NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 13 ▪ NUMBER 2 ▪ DECEMBER 2015

THIS ISSUE INCLUDES CONTRIBUTIONS BY

Lida Ayoubi Sylvia Bell Laura Hardcastle
Judy McGregor Margaret Wilson

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2015

The mode of citation of this journal is: (2015) 13 NZJPIL (page)

The previous issue of this journal was volume 13 number 1, June 2015

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide* (2nd ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ$100 (New Zealand) and NZ$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington, New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

NEW ZEALAND CENTRE FOR
PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

Officers

Director	*Professor Claudia Geiringer*
Associate Director	*Associate Professor Petra Butler*
Associate Director	*Dr Carwyn Jones*
Associate Director	*Dr Dean Knight*
Centre and Events Administrator	*Rozina Khan*

For further information on the Centre and its activities visit www.victoria.ac.nz/nzcpl or contact the Centre and Events Administrator at nzcpl@vuw.ac.nz, ph +64 4 463 6327, fax +64 4 463 6365.

THE MARRAKESH TREATY: FIXING INTERNATIONAL COPYRIGHT LAW FOR THE BENEFIT OF THE VISUALLY IMPAIRED PERSONS

Lida Ayoubi*

This paper argues that the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled is consistent with the international copyright law regime. The paper focuses on the relationship between the Marrakesh Treaty and the Three-Step-Test that governs adoption of limitations and exceptions to copyrights. The paper discusses the three limbs of the Test, as established in the Berne Convention for the Protection of Literary and Artistic Works and later incorporated in other copyright treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights. Finally, the paper suggests that to ensure equal access to copyright works for the blind and visually impaired, countries should adopt the Marrakesh Treaty that complements the Three-Step-Test.

I INTRODUCTION

There are around 285 million blind and visually impaired persons in the world. The World Health Organization (WHO) estimates that 39 million of them are blind and the remaining 246 million have low vision.[1] Individuals with blindness, visual impairments or other reading disabilities need accessible copies of copyright protected material. Accessible formats are mainly braille, large print, or audio copies of copyright works.

In 2007, a study by the World Intellectual Property Organization (WIPO) estimated an availability rate of no more than five per cent of copyright works for the visually impaired.[2] In 2013, the World Blind Union (WBU) claimed that only some seven per cent of published books in richest

* Lecturer in Law, Auckland University of Technology.

1 World Health Organization "Visual impairment and blindness" (August 2014) <www.who.int>.

2 Judith Sullivan *Study on Copyright Limitations and Exceptions for the Visually Impaired* (World Intellectual Property Organization, SCCR/15/7, 20 February 2007) at 14.

countries and less than one per cent in poorer areas becomes accessible to the visually impaired.[3] In 2014, the WBU repeated its estimate that over 90 per cent of all published material is inaccessible to the visually impaired persons.[4]

In the early 2000s, the United Kingdom Royal National Institute of Blind People (RNIB) coined the phrase "global book famine" as part of its Right to Read campaign.[5] The book famine represents the low number of books and other copyright protected material that is accessible to the blind, visually impaired and others with reading disabilities around the world.

In 2013, the Member States of the WIPO adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty).[6] The Marrakesh Treaty is the international community's attempt to facilitate access for the visually impaired to copyright material in accessible formats. The Treaty addresses the lack of limitations and exceptions for the benefit of the visually impaired in national copyright laws of the States despite the possibility of adoption of such flexibilities in international copyright law treaties.[7] It is also a response to the gap in the international copyright law system that hinders exchange of accessible works between countries.[8]

---

3 World Blind Union "June 17 Press Release for WIPO Book Treaty" (17 June 2013) World Blind Union <www.worldblindunion.org>.

4 World Blind Union 2014 Brochure < www.worldblindunion.org>.

5 The Royal National Institute of Blind People (RNIB) is part of the Right to Read Alliance that was established in 2002 to improve the blind and visually impaired persons' right to read. The organisations involved are: The Blind Centre for Northern Ireland, British Dyslexia Association, Calibre Cassette Library, ClearVision, Confederation of Transcribed Information Services (COTIS), Listening Books, LOOK (the National Federation of Families with Visually Impaired Children), National Association of Local Societies for Visually Impaired People (NALSVI), National Blind Children's Society, National Federation of the Blind, National League of the Blind and Disabled, National Library for the Blind (NLB), Royal National Institute of the Blind (RNIB), Scottish Braille Press, Scottish National Federation for the Welfare of the Blind, Share the Vision, Talking Newspaper Association of the United Kingdom (TNAUK), Torch Trust for the Blind and United Kingdom Association of Braille Producers <www.altformat.org>.

6 Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (opened for signature 27 June 2013, not yet in force) [Marrakesh Treaty].

7 See art 4(1)(a) stating:

> Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

Part (b) of art 4(1) goes on to explain the possibility of including a limitation or exception to the right of public performance.

8 See arts 5 and 6.

Despite the general agreement regarding the importance of improving access for the visually impaired and the initial positive response to the Marrakesh Treaty,[9] so far few countries have ratified the Treaty.[10] Some argue that provision of access for the blind is already possible under international copyright law and there was no need for the Marrakesh Treaty.[11] Others have challenged the permissibility as well as the necessity of a document mandating specific limitations and exceptions for the visually impaired in relation to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[12]

To examine the validity of these claims, this article evaluates the impact of international copyright law on provision of access to copyright works for the visually impaired. Part II of the article assesses different features of the international copyright law system that can serve the benefits of the visually impaired. The focus of Part II is on the Three-step Test (the Test) as the main tool for adoption of flexibilities that can facilitate access for the visually impaired.

