

## ARTICLES

### THE MARRAKESH TREATY FOR VISUALLY IMPAIRED PERSONS: WHY A TREATY WAS PREFERABLE TO SOFT LAW

Margot E. Kaminski & Dr. Shlomit Yanisky-Ravid

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# ARTICLES

## THE MARRAKESH TREATY FOR VISUALLY IMPAIRED PERSONS: WHY A TREATY WAS PREFERABLE TO SOFT LAW

Margot E. Kaminski\* & Dr. Shlomit Yanisky-Ravid\*\*

### ABSTRACT

This paper addresses the debates leading up to the recently adopted international treaty on copyright exceptions for the visually impaired, the Marrakesh International Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. This treaty was successfully adopted by the World Intellectual Property Organization (WIPO) in June 2013.

Leading up to the negotiation of this instrument, multiple UN member states pushed for the instrument to be negotiated as soft law instead of a treaty. We argue that making this instrument soft law would have precluded its success. WIPO thus correctly chose to make this international instrument a treaty rather than a joint recommendation.

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This paper explains the international need for this instrument, to solve a global “book famine” and protect the access rights of visually impaired people. It then outlines the debate that occurred leading up to adoption over whether the instrument should be hard law or soft law. This debate illuminates that discussions of hard versus soft law need to be situated in context. We explore both related human rights law and other international copyright law to explain how they altered the hard law-soft law calculation in this case.

The concluded treaty reflects WIPO’s recognition of related copyright law that had been established in other forums. By creating a binding instrument, WIPO has encouraged developing countries to implement the new treaty, towards the goal of assisting those visually impaired persons most in need of an international solution.

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## I. INTRODUCTION

The World Intellectual Property Organization (WIPO) at the United Nations recently confronted a human rights problem of global scale: visually impaired people face a “book famine” stemming from the inability of persons with print and other reading disabilities to obtain accessible versions of copyrighted works.<sup>1</sup> The World Health Organization (WHO) estimates that there are 285 million people with print disabilities, and only around five percent of books are available in accessible formats in developed countries.<sup>2</sup> In developing countries, the percentage of books that are available in accessible formats is much lower, estimated at less than one percent.<sup>3</sup>

Article 19 of the International Covenant on Civil and Political Rights protects freedom of expression, including the “freedom to seek, receive and impart information and ideas of all kinds.”<sup>4</sup> This right belongs to all persons, whether or not they are visually impaired. The 2006 United Nation General Convention on the Rights of Persons with Disabilities recognizes the right of people with disabilities to enjoy equal access to educational, cultural, political, and employment-related knowledge and materials, in accessible formats.<sup>5</sup>

Other law, however, places significant hurdles to this access right. In some countries, making accessible formats for visually impaired persons is considered an infringement of copyright law. Only 57 countries, representing fewer than half of WIPO’s 184 member states, were identified as having created specific exceptions and limitations to copyright for the benefit of the visually impaired.<sup>6</sup> In other countries, while making accessible formats might be permitted, cross-border

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<sup>1</sup> World Intellectual Property Organization, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7 (Feb. 20, 2007) [hereinafter WIPO Study], available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=75696](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696).

<sup>2</sup> World Health Org., *Visual Impairment and Blindness*, FACT SHEET N°282 (Oct. 2013), <http://www.who.int/mediacentre/factsheets/fs282/en/index.html> [hereinafter *WHO Fact Sheet*] (estimating 39 million are blind and 246 million have low vision, amongst those about 65% of all people who are visually impaired are aged 50 and older and 19 million children under 15 are visually impaired).

<sup>3</sup> Press Release, World Blind Union, On Track for a “Books Without Borders” Treaty (June 30, 2011), <http://www.worldblindunion.org/English/our-work/our-priorities/Pages/On-Track-For-A-Book-Without-Borders.aspx>.

<sup>4</sup> International Covenant on Civil and Political Rights art. 19(2), Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>5</sup> Convention on the Rights of Persons with Disabilities art. 30, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter UN Convention].

<sup>6</sup> WIPO Study, *supra* note 1, at 9, 28.

transfer of these formats is considered to be infringement. Relying on the market to solve these problems has not worked; the current copyright licensing system for making written works accessible is inadequate and inefficient.<sup>7</sup> Persons with print disabilities are consequently denied access to educational materials, literature, entertainment, and the free flow of ideas that constitute full participation in society.<sup>8</sup>

WIPO thus established an international instrument to enable accessibility for persons with print disabilities by providing specific limitations and exceptions to copyright.<sup>9</sup> Different groups offered several proposed drafts of the instrument,<sup>10</sup> and a Chair's text<sup>11</sup> was drafted as the "basis for future text-based work."<sup>12</sup> The different proposals were united into one draft, which served as the basis for

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<sup>7</sup> WIPO Study, *supra* note 1, at 10 (noting that the shortage of access to copyrighted works is created by "difficulties in reaching licensing agreements" for accessible copies, "both regarding activity within a country and movement of accessible copies across borders").

