuring Equality in Education: How Australian Laws are Leaving Students with Print Disabilities Behind' (2010) 15 *Media and Arts Law Review* 70

Harpur, Paul and Rebecca Loudoun, 'The barrier of the written word: analysing universities' policies to students with print disabilities' (2011) 33(2) *Journal of Higher Education Policy and Management* 153

Harpur, Paul and Nicolas Suzor, 'Copyright protections and disability rights: turning the page to a new international paradigm' (2013) 36 *University of New South Wales* 745

Harpur, Paul and Nicolas Suzor, 'The paradigm shift in realising the right to read : how ebook libraries are enabling in the university sector' (2014) 29(10) *Disability and Society* 1658

Harpur, Paul, Nicolas Suzor and Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 *Media and Arts Law Review* 1

Kent, Mike 'Access and Barriers to Online Education for People with Disabilities' (2016)  
<<http://www.ncsehe.edu.au/wp-content/uploads/2016/05/Access-and-Barriers-to-Online-Education-for-People-with-Disabilities.pdf>>

Köklü, Kaya, 'The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 737

Krikorian, Gaëlle and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (MIT Press, 2010)

Li, Jingyi and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) *European Intellectual Property Review* 653

Panel Report, *United States – Section 110(5) of The US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000)

Ricketson, Sam, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies Ltd, 2002)

Saunders, Peter, 'The Costs of Disability and the Incidence of Poverty' (2007) 42(4) *Australia Journal of Social Issues* 461

Schalock, Robert et al, *Intellectual Disability: Definition, Classification, and Systems of Supports*, (American Association on Intellectual and Developmental Disabilities 2010)

Suzor, Nic, Paul Harpur and Dylan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media and Arts Law Review*

Talcott, Joel B, 'Reading Disabilities: Genetics and Neurological Influence' (1994) 107(2) *The American Journal of Psychology* 305

Thomas, Nicole M., 'An Education: The Three-Step Test for Development' (2012) 34(4) *European Intellectual Property Review* 244

Van Wiele, Bram, *The ratification and implementation of the Marrakesh Treaty: a look at the future of South African Copyright Law* (LL.M. Thesis, UNIVERSITY OF CAPE TOWN, 2014)  
<[https://open.uct.ac.za/bitstream/item/14069/thesis\\_law\\_2014\\_van\\_wiele\\_b.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14069/thesis_law_2014_van_wiele_b.pdf?sequence=1)>

Wechsler, Andrea, 'WIPO's Global Copyright Policy Priorities: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' in *European Yearbook of International Economic Law 2015* (Springer, 2015) vol 6, 391

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## **Amending the Chinese Copyright Exception to Fulfil the Obligations of the Marrakesh Treaty**

**Jingyi Li \***

**Abstract:** Current Chinese copyright laws have not yet given sufficient consideration to copyright exceptions or limitations to facilitate access to copyright works for persons with a print disability. Now that China has become a signatory party of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, it would be significant if China could amend its copyright laws. The objective of this paper is hence to evaluate the effectiveness of Chinese copyright exceptions for the print disabled, and propose options to amendments to China's copyright law to ensure compliance with its signatory obligations. To this end, the paper provides an overarching examination on China's copyright exception arrangements for the print disabled, identifies the gap between Chinese copyright laws and the Marrakesh Treaty, and analyses previous proposals on copyright law reform.

Chinese copyright laws have developed a regulatory framework for balancing private proprietary interests against the public interest and granting exemption from protection on the grounds of fair use. China does not however give sufficient consideration to copyright exceptions or limitations to facilitate access to copyright works for persons with a print disability. China became a signatory party of the *Marrakesh Treaty to Facilitate Access to Published*

*Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Marrakesh Treaty)<sup>1</sup> in 2013. In this treaty, persons with a print disability are defined as those who are unable to read printed works due to blindness, visual impairment or a perceptual or reading disability.<sup>2</sup> China now has a signatory obligation to enact limitations or exceptions in its national copyright law to facilitate the reproduction, distribution and cross-border exchange of published works in Braille, audiobooks and other accessible formats for persons with a print disability without the authorization of the copyright right holder.

China has not yet ratified the Marrakesh Treaty because the present copyright exception available for persons with a print disability in Chinese Law is extremely restricted and old-fashioned, leaving a gigantic gap for China to address in order to fulfill its obligation to the Marrakesh Treaty. In China there are 75.512 million people with a visual impairment, including 8.248 million who are blind and 67.246 million who have low vision.<sup>3</sup> It would be significant if China could ratify the Marrakesh Treaty and amend its current copyright laws for the implementation of the treaty so as to benefit such a huge population with print disabilities. Legislators in China are currently

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<sup>1</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WIPO Doc VIP/DC/8, came into force 30 September 2016, (hereafter called the Marrakesh Treaty).

<sup>2</sup> Marrakesh Treaty, art 3.

<sup>3</sup> World Health Organization, *Global Data on Visual Impairments 2010*, p 5, available at <http://www.who.int/blindness/GLOBALDATAFINALforweb.pdf?ua=1>.

According to the statistics provided by the Chinese government, there are 12.63 million visually disabled persons in China by the year 2010, *Populations of People with Disabilities by 2010*, China Disabled Persons' Federation, available at [http://www.cdpf.org.cn/sytj/content/2012-06/26/content\\_30399867.htm](http://www.cdpf.org.cn/sytj/content/2012-06/26/content_30399867.htm).

proposing to modify the *Copyright Law of the People's Republic of China 1990* (hereafter called the Copyright Law). The State Council Legislative Affairs Office published the Draft of Copyright Law Amendment Bill (hereafter called the Draft) on 6 June 2014, seeking advice from the public.<sup>4</sup> The proposed reform, however, does not fully consider China's signatory obligations under the Marrakesh Treaty.

The objective of this paper therefore is to evaluate the effectiveness of Chinese copyright exceptions for the print disabled, and propose options for amendments so as to enable China to fulfil its signatory obligations. To this end, the paper firstly provides an overview of China's copyright exception arrangements for the print disabled, and identifies the gap between Chinese copyright laws and the Marrakesh Treaty. The article concludes by analysing previous proposals on copyright law reform, and by recommending options for the legal reform of Chinese copyright laws to better facilitate access to copyright works for persons with a print disability.

## **I. The present Chinese Copyright Exception for the Print Disabled**

The Copyright Law, along with the *Regulation on the Protection of the Right to Network Dissemination of Information 2006* (hereafter called the Network Dissemination Regulation) and the *Law of the People's Republic of China on the Protection of Disabled Persons 1990* (hereafter called the Disability Law) have established the Chinese legal governance framework to facilitate access to copyright works for the print disabled. This framework, however, not well-designed or effectively operated.

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<sup>4</sup> Legislative Affairs Office of the State Council, Copyright Law Amendment Bill(Draft) Open for Public Advice, available at <[http://www.gov.cn/xinwen/2014-06/10/content\\_2697701.htm](http://www.gov.cn/xinwen/2014-06/10/content_2697701.htm)>.

The Copyright Law is the fundamental instrument for copyright protection in China. Article 22 of the Copyright Law provides a number of cases that fall within the regime of fair use, permitting a work to be used without permission from, and without payment of remuneration to, the copyright owner. Subsection 12 of Article 22 specifically includes the case of transliterating a *published* work into *Braille* for *publication*. There are three restrictions on this exception. First, only published works are subject to the exception. Second, the only accessible format is Braille. Third, the use of a work is limited to translating for publication. The scope of fair use in such a case is therefore relatively narrow with only limited uses falling inside the regime. Article 22 also notes that fair use exception extends to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.<sup>5</sup> Meanwhile, to protect the author's moral rights, it requires that the name of the author and the title of the work, and the other rights enjoyed by the copyright owner in accordance with the Copyright Law, are not prejudiced.<sup>6</sup> Fair use in the Copyright Law only includes 12 cases as listed in Article 22, without flexibility to encompass any other possible situation, especially when the listed fair use cases are not themselves inclusive and comprehensive. This arrangement has been criticized as unable to provide a sufficient legal basis for courts to make a judgment when facing new situations that should legitimately fall within the fair use regime.<sup>7</sup>

The Network Dissemination Regulation is a binding regulatory instrument protecting the right to network dissemination of works owned by the

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<sup>5</sup> Copyright Law, art 22.

<sup>6</sup> Ibid.

<sup>7</sup> LIANG Zhiwen, Classified Cases of Fair Use in Copyright Law, 3 *Huadong Zhengfadaxue Xuebao* [Journal of the East China University of Political Science and Law] (2012), 34.

copyright owners, performers and producers of audio-visual products. In Article 6 the regulation provides eight cases of fair use under the network environment which do not require the user to obtain authorization from the copyright owner, nor require the user to pay royalty or remuneration. Article 6(6) specifies one case of fair use “where any already *published literary* work is provided to the blind in a way as particularly perceptible to the blind and not for the purpose of making profits”. As indicated in the provision, this exception only applies to published literary works. Considering the fact that the Network Dissemination Regulation protects the right to network dissemination of information, “providing” in this provision means making a work available to the public on the Internet, not including the right to reproduce or to distribute a work.<sup>8</sup> The regulation however does not clearly identify *who* can provide a work to the beneficiary, and has been criticized for not being practically useful.<sup>9</sup> “A way that is particularly perceptible to the blind” refers to formats that are accessible, and could only be perceivable, by the blind. In this context, large print materials, eBooks and audiobooks are excluded, because these formats are perceptible by persons other than the blind. Braille may be the only format that is exclusively accessible to the blind. When explaining this provision under the Network Dissemination Regulation, the legislator could only raise one example, this being a digital file that could be printed out by a Braille embosser punching dots onto paper.<sup>10</sup> The application of copyright exception for the blind under the Network Dissemination Regulation is therefore extremely limited.

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<sup>8</sup> WANG Qian, *The Influences of the Marrakesh Treaty on Chinese Copyright Legislation*, 10 *Faxue* [Science of Law] (2013), 51.

<sup>9</sup> MEI Shuwen Mei, *To improve the Free Use System in the Network Dissemination Regulation*, 6 *Faxue* [Science of Law] (2008), 103.

<sup>10</sup> ZHANG Jianhua ed, *Interpretation of the Regulation on the Protection of the Right to Network Dissemination of Information*, (2006, China Legal Publishing House, Beijing), 28.

The Network Dissemination Regulation also provides an exception for blind persons to circumvent technological measures. Technological measures are defined in Article 26 of this regulation as technologies, devices, and components that prevent or restrict performances and audio-visual products of works being viewed, utilized or made available to the public in an unauthorised way. With the development of Information Communication Technologies, copyright laws have been expanded to protect works from being processed, stored, edited, and exchanged in digital formats through computers, cell phones and other electronic devices.<sup>11</sup> Works in digital formats are vulnerable in that they can be easily copied, reproduced, altered and disseminated. Copyright owners are therefore using technological measures such as digital watermarks, passwords and technologies that disable cut, copy or paste functions, to prevent, restrict, or limit the unauthorized exploitation of their digitized works.<sup>12</sup> The Copyright Law in Article 48(6) prevents the unauthorized circumvention of such technological measure so as to protect the interests of the copyright holder. The Network Dissimulation Regulation, in Article 4, Article 10, Article 18 and Article 19, reaffirms the copyright holder's right to use technological measures to protect their digital works, and prohibits illegal circumvention of technological measures. It has been acknowledged that digital works can be effectively transformed into speech, Braille or other accessible formats, and facilitates the production and communication of works for print disabled.<sup>13</sup> Therefore, in Article 12(2), the

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<sup>11</sup> Brassil, Jack T., Steven Low, and Nicholas F. Maxemchuk. "Copyright protection for the electronic distribution of text documents." *Proceedings of the IEEE* 87.7 (1999): 1181-1196.

<sup>12</sup> Robert Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property' (2004) 9 *Duke Law & Technology Review*.

<sup>13</sup> See further J. Allen, M. Hunnicutt and D. Klatt, From text to speech: the MITalk system (Cambridge University Press 1987); W Yang and K Georgila, 'Automatic Detection of Unnatural Word-Level Segments in Unit-Selection Speech Synthesis' (Paper presented at the IEEE ASRU 2011, 2011)

Network Dissemination Regulation permits the circumvention of technological measures attached to a published literary work when such a work is provided to the blind in a way that is exclusively perceptible to the blind and this is done for a non-profit purpose, provided that the work can only be obtained on the internet. However, the mentioned exception to circumvention is narrow in its scope and restricted in application. First, such an exception only applies to a “published literary work”, and such work has to be “only available on the internet”. Second, digital braille may be the only format that is in such a way as particularly perceptible to the blind according to this requirement. Third, the circumvention has to be for a non-profit purpose. Additionally, Article 12 notes that the exception to circumvention does not extend to the provision of services, devices or components that assist the circumvention of technological measures. Apart from the exception for blind persons, there are another three cases of exceptions to the protection of technological measures listed in Article 12 of the regulation, these being for the purpose of teaching and research, for administrative and judicial conduct, and for security testing of the computer system and Internet. But the exhaustive remuneration of exceptions is not flexible enough to include possible situations falling outside the listed four cases, especially when the listed cases are restricted in scope. The protection of technological measures is, I suggest, too restricted, and taken to an improperly high standard, considering the requirements of international treaties, and also China’s need for development.<sup>14</sup>

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<<http://www.cs.cmu.edu/~yww/papers/asru2011.pdf>>; Ž Obrenović, 'Web accessibility and open source software' (2009) 4(4) *Disability and rehabilitation: Assistive technology* 227.

<sup>14</sup> ZHAN Qian Zhan, International Treaties on Technological Measures—Also on China’s Amendment Bill of Copyright Law, 9 Jinan Xuebao [Jinan Journal (Philosophy and Social Science)] (2014), 24.

Whilst the Disability Law is not a copyright-oriented regulation, it does contain provisions regarding the publication, production and distribution of works for visually disabled persons. The Disability Law in its Article 29 requires the government to organize and support research into and the application of Braille, especially the compilation and publication of special education teaching materials in Braille. Article 43(2) more generally requires that the government and society organize and support the compilation and publication of books in Braille and audio versions for visually impaired persons. The mentioned two provisions encourage governmental institutions to produce and publish Braille and audio books, as copyright owners themselves, so as to provide works in accessible format for the visually impaired. In terms of dissemination, the Disability Law in Article 43(2) requires that special reading rooms should be provided in public libraries for the blind to read Braille and audio books. The *Regulation on the Construction of Barrier-Free Environments 2012*, in Article 22, also specifies the requirement that government-funded national, provincial and municipal public libraries should provide special reading rooms with Braille reading materials and audiobooks for persons with visual disabilities. In situations where it is inconvenient for the visually impaired to personally visit libraries, the Disability Law in Article 50 permits the posting of Braille books free of charge. Article 50 further provides that the government shall encourage and support telecommunication, radio and television services to offer discount charges for services to visually impaired persons. Article 52 requires the government and society to take measures to promote information communication for the disabled, and create a barrier-free environment for disabled persons to participate equally in social life. Article 54 requires the government to promote relevant research for developing information communication technologies and products for use by disabled persons. The Disability Law mainly serves as an encouragement or a general statement of the government's obligation to promote accessibility for



the disabled, and includes little that is specifically applicable to fulfilling the requirements of the obligation. From the copyright law perspective, the Disability Law only concerns Braille and audio formats for the benefit of the visually disabled, without mentioning other accessible formats such as large print and digital versions. Apart from that, copyright protection for the right holder, as well as technological protection measures, may stand as barriers for governmental institutions to produce, publish and disseminate a copyright work.