The international copyright law regime consists of various instruments. However, not all are relevant to the discussion of access for the visually impaired. The Marrakesh Treaty specifically addresses the book famine.[13] It requires[14] its Member States to ensure that they comply with their obligations under the Berne Convention,[15] the TRIPS Agreement,[16] and the WIPO Copyright Treaty (WCT).[17] This is because the copyright works that are the subject of the Marrakesh Treaty

9 Catherine Saez "Over 50 Countries Sign Marrakesh Treaty on Copyright Exceptions and Limitations for the Blind" (1 July 2013) Intellectual Property Watch <www.ip-watch.org>.

10 As of November 2015, 11 countries have ratified the Treaty: see World Intellectual Property Organization "WIPO-Administered Treaties: Contracting Parties > Marrakesh VIP Treaty (Treaty not yet in force)" <www.wipo.int>.

11 See Mihlay Ficsor "Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired" (11 October 2013) Copyright See-Saw <www.copyrightseesaw.net>.

12 See Association Littéraire et Artistique Internationale (ALAI) *Report of the ALAI Ad Hoc Committee on the Proposals to Introduce Mandatory Exceptions for the Visually Impaired* (27 February 2010); and Jane Ginsburg "Do Treaties Imposing Mandatory Exceptions to Copyright Violate International Copyright Norms?" (28 February 2012) The Media Institute <www.mediainstitute.org>.

13 Marrakesh Treaty, above n 6.

14 Marrakesh Treaty, above n 6, art 11.

15 Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 31 (opened for signature 9 September 1886, entered into force 5 December 1887) [Berne Convention].

16 Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1996) [TRIPS Agreement].

17 World Intellectual Property Organization Copyright Treaty (1997) 36 ILM 65 (opened for signature 20 December 1996, entered into force 6 March 2002) [WCT].

and in the centre of the book famine problem are governed by these three instruments. Therefore, this article also looks into these instruments when analysing the impact of international copyright law on access for the visually impaired. However, other international copyright instruments are mentioned when they are likely to indirectly affect the visually impaired.

Having analysed the international copyright regime, this article makes two arguments. Firstly, copyright limitations and exceptions for the benefit of the visually impaired are consistent with the criteria of the Test. Therefore adoption of the Marrakesh Treaty is compatible with the other international copyright instruments. Secondly, the way in which the Test is framed in current international law may not be fully conducive to provision of access to copyright works for the visually impaired. Therefore, countries should adopt the Marrakesh Treaty to ensure equal access for the visually impaired.

II COPYRIGHT FLEXIBILITIES TO FACILITATE ACCESS FOR THE VISUALLY IMPAIRED

A The Balance Between Protection and Access

Protection of the public interest has been an integral part of the copyright regime since the adoption of the first formal copyright Act, the Statute of Anne 1710.[18] The Berne Convention does not directly refer to the balance of rights or protection of the public interest. However, some provisions of the Berne Convention and its negotiating history suggest that the countries of the Berne Convention Union had the balance between the protection and access in mind.[19]

The preamble to the TRIPS Agreement refers to "developmental and technological objectives" as possible "underlying public policy objectives of national systems for the protection of intellectual property".[20] Moreover, the TRIPS Agreement recognises the contribution of intellectual property

18 See Statute of Anne 1710 (GB) 8 Anne c 19 as the first formal copyright Act that recognised the importance of encouragement of learning. The importance of public interest is also recognised in both utilitarian and droit d'auteur traditions. See for example United States Constitution, art 1, § 8, cl 8; and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, at [3].

19 See Ruth L Okediji "The International Copyright System: Limitations, Exceptions, and Public Interest Consideration for Developing Countries" (International Centre for Trade and Sustainable Development, Issue Paper 15, March 2006) at 5, stating that in the context of the Berne Convention "minimum rights were developed internationally through consensus, while specific exceptions and limitations remained the domain of the state. As the Convention matured, it came to reflect and incorporate limitations and exceptions that had evolved over time in a large number of states".

20 Trips Agreement, above n 16, preamble.

protection to "social and economic welfare" of users as one of its objective,[21] and allows its members to adopt necessary measures for promotion of public interest.[22]

The preambles of the WCT, the WIPO Performances and Phonograms Treaty (WPPT), as well as the Beijing Treaty on Audiovisual Performances, highlight the necessary balance between copyright protection and the "larger public interest, particularly education, research and access to information".[23]

The Marrakesh Treaty also reaffirms the importance of public interest in the balance of protection and access and relates it to the case of the visually impaired by stating that its Contracting Parties recognise:[24]

> the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities.

International copyright law instruments offer a range of flexibilities to copyright protection in order to safeguard the public interest and give effect to the objectives that they promote. These flexibilities can be divided into three categories. The first group is the exceptions that countries shall grant to cover certain uses such as quotation.[25] The second group is the non-mandatory but

---

21 Article 7.

22 Article 8(1) stating that "members may, in formulating or amending their laws and regulations, adopt measures necessary … to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement".

23 WCT, above n 17, preamble; WIPO Performances and Phonograms Treaty 36 ILM 76 (1997) (opened for signature 20 December 1996, entered into force 20 May 2002) [WPPT], preamble; and WIPO Beijing Treaty on Audiovisual Performances WIPO Doc AVP/DC/20 (opened for signature 24 June 2012) [Beijing Treaty], preamble. The only difference between the clauses in the preambles of the WCT, the WPPT and the Beijing Treaty is that they each refer to "authors", "performers and producers of phonograms", and "performers in respect of their performances fixed in audiovisual fixations" respectively.

24 Marrakesh Treaty, above n 6, preamble.

25 Berne Convention, above n 15, art 10(1) stating that:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

permissible exceptions, such as exceptions for the purpose of teaching[26] or reporting the current events.[27] Due to limited permissible purposes, these flexibilities do not ensure equal access for the visually impaired persons.

The third group of flexibilities are those that are not specifically named in international copyright law instruments, but are made possible through the Test.[28] The implications of the Test for the visually impaired are discussed in the following section.