<sup>8</sup> UN Convention, *supra* note 5, art. 30 ("Participation in cultural life, recreation, leisure and sport. (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats").

<sup>9</sup> The Standing Committee on Copyright and Related Rights (SCCR) agreed at its twenty-second session in June 2011 to recommend to the WIPO General Assembly that Members continue discussion of the proposed instrument with the aim to "agree and finalize a proposal on an international instrument on limitations and exceptions for persons with print disabilities in the 23rd session of the SCCR." WIPO, SCCR, *Draft Report*, 86 ¶ 5, WIPO Doc. SCCR/22/18 Prov. (Dec. 19, 2011) [hereinafter SCCR/22/18].

<sup>10</sup> There were four proposals related to copyright limitations and exceptions and the needs of the visually impaired and other persons with print disabilities, submitted by the Member States of WIPO and the European Union. See WIPO, SCCR, *Comparative List of Proposals Related to Copyright Limitations and Exceptions for the Visually Impaired Persons and Other Persons with Print Disabilities*, WIPO Doc. SCCR/22/8 (Mar. 16, 2011) [hereinafter *List of Proposals*] (prepared by the Secretariat).

<sup>11</sup> WIPO, SCCR, *Revised Working Document on an International Instrument on Limitations and Exceptions For Visually Impaired Persons/Persons with Print Disabilities*, WIPO Doc. SCCR/24/9 (July 26, 2012) (adopted by the Committee as a working draft); WIPO, SCCR, *Proposal on an international instrument on limitations and exceptions for persons with print disabilities*, WIPO Doc. SCCR/22/16 (June 23, 2011) [hereinafter *Chair's July 12 Proposal*] (prepared by the Chair).

<sup>12</sup> SCCR/22/18, *supra* note 9, at 85 (reporting that "the Committee asked the Chair to prepare a Chair's text for an international instrument on limitations and exceptions for persons with print disabilities (document SCCR/22/16), which would constitute the basis for the future text-based work to be undertaken by the Committee in its 23rd session").

negotiations by member states in a diplomatic conference. Those negotiations successfully concluded in adoption of the treaty in June 2013.<sup>13</sup>

This article addresses a fundamental disagreement that arose over this instrument during its negotiations: whether the proposed international instrument should be shaped as a binding treaty (hard law) or as a joint recommendation (soft law). The U.S. delegation to WIPO's Standing Committee on Copyright and Related Rights (SCCR) first opposed any deal that would produce an enforceable treaty and was instead in favor of an informal slate of policy recommendations.<sup>14</sup> The 2011 U.S. delegation to WIPO's SCCR advocated for a two-step process, in which the first step will be a joint recommendation, "on the path" to a second step of binding international standards.<sup>15</sup> Later, the U.S. delegation changed its position and agreed to a treaty, without discussing the intensity or the extent of the binding clauses.<sup>16</sup> The European Union followed a similar pattern, initially proposing a

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<sup>13</sup> *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*, Draft, WIPO Doc. General Assembly, WO/GA/42/2, Twenty-fifth Session (Dec. 17–18, 2012), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=223007](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=223007) [hereinafter General Assembly's Draft]. For more documents about the preparation toward the Diplomatic Conference, see *Preparatory Committee of the Diplomatic Conference to conclude a Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, WIPO Conferences, Meeting and Seminars* (Dec. 17–18, 2012), [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=28442](http://www.wipo.int/meetings/en/details.jsp?meeting_id=28442) [hereinafter WIPO Preparatory Committee] ("[T]he WIPO General Assembly took a landmark decision today to convene a diplomatic conference in 2013 to complete negotiations on a pact to improve access to copyrighted works for the many visually impaired and people with print disabilities around the world. The General Assembly also expressed gratitude to Morocco for its offer to host the diplomatic conference."). *WIPO Advances Toward Treaty to Facilitate Access to Published Works by Persons with Print Disabilities, Morocco Offers to Host Diplomatic Conference Geneva*, WIPO Report, PR/2012/727, WIPO News & Events (Dec. 18, 2012), [http://www.wipo.int/pressroom/en/articles/2012/article\\_0026.html](http://www.wipo.int/pressroom/en/articles/2012/article_0026.html) [hereinafter WIPO PR/2012/727].

<sup>14</sup> Zach Carter, *Obama Administration Stalls Blind Rights Treaty for Another Year*, HUFF POST POLITICS, July 26, 2012, [http://www.huffingtonpost.com/2012/07/26/blind-treaty-2012\\_n\\_1706543.html](http://www.huffingtonpost.com/2012/07/26/blind-treaty-2012_n_1706543.html) [hereinafter *Obama Administration*] ("The U.S. and European blockade is supported by large publishing companies; developing nations and advocates for people living with disabilities object.").