## **II. Signatory Obligations Imposed by the Marrakesh Treaty**

### *II.A Reconciling copyright and access to copyright works for persons with a print disability*

Differing from traditional intellectual property right treaties, the Marrakesh Treaty prioritizes the interests of persons with a print disability as copyright users. The treaty represents a nature of reconciling copyright and access to copyright works for persons with a print disability as one of their basic human rights.<sup>15</sup> It is noted by Drahos that property rights by their nature allow the rights holder to exclude others from utilizing intellectual resources, including those with fundamental human rights interests, and are therefore likely to produce conflicts between rights.<sup>16</sup> Copyright exceptions and limitations are widely adopted to resolve the conflict between copyright users and copyright holders.<sup>17</sup> In particular, copyright exceptions and limitations for the print

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<sup>15</sup> Jingyi Li and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) (10) *European Intellectual Property Review*.

<sup>16</sup> Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, available online at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>.

<sup>17</sup> See further Richard Peltz, 'Global Warming Trend - The Creeping Indulgence of Fair Use in International Copyright Law ' (2009) 17(2) *Texas Intellectual Property*

disabled are provided by international treaties and national laws. For the preparation of the Marrakesh Treaty, Sullivan collected and analyzed the national laws of 58 different countries.<sup>18</sup> Her research reveals that countries have dramatically different arrangements in their domestic laws as to whether and to what extent a copyright exception or limitation applies.<sup>19</sup> She argues that states should have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations so as to honour their human rights obligations.<sup>20</sup>

## *II.B Mandatory copyright exceptions and limitations*

The Marrakesh Treaty represents a significant shift from previous intellectual property instruments in that it obligates contracting parties to adopt mandatory copyright exceptions or limitations. To provide conditional exceptions or limitations on copyright has long been accepted by international intellectual property treaties.<sup>21</sup> Article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) permits limitations or exceptions to intellectual property rights in certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. The *Berne Convention for the Protection of*

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*Law Journal* 26; Vicky Ku, 'Critique of the Digital Millennium Copyright Act's Exception on Encryption Research: Is the Exemption too Narrow' (2004) 7(2) *Yale Journal of Law and Technology* 46; Antony Dnes, 'Should the UK Move to a Fair-Use Copyright Exception?' (2013) 44(4) *IIC - International Review of Intellectual Property and Competition Law* 418.

<sup>18</sup> Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired,' (2007) WIPO Doc SCCR/15/7.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, 20.

<sup>21</sup> See further Ruth Okedui, 'Toward an International Fair Use Doctrine' (2000) 39(1) *Columbia Journal of Transnational Law* 7; Christophe Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12(3) *Vanderbilt Journal of Entertainment and Technology Law* 515.

*Literary and Artistic Works (Berne Convention)*, in Article 9, permits contracting countries to adopt exceptions for the reproduction of copyright works in 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.” Inspired by the Berne Convention, the *WIPO Copyright Treaty (WCT)* permits copyright exceptions in a more general way, not limited to reproduction. The *World Intellectual Property Organization Performance and Phonograms Treaty (WPPT)* additionally permits limitations or exceptions with regard to the protection of performers and producers of phonograms in connection with the protection of copyright in literary and artistic works. The stated intellectual property treaties, however, only permit, rather than encourage or obligate contracting parties to provide, copyright exceptions or limitations in their national laws. The Marrakesh Treaty is distinctive in that it imposes obligations upon contracting parties to provide a number of fundamental copyright exceptions or limitations for the print disabled.

The critical obligation imposed upon the contracting parties is contained in Article 4, which requires these countries in their national laws provide a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public, so as to empower its beneficiary persons, as well as individuals and authorized entities assisting the beneficiary, to produce and communicate published works in accessible formats without the prior permission of copyright owners. A beneficiary person in this treaty is referred as a person with a print disability, including a person who is blind or has a visual impairment, or a perceptual or reading disability, preventing them from reading printed works to substantially the same degree as a person without an impairment or disability. A person is also regarded as the beneficiary if he/she cannot hold or manipulate a book or

focus or move the eyes, because of a physical disability, to the extent that would be normally acceptable for reading. The accessible format for the beneficiary is defined to encompass a copy of a work in any manner or form which gives a beneficiary person access to the work, permitting the person to have access as feasibly and comfortably as a person without a visual impairment or other print disability. Such accessible formats include, but are not limited to, braille, large-print, audio and digital versions of a work. The Treaty, in Article 4.2, permits its beneficiary person or someone acting on his or her behalf, including a primary caretaker or caregiver, to make an accessible format copy of a work for the personal use of the beneficiary person, provided the latter has lawful access to that work or a copy of that work.

Apart from individual uses, an authorized entity may, on a non-profit basis, produce copies of a work in accessible format, and supply such copies exclusively to beneficiary persons by any means, including non-commercial lending or electronic communication by wire or wireless, as well as undertaking any intermediate steps to achieve those objectives pursuant to Article 4.2. An authorized entity is strictly defined in Article 2 so as to include someone who 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, as well as a government institution or non-profit organization that provides the mentioned services to beneficiary persons as one of its primary activities or institutional obligations.

### *II.C Cross-border exchange*

In order to ensure that works in accessible formats can be freely exchanged among countries so as to multiply choices available for beneficiary persons, Article 6 requires the contracting party in their national laws to permit a beneficiary person, someone acting on his or her behalf, or an authorized

entity, to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder. This provision deals with the longstanding and unsolved issue of parallel imports. Parallel imports are goods genuinely produced and circulated under authorization of the intellectual property holder in one market, and then imported into a second market without the authorization of the local owner of that intellectual property right in the second market.<sup>22</sup> It is controversial whether parallel imports are illegal in the second market, considering the fact that such goods are legally produced and traded in the original market, and the propriety right of intellectual property may already exhausted. Parallel imports are therefore often referred as gray-market imports.<sup>23</sup> TRIPS, in Article 6, refuses to address the issue of the exhaustion of intellectual property rights, leaving it for individual countries to freely determine whether to permit parallel imports. Consequently, national policy on this issue varies among countries. For example, the United States believes that intellectual property rights does not exhaust outside the territory of a nation, and therefore prohibits parallel imports in most cases.<sup>24</sup> Nevertheless, the Supreme Court in *Quality King Distributors Inc. v. L'anza Research International Inc.* found that the copyright holder could not prevent re-importation of the products the holder had authorized for export from the United States.<sup>25</sup> In the recent case of *Kirtsaeng v. John Wiley & Sons, Inc.*, the court reaffirmed that copyright holders could not

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<sup>22</sup> Keith Maskus, 'Parallel Imports' (2000) 23(9) *The World Economy* 1269, 1269.

<sup>23</sup> Nancy Gallinia and Aidan Hollisb, 'A contractual approach to the gray market' (1999) 19(1) *International Review of Law and Economics* 1; Dale Duhan and Mary Jane Sheffet, 'Gray Markets and the Legal Status of Parallel Importation' (1988) 52(3) *Journal of Marketing* 75.

<sup>24</sup> Sneha Jain, 'Parallel Imports and Trademark Law' (2009) 14 *The Journal of World Intellectual Property* 14.

<sup>25</sup> Court in *Quality King Distributors Inc., v. L'anza Research International Inc.*, 523 U.S. 135 (1998).

restrict trafficking of those works after first sales.<sup>26</sup> The European Union, on the other hand, permits parallel imports of copyright works from countries of the European Union in some cases, but forbids imports from outside the EU.<sup>27</sup> The Marrakesh Treaty requires contracting parties to permit such importation for the use of the print disabled, and accepts the practice of parallel importation of copyright work in this particular area. Article 9 of the Marrakesh Treaty further supports an international Bureau to share information about copies in accessible format, and facilitates the cross-border exchange of accessible copies.

#### *II.D Circumvention of technological*

In undertaking the production and communication of accessible copies, the contracting parties are required by Article 7 to ensure that the domestic copyright protection on technological measures does not constitute a barrier to the limitations or exceptions provided by this Treaty. The circumvention of technological measures so as to avoid seeking authorization from the copyright holder is prohibited by laws in various jurisdictions.<sup>28</sup> It is, however,

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<sup>26</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. (2013).

<sup>27</sup> Article 36 of *Treaty on the Functioning of the European Union* allows restriction of trade of goods for the protection of intellectual property rights. The Court of Justice of the European Union confined the restriction under Article 36 to be available for “specific subject matter” of an intellectual property right to be first to place on the European Union market. In this way, products attached with intellectual property rights, once sold in one EU country, are permitted to be parallel imported and resold inside the EU regime. See further: Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar, 2014), p 40; Domenico Sindico, 'On Parallel Importation, Trips and European Court of Justice Decisions' (2002) 5(4) *The Journal of World Intellectual Property* 505.

<sup>28</sup> For example, Section 103 of the United States *Digital Millennium Copyright Act 1976*, Section 41 of the Canadian *Copyright Act (R.S.C., 1985, c. C-42)*, and Division 2A of Australian *Copyright Act 1968* prohibit circumvention of technology measures. Article 6 of the European Directive 2001/29/EC urges its Member States to provide adequate legal protection against the circumvention of any effective technological measures.

acknowledged that digital information can be effectively transformed into accessible formats, and disseminated to persons with a print disability so as to assist them in having access to copyright works.<sup>29</sup> Article 7 of the Marrakesh Treaty therefore obligates its contracting parties to permit the print disabled, as well as persons and institutions assisting them, to circumvent technological measures for the use of the print disabled.

Scholars in a number of contracting parties of the Marrakesh Treaty have been proposing to amend their national copyright laws so as to fulfill the signatory obligations. For example, Cameron, Wood and Suzor have submitted a consultation paper to the Australian Attorney-General's department regarding the adoption of the Marrakesh Treaty.<sup>30</sup> Fitzpatrick believes that the Marrakesh Treaty is not a comprehensive solution, but that can be used as a vehicle to modernize national copyright law in the United States.<sup>31</sup> Bram has discussed how the Marrakesh Treaty should be implemented in South African copyright law in his dissertation.<sup>32</sup> In terms of specific issues, Vezzoso introduced the debate on the controversial three-step test during the drafting of the Marrakesh Treaty and concluded that this test is

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<sup>29</sup> Jingyi Li, 'Facilitating Access to Digital Content for the Print Disabled: The Need to Expand Exemptions to Copyright Laws' (2015) 27(3) *Intellectual Property Journal* 355.

<sup>30</sup> Natalie Cameron, Suzannah Wood, and Nicolas Suzor, *Submission to the Attorney-General's Department consultation on "Marrakesh Treaty options for implementation" discussion paper*, available at <<http://eprints.qut.edu.au/79122/1/2014-QUTIP-AGD-Marrakesh.pdf>>.

<sup>31</sup> Shae Fitzpatrick, 'Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities' (2014) 37 *Boston College International & Comparative Law Review* 139.

<sup>32</sup> Bram Van Wiele, *The ratification and implementation of the Marrakesh Treaty: a look at the future of South African Copyright Law* (LL.M. Thesis, UNIVERSITY OF CAPE TOWN, 2014) <[https://open.uct.ac.za/bitstream/item/14069/thesis\\_law\\_2014\\_van\\_wiele\\_b.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14069/thesis_law_2014_van_wiele_b.pdf?sequence=1)>.

capable of enough flexibility for the “Marrakesh miracle” to take place.<sup>33</sup> Trimble has discussed three possible sources for implementing the cross-border exchange provision, and proposes a suitable method to choose applicable laws and rules implementing the cross-border exchange.<sup>34</sup>

### **III. The Gap between Chinese Copyright Exceptions and Marrakesh Treaty Obligations**

#### *III.A. Rights subject to exception*

There is a significant gap between Chinese copyright laws and the Marrakesh Treaty in terms of rights subject to exception or limitation. The Marrakesh Treaty provides exceptions to or limitations on a number of exclusive rights of copyright holders. Pursuant to Article 4.1, the treaty requires contracting parties to provide exceptions to the right of reproduction, the right of distribution, and the right of making available to the public of the above types of work. This provision further notes that contracting parties may provide a limitation or exception to the right of public performance if they so choose. It is optional for contracting parties to adopt exceptions or limitations of the proprietary right to receive remuneration according to Article 4.5. Additionally, the Marrakesh Treaty, in Article 6, requires contracting parties to permit importation of an accessible format copy without the authorization of the local rightholder, which provide a limitation for the local rightholder to prohibit parallel imports. Article 7 of the Marrakesh Treaty provides an exception to the protection of technological measures, permitting persons with a print disability and their helpers to circumvent technological measures so as to make accessible format copies.

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<sup>33</sup> Vezzoso, Simonetta 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 796.

<sup>34</sup> Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 768.



17. In China, Article 22 of the Copyright Law applies generally to all kinds of “copyright owner’s rights”, without specifying particular kinds of rights subject to fair use. Based on Article 9 of the Copyright Law, the copyright owner has an expanded range of rights, including the right of publication, the right of authorship, the right of alteration, the right of integrity, the right of reproduction, the right of distribution, the right of exhibition, the right of performance, the right of broadcasting, the right of information network dissemination, the right of exploitation and the right to remuneration. Article 9(9) further points out that the list is not exhaustive, and other rights protected by Chinese laws and regulations will be regarded as protected by the Copyright Law. Apart from the mentioned author’s rights, article 22 extends the listed fair use cases to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.<sup>35</sup> Judging by its appearance, Chinese Copyright Law provides a very extended range of rights subject to exception. However, subsection 12 of Article 22 by itself reframes the application of exceptions. “Transliterating a published work into Braille for publication” may only involve an exception to the right to translate, the right to reproduce and the right to publish. The owner’s right to collect royalties is also excluded in the fair use context. The types of rights being restricted under the Copyright Law are however much narrower than those of the Marrakesh Treaty, even without consideration of issues related to distribution, importation and technological measures.

The right to make a work available to the public is normally accepted as the right of authors, performers and phonogram producers to authorize or prohibit the dissemination of their works through interactive networks, mostly

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<sup>35</sup> Copyright Law, art 22.

via the Internet.<sup>36</sup> The Copyright Law, in Article 9, does not articulate the right of making work available to the public. Such a right falls within the scope of exclusive copyright, pursuant to Article 9(9), considering the fact that the Network Dissemination Regulation protects the right of copyright owners, performers and producers of audio-visual products to network and disseminate information. Again, the right of making a work available to the public may only apply to the author of a published literary work, and not extend to performers or producers, given that Article 6(6) of the Network Dissemination Regulation articulates that the exception should only be available “where any already *published literary* work is provided to the blind in a way as particularly perceptible to the blind and not for the purpose of making profits”.