B The Three-step Test and Access for the Visually Impaired

The possibility of the adoption of limitations and exceptions to the reproduction right was introduced in the 1967 Stockholm Conference for the Revision of the Berne Convention. Article 9(2) of the Berne Convention authorises its Member States "to permit the reproduction of [literary and artistic 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".[29] Because of the three requirements that define the legitimacy of a limitation or exception, this provision has become known as the Three-step Test.

Other versions of the Test were later included in international intellectual property law instruments.[30] Those regulating copyright include the TRIPS Agreement,[31] the WCT[32] and the WPPT,[33] the Beijing Treaty[34] and the Marrakesh Treaty.[35] With the exception of the Beijing Treaty and the Marrakesh Treaty, the other four instruments that contain the Test are all in force. Because

---

26 Article 10(2) stating that:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice.

27 Article 10*bis*.

28 This is with the exception of the Marrakesh Treaty which specifically addresses copyright limitations and exceptions for the benefit of the visually impaired.

29 Berne Convention, above n 15, art 9(2).

30 See Andrew Christie and Robin Wright "A Comparative Analysis of the Three-Step Test in International Treaties" (2014) 45 International Review of Intellectual Property and Competition Law 409 for a detailed discussion of all the versions of the Three-Step Test in international intellectual property documents.

31 TRIPS Agreement, above n 16, arts 9 and 13.

32 WCT, above n 17, art 10.

33 WPPT, above n 23, art 16(2).

34 Beijing Treaty, above n 23, art 13(2).

35 Marrakesh Treaty, above n 6, art 11.

of its adoption in major intellectual property law instruments the Test has become the defining authority in adoption of copyright limitations and exceptions at the national level.[36]

Article 10 of the WCT repeats the wording of the Berne Convention. Article 13 of the TRIPS Agreement, however, requires countries to "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".

1 The voluntary nature of the Test

The current international copyright regime impacts the access of the visually impaired persons to copyright works in two apparent ways. Firstly, there is no mentioning of the rights of the visually impaired to accessible formats of copyright works in any international copyright law document. This is not, however, limited to the visually impaired and is a common feature of the international copyright law system. Besides the rights of the copyright holders (such as authors, performers, producers of phonograms and broadcasters), international copyright law does not mention anyone else's rights. The Berne Convention refers to the public but only when discussing public performances or communication to the public of copyright protected works.[37] Under the title Objectives, art 7 of the TRIPS Agreement requires that:[38]

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8(1) of TRIPS Agreement states that "[m]embers may, in formulating or amending their laws and regulations, adopt measures necessary … to promote the public interest in sectors of vital importance to their socio-economic and technological development".[39]

Secondly, the Test that makes adoption of limitations and exceptions for the visually impaired possible is a voluntary provision. The negotiating history of the Berne Convention suggests that in

---

36 Christophe Geiger, Daniel Gervais and Martin Senftleben "The Three-step Test Revisited: How to Use the Test's Flexibility in National Copyright Law" (American University Washington College of Law, PIJIP Research Paper Series 2013-04, 2013) at 1.

37 Despite a lack of direct reference to users or public interest, one example of subtle reference to the rights of the public is art 2*bis* that defines published works as "works published with the consent of their authors … provided that the availability of such copies has been such as to satisfy the *reasonable requirements of the public*": Berne Convention, above n 15, art 2*bis* (emphasis added).

38 TRIPS Agreement, above n 16, art 7.

39 Article 8.

order to reach an agreement the decision as to where to strike the balance between protection and access was left to the national States.[40]

Therefore, under the current international copyright regime national legislators are under no obligation to regulate limitations and exception for the benefit of the visually impaired. Consequently, in the absence of relevant provisions in national copyright laws, copyright holders are not required to provide the visually impaired or their advocacy organisations with permission to convert a copyright work to an accessible format.

The optional nature of the flexibilities, sanctioned by the Test, stands out against the backdrop of the mandatory protection requirements in international copyright law. The provisions that deal with protection of the authors or other copyright holders' rights are mandatory and binding.[41]

The Test was adopted as a voluntary measure to give room to national States for regulation of flexibilities in their copyright laws. However, this approach has not proven conducive to provision of access for the visually impaired and the realisation of their human rights. As of 2007, fewer than half of the WIPO member States had limitations and exceptions for the benefit of the visually impaired in their national copyright laws.[42] Moreover, the vague and open-ended wording of the three steps of the Test has created difficulties for the visually impaired even when countries have adopted limitations and exceptions.

2 Creating limitations and exceptions for the visually impaired

Article 9(2) of the Berne Convention only mentions the limitations and exceptions to the right to reproduction.[43] However, because distribution is linked to reproduction, limitations and exceptions may also allow distribution of reproduced accessible copies.[44]

---

40 See P Bernt Hugenholtz and Ruth Okediji *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report* (Open Society Institute, 6 May 2008).

41 See Daniel Gervais "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5 UOLTJ 1 at 12 stating that "while rights are generally well defined in the Berne Convention, exceptions other than those related to 'public information' are unregulated internationally".

42 Judith Sullivan *Study on Copyright Limitations and Exceptions for the visually impaired* (World Intellectual Property Oorganization (WIPO) Standing Committee on Copyright and Related Rights (SCCR), SCCR/15/7, 20 February 2007) at 28. This number has risen ever since where countries like Colombia have adopted limitations and exceptions for the benefit of the visually impaired. See Law No 1680 of 2013 (Columbia). However, there is still a lack of minimum mandatory limitations and exceptions for the benefit of the visually impaired on an international level.