<sup>15</sup> SCCR/22/18, *supra* note 9, at 22–23.

<sup>16</sup> Justin Hughes, *Senior Advisor to the Under Sec'y of Commerce for Intellectual Prop., U.S. Statement at the WIPO General Assembly* (Dec. 17, 2012), <http://geneva.usmission.gov/2012/12/17/wipo/> (explaining that the US was always in favor of promoting access to print materials for visually impaired persons and the US believes that the recommendation would have a better and faster effect because many countries follow Berne Convention recommendations, compared to the long process of ratification followed by a binding treaty).



joint recommendation and finally voting for negotiating a binding treaty.<sup>17</sup> By contrast, other delegations, including Argentina, Brazil, Ecuador, Paraguay, Mexico, and the African Group, always insisted the agreement should be a binding hard-law treaty.<sup>18</sup>

This article addresses this debate between WIPO member states, identifying the differences between employing a soft-law joint recommendation and a hard-law treaty in this policy space. We situate our discussions of hard and soft law against the existing landscapes of both international copyright law and international human rights law. By now, several other scholars have addressed this question, coming to varying conclusions and referring to an earlier draft of this article.<sup>19</sup>

Our conclusion, based on the interaction between international intellectual property law and human rights law, is that WIPO correctly decided that the instrument should be constructed as a binding treaty, hard law, rather than a non-binding joint recommendation, soft law. First, non-binding recommendations can become “dead letter” law—law that is signed but never actually complied with. The global problem of the book famine is too important for the solution to be reduced to an ineffective international statement of policy. Second, soft law is a less appropriate solution where negotiators already share a policy consensus to a great degree of specificity, rather than vague aspirations that might require experimentation. Third, soft law can be inefficient and incur unnecessary costs for countries. Fourth, a hard-law human rights treaty already exists in this space, but has not been implemented. Thus a soft-law instrument would not operate the way such instruments have been used by WIPO in the past. Fifth, a hard instrument would promote national legislation in developing countries. Sixth, in the copyright context, the international field is crowded with multiple hard-law agreements in

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<sup>17</sup> *Id.* at 25. James Love, *KEI Statement on WIPO decision to hold June 2013 diplomatic conference for treaty on copyright exceptions for disabilities*, KNOWLEDGE ECOLOGY INTERNATIONAL (Dec. 18, 2012), <http://keionline.org/node/1631>.

<sup>18</sup> *Id.* at 24–25; SCCR/22/18, *supra* note 9.

<sup>19</sup> Aaron Scheinwald, *Who Could Possibly be Against a Treaty for the Blind?*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 445, 507–08 (2012) (concluding that reaching a consensus is the important factor, where the binding document reflects a high level of consensus); Silke von Lewinski, *WIPO's Discussion on Exceptions and Limitations in Particular in Favor of Visually Impaired Persons*, 53 REVUE INTERNATIONALE DU DROIT D'AUEUR [R.ID.C.] 71, 163–65 (2010) (Fr.) (available in French, German and English) (opposing the solution of binding international treaty and suggests that solutions may be found at national level for those who desire).

different forums, preventing the experimentation and norm-setting that soft law ordinarily can provide.

It is our conclusion that choosing soft law here would have constituted a functional withdrawal from the goal of creating international exceptions and limitations to copyright laws for blind people and people with print disabilities. We therefore applaud WIPO for choosing binding hard law as the more appropriate instrument toward the goal of establishing compliance with limitations and exceptions, benefitting the world's visually impaired population. At this stage, countries have signed the treaty, but should soon ratify it and begin making the necessary adjustments in their national laws.

## II. BACKGROUND ON THE INSTRUMENT THROUGH ITS PROPOSAL STAGES

This section is intended as an introduction to the history of the treaty and the reasons for its existence. We briefly sketch international copyright law, and the general justifications for limitations and exceptions to copyright. We then identify the specific problem the instrument seeks to solve: the lack of access to copyrighted works by persons with print disabilities. This section concludes by briefly summarizing arguments for how the instrument fits into existing international copyright law.

### A. *International Copyright Law and Limitations and Exceptions*

The international framework for copyright protection exists in many different forums, from WIPO to the World Trade Organization (WTO) to individual bilateral agreements to plurilateral agreements like the Anti-Counterfeiting Trade Agreement (ACTA).<sup>20</sup> International instruments addressing copyright were designed to promote harmonization among countries by establishing uniform ways of protecting the rights of authors in their literary and artistic works. International treaties that address copyright law include the Berne Convention for The Protection of Literary and Artistic Works ("Berne Convention"), the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) at the WTO.<sup>21</sup> International copyright laws grant the owners of certain non-tangible

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<sup>20</sup> See Margot E. Kaminski, *An Overview and the Evolution of The Anti-Counterfeiting Trade Agreement*, 21 ALB. L.J. SCI. & TECH. 385 (2011).