### *III.B. Works subject to exception*

Copyright exceptions provided by Chinese law for the print disabled are similar to those of the Marrakesh Treaty, in that both of these mechanisms only apply to *published* works. The two mechanisms also make similar types of work subject to copyright exception. To be more specific, the Marrakesh Treaty provides exceptions for “literary and artistic” works to be reproduced and communicated in accessible formats, within the meaning of Article 2(1) of the *Berne Convention*.<sup>37</sup> The *Berne Convention* adopts an extended interpretation of “literary and artistic” works that includes every production in the literary, scientific and artistic domain in any possible mode or form of expression, such as books, paintings, architecture, sculpture, photographic works,

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<sup>36</sup> See further, Kristy Wiehe, 'Dollars, Downloads and Digital Distribution: Is Making Available a Copyrighted Work a Violation of the Author's Distribution Right ' (2008) 15 *UCLA International Law Review* 11; John Horsfield-Bradbury, 'Making Available as Distribution: File-Sharing and the Copyright Act ' (2008) 22 *Harvard Journal of Law and Technology* 274.

<sup>37</sup> Marrakesh Treaty, art 2.

dramatic or dramatico-musical works, musical compositions, illustrations and maps.<sup>38</sup> Such a regime generally covers any possible expression of literary, scientific and artistic work under copyright protection. However, the Marrakesh Treaty, in Article 2(a), confines the form of works to texts, notation and/or related illustrations, as well as audio forms.<sup>39</sup> Article 2(a) furthermore requires that a work has to be published or otherwise made publicly available for it to be subject to a copyright exception or limitation provided by the treaty.

Chinese Copyright Law has a similarly extended range of types of work subject to exception. Article 22 does not limit the types of work subject to fair use, and these exceptions therefore apply to any kind of work protected under the Copyright Law. According to Article 3, works protected under the Copyright Law include literary and artistic works, as well as those in natural science, social science, engineering technology, and the like, in the form of literary, narrative, musical, dramatic, quyi,<sup>40</sup> choreographic, photographic, cinematographic, television and video-graphic works. Maps and computer software are also included. The definition of *work* is open-textured, with an additional subsection to encompass “other works protected by laws and administrative rules and regulations.” In this context, the Copyright Law is broad in the range of works it makes subject to copyright exception, and is in this way similar to the Marrakesh Treaty. Nevertheless, the range of works subject to exception to the right to making works available to the public is narrow in scope. The Network Dissemination Regulation in Article 6 (6)

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<sup>38</sup> Berne Convention, art 2(1).

<sup>39</sup> The inclusion of audio form is specifically noted in the Agreed statement concerning Article 2(a).

<sup>40</sup> Quyi is a Chinese performance art consisted of narrative storytelling using staged monologues and dialogues. Quyi includes performances such as ballad singing, Pingshu, comic dialogues, clapper talks and cross talks.

provides copyright exception for the blind only for *published literary* works. Accordingly, works in visual art and scientific works are not subject to such exception. In particular, works such as video recordings and radio and TV programs protected under this regulation cannot be made available to the blind.

### *III.C. Braille being the only accessible format*

Accessible format in China is extremely restricted in scope when compared with that of the Marrakesh Treaty. An accessible format copy is defined in the Marrakesh Treaty as a copy of a work in an alternative manner or form permitting the beneficiary person to have access to the work as feasibly and comfortably as a person without print disability.<sup>41</sup> The range of accessible formats is extended. As long as a format permits a beneficiary to have equal access to a work, this format is regarded as an assessable format. The most commonly known accessible formats include braille, large print and audio versions, as well as digital files that can be converted into audio form, or can be printed out into braille. The variety of accessible formats effectively facilitates persons with a print disability to have access to information and knowledge that is equal to that of their non-disabled peers.<sup>42</sup>

In dramatic contrast, Chinese copyright laws only recognize Braille as an accessible format for copyright exception. The Copyright Law in Article 22(12) explicitly notes that only the transliteration of a work into *Braille* falls into the fair use regime. This case of fair use was firstly adopted in the Copyright Law in 1991. At that time, works in audio and digital versions were not popular in China. With the development of information and communication technologies, an increasing number of new formats, such as audiobooks,

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<sup>41</sup> Marrakesh Treaty, art 2(b).

<sup>42</sup> Li, above n 29.

ebooks and digital files, are used to assist visually disabled persons to have access to works.<sup>43</sup> However, Article 22(12) has not adapted to the changes in the digital era, and the accessible format remains restricted to Braille, even after the Copyright Law Amendment 2001 and Amendment 2010. To restrict the accessible format only to Braille excludes the making of audiobooks and ebooks for the print disabled from the free-use regime, and dramatically reduces the effectiveness and practical value of the free use exception.

The Network Dissemination Regulation, introduced in 2006 and governing network dissemination of information, to some extent inherits the narrowness of recognized accessible formats from the Copyright Law. Article 6(6) of the regulation restricts the means of dissemination to what is “only perceivable by the blind”. In this context, large-print, audio and digital files are excluded from the exception, because they are perceptible by sighted persons. As explained by Zhang, the only version exclusively perceptible by the blind seems to be digital Braille.<sup>44</sup> In this context, Braille is still the only accessible format to provide copyright exception for the print disabled. Blind persons can only download digital Braille, and use a special Braille printer to print out a work in Braille.<sup>45</sup>

The Disability Law goes further than the copyright laws, in that it recognizes both Braille and audio versions as accessible formats for the blind in Article 43(2). Apart from that, Article 52 and Article 54 of the Disability Law require promoting information communication technologies and products for use by

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<sup>43</sup> Krishna Jayakara et al, 'Promoting Broadband and ICT Access for Disabled Persons: Comparative Analysis of Initiatives in Asia-Pacific Region' (2015) 31(4) *The Information Society* 299

<sup>44</sup> ZHANG Jianhua, above n 10, 28.

<sup>45</sup> LIN Min, “The Impact of New International Copyright Legislation on Library Service for Visually Impaired People”, 2015 (10) *Library And Information Services*, 74-78, 74.

disabled persons. More accessible formats, including digital works, may be involved with such information communication technologies. However, the Disability Law does not provide specific requirements on what the country should do to “promote” accessible formats, neither does it provide criteria for measuring to what extent the “promoting” has been effective. Therefore the rights of the disabled that require the country to actively promote accessible information and knowledge are not protectable in the judicial system.<sup>46</sup> What is more, the Disability Law parallels the Copyright Law in the Chinese legislation system. Without specific articulation, the Disability Law cannot exclude the protection of copyright under the Copyright Law and Network Dissemination Regulation when conflict occurs.<sup>47</sup> Individuals or institutions therefore cannot translate a work into digital or video versions for the print disabled, since that may constitute a copyright infringement.

#### *III.D. Blind persons able to read Braille as beneficiaries*

In addition to the restrictions it imposes on accessible formats, Chinese copyright law only features exceptions benefiting a limited portion of persons with a print disability when compared with the Marrakesh Treaty. In the Marrakesh Treaty, the beneficiary is defined as someone with a print disability, which includes a person who (a) is blind; (b) has a visual impairment or a perceptual or reading disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (c) is otherwise unable, through a physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would

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<sup>46</sup> YANG Fei, On the Barrier-free Right of Information of the Disabled], 2 Henan Caijingzhengfadxue Xuebao[Journal of Henan University of Economics and Law] (2013), 118.

<sup>47</sup> ZHANG Zhiming, Chinese Legal System under the Background of Social Transformation], 2 Zhongguo Faxue [China Legal Science] (2009), 140.

normally be acceptable for reading.<sup>48</sup> The scope of beneficiaries is extended in that it includes not only those with a visual disability but also persons with a reading disability who cannot understand the meanings of printed words, and persons who cannot hold or look at a book because of other physical disabilities.

Unlike the Treaty, which provides a detailed regime of beneficiary persons, Chinese Copyright Law does not clearly define the concept of a beneficiary. Exceptions provided in both Article 22(12) of the Copyright Law and Article 6(6) of the Network Dissemination Regulation are for the use of “blind” persons. It follows that blind persons are the only beneficiaries of such kind of copyright exception.<sup>49</sup> Furthermore, given that Braille is the only possible accessible format that can be produced under copyright exceptions, a blind person can only benefit from the exception when he/she is able to read Braille. The beneficiaries are therefore blind persons who can read Braille. This means that the scope of beneficiary persons in Chinese copyright laws is relatively narrow when compared with the Marrakesh Treaty.

### *III.E. Authorized entities not defined*

An additional significant gap between Chinese copyright laws and the Marrakesh Treaty is that Chinese copyright laws have not yet taken into consideration the importance of the authorized entity. Authorized entities play a crucial role in the copyright exception and limitation system provided in the Marrakesh Treaty. Article 4 of the treaty empowers authorized entities to produce and communicate a work without the prior permission of copyright owners when certain specified conditions are met. The authorized entity is strictly defined as an entity that is authorized or recognized by the

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<sup>48</sup> Marrakesh Treaty, art 3.

government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.<sup>50</sup> An authorized institution should be non-profit, officially recognized and provide special services enabling the beneficiary to have access to copyrighted works.

Neither the Copyright Law nor the Network Dissemination Regulation nominate any specific institution to produce and disseminate works for the print disabled. The Disability Law does require the “government” and “society” to take steps to assist disabled persons to have access to works in Braille and audio versions. But the “government” and “society” are highly abstract and general entities, and it is difficult to identify institutions that are actually accountable for such mission. In practical terms there are only two publishers producing Braille publications in China, namely, the China Braille Publishing House and the Publishing Factory of the Shanghai School for the Blind. The China Braille Publishing House is the dominant publisher for producing Braille books.<sup>51</sup> The Shanghai School only publishes textbooks for the use of primary and secondary education.<sup>52</sup> Both of these publishers are non-profit institutions funded and supervised by the government. They provide Braille books for free or at cheap prices to the Chinese print disabled. Nevertheless, without a clearly announced status as an authorized entity, neither of the two publisher can automatically and effectively enjoy copyright exceptions or limitations provided under the Copyright Law or the Network

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<sup>49</sup> WANG, above n 8, 53.

<sup>50</sup> Marrakesh Treaty, art 2(c).

<sup>51</sup> China Braille Publishing House, available at <<http://www.cbph.org.cn/>>

<sup>52</sup> Shanghai School for the Blind, Publishing Factory, <http://www.cshsb.com/web/blindchildren/class.aspx?FIDTypes=11>.



Dissemination Regulation.

*III.F. Inadequate consideration of exceptions regarding private use, technological measures and cross-border exchange*

The Marrakesh Treaty provides a more comprehensive system than China for copyright exceptions and limitations. The Treaty, in Article 4.2, obligates its contracting parties to provide exceptions for private use by the beneficiary person or someone acting on their behalf. Chinese Copyright Law, in Article 22(12), only provides exceptions for publishers, and does not extend to the beneficiary's private uses. Article 22(1) provides that anyone, including the print disabled, can use a published work for the user's own private study, research or self-entertainment, as a free use case without authorization from the author. However, assisting other people to use a work is not accepted as fair use in this provision. Caregivers or caretakers therefore have no legal basis to assist the print disabled to use a copyright work without authorization from the copyright owner.

30. Another loophole in Chinese copyright law is the lack of consideration given to technological protection measures. Technological measures present a practical barrier for print disabled persons and their assistants to have access to a work, even when copyright exceptions and limitations are in place. The Marrakesh Treaty therefore requires its contracting parties to provide exceptions or limitations to permit circumventing technological measures when necessary. In China, on the other hand, the legal protections against the circumvention of technological measures still hinder the promotion of accessibility for the print disabled. Chinese Copyright Law, in Article 48(6), forbids the circumvention of technological measures protecting copyright and other rights over a work. This provision, however, permits other laws or administrative regulations to adopt exceptions to this provision. As

introduced above, the Network Dissemination Regulation, in Article 12(2), provides an exception for circumventing technological measures when providing a published literary work to the blind. The exception is nevertheless extremely restricted, and only applies to online published literary works. Such an exception does not overcome the barrier established by Article 48(6) of the Copyright Law that may prevent persons with a print disability, as well as other persons and institutions assisting them, from having access to copyright works even if they are eligible to enjoy such a work with a copyright exception. In this way, China does not comply with its signatory obligation under the Marrakesh Treaty in that its legal protection against the circumvention of technological measures prevents beneficiary persons from enjoying related copyright limitations and exceptions.

Parallel imports among countries of copies in accessible formats for the print disabled is accepted by the Marrakesh Treaty, whereas Chinese copyright laws remain silent or at best ambiguous on this issue. The Marrakesh Treaty, in Article 5 and Article 7, encourages the exchange of accessible format copies among authorized entities and beneficiaries from different Member States. This arrangement helps to reduce duplicative production efforts and drives down the cost of providing accessible copies.<sup>53</sup> Countries have different attitudes towards issues of parallel importation of copyright works, which renders the application of cross-border exchange complicated.<sup>54</sup> In China, the Copyright Law avoids mentioning the issue of parallel imports. The listed exclusive rights of copyright holders do not include the right to import. Neither Article 47, listing eleven types of action constituting copyright

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<sup>53</sup> Shae. Fitzpatrick, 'Setting Its Sights on the Marrakesh Treaty: The US Role in Alleviating the Book Famine for Persons with Print Disabilities' (2014) 37 *Boston College International & Comparative Law Review* 139, 159.

<sup>54</sup> Marketa. Trimble, 'The Marrakesh Puzzle' (2014) 45(7) *IIC-International Review of Intellectual Property and Competition Law* 768, 782.

infringements which bear civil liability, nor Article 48, enumerating eight kinds of copyright infringements that bear administrative liability, mention the act of importing a copyright work. In the civil law area, China has a legal principle according to which the “absence of legal prohibition means freedom”, which in turn means that if there is no specific prohibition in the legislation, people can act freely in that area.<sup>55</sup> It follows that to import a copyright work legally obtained from another country is not generally forbidden by Chinese Copyright Law. In some cases China may prohibit parallel imports of works protected by a country which China has signed a bilateral agreement with. For example, China signed the *People's Republic of China Intellectual Property Rights Memorandum Of Understanding 1992* with the United States. In Article 3(4) of this memorandum the Chinese government promised to forbid parallel imports by clarifying that “the exclusive right survives the first sale of copies”.<sup>56</sup> Article 3(4) further notes that this memorandum of understanding prevails over domestic regulations where there is an inconsistency. Although China did not subsequently adopt a new regulation clarifying this issue, the bilateral memorandum is binding and forbids parallel imports of works owned by United States copyright holders. Apart from that, Chinese scholars are divided into two schools on the issue of parallel imports. One school argues that China should forbid parallel imports of intellectual property products so as to better protect intellectual property rights as well as to protect the consumer’s interests.<sup>57</sup> Another school believes that to allow parallel imports

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<sup>55</sup> YI Jun, Absence of Legal Prohibition Means Freedom in Civil Area, 4 *Zhongguo Shehui Kexue* [Journal of Chinese Academy of Social Sciences] (2014), 121.