43 Berne Convention, above n 15, art 9(2).

44 Sullivan, above n 42, at 18 stating that "distribution, however, is linked to reproduction – when reproductions are authorised, distribution usually happens - so limitations on exceptions to the reproduction right may impliedly limit exceptions to distribution rights". Sullivan further states at 18–19 that de minimis

The TRIPS Agreement and the WCT explicitly permit adoption of limitations and exceptions to all the exclusive rights that they protect.[45] Therefore, limitations and exceptions for the benefit of the visually impaired could be potentially applied to the rights to reproduction, distribution and making available to the public that are protected under the three abovementioned treaties.[46]

To further examine the adoption of limitations and exceptions for the visually impaired, each limb of the Test needs to be evaluated. The first time an international body interpreted the steps of the Test was by a Panel established by the World Trade Organization (WTO) Dispute Settlement Body (DSB) to address the claims of the European Union regarding s 110(5) of the United States Copyright Act (WTO 110(5) case). The European Communities requested a consultation and then establishment of a panel to address the copyright exemptions in s 110(5)(A) of the United States Copyright Act.[47]

Section 110(5)(A) permits "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes" (homestyle exemption).[48] Section (5)(A) permits some establishments to publicly play "transmission or retransmission embodying a performance or display of a nondramatic musical", upon meeting certain criteria regarding their size and transmission

---

exceptions are possible to the right of broadcasting by wireless means, other communication to the public by electronic transmission and public performance.

45 TRIPS Agreement, above n 16, art 13; and WCT, above n 17, art 10(1).

46 The Marrakesh Treaty refers to the Berne Convention, TRIPS Agreement and the WCT but even if it had not done that the WTO 110(5) Panel rejected the argument that art 13 of the TRIPS Agreement only applies to the new exclusive rights introduced in the TRIPS Agreement. Therefore, art 13 covers all copyrights including the reproduction right.

47 World Trade Organization (WTO) *United States — Section 110(5) of the US Copyright Act* (WT/DS160/R, 15 June 2000) [Report of the Panel]. For a general discussion of this decision see Jane Ginsburg "Towards Supranational Copyright Law? The WTO Panel decision and the 'three-step test' for copyright exceptions" (2001) 187 RIDA 2; BC Goldman "Victory for Songwriters in WTO Music-Royalties Dispute Between US and EU- Background of the Conflict Over the Extension of Copyright Homestyle Exemption" (2001) 32 International Review of Intellectual Property and Competition Law 412; Martin Senftleben "Towards a Horizontal standard for Limiting International Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law" (2006) 37 International Review of Intellectual Property and Competition Law 407; Mihaly Ficsor "How Much of What? The 'Three-Step Test' and Its Application in Two Recent WTO Dispute Settlement Cases" (2002) 192 RIDA 111; Christophe Geiger "Exploring the flexibilities of the TRIPS Agreement's provisions on limitations and exceptions" in Annette Kur and Vytautas Mizaras (eds) *The Structure of Intellectual Property Law: Can One Size Fit All?*(Edward Elgar, Cheltenham, 2011) 287; and Justin Oliver "Copyright in the WTO: The Panel Decision on the Three-Step Test" (2002) 25 Columbia Journal of Law & the Arts 119.

48 17 USC § 110(5)(A); see United States Copyright Office *Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code* (Circular 92, December 2011) at 26–27.

equipment (business exemption).[49] This section was claimed to be a violation of the United States obligations under arts 9(1) and 13 of the TRIPS Agreement, which requires Members to comply with arts 1–21 of the Berne Convention.[50]

The WTO Panel found that the business exemption in s 110(5)(B) of the United States Copyright Act is in violation of the Test as set up in art 13 of the TRIPS Agreement.[51] The Panel's interpretation of the scope and the three steps of the Test is used for evaluating limitations and exceptions for the benefit of the visually impaired.

(a) Step one

The first limb of the Test in the Berne Convention,[52] TRIPS Agreement[53] and WCT calls for limitations and exceptions to be for "certain special cases".[54] As with the "most purpose-specific"[55] exceptions, those for the benefit of visually impaired seem not to face a challenge in meeting the first requirement of the Test.[56]

The WTO Panel in the 110(5) case interpreted the term "certain" as meaning "clearly defined"[57] and the term "special" as having "an individual or limited application or purpose".[58]

Provision of access for the visually impaired to copyright works meets the definition of the Panel of the first step of the Test by being "well-defined ("certain") and narrowly limited ("special")".[59] Where the Panel asks for a limitation or exception to be "narrow in quantitative as

---

49 17 USC § 110(5)(B).

50 See Report of the Panel, above n 47, at 6.

51 At 69.

52 Berne Convention, above n 15, art 9(2).

53 TRIPS Agreement, above n 16, art 13.

54 WCT, above n 17, art 10.

55 Daniel Gervais "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5 (1&2) UOLTJ 1 at 27.

56 See Daniel Gervais "Comment submitted by Professor Daniel Gervais (Vanderbilt University Law School): In response to the Copyright Office Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities" United States Copyright Office <www.copyright.gov> at 10, relating to Notice of Inquiry (74 Fed Reg 196 (13 October 2009); and Daniel Gervais, above n 47, at 27 stating that "one could argue that an exception limited to a class of users is similarly limited in scope".

57 Report of the Panel, above n 47, at [6.108].

58 At [6.109].

59 Jane Ginsburg "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (2001) Revue International du Droit d'Auteur 1 at 5.

well as a qualitative sense" the question arises regarding to what the narrowness should apply.[60] The Panel defined this requirement as having "a narrow scope as well as an exceptional or distinctive objective."[61] Some authors argue that, considering its application of the first step to s 110(5), the Panel targeted the "potential beneficiaries that must be sufficiently limited" when interpreting the quantitative restrictions.[62]

Although not each and every instance of access for the visually impaired is identifiable, the case of access is defined clearly enough to create legal certainty.[63] They would serve a certain portion of the public. National copyright laws that have adopted limitations and exceptions for the visually impaired have usually provided clear definitions of beneficiaries who are unable to read normal copies because of visual or other impairments. Moreover, limitations and exception for the visually impaired have the "limited application or purpose" of benefiting the visually impaired beneficiaries.

The Panel rejected the idea of using public policy purposes for evaluating limitations and exception.[64] Such purposes, however, can be useful for clarifying the scope and definition of intended limitations and exceptions.[65] Provision of access for the visually impaired as a policy purpose establishes the narrow scope and reach of the limitations and exceptions for the visually impaired.