<sup>21</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention]; WIPO Copyright Treaty, Dec. 20, 1996 [hereinafter WCT]; and the WIPO Performances

works exclusive rights for a limited time.<sup>22</sup> International requirements include, for example, a minimum level of copyright protection, and rules against discrimination between copyrighted goods based on national origin.<sup>23</sup>

International regulation was inspired in part by the ease of transferring copyrighted works across borders. International intellectual property agreements thus often address and regulate the issue of cross-border movement of copyright works.<sup>24</sup> International copyright law emphasizes protecting the control of copyright owners (also referred to as rights holders) and their right to exclude others from their works.

Different states justify copyright law under different theories. In the United States, for example, copyright has a utilitarian justification: it is meant to “promote the Progress of Science and useful Arts.”<sup>25</sup> French and German copyright laws, by contrast, treat copyrighted works as an extension of the personality of the author or the fruits of the author’s expression of his or her body and soul.<sup>26</sup> Some have found distributive justice justifications for copyright, as well.<sup>27</sup> International copyright law attempts to reconcile these multiple theories, and scholars have observed that

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and Phonograms Treaty, Dec. 20, 1996, WIPO [hereinafter WPPT]. *Also see* International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 12, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention] and Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 27, 1971, both addressing copyrights of phonograms, which might be relevant for people with print disabilities. The above Conventions are available at the WIPO site: [http://www.wipo.org/vip\\_resources/en/treaties.html](http://www.wipo.org/vip_resources/en/treaties.html). The Trade Related Aspects of Intellectual Property Rights [hereinafter TRIPS], available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

<sup>22</sup> See, e.g., Berne Convention, *supra* note 21, at art. 1; WCT, arts. 2, 4–9; TRIPS, arts. 9–12.

<sup>23</sup> Berne Convention, *supra* note 21, at arts. 5(1), 5(3), 19.

<sup>24</sup> von Lewinski, *supra* note 19, at 145–49 (available in French and English); Berne Convention, *supra* note 21, at art. 16; WCT, *supra* note 21, at art. 6.

<sup>25</sup> U.S. CONST. art. I, § 8, cl. 8; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

<sup>26</sup> Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998).

<sup>27</sup> See Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 805 (2007).

the language of international agreements shows that international copyright law is motivated at least by both natural law and utilitarian considerations.<sup>28</sup>

There is a natural tension in copyright, under any theory, between the rights of authors and the rights of users of their work—including second-generation authors and innovators. It can be challenging to achieve an appropriate balance between the authors of today and the authors of tomorrow.<sup>29</sup> But most copyright law tries to strike a balance so that there is “enough and as good left in common for others” to create their own work in the future.<sup>30</sup> For example, when an author resituates a fairytale in a modern setting, we can choose to recognize that the trope has become part of a cultural commons over time, and allow the new author to express herself unhindered by copyright licensing.

Under a property right accountability theory, copyright limitations arise because the owner has a responsibility to other individuals and communities during the exploitation of those rights. Governments impose certain limitations and exceptions on the ownership regime to ensure systemic accountability to non-owners.<sup>31</sup>

A different kind of tension arises from the utilitarian (U.S.) perspective. From this perspective, the benefits to copyright owners must be balanced against the good for society as a whole. Copyright should be limited in order to avoid squelching more creative production than it incentivizes. At least theoretically, utilitarian motives allow for more open-ended provisions of limitations, such as fair use or fair dealing, because government regulators consider the interests of society as a whole, rather than prioritizing the rights of individual owners.<sup>32</sup>

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<sup>28</sup> MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 17 (2004).

<sup>29</sup> *Id.* at 38–39. See also WIPO Study, *supra* note 1, at 12 (“Creators in general are not working in a vacuum. Rather they are often building on, or being inspired by, earlier creativity . . . . Users and creators are therefore not necessarily distinct groups having different needs and many people will at certain times be users and at other times be creators.”).

<sup>30</sup> JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 15 (J.W. Gough ed., Basil Blackwell 1948) (1690).

<sup>31</sup> See generally Hanoeh Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (discussing the accountability of a property owner).

<sup>32</sup> See 17 U.S.C. § 107 (2006); Pierre N. Leval, 103 HARV. L. REV. 1105, 1105–36 (1990).