<sup>56</sup> *People's Republic Of China Intellectual Property Rights Memorandum Of Understanding 1992*, available at <[http://tcc.export.gov/trade\\_agreements/all\\_trade\\_agreements/exp\\_005362.asp](http://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005362.asp)>.

<sup>57</sup> QU Sanqiang, Issues on Parallel Imports and Protection on Intellectual Property Rights in China, 8 *Faxue* [Legal Science] (2002), 72; LI Yuhong, Research on

of certain products can benefit Chinese people, considering the fact that China is still a developing country.<sup>58</sup>

Overall, there are a number of differences between the exceptions provided by Chinese copyright laws for the print disabled and the obligations imposed by the Marrakesh Treaty. In practice, the regulatory framework established by the Copyright Law, the Network Dissemination Regulation, and the Disability Law is unable to provide adequate copyright exceptions or limitations to facilitate access to published works for the print disabled.

#### **IV. Copyright Law Amendment Bill Draft**

As introduced previously, the State Council Legislative Affairs Office has published the Draft of Copyright Law Amendment Bill seeking advice regarding the amendment of the Copyright Law. In this Draft, the free use for the print disabled is still restricted to “the translation of published works into Braille for publication”.<sup>59</sup> Introducing the “three-step test” and the exception to the circumvention of technological measures are the two main issues concerning copyright exceptions and limitations in the Draft.

##### *IV.A. “three-step test”*

Originally, the “three-step test” was established internationally in Article 9 of

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Exhaustion of Distribution Right—in the background of China’s Copyright Law Modification], 3 Hebei Faxue [Hebei Law Science] (2015), 144; GUAN Yuying, Analysis of the First Sale Doctrine in Copyright Area, 10 Faxue Zazhi [Law Science Magazine] (2014), 52.

<sup>58</sup> ZHANG Hong, Study on Scope of Border Protection of Intellectual Property Rights—With the Discussion on Parallel Import of the Goods Concerning Intellectual Property Right, 11 Zhengfa Luntan [Tribune of Political Science and Law] (2004), 131; YI Yu, HE Ying, Research on Parallel Import of Intellectual Property Rights, 9 Hebei Faxue [Hebei Law Science] (2006), 68.

<sup>59</sup> *Draft of Copyright Law Amendment Bill* of P.R.C., art 43, available at: <[http://www.jetro.go.jp/ext\\_images/world/asia/cn/ip/law/pdf/origin/opinion](http://www.jetro.go.jp/ext_images/world/asia/cn/ip/law/pdf/origin/opinion)

the *Berne Convention*, to permit contracting countries to adopt exceptions for reproduction in 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.” Similar exceptions were later permitted by the TRIPS, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The WTO expert panel explains that the “three-step test” requires exceptions or limitations that should (a) be confined to certain special cases that are clearly defined in the national legislation;<sup>60</sup> (b) not conflict with a normal exploitation of the work not affecting actual and potential economic interests arising from the normal exploitation of a work;<sup>61</sup> and (c) not unreasonably prejudice the legitimate interests of the right holder.<sup>62</sup> Although the WTO Panel’s interpretation has been criticized as overly restrictive in favor of copyright owners and insufficiently deferential to other societal and governmental interests,<sup>63</sup> it provides a mechanism for properly balancing the interests of copyright owners and copyright users.<sup>64</sup> The Marrakesh Treaty, in Article 11, affirms the importance of the “three-step test” in legitimating copyright exceptions or limitations for the print disabled. It is believed that the “three-step test” provides sufficient flexibility for national law-makers to adopt exceptions and

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<sup>60</sup> Panel Report, *United States – Section 110(5) of The US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000), 6.112.

<sup>61</sup> *ibid*, 6.181.

<sup>62</sup> *Ibid*, 6.220, 6.224.6.229.

<sup>63</sup> Robert Howse, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2010) 3(4) *The Journal of World Intellectual Property* 49; Christophe Geiger, 'From Berne to National Law, via the Copyright Directive: the dangerous mutations of the three-step test' (2007) 29(12) *European Intellectual Property Review* 486.

<sup>64</sup> Li and Selvadurai, above n 15.

limitations at the domestic level.<sup>65</sup>

Chinese Copyright Law does not specifically articulate the “three-step test” as a precondition of copyright exceptions and limitations. It is to be noted that China is a contracting party of the mentioned treaties, and has ratified the *Berne Convention*, TRIPS, WCT and the WPPT. The “three-step test” is however not articulated in the Chinese Copyright Law. Instead, the *Regulations for the Implementation of the Copyright Law* (the Copyright Regulation) adopts this test by providing that “the exploitation of a published work which may be exploited without permission from the copyright owner in accordance with the relevant provisions of the Copyright Law, shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner.”<sup>66</sup> The Copyright Regulation was made by the State Council, which is the executive department of the Chinese government, whereas the Copyright Law was made by the Chinese National People’s Congress as the legislating department. The Copyright Regulation is used to guide the enforcement of the Copyright Law from an administrative perspective.<sup>67</sup> Without a stipulation in the Copyright Law, it has been suggested that it is improper for the Copyright Regulation to set up the three-step test for copyright exceptions.<sup>68</sup> The Draft of the Copyright Law Amendment Bill therefore proposes to insert the “three-step test” in Article

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<sup>65</sup> Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *American University International Law Review* 581.

<sup>66</sup> Regulations for the Implementation of the Copyright Law of the People's Republic of China, State Council of the People's Republic of China, art 21. Geiger regards this test as a “two-step test”, without mentioning “certain special cases”. See Geiger, above n 49. It is however not the case because Article 22 specifically lists twelve cases, which is in comply with the requirement of “certain special cases”.

<sup>67</sup> Copyright Regulation, art 1.

<sup>68</sup> Wenqing Liu, 'Reform of China's Copyright Legislation' (2011) 59 *Journal of the*

22, prohibiting fair use from impairing the normal exploitation of the work concerned, or constituting unreasonable prejudice to the legitimate interests of the copyright owner.

The “three-step test”, if introduced into Article 22, will govern the application of the fair use case of “translating a published work into Braille for publication.” That may constitute a restriction on such an exception. However, considering the fact that the mentioned exception is extremely restricted, the introduction of the “three-step test” may make no difference, because such an exception is itself not likely to impair the normal exploitation of the work, or constitutes unreasonable prejudice to the legitimate interests of the copyright owner. Even if the Copyright Law is amended to expand the exception for the print disabled, as required by the Marrakesh Treaty, the “three-step test” may still not restrict the application of such exception. First, the Marrakesh Treaty restricts the copyright exceptions to cases where only authorized entities, persons with a print disability, and persons assisting them can produce and distribute accessible copies, and this is only for the use of persons with a print disability. Second, the blind market is normally not profitable given that persons with a print disability usually have relatively low income and cannot afford expensive intellectual products.<sup>69</sup> Therefore, the production and

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*Copyright Society of the U.S.A.* 849.

<sup>69</sup> It is aware that ‘there are at least 650 million persons with disabilities worldwide, of whom 80 per cent live in developing countries, and that the majority of persons with disabilities live in conditions of poverty.’ *Realizing the Millennium Development Goals for persons with disabilities through the implementation of the World Programme of Action concerning Disabled Persons and the Convention on the Rights of Persons with Disabilities*, 3rd Comm, 63 rd sess, Agenda Item 55(c), UN Doc A/RES/63/150 (18 December 2008). In 2003, the Panel Study of Income Dynamics in the United States conducted a survey on nationally representative sample of over 7,000 families. The statistics shows that 4.9% of people without disability are living below poverty line, while 13.2% of disabled people are below the poverty line. The median family income is \$64,000 for people without

distribution of works in accessible formats for the print disabled does not conflict with a normal exploitation of the work. Third, the Marrakesh Treaty leaves it to the contracting parties to determine whether to collect remuneration so as to avoid unreasonably prejudicing the legitimate interests of the right holder. It follows that copyright exception required by the Marrakesh Treaty comply with the requirements of the “three-step test”. The introduction of the “three-step test” into Chinese Copyright Law therefore does not conflict with the copyright exception provided for the print disabled.

#### *IV.B. Technological measures*

The Draft of the Copyright Law Amendment Bill proposes an exception for the circumvention of technological measures. As discussed previously, the Chinese Copyright Law, in Article 48(6), forbids the circumvention of technological measures. The Network Dissemination Regulation, in Article 12(2), provides a restricted exception to the circumvention for the blind, which is far from adequate for giving the print disabled access to works. The Draft of the Copyright Law therefore proposes an exception, in Article 71, allowing technological measures to be legally circumvented where any already published work is provided to the blind in a way that is exclusively perceptible to the blind and is not for the purpose of making profits, provided that the work cannot be obtained by the blind in ordinary ways.

The proposed exception is still restricted in its scope, with four restrictions.

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disability, while median family income of disabled people is only \$40,778. Richard V. Burkhauser, Robert R. Weathers and Mathis Schroeder, 'A Guide to Disability Statistics from the Panel Study of Income Dynamics' (Cornell University, 2006) <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1207&context=edicollect>> [Accessed February 6, 2014]. The Preamble to the *Marrakesh Treaty* further notes that “the majority of persons with visual impairments or with other print disabilities live in developing and least-developed countries.”



First, works subject to such an exception have to be previously published. This requirement is found in Article 22(12) which provides free use for transliterating a *published* work into Braille for publication. It also complies with the requirement of Article 7 in the Marrakesh Treaty providing an exception for circumvention of technological measures so as to facilitate access to *published* works for the print disabled. Second, circumvention is permitted only when providing a work to the blind in a way that is “particularly perceptible to the blind”. As discussed before, this way is suggested to be Braille. In this context, circumvention of technological measures is only allowed when producing Braille texts or digital Braille files, and providing them to blind persons who can read Braille. Third, the circumvention should not be used for a profit-making purpose. This requirement complies with the Marrakesh Treaty requiring authorized entities to be non-profit organizations,<sup>70</sup> and requiring that activities producing and distributing copies in accessible formats are undertaken on a non-profit basis.<sup>71</sup> This requirement is reasonable in that for-profit circumvention may fail the “three-step test” because it can result in competition for the copyright owner’s market share, and impair the owner’s legitimate interests. Lastly, the exception only applies when a work cannot be obtained by the blind in ordinary ways. This requirement is sometimes known as the “commercial availability test”. This test is used to protect the copyright owner’s commercial interests, and to avoid unfair competition for authorized copies on the market. The Marrakesh Treaty, in Article 4(4), permits the contracting party in its domestic law to confine limitations or exceptions to works which, in their particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. It is further noted

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<sup>70</sup> Marrakesh Treaty, art 2.

<sup>71</sup> Ibid, art 4.

that any contracting party availing itself of this possibility shall so declare in a notification at the time of the ratification of this Treaty. A number of countries adopt the “commercial availability test” when providing copyright exceptions for the print disabled.<sup>72</sup> For example, the Australian *Copyright Act 1968* provides that if no new copy of an accessible version of the work can be obtained within a reasonable time at an ordinary commercial price, a copyright exception would apply to a work which already be published in accessible formats.<sup>73</sup> Australia made a declaration that it confines the limitations or exceptions for the print disabled to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons.<sup>74</sup>

The proposed exception for the circumvention of technological measures in the Draft of the Amendment Bill excludes activities providing the technology, devices or components intended to circumvent measures. Digital technologies and devices are widely used to transfer a work from print format to accessible format for the print disabled. For example, text-to-voice software can read out a digital text for persons with a print disability; screen reader software can generate synthesized voices when opening a webpage; there is a refreshable braille display device using an electro-mechanical system for displaying braille characters by constantly raising and lowering round-tipped pins through holes in a flat surface.<sup>75</sup> The mentioned technologies and devices are often developed and provided by professional hi-tech companies. The Draft

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<sup>72</sup> Jingyi Li, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 740.

<sup>73</sup> Australian *Copyright Act 1968*, s 135ZP (3), (4), (5), (6).

<sup>74</sup> WIPO, Australia Declarations, Reservations, available at <[http://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=10853C](http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=10853C)>.

<sup>75</sup> Li, above n 29.

Amendment Bill only permits the use of circumventing technological measures, and forbids the provision of technologies or devices used to assist the circumvention. The exception has been criticized as neither comprehensive nor achievable, because it lacks exceptions on providing technologies, devices and the professional service required for constructing a practical means for blind persons to circumvent technological measures.<sup>76</sup>

#### *IV.C. Scholarly response to the Marrakesh Treaty*

Apart from the discussed proposals in the Draft of the Copyright Law Amendment Bill, Chinese scholars have recently proposed a number of aspirational suggestions regarding copyright exceptions for the print disabled to fulfill China's obligations to the Marrakesh Treaty.

Wang proposes to substantially expand Chinese copyright exceptions for the print disabled. First, he thinks the beneficiary of free use in Article 22(12) should be extended to “visually impaired persons”. Second, he proposes to include film as a type of work subject to copyright exception. Wang believes that although works subject to copyright exception as defined in Article 2 of the Marrakesh Treaty are literary and artistic works in the form of texts, notation and/or related illustrations, they do not include films. He argues that Article 12 serves as a “development provision” providing countries flexibility to include other limitations and exceptions if necessary. He believes it is necessary to include films in the scope of works subject to copyright exception because although persons with a visual disability could listen to dialogue in a film, they cannot understand the film well without narration to

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<sup>76</sup> GUO Peng, To Improve the Exception for Technological Measures: A Critical Rethink on Copyright Law Amendment Bill, 10 Jinan Xuebao [Jinan Journal(Philosophy and Social Science)] (2012), 108.

explain the scenes and actions in the film.<sup>77</sup> Third, Wang proposes to provide an exception to the right of translation.<sup>78</sup> The Marrakesh Treaty provides flexibility to its contracting parties to decide whether to include the right of translation under the copyright exception.<sup>79</sup> The Berne Convention provides that a license to translate a work could be granted by a country's authority upon request when the work has been published for three years without being published in a language in general use in that country, or one year in the case of translations into a language which is not in general use in one or more developed countries.<sup>80</sup> Wang accordingly proposes to introduce an exception to the right of translation so as to translate works published in other languages into Chinese for the Chinese print disabled. Meanwhile, China has 56 nationalities, and some minority nationalities have their own languages. Wang therefore thinks it is necessary to translate Mandarin into the languages of the minority nationalities for the print disabled persons who speak those minority languages. Wang further suggests extending the exception to performers' rights, apart from the right of public performance. Audiobooks, as an accessible format acknowledged by the Marrakesh Treaty, are read by narrators. Wang believes that to copy, reproduce and distribute such an audiobook for the print disabled, the narrator's performers' rights may be limited. As a matter of fact, Article 22 of the Copyright Law has already extended the exception of free use to performer's rights.