(b) Step two

In commenting on the second step of the Test, the Panel considered the "normal exploitation of a work" as having a both empirical and normative meaning. The Panel suggested that "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical

60 Report of the Panel, above n 47, at [6.109].

61 At [6.109].

62 Geiger, Gervais, and Senftleben, above n 36, at 14.

63 Report of the Panel, above n 47, at [6.108] stating that "there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty".

64 At [6.112].

65 See Sam Ricketson and Jane Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, Oxford University Press, Oxford, 2006) vol 1, at 764–767 discussing the question whether the phrase "certain special cases" mean that limitations and exception should have a special purpose or justification including a policy purpose. The authors argue that, while interpretation of the Panel does not extend to the first step of the Test in art 9(2) of the Berne Convention, which has different purposes and histories, considering the negotiating history of the Berne Convention as well as the fact that any public policy reasons would be further tested under the second and third steps of the Test, "certain special cases" does not appear to signal a need for special purposes.

importance, must be reserved to the authors".[66] The Panel went on to explain the likely forms of exploiting a work as those "with a certain degree of likelihood and plausibility".[67]

According to the Panel for a limitation or exception to be in conflict with the normal exploitation of a work it needs to "enter into economic competition" with the normal exploitations defined above and rob the right holders of "significant or tangible commercial gains".[68]

To evaluate the impact of limitations and exceptions for the visually impaired on the author's normal exploitation of a work, it would be helpful to identify all instances of normal exploitations on both national and international level (in case of cross-border exchange of works): (1) a market for normal copies that can be empirically measured; (2) a market for accessible copies that can be empirically measured; (3) a normative market of normal copies; and (4) a normative market of accessible copies.

(i) A market that can be empirically measured (empirical market)

Provision of accessible formats through limitations and exceptions does not interfere with the empirical definition of all forms of normal exploitation (the empirical markets for normal and accessible copies).

Currently there is no real empirical market of accessible works from which the right holders make "significant or tangible commercial gains". Even if presumably an empirical market of accessible works exists, limitations and exceptions for the visually impaired will cause the publishers to lose "significant or tangible commercial gains" from the small percentage of the works they make accessible. This is because reproduction of accessible works through limitations and exceptions is mainly on a non-profit basis; therefore, there is no real profit made which could have belonged to the right holder.

According to the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired, "in at least two-thirds" of the national laws containing limitations and exceptions for the visually impaired "profit-making or commercial activity is ruled out".[69] Limiting the type of actors that can use an exception is stricter in some countries like New Zealand where the law bans an entity that is "established or conducted for profit" from making copies.[70] The United Kingdom

66 Report of the Panel, above n 47, at [6.179] quoting at fn 161"Document S/1: Berne Convention; Proposals for Revising the Substantive Copyright Provisions (Articles 1-20). Prepared by the Government of Sweden with the assistance of BIPRI, p. 42".

67 Report of the Panel, above n 47, at [6.180].

68 At [6.183].

69 Sullivan, above n 42, at 32.

70 Copyright Act 1994, s 69 (3).

Copyright, Designs and Patents Act also defines an approved body as "an educational establishment or a body that is not conducted for profit".[71] Other countries like the United States allow for a wider range of entities such as an educational organisation which may be profit-making in general to use the copyright limitations and exceptions as long as the conducted activity is not to gain profit. "Authorized entity" in the United States Copyright Act is defined as a "non-profit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities".[72]

Finally, limitations and exceptions do not interfere with the empirical market of normal copies. In the absence of accessible works reproduced under limitations and exceptions, the visually impaired would not buy normal copies that normally have considerable economic or practical importance to the authors.

(ii) Normative market

Similar to the case of an empirical market of normal copies, limitations and exceptions would not interfere with a normative market of normal copies for reasons mentioned above.

It may, however, be more difficult to establish that reproduction of accessible formats under limitations and exception does not interfere with the normative markets of accessible copyright works.

The Panel's normative interpretation of exploitation of a work covers any plausible future market. Therefore, future exploitation is possible assuming that if the author decides to produce accessible formats there will be considerable demand from the visually impaired. In that scenario, limitations and exceptions could potentially interfere with a normative normal exploitation of a copyright work if they "enter into economic competition".

It is, however, harder to evaluate the possibility of "significant or tangible commercial loss" in a normative market because the Panel does not elaborate on the threshold that the revenue from a copyrighted work or loss thereof should reach to be considered significant or tangible. Perhaps establishing this issue was easier in the WTO 110(5) case. In that case, commercial establishments were using copies of works that they could have paid for, whether at the time of the decision or in the future. In the case of the visually impaired, however, the alternative to stopping reproduction of accessible formats is not the purchase of normal copies of the works by the visually impaired, but purchase of formats that publishers may, or may not, produce.

---

71 Copyright, Designs and Patents Act 1988 (UK), s 31B(12).

72 17 USC § 121(d)1.

Moreover, even if the author manages to establish a market for accessible books, it could coexist with the limitations and exceptions. As mentioned before, many countries confine the application of limitations and exceptions to lack of a commercial copy. Also, if the commercial copy is reasonably priced, the visually impaired may prefer to buy that copy which may be faster to obtain. Many authorised entities have arrangements with publishers to buy their accessible copies instead of producing them. Moreover, there would only be a future market if the works that the author produces are reasonably priced. Therefore, demand and production of accessible copies do not necessarily equate to a market.

In spite of these speculations, it is possible that works produced through limitations and exception may "enter into economic competition" and therefore interfere with a normative normal exploitation of a work by the author.