The tension in copyright between the divergent interests of authors and users is the foundation of limitations and exceptions to copyright laws.<sup>33</sup> On an international level, limitations and exceptions are preserved in the “three-step test” articulated in the following international intellectual property agreements: Article 9(2) of the Berne Convention, Article 13 of TRIPS, Article 10 of the WCT, and Article 16(2) of the WPPT.<sup>34</sup>

The three-step test is an abstract formula that permits unauthorized reproductions of copyrighted 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>35</sup> The three-step test on limitations and exceptions was formulated to allow countries to create or preserve their own domestic systems for limitations and exceptions, which substantially differ from country to country.<sup>36</sup> Countries’ systems for limitations and exceptions must fit within the three-step test.<sup>37</sup> However, no international instrument dictates which particular limitations and exceptions a country must minimally adopt. The United States has adopted “fair use” as its version of exceptions and limitations.<sup>38</sup> Some scholars claim fair use to be substantially broader than the three-step test.<sup>39</sup>

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<sup>33</sup> SENFTLEBEN, *supra* note 28, at 2–3.

<sup>34</sup> Berne Convention, *supra* note 21, at art. 9(2); TRIPS, *supra* note 21, at art. 13; WPPT, *supra* note 23, at art. 16(2).

<sup>35</sup> Berne Convention, *supra* note 21, at art. 9(2).

<sup>36</sup> SENFTLEBEN, *supra* note 28, at 1 (“A country’s specific system of limitations, in general, seems to be a sacrosanct feature of domestic copyright laws . . . .”); *see also* WIPO Study, *supra* note 1, at 12 (“The nature and scope of exceptions and limitations to rights has been largely left to national policy makers to determine within broad permissive areas.”).

<sup>37</sup> *See, e.g.*, Panel Report, United States—Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000) (discussing the European Communities’ determination that Section 110(5) of the U.S. Copyright Act, which permits, under certain conditions, playing radio and television music in public places without a royalty, did not comply with the Berne Convention, and that the WTO panel found that while one section did fall into the three-step test, the other did not and was in violation of U.S. obligations under the Berne Convention).

<sup>38</sup> 17 U.S.C. § 107 (2006).

<sup>39</sup> *See, e.g.*, Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75 (2000); Jacob Zweig, *Fair Use as Free Speech Fundamental: How Copyright Law Creates a Conflict Between International Intellectual Property and Human Rights Treaties*, 64 HASTINGS L.J. 1550 (2013).

*B. The Problem: The Market Isn't Working and Existing Exceptions Are Inadequate*

The World Health Organization (WHO) estimates that 285 million people are visually impaired worldwide: 39 million are blind, and 246 million have low vision.<sup>40</sup> Again, in developed countries, fewer than five percent of published books are currently available in formats useable by visually impaired people.<sup>41</sup> This number is even lower in developing countries, which shows a critical problem, since ninety percent of visually impaired persons live in countries of low or moderate incomes.<sup>42</sup> These figures point to market failure in offering accessible works for people with print disabilities.<sup>43</sup>

The world today is going through rapid technological developments. In a knowledge-based world, access to copyrighted works has become more and more important to everyday life, and improves overall welfare. Thus, the accessibility of print works has become an essential component of full participation in society.<sup>44</sup>

The 2006 United Nation General Convention on the Rights of Persons with Disabilities (Disabilities Convention) recognizes the right of people with disabilities to enjoy access to educational, cultural, political, and employment-related knowledge and materials in accessible formats.<sup>45</sup> To ensure access to knowledge for the millions of people with print disabilities, governments have to address copyright laws.

There are two core copyright-related obstacles to access for the visually impaired. The WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired<sup>46</sup> notes that the shortage of access to copyrighted works is created by difficulties in reaching licensing agreements for accessible copies, for both activity within a country and the movement of copies across borders.<sup>47</sup> Many

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<sup>40</sup> WHO Fact Sheet, *supra* note 2, at 1.

<sup>41</sup> WIPO Study, *supra* note 1, at 14.

<sup>42</sup> List of Proposals, *supra* note 10, at 3.

<sup>43</sup> Scheinwald, *supra* note 19, at 495, 511.

<sup>44</sup> See generally Jack Balkin, *What is Access to Knowledge?*, BALKINIZATION (Apr. 21, 2006, 7:05 PM), <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html>.

<sup>45</sup> UN Convention, *supra* note 5.

<sup>46</sup> WIPO Study, *supra* note 1.

<sup>47</sup> *Id.* at 10.

visually impaired persons live in developing countries, while many of the copyrighted works they wish to access are produced in developed countries. Addressing the cross-border movement of information is critical.

Visually impaired persons cannot read print materials directly. Instead, they use transformed formats based on the original print work. Such formats include Braille, “talking books,” and audio formats created by software that converts print materials into audio (the most popular are the open-source DAISY CD Digital Accessible Information Sys. and DAISY TEXT/AUDIO).<sup>48</sup> Transferring a work into different formats, however, may be considered an infringement of the copyright owner’s derivative work rights.<sup>49</sup> For example, copyright owners frequently license audio editions of their books to specific publishers, so an unauthorized audio version is likely to be considered an infringement.