Yan, in response to Wang, proposes that the beneficiary should not be limited to "visually impaired persons". He thinks that "visually disabled persons" does not include persons with a perceptual or reading disability, or persons with other physical disabilities which prevent them from holding or

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<sup>77</sup> WANG, above n 7, 54.

<sup>78</sup> *ibid*, p 58.

<sup>79</sup> Marrakesh Treaty, Agreed statement concerning Article 4(3).

<sup>80</sup> Berne Convention, Appendix Art 2.

manipulating a book or focusing or moving their eyes to read a book. These persons are beneficiaries of the Marrakesh Treaty,<sup>81</sup> and should enjoy the benefit of copyright exceptions and limitations in China. Therefore Yan proposes to define the beneficiaries as “disabled persons” instead of “visually impaired persons”.<sup>82</sup> Yan disagrees with Wang on the question of whether films should be included as a type of work subject to copyright exception. He believes that the flexibility provided by Article 12 of the Marrakesh Treaty has its boundaries. A contracting party shall not discretionarily introduce a new type of work to copyright exception when there is no specific or implied provision in the Treaty to permit it. For a similar reason, Yan suggests excluding the right of translation under the copyright exception for the print disabled, because the Marrakesh Treaty does not provide specific or implied provisions for such an exception. He thinks it is better to follow the *Berne Convention*, if necessary, regarding translating a work into Chinese.

Cao believes that the Marrakesh Treaty encourages its contracting parties to adopt the “three-step test”.<sup>83</sup> In Article 5(4), the Marrakesh Treaty notes that if a contracting party does not adopt the test in their national copyright law, an authorized entity in that country could not reproduce, distribute or make available of works in accessible format copies to beneficiary persons or authorized entities outside that contracting party’s jurisdiction. Cao therefore argues that the Marrakesh Treaty encourages its contracting parties to adopt the test so as to freely exchange accessible format copies with other member

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<sup>81</sup> Marrakesh Treaty, art 3.

<sup>82</sup> YAN Yonghe, Copyright Exceptions and Limitations for the Disabled in Chinese Copyright Law—Discuss with Qian Wang, 9 *Zhongnan Minzu Daxue Xuebao* [Journal of South-Central University for Nationalities (Humanities and Social Sciences)] (2014), 101.

<sup>83</sup> CAO Yang, The Adoption of the Marrakesh Treaty and Its Influences, 9 *Zhishi Chanquan* [Intellectual Property Law] (2013), 81.

states. Cao further points out that the Marrakesh Treaty does not intend to use the “commercial availability test” as a precondition for cross-border exchange. He argues that it may not be possible for an authorized entity to investigate the commercial availability of a work in certain accessible formats before importing or exporting such a work. He is worried that such a test may impose an unreasonable restriction on cross-border exchange. He therefore proposes not to adopt the commercial availability test in Chinese Copyright Law.

## **V. Further Recommendations for Copyright Law Reform**

The current Chinese copyright exceptions and limitations for persons with a print disability are, I suggest, insufficient to meet the requirement of the Marrakesh Treaty. The Draft of the Copyright Law Amendment Bill however does not give adequate consideration to its compliance with the Treaty. China therefore needs to substantially reform in its copyright laws so as to fulfill its signatory obligations to the Marrakesh Treaty.

### *V.A. Expanding the scope of “beneficiary”*

The Copyright Law and the Network Dissemination Regulation only recognize blind persons as the beneficiaries of copyright exceptions, and therefore cannot effectively benefit all persons in need. Copyright exceptions for the print disabled aim to provide equal opportunity for persons who cannot read print materials to have access to information and knowledge.<sup>84</sup> The scope of who counts as a beneficiary in China is too narrow to create this kind of equality, because there are a large number of persons who are not

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<sup>84</sup> Margaret Chon, 'Substantive Equality In International Intellectual Property Norm Setting And Interpretation' in D.J. Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007) .

blind, but cannot read print materials, and cannot have access to reading materials within the current copyright exception system. Blindness is defined as an extremely severe degree of visual impairment. The general standard of blindness is visual acuity of less than 3/60 due to glaucoma, cataracts, macular degeneration or refractive errors, or less than 10 degrees central field.<sup>85</sup> Apart from blindness, persons with low vision, those whose visual acuity is equal to or better than 3/60 but less than 6/18, or those with a corresponding visual field loss of less than 20 degrees, are also regarded as a vulnerable group suffering from difficulties in reading print materials.<sup>86</sup> Along with blindness, low vision is also generally regarded as a visual disability.

Apart from visual disabilities, there are a number of other disabilities or diseases that prevent a person from reading print materials. For example, persons with a “reading disability”, also known as dyslexia, have difficulties with spelling, phonological processing and rapid visual-verbal responses, these resulting primarily from neurological factors, and they read at levels significantly lower than normal persons.<sup>87</sup> There are other people who, because of old age or other physical disabilities, are unable to hold a book or move their head or eyes so as to read as others do, and they also suffer from difficulties in reading a print book. The Marrakesh Treaty therefore recognizes these disabilities, and defines its beneficiary persons as persons with a “print disability”. This includes someone who: (a) is blind; (b) has a visual

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<sup>85</sup> World Health Organization, “Vision 2020 The Right to Sight”, available at: [http://www.who.int/blindness/Vision2020\\_report.pdf](http://www.who.int/blindness/Vision2020_report.pdf) (accessed 12 March 2014).

<sup>86</sup> Ibid.

<sup>87</sup> See further Joel B. Talcott, “Reading Disabilities: Genetics and Neurological Influence” (1994) 107(2) *The American Journal of Psychology* 305; Howard Margolis and Gary Brannigan, *Reading Disabilities : Beating the Odds* (Reading2008 & Beyond, 2009).

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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 (c) is otherwise unable, through a 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. This scope is open-textured, giving adequate consideration to all possible disabilities that may impair a person's ability to read print materials. Apart from the Marrakesh Treaty, a number of countries, such as Australia,<sup>88</sup> New Zealand,<sup>89</sup> Iceland<sup>90</sup> and Canada<sup>91</sup>, have already introduced copyright exceptions for persons with a print disability. Chinese Copyright Law and the Network Dissemination Regulation should therefore, I suggest, extend the scope of their beneficiaries to persons with a print disability, and then define types of print disabilities as this is done in the Marrakesh Treaty.

*V.B. Diversifying accessible formats*

To include only Braille as the accessible format for the print disabled is, I suggest, inefficient. Not every print disabled person can read Braille. People need special training to know how to “read” Braille, and not everyone has the opportunity to learn it. There has not yet official statistics to show the percentage of blind persons who are able to read Braille in China. Mr. Wei Zhang, Head of the China Braille Publishing House, has said, when interviewed by the journalist, that in China only 10% of blind persons use

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<sup>88</sup> Australia *Copyright Act 1968*, Sec. 10.

<sup>89</sup> New Zealand *Copyright Act 1994*, art. 69.

<sup>90</sup> Act amending the Copyright Act, No. 73/1972, with subsequent amendments. No. 9 of 28 February 2006 (Iceland), art. 19.

<sup>91</sup> Copyright Modernization Act (S.C. 2012, c. 20, An Act to amend the Copyright Act) (Canada), art. 32.



Braille.<sup>92</sup> A quantitative study in China conducted by Li, Gu, Liu and Wei concluded that 30% of 370 blind adults could read Braille.<sup>93</sup> This number is relatively high because the survey was mainly conducted in and around a blind school, and a good proportion of people interviewed were educated blind. According to Deng, only 0.01% of blind people have the opportunity to go to blind school to learn how to read Braille.<sup>94</sup> Even in the United States, only 12% of blind school-age children can read Braille.<sup>95</sup> It is clear that the majority of print disabled persons cannot benefit if Braille is the only accessible format that can be reproduced and communicated under copyright exceptions.

Braille reading materials are limited in type and number. Translating works into Braille is costly and time consuming. Apart from the Publishing Factory of the Shanghai School for the Blind, which provides limited number of Braille textbook for primary and secondary education, the China Braille Publishing House is the only publishing company that provides Braille materials for the print disabled. Based on the statistics provided on its website, it has published over 70,000 kinds of reading material, and produced 5 million copies, since it was established in 1953.<sup>96</sup> The current publishing capacity of the publishing house is 450 kinds and 200,000 copies of Braille materials per

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<sup>92</sup> WANG Huang, LIU Xiaobing, A Report on China Braille Publishing House and China Braille Library, Gangming Ribao [Kuangming Daily] (online) 31 May 2012, available at <<http://media.people.com.cn/GB/40757/18033580.html>>.

<sup>93</sup> Cheng Li et al, 'A Survey of Braille Use in China' (2013) (2) *Applied Linguistics* 42.

<sup>94</sup> DENG Yawen, The Information Obstacles of Vulnerable Groups and the Knowledge Aid of Library], 35 Keji Qingbao Kaifa Jingji [Sci-Tech Information Development and Economy] (2008), 5.

<sup>95</sup> See Ralph Ranalli, *A boost for Braille* (5 January 2008) boston.com <[http://www.boston.com/news/education/k\\_12/articles/2008/01/05/a\\_boost\\_for\\_braille/](http://www.boston.com/news/education/k_12/articles/2008/01/05/a_boost_for_braille/)>.

<sup>96</sup> China Braille Publishing House, Brief History of the China Braille Publishing House, available at

year.<sup>97</sup> However, according to the list on its website, there are in total 913 kinds of Braille books for sale, including 671 kinds of literary and artistic books, 124 kinds of textbook and exercise book for primary and secondary education, and 118 kinds of textbook for higher education and vocational education.<sup>98</sup> Braille books are relatively few in number when compared with the huge number of print books in China, and are far from adequate to meet the needs of the print disabled. To limit accessible format to Braille therefore minimizes the opportunities of the print disabled to have access to published works.<sup>99</sup>

Apart from Braille, there are other accessible formats by means of which the print disabled can have access to information and knowledge. For example, large-print materials are printed out with enlarged words, enabling persons with low vision to read them. Audiobooks are a convenient accessible format by means of which the content of a book is read out for persons who cannot read. As a matter of fact, the China Braille Publishing House has already published and disseminated large-print books and audiobooks for its beneficiaries. It has launched an online library for print disabled people,

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<<http://www.cbp.org.cn/Article/ArticleShow.asp?ArticleID=1>>.

<sup>97</sup> Ibid.

<sup>98</sup> All the data are calculated based on the subscription catalogue on the website of China Braille Publishing House. See <<http://www.cbp.org.cn/Article/ShowClass.asp?ClassID=6&SpecialID=&page=1>>.

<sup>99</sup> Above all, it is noted that the author is not intended to conclude that braille books are useless or replaceable. Braille is the basic tool for visual impaired people to communicate. Researchers found that braille education is helps blind students to have a better performance at school. Acquiring braille also positively correlated to employment. See Ruby Ryles, 'Research Study: Early Braille Education Vital' (2004) (Spring) *Future Reflections* <<https://nfb.org/images/nfb/publications/fr/fr14/fr04se22.htm>>; Matthew Ebnet, *Braille Challenge Gives Young Blind Students a Chance to Shine* (30 June 2001) Los Angeles Times<<http://articles.latimes.com/2001/jun/30/local/me-16960>>.

providing audiobooks, electronic books, electronic braille and journals.<sup>100</sup>

I therefore suggest that China should include other accessible formats, such as large print, audiobooks and digital text, into the regime of accessible formats. When defining “accessible format”, the Copyright Law and Network Dissemination Regulation should provide a non-exhaustive list, and include an open-textured clause to encompass other alternative manners or forms which gives a beneficiary access to the work as conveniently and comfortably as a person without visual impairment or other print disability.

*V.C. Expanding exceptions for circumvention of technological measures*

The proposed exceptions for circumvention in the Draft of the Copyright Law Amendment Bill are not sufficient to overcome barriers established by technological protection measures when producing and communicating works in accessible formats. I suggest that the exceptions for circumvention in both Copyright Law and the Network Dissemination Regulation should be expanded so as to meet the demands of the print disabled in the digital era.

First, I suggest that the scope of accessible formats and beneficiaries be expanded in both the Copyright Law and the Network Dissemination Regulation. Under the current Network Dissemination Regulation, technological measures can only be legally circumvented when producing and communicating works for the use of “blind” persons “in a way only perceivable to the blind”. The Draft of the Copyright Law Amendment Bill adopts the same preconditions when providing exceptions for circumvention in a more extended regime not limited to network. The scope of

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100 There are also two other categories of resources listed in the website, with the name of ‘special resources’ and ‘online reference book’. However, neither of the two links can be opened. See <<http://www.blc.org.cn/Default.aspx>>.

“beneficiaries” and “accessible formats” is in each case too narrow to provide persons with a print disability equal access to digital works. As discussed in the above two suggestions, exceptions for the circumvention of technological measures in both the Network Dissemination Regulation and the Copyright Law would facilitate access to works in the digital era if expanded to the provision of works in “accessible formats” for the use of “persons with a print disability”.

Second, the types of works subject to the exception regarding circumvention should be extended. Under the current Network Dissemination Regulation, works subject to the exception of circumvention are published literary works. What is more, such a work must be available only on the Internet, without being published elsewhere in tangible formats. This scope is extremely narrow, and it restricts the range of available works the print disabled can enjoy. It is acceptable that some artistic works, such as paintings, photographs and sculptures, are not included in the range because they are totally visually based, and cannot be translated into accessible formats for the print disabled. Dramatic works and films may already be accessible to the print disabled because people who cannot watch a work are able to listen to the narrative and dialogue.<sup>101</sup> However, print disabled persons may not be able to enjoy films and dramas made for general audiences because they are unable to follow the story without seeing the scenes and the action. Such works can, however, be produced in special editions with an explanatory narrative, in which case they can be enjoyed by the print disabled. This is why a great number of countries have proposed to include artistic works among those to

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101 Kimberly Kindy, “Filmmakers’ group tries to reshape treaty that would benefit the blind”, The Washington Post, June 22, 2013, available at: <https://www.washingtonpost.com/politics/filmmakers-group-tries-to-reshape-treaty-that-would-benefit-the-blind/2013/06/22/f98e6130-d761-11e2-9df4->

which the print disabled should be given access, when negotiating the Marrakesh Treaty. The Treaty eventually included artistic works subject to exceptions and limitations.<sup>102</sup> In China, Wang and Yan also suggest limitations to the protection of films and dramatic works for the print disabled.<sup>103</sup> In contemporary society, films and recordings of dramas are usually disseminated on the Internet. It is therefore suggested that equal access be introduced for the print disabled, with copyright exceptions extended to films, drama and other kinds of artistic works available on the Internet. Similarly, print disabled persons in China should be informed of and able to benefit from scientific developments by means of access to scientific works on the Internet. Thus it is suggested that the works for which technological protection measures can be legally circumvented should include “artistic, literary and scientific works”. The Draft of Copyright Law Amendment Bill, on the other hand, has already expanded the scope of works subject to exceptions to circumvention measures, to include “published works” encompassing artistic, literary and scientific works.