However, the approach of the WTO Panel in interpreting the Test has since been widely criticised. The Panel's interpretation of the second step of the Test imposes the risk of preventing extension of limitations and exceptions to new situations that are currently unforeseen but likely and restricting limitations and exceptions once new technologies make exploitation of previously uncontrollable uses possible.[73]

Therefore, defining the normal exploitation of a work may require attention to non-economic normative considerations behind the exploitations of a right holder.[74] For instance, from a non-economic perspective, is it justified for the normal exploitation of a right holder to include both empirical and normative definitions? In other words, should economic interests of the authors govern normative markets that may hinder realisation of human rights of the visually impaired?

In the context of the Berne Convention, the answer to these questions may seem to be yes. The preamble of the Berne Convention states the purpose of the Convention as protecting, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.[75] However, considering the lack of clarity in the interpretation of the normal exploitation, the negotiating history of the Berne Convention, particularly the preparatory work for the Stockholm Conference, highlights the importance of non-economic considerations.[76]

---

73 Geiger, Gervais and Senftleben, above n 36, at 15.

74 See Ricketson and Ginsburg, above n 65, at [13.20].

75 Berne Convention, above n 15, preamble.

76 See Ricketson and Ginsburg, above n 65, at [13.21] for a discussion of non-economic normative consideration arguing that the during the Stockholm Conference the Three-Step Test was adopted with the view of accommodating already existing limitations and exceptions in the countries of the Union, many of which had public interest roots.

In the context of the TRIPS Agreement, focusing on the economic aspects of the copyright law and not taking account of the other objectives that TRIPS Agreement Member States aim to achieve through copyright protection are major critiques to the Panel's decision.[77] These critiques are supported by the objectives and principles of the TRIPS Agreement outlined in its preamble that need to be taken into account when interpreting an instrument according to the Vienna Convention.[78]

Article 31(1) of the Vienna Convention on the Law of Treaties states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[79]

The need for interpretation of the TRIPS Agreement in light of its objectives and purposes is emphasised in the Doha Declaration on the TRIPS Agreement and Public Health. The Doha Declaration states that "in applying the customary rules of interpretation of international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles".[80]

Regarding the WCT, non-economic normative considerations should protect and promote the public interest as highlighted in the preamble of the Treaty.[81]

---

77 See Ginsburg, above n 47; Ricketson and Ginsburg, above n 65, at [13.21]; Christophe Geiger "The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP Law" in Graeme Dinwoodie (ed) *Methods and Perspectives in Intellectual Property* (Edward Elgar, Cheltenham, 2013) 153; Henning Grosse Ruse-Khan "Proportionality and Balancing within the Objectives for Intellectual Property Protection" in Paul Torremans (ed) *Intellectual Property and Human Rights* (Kluwer, Austin, 2008) 161; and Peter Yu "The Objectives and Principles of the TRIPS Agreement" (2009) 46 Houston Law Review 979.

78 See TRIPS Agreement, above n 16, preamble where two of the objectives of the TRIPS Agreement outlined in the preamble that can inform the interpretation of the Three-Step Test are the recognition of "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives"; and "also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base". See also TRIPS Agreement, arts 7 and 8 laying out the principles of importance of contribution of intellectual property right to "social and economic welfare, and to a balance of rights and obligations" and to "the public interest in sectors of vital importance to … socio-economic and technological development".

79 United Nations, Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) [Vienna Convention], art 31(1).

80 World Trade Organization (WTO) *Declaration on the TRIPS Agreement and Public Health* (Ministerial Conference, WT/MIN(01)/DEC/2, 20 November 2001); 41 ILM 746 (2002) [Doha Declaration], art 5(a). See also Susy Frankel "WTO Application of the 'Customary Rules of Interpretation of Public International Law' to Intellectual Property" (2006) 46 Virginia Journal of International Law 365.

81 WCT, above n 17, preamble.

Therefore, in the case of the visually impaired, the current inequality of access and its impact on human rights of the visually impaired should justify adoption of limitations and exception that could potentially interfere with an exploitation of copyright works that can be considered normal in the future (either because a market is formed or that new technologies make such exploitation easier or more attractive to the right holders). Furthermore, by considering the Test as a guiding tool for adoption of limitations and exceptions, such non-economic incentives can be evaluated against the third step of the Test.

(c) Step three

The third step of the Test requires a limitation or exception not to "unreasonably prejudice legitimate interests of the author" in the Berne Convention[82] and WCT[83] and those of the "right holder" in the TRIPS Agreement.[84] Therefore, this step has two elements to be considered. Firstly, "legitimate interest" implies that not all interests of the author or right holder are legitimate. Secondly, "unreasonable prejudice" suggests that some prejudice to the legitimate interests of the author or right holder are justifiable or reasonable.[85] These characteristics transform the third step into a "refined proportionality test" for contrasting copyright protection against public policy objectives.[86]

The Panel in the 110(5) case stated that "the term [legitimate] relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective".[87] Although the Panel focused on economic interests of the right holder, its reference to "a normative perspective" is useful for determining the legitimacy of the interests of the right holders in relation to limitations and exceptions for the benefit of the visually impaired.[88]

---

82 Berne Convention, above n 15, art 9(2).

83 WCT, above n 17, art 10.

84 TRIPS Agreement, above n 16, art 13.

85 See Geiger, Gervais and Senftleben, above n 36, at 52 stating that the French version of the Berne Convention, that is also the official text of the Convention in case of discrepancy between linguistic versions, uses the phrase "*ne cause pas un prejudice injustifié*"; therefore, it could suggest a test of justifiability rather than reasonableness compared to the English version.

86 At 15–16.

87 Report of the Panel, above n 47, at [6.224].

88 See at [6.227] stating that

> … one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders. It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights. That is not to say that legitimate interests are necessarily limited to this economic value.