To avoid copyright infringement, a company seeking to make a given work accessible could choose to obtain a copyright license to reproduce that work in a specific format. Licensing costs, however, can be high, especially if the licensee’s goal is not to promote a particular book but to make as many books accessible as possible. In a working market, this is less of a problem; a publisher could at least hypothetically recoup the licensing costs of an audio book through sales of that book. However, because so many visually impaired people live in developing countries that speak languages other than English, the licensing and distribution costs are often prohibitively high from the perspective of a for-profit publisher. A rational for-profit publisher might not choose, for example, to enter the Hindi market for audio books.

Most conversions of published books into accessible formats are typically undertaken by nonprofit organizations, which survive on limited funding from charities and government support. For those not-for-profits that do not expect to recoup costs, copyright licensing only adds to the already high cost of accessible formats. It is costly to convert works to Braille, or scan them in the right format for specific software. It is costly to pay somebody to read and record written materials, and then have those materials translated and distributed.<sup>50</sup> In a not-for-profit

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<sup>48</sup> See von Lewinski, *supra* note 19, at 127–41 (discussing a survey and the different tools).

<sup>49</sup> Berne Convention, *supra* note 21, at arts. 2(6), 5(1), 8–9 (describing the exclusive rights of the authors); WCT *supra* note 21, at art. 6.

<sup>50</sup> See von Lewinski, *supra* note 19, at 127–41 (explaining for example that DISY open source software operates on XML format, whereas most works are on PDF and need scanning); *see also* Scheinwald, *supra* note 19, at 482 (noting that the cost equivalent of a Braille Harry Potter series in Australia to its

market, the addition of a copyright licensing fee to these already significant costs imposes a substantial burden on those companies that provide accessible works, and the visually impaired people who desire access.<sup>51</sup>

In light of market failure, one can expect governments to intervene in this space by creating a copyright exception for the visually impaired. However, many countries have not adopted copyright exceptions for visually impaired people. At the time of the WIPO Study, significantly fewer than half of WIPO Member States had laws relating specifically to the needs of visually impaired people.<sup>52</sup> Some fifty-seven countries, however, do have specific provisions that permit assisting visually impaired people by making a copyright work available in an accessible form.<sup>53</sup> Such countries include traditionally more powerful WIPO negotiators such as Australia, Canada, the United States, France, Portugal, Spain, the UK, and Japan.<sup>54</sup> In six countries, exceptions are limited to Braille copies,<sup>55</sup> which is not the main tool used by visually impaired people.<sup>56</sup> Nineteen countries limit exceptions to the production of Braille or other specialized formats,<sup>57</sup> while twenty-one countries do not limit the format.<sup>58</sup> The remaining eleven countries have other variations on the types of accessible formats possible; for example, Norway permits all formats except for sound.<sup>59</sup>

The second problem created by copyright law concerns the cross-border transfer of accessible products. This is a crucial point, since the production of accessible formats is so costly and time consuming. The inter-institutional and cross-border exchange of existing formatted copies avoids duplication of both effort and costs. As discussed, in a number of countries, making an accessible

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300,000 people who suffer from correctable visual impairment would cost the government \$133 million).

<sup>51</sup> Ng-Loy Wee Loon, *Visually Impaired Persons and Copyright*, 41 INT'L REV. INTELL. PROP. & COMPETITION L. 377 (2010).

<sup>52</sup> WIPO Study, *supra* note 1, at 28.

<sup>53</sup> *Id.* at 9.

<sup>54</sup> *Id.* at 30.

<sup>55</sup> *Id.* at 36.

<sup>56</sup> Loon, *supra* note 51, at 378.

<sup>57</sup> WIPO Study, *supra* note 1, at 38.

<sup>58</sup> *Id.* at 36.

<sup>59</sup> *Id.* at 39.



format is permissible through an exception to copyright law.<sup>60</sup> But the importation of accessible copies from other countries may be forbidden, through national law or international treaties.<sup>61</sup> In these countries, organizations seeking to increase access to copyrighted works will have to remake their products within their borders, duplicating previously invested efforts and cost. The ban on the importation of accessible works made in other countries also prevents more efficient solutions, such as online delivery. In the absence of harmonization among countries, existing law raises hurdles for cross-border product exchange.<sup>62</sup> Thus, many countries cannot produce accessible copies or cannot import these copies from an existing global library.<sup>63</sup>

The UN Convention regarding the general rights of people with disabilities appears to directly address these problems. However, its existence and ratification have not significantly changed the actual on-the-ground ability of persons with print disabilities to access copyrighted works.<sup>64</sup>

Article 30 of the UN Convention obliges Member States to take appropriate measures to ensure that copyright law does not constitute an unreasonable or discriminatory barrier to access to cultural materials for persons with disabilities.<sup>65</sup>

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<sup>60</sup> *Id.* at 378 (“Making Braille format is governed by compulsory licensing scheme in Singapore whereas in Hong Kong may fall within an exception in Hong Kong’s copyright law, although both former British colonies, have the same legal tradition and they are comparable in terms of economic development. In other words, the same act of reproduction which is permitted in Singapore with payment of an equitable remuneration to the copyright owners can be undertaken in Hong Kong free of any payment.”).