The requirement in the Network Dissemination Regulation that a work must be “available on the Internet” if it is to be subject to an exception to circumvention should remain. Copyright exceptions and limitations are used to provide persons with a print disability access to works equally to that enjoyed by persons without such a disability. If the print disabled can obtain from the Internet a work which has not yet been made available to general

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895344c13c30\_story.html (accessed September 10 2016).

<sup>102</sup> See further: WIPO, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries, Proposal by the African Group, Doc. SCCR/20/11, Art 1; WIPO, Proposal on an international instrument on limitations and exceptions for persons with print disabilities, Doc SCCR/22/16, art A.

<sup>103</sup> Wang, above n 8; Yan, above n 85.

Internet audiences, this may be unfair. What is more, providing Internet access to the work has not yet been made generally available on the Internet for the print disabled could harm the copyright owner's right to make the work available to the public. The precondition of general availability online must therefore remain.

The Copyright Law may adopt the "commercial availability test" as a precondition for providing copyright exceptions. The Draft of Copyright Law Amendment Bill confines the scope of works to those that cannot be obtained by the blind by ordinary means. This requirement is similar to the "commercial availability test". The Marrakesh Treaty permits the contracting parties to freely determine whether to adopt the test in their domestic law. I suggest, nevertheless, that China should not adopt this test as a pre-condition for either the general copyright exception for the print disabled, or the exception for the circumvention of technological measures. Statistics show that persons with a disability have lower income than that of healthy persons. In China, the per capita disposable income of urban residents in 2012 was ¥24,565, whereas the figure for persons with disabilities was ¥14,050.<sup>104</sup> Furthermore, people with a disability in urban areas have to spend 1.56 times more on medical treatment than healthy people, while the disabled in rural areas spend 2.09 times more than their peers.<sup>105</sup> With relatively lower income, and more medical spending, the print disabled are less likely to purchase books for entertainment. Thus a work in accessible format may be available on the market, but it may not be affordable to the print disabled even when

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<sup>104</sup> Zhongguo Xinwen Wang [China News], Bureau of Statistics: per capita disposable income of urban residents in 2012 is ¥ 24,565, available at <<http://finance.chinanews.com/cj/2013/01-18/4499705.shtml>>, accessed on 16 September 2013.

<sup>105</sup> LI Jianguo, Report of the standing committee of the national people's congress on the Application of Disability Law], available at

the price seems “reasonable” by normal standards.

For the similarly reasons, even if the exceptions were significantly expanded, the Copyright Law should, I suggest, retain the exceptions to free use, instead of being a statutory license with a requirement to pay remuneration to the copyright owner. The cost of the remuneration, even when only imposed on authorized institutions for producing and communicating works in accessible format, is likely to be transferred to the beneficiaries through a higher price, which they cannot afford. Another reason for not introducing a remuneration requirement is that the potential loss to the copyright owner in such a case is minimal, and such a loss is considered legitimate under the “three-step test”. As discussed previously, the actual or potential economic loss because of the “blind market” is minimal, and most authors create literary and artistic works only for visually able people. When copies in an accessible format are not in competition with the author’s for-profit market, no potential customer will be lost in the original market and no actual loss will occur.

Lastly, the exception to circumvention should, I suggest, be extended to provide services, technologies, devices and components for the use of the print disabled. With a print disability, some persons may even have difficulty manipulating a computer. Information conveyed on a computer or on the Internet often contains images, graphs and linearized tables without alternative text. More often than not, users of computers have to press or click on certain words, animated pictures, or graphic buttons to operate a function. The print disabled may need screen-reader software to assist them to operate a computer. This software provides feedback from computers via synthetic speech or Braille. However, in China such software sells at prices that are likely to be unacceptable to the disabled. For example, in China the

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<[http://www.npc.gov.cn/npc/xinwen/2012-08/30/content\\_1735374.htm](http://www.npc.gov.cn/npc/xinwen/2012-08/30/content_1735374.htm)>.

“Sunshine” screen reader, a government-funded software, is sold at ¥800,<sup>106</sup> whereas the average annual income of disabled persons is only ¥14,050. With limited purchasing power, the print disabled are less likely to be equipped with such software. Therefore a copyright exception that provides them with screen-reader software and other assistive software, devices and components is necessary. Furthermore, technological knowledge is sometimes required to circumvent technological protection measures. The print disabled may not have the expertise to circumvent these measures without the help of others. Therefore it is also necessary to provide an exception so as to permit computer experts or companies to provide services to assist the print disabled with help in these matters.

*V.D. Clarifying authorized entities*

Neither the Copyright Law nor the Network Dissemination Regulation has clearly defined authorized entities. The current copyright exception mechanism for the print disabled does not nominate a person or an institution to conduct this kind of copyright exception. In light of the arrangements adopted in implementing the Marrakesh Treaty, I suggest that it be clearly pointed out authorized institutions, along with print disabled persons and persons assisting the print disabled, should be able to refer to free use exceptions to produce and communicate accessible format copies.

It is, then, necessary to define authorized entities that are entitled to copyright exceptions. The Marrakesh Treaty provides that *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

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<sup>106</sup> China Braille Publishing House, Sunshine Software for sale, available at



institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.” In China, the China Braille Publishing House and the Publishing Factory of the Shanghai School for the Blind are in fact considered to be authorized entities. These two institutions are in fact sponsored by the Chinese government, and are producing and communicating works in accessible formats for the print disabled on a non-profit basis. However, without being legally acknowledged as authorized entities, they are not entitled to produce and communicate works without the authorization of the copyright owner. In the case *China Braille Publishing House v. Xu Jinjing*, the court held that the China Braille Publishing House infringed Xu’s copyright when producing his published printed book in audio form and selling the copies.<sup>107</sup> The China Braille Publishing House in this case failed to claim free use under Article 22(12) of the Copyright Law, because it was not translating a work into Braille. The Marrakesh Treaty, in Article 4, obligates its contracting parties to provide an exception for authorized entities to produce and communicate copies of published works in accessible format for the use of the print disabled. To fulfill its signatory obligation to the Marrakesh Treaty, Chinese Copyright Law should, I suggest, extend the exceptions in Article 22 entitling authorized entities to produce and communicate works in accessible formats for the print disabled, and it should define authorized entities based on the Marrakesh Treaty’s definition. In that case, the China Braille Publishing House could be acknowledged according to the law as an authorized entity, enabling it to reproduce and communicate a print book into audiobook without the authorization of the author. In that event, what happened in Xu’s case would fall into the regime of copyright exceptions.

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<<http://www.cbp.org.cn/Article/ArticleShow.asp?ArticleID=96>>.

<sup>107</sup> *China Braille Publishing House v. Xu Jinjing*, (2009) Jing Er Zhong Min Zhongzi

Clarifying the definition of *authorized entity* could prevent unreasonable prejudice of a copyright owner's interests. If audiobooks, digital texts and other accessible formats could be used by readers without a print disability, and were included in the copyright exception, there would be a risk that private institutions would abuse the exception and make profits from it. For example, audiobooks and eBooks are currently popular among ordinary Chinese people.<sup>108</sup> A worrying trend is that a great number of audiobooks and eBooks are made without acquiring authorization from the copyright owner.<sup>109</sup> If private institutions claim a copyright exception to produce and communicate copies in audio and digital versions, these copies may compete with commercial copies published after acquiring the authorization from the copyright owner. The copyright owner's economic interests would be impaired. I therefore suggest that the Copyright Law should be clarified, as in Article 2 of the Marrakesh Treaty, where it is specified that only government recognized not-for-profit institutions can produce and communicate works in accessible formats, and the provision of accessible copies is limited to beneficiary persons and other authorized entities.

The private sector is encouraged to be involved in providing works in accessible formats, provided that they respect the protection on copyright. An authorized entity may lack the commercial incentive to produce more and better products to increase their competitiveness. For example, in the collection of the China Braille Publishing House, 611 out of the 671 kinds of literary and artistic books they have produced are out of stock. Only 8 titles of political, legal and historical books are available among the 74 titles listed. The

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No. 03906 [Beijing No. 2 Intermediate People's Court, (2009) 03906].

<sup>108</sup> FU Naiqin, Study on Audiobooks in Internet Era, 6 *Zhongzhou Xuekan* [Zhongzhou Academic Journal] (2015), 174.

<sup>109</sup> YANG Yanchao, Development of eBooks and its Challenges to Copyright Right Protection, 7 *Zhishi Chanquan* [Intellectual Property Right] (2014), 41.

situation with books for education is better, with only 18 kinds sold out.<sup>110</sup> In a cost-effective analysis, republishing a sold-out book that is still in demand is usually profitable for the publisher because there is no further cost on composing, editing, proofreading or typesetting before reprinting the book. The China Braille Publishing House, because it is a government-funded non-profit institution, has no incentive to make full use of its resources. A private company, on the other hand, has an incentive to get actively involved in publishing, producing and disseminating a work if it is profitable. Although private companies cannot be entitled to copyright exception, they can still produce and communicate a work after acquiring the authorization and paying the royalty. A great number of websites and apps are offering thousands of kinds of audiobooks and eBooks to millions of people.<sup>111</sup> The price tends to be reasonable when a number of competitors are on the market.<sup>112</sup> Print disabled persons are more likely to purchase a commercially produced copy at reasonable price when the market is profitable. The private sector is therefore encouraged to be involved in providing works in accessible formats even though they cannot claim copyright exception.

The Copyright Law or governmental directives can encourage an authorized entity to be involved in the cross-border exchange of works in accessible copies. The Marrakesh Treaty provides a mechanism for cross-border

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<sup>110</sup> All the data are calculated by the author based on the subscription catalogue on the website of China Braille Publishing House. China Braille Publishing House, Subscription catalogue, available at <  
<http://www.cbp.org.cn/Article/ShowClass.asp?ClassID=6&SpecialID=&page=1>>.

<sup>111</sup> Ba Dan, Study on Audiobooks in the New Media Environment, 1 Changchun Shifan Daxue Xuebao [Journal of Changchun Normal University (Humanities and Social Sciences)] (2016), 198.

<sup>112</sup> Dufwenberg, Martin, and Uri Gneezy. "Price competition and market concentration: an experimental study." *international Journal of industrial Organization* 18.1 (2000): 7-22.

exchange among contracting countries, permitting an authorized entity to import or export copies of works in accessible formats. Cross-border exchanges face no barriers in China because the current Chinese Copyright Law does not prohibit importation or exportation of copyright works. Nevertheless, Copyright Law or governmental directives can encourage these exchanges by providing financial support, or establishing an institution or department to deal with issues that arise. The Chinese language is widely used on the mainland, Hong Kong, Taiwan, Malaysia and Singapore. In this context, the exchange of information and resources among territories would save time and resources in producing copies in accessible formats.

Furthermore, libraries can contribute to the communication of copies in accessible formats.<sup>113</sup> The National Braille Library is located in Beijing. It has only 309 tables and 520 seats,<sup>114</sup> but provides more than 20,000 kinds and 500,000 copies of braille books for print disabled people.<sup>115</sup> The other 47 provinces and 394 cities have already established local braille libraries or braille sections in the existing public libraries.<sup>116</sup> If readers live far away from the library, or if it is inconvenient for them to go to the library personally, they can request borrowing a book from the library via telephone, mail or the

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<sup>113</sup> The library may reproduce works subject to the exception to library and achieves. In Chinese Copyright Law, art 22(8) provides a free use case for the “reproduction of a work in its collections by a library, an archives center, a memorial hall, a museum, an art gallery or a similar institution, for the purposes of display, or preservation of a copy, of the work.”

<sup>114</sup> China Braille Library, Introduction on the China Braille Library, available at <<http://www.blc.org.cn/StaticInfoShow.aspx?firstCategory=%E8%AF%BB%E8%80%85%E6%8C%87%E5%8D%97>>.

<sup>115</sup> China Braille Publishing House, China Braille Library Lending Catalogue (7 June 2011), available at <<http://www.cbp.org.cn/Article/ArticleShow.asp?ArticleID=322>>.

<sup>116</sup> The China Disabled Persons' Federation, State Communique on 2012 National Disabled Statistics in 2010, available at <<http://www.cdpf.org.cn/2008old/sytj/content/2011->

Internet. Books will be sent to them for free according to Article 50 of the Disabilities Law, which provides that “mailing and delivery of publications for blind persons shall be free of charge.” Again, as discussed before, this provision needs further amendment to expand its scope to benefit all persons with a print disability by giving them access to copies of works in all possible accessible formats.

## **VI. Conclusion**

Thus under the current copyright exception mechanism, China has a challenging task to meet print disabled persons’ demand for access to a copyright work. The fair use provision in the Copyright Law is extremely restricted, only covering the case of transliterating a *published* work into *Braille* for *publication*. The Network Dissemination Regulation is similarly limited in that it only provides fair use regarding the provision of “an already *published literary* work to the blind in a way as particularly perceptible to the blind”. Exceptions to the circumvention of technological measures provided by the Network Dissemination Regulation and proposed in the Draft of Copyright Law Amendment Bill are also restricted in terms of the scope of the beneficiaries, the works subject to the exception, and the range of accessible formats. When compared with the Marrakesh Treaty, Chinese copyright laws have a narrower scope regarding accessible formats and works subject to copyright exception, and provide inadequate consideration of exceptions regarding private use, technological measures and cross-border exchange. Even if the proposed Draft of Copyright Law Amendment Bill was adopted, there would still be gigantic gaps to be filled for China to satisfy its signatory obligation under the Marrakesh Treaty. This article suggests that the Copyright Law and Network Dissemination Regulation need further

amendment so as to include persons with every type of print disability as beneficiaries, and to encompass all possible accessible formats, and to extend the exceptions to the circumvention of technological measures, and to provide reasonable exceptions to not-for-profit authorized entities. Once accomplished, the mentioned amendments would ensure that China's copyright laws were compliant with the requirement of the Marrakesh Treaty. I urge that China should ratify the Marrakesh Treaty so as to ensure that its large population of print disabled persons can benefit from a comprehensive copyright exception mechanism, and from the cross-border exchange of copies in accessible formats.

## Reference

*Realizing the Millennium Development Goals for persons with disabilities through the implementation of the World Programme of Action concerning Disabled Persons and the Convention on the Rights of Persons with Disabilities*, 3rd Comm, 63 rd sess, Agenda Item 55(e), UN Doc A/RES/63/150 (18 December 2008).