The WTO Panel argued that "a certain amount of prejudice has to be presumed justified as 'not unreasonable'"[89] and that unreasonable prejudice is caused by imposing or having the potential to impose "serious loss of profit" for the right holder.[90]

Therefore, the reproduction of accessible copies by a visually impaired individual for private use, by a non-profit organisation or by a profitable entity such as a library or educational institution for non-commercial purposes does not violate the third step of the test. This is because limitations and exceptions do not affect the author's right to exploitation of the empirical markets; and, regarding their effect on exploitation of normative markets, some level of prejudice to the legitimate interests of the author or right holder is reasonable or justifiable.[91] Therefore, the author's potential loss of profit on sale of accessible copies can be viewed as reasonable prejudice in light of the contribution of limitations and exceptions to the realisation of the human rights of the visually impaired.

The other issue that rises regarding the Test is whether the steps are sequential. The drafting history of the Berne Convention, where the Test first appeared, seems to suggest that the steps are

---

In this paragraph the Panel refers to another decision regarding patents that took account of "public policies or other social norms" but at the same time highlights the difference between arts 13 and 30 of the TRIPS Agreement (the later also referring to interests of the third parties). Although the mentioned difference is true, it does not justifies overlooking policy purposes when dealing with art 13 since limitations and exceptions to both patents and copyright are subject to the preamble and the objectives and purposes (arts 7 and 8) of the TRIPS Agreement that underscore public interest.

89 Report of the Panel, above n 47, at [6.229].

90 At [6.229].

91 At [6.229]; The existence of two concepts of reasonableness or justifiability is due to the slight discrepancy in the English and French texts of the Berne Convention. See Geiger, Gervais and Senftleben, above n 36, at 5.

sequential.[92] However, some authors argue that considering that the Test is a "single analytical whole" that "serves the ultimate goal to strike an appropriate balance" it is possible to move to the third step even if the second step is not met.[93] The balance-striking purpose of the Test is also highlighted in the preambles of the WIPO Internet Treaties.[94]

If the steps of the Test are considered holistically rather than cumulatively or sequentially, a limitation or exception that does not meet the requirement of the second test could still be justified as a whole, by application of the third step.[95] In that case, reproduction of an accessible copy which may interfere with a normal exploitation of the work (most probably a potential future market) may still be justified.

The requirements of the Marrakesh Treaty regarding authorised entities that can reproduce or distribute accessible copies of copyright works are in line with the Test and the WTO Panel's

---

92 See World Intellectual Property Organization "Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20)" in *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967* (Geneva, 1971) 1129 at 1145–1146 stating that the sequential nature of the three steps is mainly understood from the following passage in the Stockholm Conference records:

> The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.

93 Geiger, Gervais, and Senftleben, above n 36, at 6. See also Christophe Geiger "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" (2010) 1 JIPITEC 119.

94 WCT, above n 17, preamble stating that the "need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention"; The preamble of the WPPT recognises the "need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information".

95 See Geiger, Gervais and Senftleben, above n 36, at 52, arguing that:

> … even if the drafting treaty history of Berne may support sequential steps such a reading of the Test would be mandatory only in the context of the Berne three-step and not in the context of any of the subsequent versions in other Agreements which follow other rationales and have other histories.

interpretation of it. As art 2 of the Treaty states, the basis of the authorised entities' activities must be non-profit.[96] The Treaty provides other examples of requirements that would authorise an entity to use imitations and exception. Those requirements include: lawful access to a copyright work or a copy of it;[97] avoiding changes other than those needed to make the work accessible;[98] and supplying accessible works exclusively for use by the visually impaired.[99]

Finally, while Contracting Parties are offered a degree of autonomy in regulating limitations or exceptions for the benefit of visually impaired, the importance of adhering to the criteria of the Three-step Tests is emphasised in multiple provisions of the Treaty.[100] Article 11 of the Treaty enunciates the requirements of the Three-step Tests, as set out in the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty.[101]

C International Exchange of Accessible Works

Another restraint on access for the visually impaired is the restriction on method of international distribution of accessible works. The international copyright law does not address this issue.[102] Copyright regulations are territorial and thus mainly concerned with the issues existing within the borders of each country. The need to consider both the jurisdiction of the importer and the exporter country complicates the international exchange of accessible works.[103] These complications have led to duplication in production of accessible formats.

This, in the case of the visually impaired, equals confusion over use of foreign works and no exchange possibilities, except in the case of special agreements between certain institutions. For instance, the New Zealand Blind Foundation has had an arrangement with Vision Australia to exchange accessible works. Both institutions are required to clear copyright for the exchange titles.[104]

---

96 Marrakesh Treaty, above n 6, arts 2(c) and 4(2)(iv).

97 Article 4(2)(i). See also art 4(2)(b) that requires lawful access to copyright work by a beneficiary person, or someone acting on his or her behalf.

98 Article 4(2)(ii).

99 Article 4(2)(iii).

100 Article 11.

101 Article 11.

102 See Sullivan, above n 42, at 58.

103 At 48–64.

104 E-mails from Jennifer Ashton (Pre-Production Co-ordinator, Accessible Format Production, Blind Foundation) and Lyviana King (Accessible Formats Facilitator, Blind Foundation) to Lida Ayoubi regarding provision of accessible works to the visually impaired in New Zealand (10 July 2013 and 18 June 2014).

International exchange of accessible copyright works is critical in light of the significance of technology and resources in production of accessible formats and the number of countries in the world that share the same language. Not only does international copyright law not address the international exchange of accessible works, it also indirectly contributes to the lack of exchange possibilities through offering voluntary flexibilities to copyright. Countries' freedom to adopt flexibilities under the Test has led to a lack of limitations and exceptions, or adoption of ones that are badly-crafted. At the same time, the territorial nature of copyright has not stopped the international community from adopting minimum standards of protection for copyright and related rights. Moreover, the principle of national treatment means that authors enjoy a minimum level of protection everywhere.[105]

Regulating the possibility to import and export accessible formats more extensively on the international and consequently national level facilitates the flow of resources between the developed and developing countries and equals better access for the visually impaired people in the latter. It also prevents resources from going to waste by skipping repetition and reproduction of the same titles over and over again in various countries with the same language.