<sup>61</sup> *Id.* at 378 (“It is possible to import such copies into Hong Kong, but not into Singapore. In Singapore’s copyright law, there is in fact an explicit prohibition on importing articles made under compulsory license. This exclusion is explained on the basis that, whilst these articles are legitimate copies in the country of manufacture, they were not produced with the voluntary consent of the copyright owner. In this sense, they are not considered genuine products produced by or with the consent of the copyright owners and hence the doctrine of exhaustion should not apply.”).

<sup>62</sup> *See, e.g.*, Berne Convention, *supra* note 21, at art. 16 (“Infringing Copies . . . (1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection. (2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.”) (emphasis added); WCT, *supra* note 21, art. 6 (“Right of Distribution”).

<sup>63</sup> Loon, *supra* note 51, at 378–79 (giving Singapore and Hong-Kong as examples).

<sup>64</sup> UN Convention, *supra* note 5.

<sup>65</sup> *Id.* at art. 30 (“Participation in cultural life, recreation, leisure and sport (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats; . . . (3) States Parties shall take all appropriate steps, in accordance with

Article 30, however, uses general terms and states a principle—that intellectual property should not unreasonably or discriminatorily impede access to cultural materials in accessible formats—rather than proposing a specific mechanism.

Many of WIPO's member states have not complied with this general obligation, notwithstanding ratification of the treaty. The WIPO Study pointed out in 2007 that “international agreements relevant to the rights of disabled people may already require countries to take the needs of disabled people into account when framing their copyright laws.”<sup>66</sup> In practice, however, most countries did not make such accommodations. Thus, WIPO's members were justified in seeking to create a new, more specific international instrument to establish international legal standards on both copyright exceptions and the cross-border exchange of special format copies.

### C. *The Place for Such an Instrument Within the Three-step Test*

Until now, nothing in international law has specifically provided for exceptions to copyright for the benefit of visually impaired people.<sup>67</sup> This exception is not, however, a new or outlandish concept for many countries. Not only did many countries already have such an exception, but discussion of this exception arose during earlier international copyright lawmaking.

The study group that undertook the preparatory work for the 1967 Stockholm Revision Conference at which the three-step test was established surveyed existing limitations, and created a list of the fourteen most frequent limitations. These included “(9) reproduction in special characters for the use of the blind” and “(10) sound recordings of literary works for the use of the blind.”<sup>68</sup> Exceptions for the blind have thus widely existed across countries since before international copyright law was deeply harmonized in the latter half of the twentieth century.

The negotiators of international copyright law may, in fact, have explicitly contemplated that the three-step test would cover an exception for the visually impaired. The 1967 study group presented a preliminary draft of limitations and

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international law, 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.”).

<sup>66</sup> WIPO Study, *supra* note 1, at 11.

<sup>67</sup> *Id.* at 17.

<sup>68</sup> SENFTLEBEN, *supra* note 28, at 48 (citing to Doc. S/1, Records 1967, 112 n.1, and pointing out that enumerated limitations 1 to 6 were provided for in the earlier 1948 Brussels Act).

exceptions that allowed exceptions “for specified purposes,”<sup>69</sup> including “the interests of the blind.”<sup>70</sup> The final version of the three-step test similarly contemplates exceptions “in certain special cases,” and one might presume, given the widespread nature of the exception in countries at the time and recognition of it in the drafting process, that the interests of persons with print disabilities would constitute a special case.

While the three-step test may have been intended to allow copyright exceptions for access by persons with print disabilities, in practice its vagueness leaves many countries confused, so they do not adopt such exceptions. Delivering accessibility for visually impaired people may be justified under current international exceptions,<sup>71</sup> but the framework of exceptions in international treaties and conventions related to copyright “is complex and confusing for those drawing up exceptions to rights for the benefit of visually impaired people.”<sup>72</sup>

The WIPO Study concluded that because of the uncertainty costs inherent in a broader copyright exception like the three-step test, the only comprehensive solution would be to outline exceptions that specifically provide for the needs of the blind or other visually impaired people.<sup>73</sup>

#### *D. The Marrakesh Treaty*

The treaty adopted at the Marrakesh Conference attempts to address the above problems.<sup>74</sup> Its negotiation, however, was beset for several years by a key controversy. At the Twenty-Second and Twenty-Third Session of the Standing Committee on Copyright and Related Rights (SSCR) at WIPO, the Committee recognized “the aim to agree and finalize a proposal on an international instrument

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<sup>69</sup> *Id.* at 50 (citing to Doc. S/1, Records 1967, 112) (countries may “limit the recognition and exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works”).