Boyle, Robert, 'A Manifesto on WIPO and the Future of Intellectual Property' (2004) 9 *Duke Law & Technology Review*

Burkhauser, Richard V. , Robert R. Weathers and Mathis Schroeder, 'A Guide to Disability Statistics from the Panel Study of Income Dynamics' (Cornell University, 2006)  
<<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1207&context=edicollect>>

Dnes, Antony, 'Should the UK Move to a Fair-Use Copyright Exception?' (2013) 44(4) *IIC - International Review of Intellectual Property and Competition Law* 418

Duhan, Dale and Mary Jane Sheffet, 'Gray Markets and the Legal Status of Parallel Importation' (1988) 52(3) *Journal of Marketing* 75

Fitzpatrick, Shae, 'Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities' (2014) 37 *Boston College International & Comparative Law Review* 139

Fitzpatrick, Shae, 'Setting Its Sights on the Marrakesh Treaty: The US Role in Alleviating the Book Famine for Persons with Print Disabilities' (2014) 37 *Boston College International & Comparative Law Review* 139

Gallinia, Nancy and Aidan Hollisb, 'A contractual approach to the gray market' (1999) 19(1) *International Review of Law and Economics* 1

Geiger, Christophe, 'From Berne to National Law, via the Copyright Directive: the dangerous mutations of the three-step test' (2007) 29(12) *European Intellectual Property Review* 486

Geiger, Christophe, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12(3) *Vanderbilt Journal of Entertainment and Technology Law* 515

Geiger, Christophe, Daniel Gervais and Martin Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3)

Howse, Robert, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2010) 3(4) *The Journal of World Intellectual Property* 493

Jain, Sneha, 'Parallel Imports and Trademark Law' (2009) 14 *The Journal of World Intellectual Property* 14

Jayakara, Krishna et al, 'Promoting Broadband and ICT Access for Disabled Persons: Comparative Analysis of Initiatives in Asia-Pacific Region' (2015) 31(4) *The Information Society* 299

Ku, Vicky, 'Critique of the Digital Millenium Copyright Act's Exception on Encryption Research: Is the Exemption too Narrow' (2004) 7(2) *Yale Journal of Law and Technology* 465

Li, Cheng et al, 'A Survey of Braille Use in China' (2013) (2) *Applied Linguistics* 42

Li, Jingyi, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 740

Li, Jingyi, 'Facilitating Access to Digital Content for the Print Disabled: The Need to Expand Exemptions to Copyright Laws' (2015) 27(3) *Intellectual Property Journal* 355

Li, Jingyi and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) (10) *European Intellectual Property Review*

Liu, Wenqing, 'Reform of China's Copyright Legislation' (2011) 59 *Journal of the Copyright Society of the U.S.A.* 849

Maskus, Keith, 'Parallel Imports' (2000) 23(9) *The World Economy* 1269

Okedui, Ruth, 'Toward an International Fair Use Doctrine' (2000) 39(1) *Columbia Journal of Transnational Law* 75

Peltz, Richard, 'Global Warming Trend - The Creeping Indulgence of Fair Use in International Copyright Law ' (2009) 17(2) *Texas Intellectual Property Law Journal* 267

Sindico, Domenico, 'On Parallel Importation, Trips and European Court of Justice Decisions' (2002) 5(4) *The Journal of World Intellectual Property* 505

Stamatoudi, Irini and Paul Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar, 2014)



Trimble, Marketa 'The Marrakesh Puzzle' ( 2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 768

Trimble, Marketa., 'The Marrakesh Puzzle' (2014) 45(7) *IIC-International Review of Intellectual Property and Competition Law* 768

Van Wiele, Bram, *The ratification and implementation of the Marrakesh Treaty: a look at the future of South African Copyright Law* (LL.M. Thesis, UNIVERSITY OF CAPE TOWN, 2014)

<[https://open.uct.ac.za/bitstream/item/14069/thesis\\_law\\_2014\\_van\\_wiele\\_b.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14069/thesis_law_2014_van_wiele_b.pdf?sequence=1)>

Vezzoso, Simonetta 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) *IIC - International Review of Intellectual Property and Competition Law* 796

Chon, Margaret, 'Substantive Equality In International Intellectual Property Norm Setting And Interpretation' in D.J. Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007)

Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, available online

at <<http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf%3E>>.



# Conclusion

## I. Introduction

This thesis has examined the issue of whether the current copyright exceptions and limitations mechanism are effective to facilitate access to copyright works for persons suffering a print disability. In order to answer this central research question, the thesis has analysed the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* as well as national copyright laws that have implemented the Treaty, and concluded that the current mechanism effectively balances and reconciles the protection of copyright and access to copyright works for persons with a print disability despite room for further refinement. The thesis devotes six articles to resolve the central research question and reach a conclusion. These articles serve to address this research question by establishing a theoretical framework to guide the evaluation and identify the desirable outcomes, comparing the divergences between the Marrakesh Treaty and national copyright laws, considering opportunities and challenges for the regulatory framework arising with technological development, and providing recommendations for refinement of the Marrakesh Treaty and reforms of national copyright laws. The six articles represent a comprehensive examination of the copyright exception and limitation system in both the international and domestic sphere.

The primary focus of the thesis is to evaluate the effectiveness of the current copyright exceptions and limitations mechanism. It therefore provides an extensive examination of the Marrakesh Treaty because the treaty represents a significant progress of the discussed issue. Prior to the Marrakesh Treaty, there were a number of international treaties, as well as national copyright laws that provided relevant provisions to facilitate access to copyright works for the print disabled. The Marrakesh Treaty is remarkable in that it provides a comprehensive mechanism of copyright exceptions or limitations to facilitate access to published works for persons with a print disability, and it obligates contracting parties to adopt this mechanism and take part in international cooperation. The Marrakesh Treaty is widely accepted by countries all over the world, and came into force on 30 September 2016. It has significantly influenced the international system as well as national laws regarding copyright exceptions and limitations for the print disabled. The thesis therefore provides an extensive discussion of the Marrakesh Treaty, and adopts it as a regulatory framework, along with the theoretical framework that reconciles intellectual property rights and human rights, to provide international standards of copyright exception for countries to reform their domestic copyright laws.

Another significant contribution of this thesis is that it provides an overarching analysis of national copyright laws regarding exceptions or limitations for persons with a print disability. The thesis examines and summarises the types and merits of copyright exceptions or limitations in around 58 countries, and identifies the gap between national copyright laws and the Marrakesh Treaty. The author also provides

detailed examination of Australian and Chinese copyright laws. The thesis concludes that contracting parties, whether or not they have provided well-designed copyright exceptions or limitations mechanism for the print disabled, should reform their national copyright laws so as to comply with the requirements of the Marrakesh Treaty. The thesis also demonstrates the path for reforms in these two countries.

## **II. Findings on Research Questions**

As delineated in the Introduction, the central research question to be considered is whether the Marrakesh Treaty, together with national laws that have implemented the Treaty, have effectively reconciled the conflicts between the proprietary right of copyright holders and access to works for the print disabled persons. In order to address the central research question, five sub-questions were raised. The six articles presented in this thesis have separately provided contributions to the inquiries raised in the thesis.

### **A. What is an appropriate theoretical framework to reconcile the conflicts between copyright owners' interests and print disabled persons' access to copyright works?**

An appropriate theoretical framework is essential to evaluate the effectiveness of current copyright exceptions and limitations mechanism, and to provide a guideline for further refinement. Article 1, 'From Theoretical Deliberations to Implementation: The Reconciliation of Intellectual Property Rights and Human Rights in the

Marrakesh Treaty',<sup>1</sup> is devoted particularly to answering this question.

First, it is to be noted that the conflicts between copyright owners' interests and print disabled persons' access to copyright works derived from the long existing conflicts between intellectual property rights and human rights. Particularly access to copyright works is essential to the realisation of human rights for persons with a print disability because it contributes to non-discrimination, equal opportunity, accessibility, and full participation and inclusion in society, which are claimed as basic human rights for disabled persons.

Secondly, the thesis examines theoretical frameworks to reconcile the conflicts between intellectual property rights and human rights proposed by different schools, and concludes that the approach prioritising the value of human rights is the most appropriate theoretical framework to reconcile the conflicts between these two kinds of rights. To be more specific, the discussed approach acknowledges that human rights are the most fundamental and basic inherited rights prioritising intellectual property rights. The idea of 'balance' and 'reconcile' can be adopted to provide guidance when resolving specific conflicts. The thesis interprets the 'balance' theory as human rights outweighing intellectual property rights, and the inequality is correct and just as long as it passed the 'three-step' test. The thesis concludes the 'reconcile' theory as the two kinds of rights can coexist through a tweaking of intellectual property law that better respects, reflects, and integrates human rights concerns. The

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<sup>1</sup> *This article has been submitted for publication and is awaiting for the editor's decision at the time of thesis submission.*

thesis argues that the ‘reconciling’ approach is not irreconcilable with the ‘balancing’ framework, and that these two approaches coexist in the Marrakesh Treaty.

Thirdly, the thesis finds that the copyright exceptions and limitations adopted to resolve the specific conflicts between copyright protection and access to copyright works for persons with a print disability reflect the theoretical discourse of the ‘balancing’ and ‘reconciling’ approaches. From the perspective of a balancing approach, considering the fundamental importance of access to information and knowledge as to assure the realisation of human rights of persons with print disability, copyright protection has to be compromised and restrained by exception arrangements. Meanwhile, exceptions and limitations are subject to a number of conditions, such as ‘three-step test’, so as to protect the legitimate interests of intellectual property rights owners, and ensure that these two types of rights are correctly and justly balanced. From the reconciling perspective, the arrangement of exception or limitation is a specific method to integrate human rights ends with intellectual property instruments, especially in the Marrakesh Treaty. The realisation of accessibility could coexist with upholding the value of copyright protection.

Based on the theoretical framework, the thesis concludes that the Marrakesh Treaty reconciles these two kinds of rights by embracing human rights considerations in an intellectual property treaty, and it tries to balance these two kinds of rights correctly and justly through the ‘three-step test’ when solving specific conflicts between copyright protection and the print disabled’s right to have access to published works.

This value is also denoted in the Preamble to the Marrakesh Treaty, which acknowledges the need to provide both ‘effective protection of the rights of authors’ and the need to ensure ‘effective and timely access to works for the benefit of persons with visual impairments’. The thesis concludes that the Marrakesh Treaty translates the theoretical framework reconciling and balancing intellectual property rights and human rights into an enforceable international treaty, and employs this theoretical framework to effectively balance and reconcile copyright protection and access to published works for persons with a print disability.

#### **B. How would the Marrakesh Treaty cooperate with its Contracting Parties’ national laws?**

The effectiveness of the Marrakesh Treaty largely depends on whether it will be widely accepted by the contracting parties and came into force with their support. In this thesis, Article 2, Article 5 and Article 6 examine the variety of national copyright regulations, and try to answer this question.

First, Article 2, ‘Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty’,<sup>2</sup> examines current copyright exceptions and limitations for persons with a print disability in a significant number of countries. It acknowledges that establishing uniform standards for the discussed copyright exceptions or limitations is not easy because countries have dramatically divergent arrangements in

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<sup>2</sup> Jingyi Li, Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty, (2014) 45(7) *International Review of Intellectual Property and Competition Law* 737.



their domestic copyright laws, and they expressed a variety of views and vastly varying levels of support when drafting the Marrakesh Treaty. Despite the divergencies, the thesis is still optimistic that the treaty will be widely accepted. In the year 2014, Article 3 correctly predicted that the Marrakesh Treaty would enter into force in the near future. It turns out that the Marrakesh Treaty achieved enough ratifications and entered into force on 30 September 2016.

Secondly, the thesis acknowledges that there are still a number of countries have not become a signatory party to the treaty or not yet ratified the treaty. The thesis argues that the main reason for not accepting the Marrakesh Treaty is that a country's domestic law is significantly divergent from the obligations required by the Marrakesh Treaty. In terms of countries that have already ratified the treaty, there is still need to modify their national laws to some extent so as to comply with the requirements of the Marrakesh Treaty. Therefore, to ensure a smooth and successful implementation of the Marrakesh Treaty, it is necessary to identify the gaps between the Marrakesh Treaty and the national copyright law of each individual country, and examine to what extent national laws need to be modified so as to comply with the Marrakesh Treaty.

While particular circumstances and regulatory frameworks surrounding copyright exceptions and limitations for the print disabled vary in different countries, the two case studies on Australia and China presented in Articles 5 and 6 reflect the gaps between national copyright laws and the Marrakesh Treaty, and demonstrate how to

fill in the gaps.

Article 5, ‘Copyright Exceptions for the Print Disabled: Ensuring Australia’s Compliance with the Marrakesh Treaty’,<sup>3</sup> studies the exceptions and limitations provided by the *Australia Copyright Act 1968*. Australia has been actively taken part in negotiating and ratifying the Marrakesh Treaty. Australia has been selected for examination because it discloses the influence of Marrakesh Treaty on a developed country with an already well-designed legal mechanism to assure print disabled persons’ access to copyright works. The examination of this jurisdiction also provides valuable insights as to the likely reaction of such a country to the Treaty and the law reform discourse that precedes the acceptance and ratification of this Treaty. The *Australian Copyright Act 1968* provides a relatively comprehensive legal system to assist persons with a print disability to have access to works protected by copyright. In such a context it is useful to examine the additional benefit provided by the Treaty to such a jurisdiction. It concludes that even though such countries may have better arrangements on certain specific issues, copyright exceptions or limitations for the print disabled in such countries nevertheless have a number of problems impeding their effectiveness. A copyright law reform based on the requirements of the Marrakesh Treaty is still necessary for these countries.

China is different from Australia in that copyright exception provided in Chinese Copyright Law is extremely restrictive and significantly insufficient. Article 6,

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<sup>3</sup> The article has been submitted for publication and is awaiting for decisions at the time of thesis submission.

‘Amending the Chinese Copyright Exception to Fulfil the Obligations of the Marrakesh Treaty’,<sup>4</sup> studies the Chinese copyright exception for blind persons established by the *Chinese Copyright Law 1990*, *Regulation on the Protection of the Right to Network Dissemination of Information 2006* and the *Law of the People's Republic of China on the Protection of Disabled Persons 1990*. After comparing the Marrakesh Treaty and exceptions and limitations provided by Chinese copyright laws, this article demonstrates a very large gap between the Chinese copyright exception mechanism and the requirements of the Marrakesh Treaty. It concludes that countries like China that have given insufficient consideration to persons with a print disability in their copyright laws need a comprehensive reform to meet their signatory obligation to the Marrakesh Treaty, as well as to better facilitate access to copyright works for persons with a print disability. The Marrakesh Treaty is suggested to serve as the source of regulatory guidance in the process of national law reforms.

**C. Has the Marrakesh Treaty, together with national laws that have implemented the Treaty, effectively balanced copyright owner’s interests and access to works for print disabled persons?**

To answer this question requires an examination of the current regulatory framework established by the Marrakesh Treaty as well as an evaluation of national copyright laws. This thesis discusses the merits of the Marrakesh Treaty in Article 3, and evaluates national copyright laws in Article 2, Article 5 and Article 6.

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<sup>4</sup> This article has been submitted for publication and is awaiting for decisions at time of thesis submission.