The fact that lack of access to books exists despite the availability of copyright limitations and exceptions in many countries' national laws is recognised in the Treaty's preamble:[106]

> Recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.

Following this recognition, it is suggested that the need for "considerable resources" together with unavoidable "duplication of efforts" to produce accessible works are to blame for the persistence of the book famine.[107]

Articles 5 and 6 of the Treaty address the exchange of accessible copies of copyright works internationally. Article 5 requires the Contracting Parties to allow for accessible works that are produced under copyright limitations and exceptions or other laws to be shared with another country.[108] Similar to production and use of accessible copies under art 4, such copies can only be

---

105 See Berne Convention, above n 15, arts 5(1) and 5(3); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (opened for signature 26 October 1961, entered into force 18 May 1964) 496 UNTS. 43 [Rome Convention], arts 2and 4–6; TRIPS Agreement, above n 16, art 3; WCT, above n 17, art 3; WPPT, above n 23, art 4; and Beijing Treaty, above n 23, art 4.

106 Marrakesh Treaty, above n 6, preamble.

107 Preamble.

108 Article 5(1).

shared with authorised entities or visually impaired individuals in another country.[109] While art 5(2) instructs the countries on how to regulate exchange of accessible copies, art 5(3) recognises the Parties' right to provide for other limitations or exceptions for the same purpose.[110]

The Treaty makes it possible for countries that are not members of the Berne Convention to receive copies of accessible works from other countries. However, to protect the interests of copyright holders, the Treaty requires the distribution or making available of accessible works to be limited to beneficiaries within the jurisdiction of those countries.[111]

Still, authorised entities in countries that are not members of the Berne Convention, but parties to the WCT, can distribute or make the works available to other jurisdictions, provided they have reproduced (and not received) the work themselves.[112] Alternatively, adherence to the principles of the Test in national law has the same effect, in case the contracting party is neither a member of Berne Convention nor the WCT.[113] This provision successfully addressed what came to be known as the "Berne gap" in reference to application of the Test to the right to distribution in countries that are not parties to the Berne Convention.[114]

Therefore, countries like Iran who have joined the Marrakesh Treaty but not the Berne Convention or the WCT can still take part in the international exchange of accessible works. Under the provisions of art 5, Iran can receive accessible copies from other authorised entities, but can only distribute those copies locally.[115] It is not, however, completely clear whether the authorised entities in Iran could distribute their works to other jurisdictions. The Copyright Law of Iran appears to protect the right to distribution of copyright works.[116] The law also holds that "public libraries, documentation centers, scientific institutions and educational establishments, which are non-

---

109 Article 5(2)(a) and (b).

110 Article 5(3).

111 Article 5 (4)(a).

112 The European Union and Tuvalu appear to be the only countries member to the WCT and not the Berne Convention; see World Intellectual Property Organization "WIPO-Administered Treaties: Contracting Parties Berne Convention (Total Contracting Parties: 169)" <www.wipo.int>; and World Intellectual Property Organization "WIPO-Administered Treaties: Contracting Parties > WIPO Copyright Treaty (Total Contracting Parties: 94) " <www.wipo.int>.

113 Marrakesh Treaty, above n 6, art 5 (4)(b).

114 See WIPO Standing Committee on Copyright and Related Rights *Draft Report of the Informal Session and Special Session held at Geneva, 18–20 April 2013* (SCCR/SS/GE/2/13/3 PROV, 31 May 2013).

115 Marrakesh Treaty, above n 6, art 5(4)(a). See generally Simonetta Vezzoso "The Marrakesh Spirit – A Ghost in Three Steps?" (2014) 45 International Review of Intellectual Property 796 at 806–809 for a discussion of the "Berne gap".

116 Act for Protection of Authors, Composers and Artists Rights (Copyright Law) 1970 (Iran), art 3 stating that "author's rights include exclusive right to publish, broadcast, perform and publicize works".

commercial, may reproduce protected works by a photographic or similar process, in the numbers necessary, for the purposes of their activities".[117] Considering this provision as compatible with the Three-step Test, the entities that are authorised to reproduce works, under the Marrakesh Treaty, would be able to distribute them beyond the jurisdiction of Iran.

While art 5 is mainly dealing with export of accessible works to other countries, art 6 of the Marrakesh Treaty addresses the importation of such works. Therefore, visually impaired individuals, those acting on their behalf and the authorised entities that can make an accessible copy of a work should be allowed to import accessible works as well.[118]

Finally, the Treaty asks the States to take necessary measures to facilitate the cross-border exchange of accessible works. Such measures could include encouraging the voluntary sharing of information between authorised entities to identify each other as well as communicating that information to the general public. To this end, WIPO would "establish an information access point" and share information "about the functioning" of the Treaty.[119]

III CONCLUSION

The flexibility that the international copyright law regime offers under the Test provides a foundation for facilitation of access to copyright content for visually impaired persons. However, this flexibility is insufficient to ensure equal access for the visually impaired.

Adoption of the copyright flexibilities under the framework of the Test is on a voluntary basis. Moreover, the Test, as the main authority for adoption of limitations and exceptions, does not directly restrict the beneficiaries, authorised entities, accessible formats and the nature of uses for the visually impaired. However, it leaves them open to interpretation and decision of the States that may regulate those issues in a way that is not conducive to provision of equal access for the visually impaired. Due to the territorial nature of copyright, the lack of any guidelines on the international exchange of accessible works has halted the sharing of valuable resources between the visually impaired in different countries.

As this article shows, limitations and exceptions for the benefit of the visually impaired as mandated by the Marrakesh Treaty are consistent with the Berne Convention and TRIPS Agreement Three-step Tests. Therefore, the Marrakesh Treaty is compatible with the instruments that shape the current international copyright law regime. Further, to ensure that the visually impaired fully benefit from the flexibility that the Test offers, countries should adopt the Marrakesh Treaty and implement the necessary measures.

---

117 Article 8.

118 Article 6.

119 Article 9.