First, Article 3, ‘Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled’,<sup>5</sup> shows that previous intellectual property treaties did not prioritise the value of human rights and mainly focused on the proprietary interests of copyright owners. The thesis also finds that these treaties only permitted, rather than obligated, contracting parties to provide copyright exceptions or limitations. After evaluating the merits of the Marrakesh Treaty, the thesis recognises that the Treaty adopts the theoretical framework to reconcile and balance intellectual property rights and human rights, and prioritize the value of human rights. It concludes that the Marrakesh Treaty articulates international minimum standards for access to published works for persons with a print disability. The thesis observes that the range of obligations imposed by the Treaty on contracting parties, as well as the comprehensive and detailed governance framework created for the provision of material in accessible formats, will significantly enhance the well-being of the beneficiaries to the Treaty. The thesis meanwhile suggests that the lack of consideration of certain issues may impair the effectiveness of the Marrakesh Treaty. Such issues include the absence of provision as to reasonable pricing, the absence of criteria to guide the determination of remuneration, the absence of a standard for determining blindness and assess visual impairment, the absence of provision addressing adoption of information and communication technologies, and

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<sup>5</sup> Jingyi Li, Niloufer Selvadrai, ‘Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled’ (2014) 36(10) *European Intellectual Property Review* 653.

the lack of arrangements to support a greater circulation of materials.

Secondly, based on an overarching analysis of a significant number of national copyright laws in Article 2,<sup>6</sup> and a detailed examination of Australian and Chinese Copyright law in Article 5<sup>7</sup> and Article 6<sup>8</sup>, the thesis concludes that national copyright laws dramatically vary in terms of the provision of exceptions or limitations for persons with a print disability. This divergence constitutes a barrier for countries to ratify and implement the Marrakesh Treaty. The chances of ratification are even smaller for countries, such as China, where domestic copyright laws have not yet provided adequate consideration to persons with a print disability. What is more, the thesis finds that divergent copyright exception arrangements among countries hinder the international cooperation mechanism designed by the Marrakesh Treaty.

Thirdly, two case studies on the Australia Copyright Act 1968 and Chinese copyright laws reveal deficiencies in national copyright laws. A study of Australian copyright law could reflect the influence of the Marrakesh Treaty on a developed country with an already well-designed legal mechanism to assure print disabled persons' access to copyright works, as well as the reaction of such a country to accepting and ratifying this treaty. In addition, a study of Chinese copyright laws reveals the difficulties a developing country could possibly encounter, and indicates the reaction such a

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<sup>6</sup> Jingyi Li, Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty, (2014) 45(7) *International Review of Intellectual Property and Competition Law* 737.

<sup>7</sup> Jingyi Li, Niloufer Selvadrai, Australian Copyright Law Regarding Limitations and Exceptions for the Print Disabled: Achievements to date and required further reforms, submitted for publication.

<sup>8</sup> Jingyi Li, Amending the Chinese Copyright Exception to Fulfil the Obligations of the Marrakesh Treaty, submitted for publication.

country could have to the Marrakesh Treaty. Overall, the Australia *Copyright Act 1968* has already provided a well-designed mechanism for persons with a print disability to get access to copyrighted works. Nevertheless, problems exist. For instance, exceptions available for private and domestic use under ‘fair dealing’ or ‘fair use’ are disorganised and uncertain; the scope of a statutory licence for institutions assisting people with disability is limited; the declaration procedure and remuneration mechanisms are onerous; and the widespread use of technological measures in digital contexts creates significant barriers to access for people with disability. China has even more severe problems. The fair use provision in the Copyright Law is extremely restricted in only including the situation of transliterating a *published* work into *Braille* for *publication*. The Network Dissemination Regulation is similarly limited in that it only provides fair use to the provision of ‘an already *published literary* work to the blind in a way as particularly perceptible to the blind’. Exceptions to circumvention of technological measures provided by the Network Dissemination Regulation and proposed in the Draft of Copyright Law Amendment Bill are also restricted in terms of the scope of beneficiaries, works subject to the exception and accessible formats. When compared with the Marrakesh Treaty, Chinese copyright laws have narrower coverage of accessible formats and works subject to copyright exception, and provide inadequate consideration for exceptions regarding private use, technological measures and cross-border exchange. Even if the proposed Draft of Copyright Law Amendment Bill is adopted, there will still be very large gaps for China to fulfill its signatory obligation under the Marrakesh Treaty.

#### **D. Does the Marrakesh Treaty properly consider new demands arise in the information era?**

The changed information environment created by the proliferation of information and communication technologies (ICTs) is an essential element to take into account in determining the effectiveness of the Marrakesh Treaty. Article 4, 'Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: Changes and Opportunities in ICT Era',<sup>9</sup> has discussed this question in detail in order to examine whether the Marrakesh Treaty has properly considered the changes in the digital era.

The thesis identifies the challenges as well as the opportunities ICTs have created for persons with a print disability to equally participate in the information society in order to determine the effectiveness of the Marrakesh Treaty in meeting the needs of print disabled individuals in the digital age. The thesis points out that the ICTs mainly produce and disseminate information on screens, which are difficult for persons with a print disability to 'read'. Meanwhile the thesis summarises the benefits of ICTs that enable persons with a print disability to get access to a work with the assistance of audiobooks, digital Braille, broadcasting, and text-to-speech software converting digital text into voice. Although the Marrakesh Treaty contains a variety of copyright exceptions for reproducing copyrighted works in Braille, in audiobook form and in other accessible formats for persons who cannot 'read' the content in such publications, the thesis nevertheless finds that limitations and exemptions in the

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<sup>9</sup> Jingyi Li, Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: Changes and opportunities in ICT era, 2015(27) *Intellectual Property Journal* 355.

Marrakesh Treaty do not sufficiently consider materials disseminated using ICTs. Specifically, the thesis compares the Marrakesh Treaty with some desirable regulatory practices in countries such as the United States, the United Kingdom, Australia and the European Union, relating to the Internet, computer software, database, telecommunications and broadcasting. The thesis argues that the treaty has not yet confirmed digital and audio forms as accessible formats; the treaty does not permit manufacturing, importing and distributing technologies, devices or components for the purpose of circumventing a technological protection measure; and does not promote web accessibility. It is suggested that these omissions significantly limit the operation and effect of the Treaty and substantially compromise its utility in the digital age.

**E. How could the Marrakesh Treaty better fulfill its commitment to facilitate accessibilities for persons with print disabilities?**

The issues surrounding how to refine the current copyright exceptions and limitations mechanism established by the Marrakesh Treaty have thematic significance in all of the articles. The suggestions include refinement of the Marrakesh Treaty and reform of national copyright laws.

The thesis suggests that the regulatory framework established by the Marrakesh Treaty can be refined to better facilitate access for print disabled persons. The thesis studies a number of intellectual property treaties and national copyright laws, and identifies a number of desirable regulatory practices. It also considers valuable suggestions made during the drafting of the Marrakesh Treaty. The thesis suggests



that the Marrakesh Treaty would be able to further benefit the print disabled if it were to insert provision as to reasonable pricing, provide criteria to guide the determination of remuneration, sets an international standard for determining blindness and assessing visual impairment, address issues relating to information communication technologies such as computer software and internet access, and make arrangements to support greater circulation of materials via the Internet. Specifically, the thesis proposes that the Marrakesh Treaty could further facilitate access to copyrighted works for the print disabled by incorporating ICTs into its mechanisms; expanding the ambit of works subject to copyright exemptions so as to cover a variety of digital contents; permitting producing and distributing devices, software and components for the purpose of circumventing technological measures; promoting web accessibility; and establishing an international cooperative mechanism with joint efforts from governmental institutions and private sectors.

The thesis additionally suggests that contracting parties should reform their national copyright laws so as to meet their signatory obligations to the Marrakesh Treaty, and overcome divergencies so as to cooperate with each other. Specifically, to overcome problems existing in Australia *Copyright Act 1968*, as well as to fulfill Australia's international obligations under the Marrakesh Treaty, the ALRC and the Attorney-General's Department have proposed the following: that cross-border exchange of accessible copies be facilitated; that a new mechanism of exceptions for private and domestic use be established; that an exception for the circumvention of technological protection measures be provided; and that the statutory licence for

institutions assisting persons with a print disability be reformed. The thesis contends that the copyright exception mechanism for the print disabled would be dramatically improved by adopting the law reform proposals suggested by the ALRC and the Attorney-General's Department. Even so, it is suggested that the blueprint for a copyright exception scheme would better serve the print disabled if additional issues were considered. Apart from that, the thesis suggests clarifying as to whether to reform the current 'fair trading' or to adopt a 'fair use' provision, promote digital and online access for the print disabled, reform the print disability radio license, and create a balance between non-profit and wider participation based on a remuneration system.

Further by conducting a case study on the Copyright law of China, the thesis suggests the Copyright Law and Network Dissemination Regulation should be further amended so as to include persons with extensive types of print disabilities as beneficiaries, to encompass all possible accessible formats, to expand the exception to circumvention of technological measures and to provide reasonable exceptions to the not-for-profit authorised entities. Once the mentioned amendments have been made, and China's copyright laws have complied with the requirements of the Marrakesh Treaty, it is suggested that China should ratify the Marrakesh Treaty so as to ensure that the large population of print disabled persons in China can benefit from a comprehensive copyright exception mechanism and the cross-border exchange of copies in accessible formats.

### III. Corrections

Article 2, Part V, on Page 128 - Insert a new paragraph in the end: “The Marrakesh Treaty entered into force on 30 September 2016 after receiving ratification from 20 contracting parties. To date 82 parties have signed this treaty and 28 countries have ratified it.<sup>10</sup> Thus the copyright exceptions and limitations of the Marrakesh Treaty aiming at balancing copyright protection and access to published works for persons with a print disability proved to be widely accepted. Countries readily ratifying and implementing the treaty, such as Australia, Canada and Singapore, generally do not have giant gaps in their national copyright laws with the requirements of the Marrakesh Treaty. Brazil, Chile, Uruguay, Mexico and Paraguay, which has actively involved in proposing and negotiating the treaty, are also among the countries ratified the Marrakesh Treaty. However, a number of countries, such as Armenia, Bulgaria and Hungary, did not sign the treaty because their national copyright laws do not compatible with the Marrakesh Treaty. Countries such as China, Greece, Cameroon and Indonesia have signed the treaty, but not yet ratified it. Some of these countries are having undergoing discussions on law reform so as to enable their copyright laws compatible to the Marrakesh Treaty.<sup>11</sup> It is hoped that more countries can ratify the Marrakesh Treaty so as to facilitate access to published works for persons with a print disability, and to further ensure the realization of their human rights.”

Article 3, Part III, sub-section “the affirmation of the three-step test”, on Page 136 -

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<sup>10</sup> WIPO, Contracting Parties > Marrakesh VIP Treaty, available at < [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) >, accessed 15 June 2017.

<sup>11</sup> See further on Article 5 and Article 6.

Insert in the end of the last paragraph: “ Hence exceptions and limitations in the Marrakesh Treaty are elaborately designed to cooperate the three-step test. It effectively balances copyright protection and access to works for persons with a print disability when providing copyright exceptions and limitations that pass the three-step test.”

Article 3, Part IV, sub-section “Absence of criteria to guide determination of remuneration”, on Page 137 - In the last paragraph, after the first sentence with footnote 92, insert the sentence, “Instead of specifically requiring the contracting parties to collect or not to collect remuneration, which may hinder the ratification of the treaty, such an interpretation of the three-step test provides overarching principles and general guidance for determination of remuneration. Such guidance, enables countries to better calibrate public interests and human rights whilst determining how to collect remuneration. With this guidance, countries have to take a consideration of the stated interests before collecting remuneration.”

Article 3, Part IV, sub-section “Wider representation”, on Page 139 - In the first sentence of this sub-section, change the word “formulation” into “operation”. Delete the sentence, “[I]t would have been beneficial for there to have been greater representation from the visually impaired or their representatives, as participants or at least as observers or commenters to the negotiation process.” Insert the sentence “The Marrakesh Treaty was signed with all its contracting parties and Members of Assembly being states. Non-governmental institutions are unable to participate in the

administration of the treaty because there is no observer or commenter assigned in the Treaty. Although the World Blind Union and some non-governmental institutions has been involved in drafting the Marrakesh Treaty, they are not fully participate in the process of operating and implementing this treaty. It would have been beneficial for there to have been greater representation from the visually impaired or their representatives, as participants or at least as observers or commenters to the administration of this treaty.”

Article 4, on Page 143 - Delete the first sentence of the last paragraph.

#### **IV. Conclusion**

The articles comprising this thesis have examined and evaluated the effectiveness of the current copyright exceptions and limitations mechanism from the perspective of international treaties and national copyright laws. The distinct contribution of this study is that it uses the three-step test as the theoretical framework to evaluate the effectiveness of the mechanism, especially whether it has reconciled copyright protection and access to copyright works for persons with a print disability. The thesis further provides detailed recommendations for reform of domestic law and refinement of the Marrakesh Treaty. The suggested regulatory frameworks protect the basic human rights of persons with a print disability, as well as uphold the copyright holder’s legal interests. In particular, copyright law reforms in Australia and China are analysed so as to illustrate the influence of the Marrakesh Treaty on countries with different level of copyright law development on exceptions and limitations.

Overall, the Marrakesh Treaty is effective in enhancing access to published works for print disabled persons, as it goes well beyond existing public international law in seeking to delineate precise minimum mandatory exceptions and limitations to copyright-related rights for the visually impaired. The treaty properly resolves the conflicts between copyright protection and access to copyright works for print disabled persons by its copyright exceptions and limitations mechanism. This mechanism prioritises the value of human rights, and upholds the interests of copyright owners with the ‘three-step test’ and other restrictions on the exceptions or limitations. The effectiveness of this treaty is also endorsed by its contracting parties readily signing and ratifying it, with the treaty coming into force in September 2016. A number of contracting parties are meanwhile preparing to reform their national copyright laws so as to meet their obligations in terms of the treaty.

Nevertheless, the current copyright exceptions or limitations mechanism still has room for further improvement. For one thing, the Marrakesh Treaty fails to consider issues related to remuneration of copyright owners, reasonable pricing of accessible format copies, international standards for determining blindness and assessing visual impairment, and information communication technologies. In order to effectively promote access to published works for persons with a print disability, the Marrakesh Treaty needs to be further refined so as to fulfill these gaps. The thesis has discussed good practices instituted by international organisations and national copyright laws to which the Marrakesh Treaty can refer. Another improvement relates to the fact that some contracting countries of the treaty have national laws which are dramatically

different from the Marrakesh Treaty. The thesis suggests that countries adopt the minimum standards of the Marrakesh Treaty in their national laws, so as to ensure equal and adequate access to copyright works for persons with a print disability. Countries will also be able to cooperate with each other under the Marrakesh Treaty mechanism if they ratify the treaty, and exchange copies in accessible formats so as to better benefit persons with a print disability with lower cost and more reading resources.