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

<sup>71</sup> WIPO Study, *supra* note 1, at 11.

<sup>72</sup> *Id.* at 134.

<sup>73</sup> *Id.* at 29 (observing that it is “extremely unlikely that exceptions that do not specifically provide for the needs of blind or other visually impaired people would provide a comprehensive solution to the needs of those facing a print disability”).

<sup>74</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, VIP/DC/8 REV. [hereinafter Marrakesh Treaty], available at [http://www.wipo.int/edocs/diplconf/en/vip\\_dc/cip\\_dc\\_8.pdf](http://www.wipo.int/edocs/diplconf/en/vip_dc/cip_dc_8.pdf).

on limitations and exceptions for persons with print disabilities.”<sup>75</sup> While states agreed on the goal of enabling and facilitating access to knowledge for people with print disabilities, they could not overcome the hurdle of whether the instrument should be soft law or hard law.<sup>76</sup> We argue that the eventual decision that the instrument would be hard law was the correct choice.

### III. THE FEATURES OF HARD LAW AND SOFT LAW

WIPO’s negotiating countries remained split for a long time over what kind of instrument the treaty for the blind would be: hard law or soft law. International instruments can contain different levels of hardness and softness. They can be more or less binding, and more or less specific in their provisions. In the intellectual property regime, WIPO’s historical approach has been to favor treaties and conventions, which are characterized by more binding features. Nevertheless, some years ago, WIPO adopted a series of softer non-treaty “Joint Recommendations,” mainly in the area of trademark law.<sup>77</sup>

The instrument at issue could have been pursued either as a recommendation (soft law) or as a binding treaty (hard law). Each would have created different opportunities and obligations. In this section, we present the features of soft law and hard law that the negotiators had to weigh. We argue that those who proposed a soft-law recommendation failed to consider the broader contexts in which the instrument would be made.

WIPO’s Marrakesh Diplomatic Conference made the correct decision in choosing to pursue a treaty instead of a joint recommendation. Once the countries, the WIPO’s professional committee, and WIPO’s General Assembly all asserted the goal of creating an international instrument on copyright limitations and exceptions for persons with print disabilities, the remaining question was how hard or soft the features of this instrument should be.

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<sup>75</sup> SCCR/22/18, *supra* note 9, at 86.

<sup>76</sup> See *infra* note 11; SCCR/22/18, *supra* note 9, at pmb1.

<sup>77</sup> Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, WIPO Doc. 833(E) (Sept. 20, 1999–Sept. 29, 1999) [hereinafter Well-Known Marks Recommendation], available at [http://www.wipo.int/export/sites/www/about-ip/en/development\\_iplaw/pdf/pub833.pdf](http://www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub833.pdf); Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, WIPO Doc. 845(E) (Sept. 24, 2001–Oct. 3, 2001) [hereinafter Internet Marks Recommendation], available at [http://www.wipo.int/export/sites/www/about-ip/en/development\\_iplaw/pdf/pub845.pdf](http://www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub845.pdf).

### A. Definitions

The mechanisms of international agreements vary along a spectrum, from hard to soft. Abbott and Snidal define this spectrum along three dimensions: (i) the precision of the rules; (ii) the level of obligation; and (iii) whether there is delegation to a third-party decision-maker.<sup>78</sup> “Hard” agreements bind parties to precise rules, and are often enforced by a third party. Hard agreements can require parties to implement new laws in order to bring domestic law into compliance; otherwise, states may face an enforcement mechanism.

Similarly, Michael W. Reisman describes all lawmaking as the communication of three elements: content, signals of authority, and communications of intent to make the law effective.<sup>79</sup> Law may be harder or softer along these dimensions. A given law may contain precise content, but exist amidst other signals that the enactors have no intention of making the law effective. Or it may appear effective, but state a generalized, less enforceable principle rather than precise content. For example, in the case of complex environmental treaties, states concerned with enforcement have created binding hard-law agreements with vaguer, shallower terms that are readily complied with, but are ineffective as regards behavioral change.<sup>80</sup>

It is thus worth recognizing that even a binding agreement may be softer or harder based on content, so how “hard” the agreement ultimately is depends on the rules it contains, in addition to their enforceability or implementation requirements.

### B. Hard Law

Hard law presents a number of benefits, many of which ensure local compliance.

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<sup>78</sup> Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401 (2000). This is substantively similar to Kal Raustiala’s consideration of (i) the substance of the agreement; (ii) the form of the agreement; and (iii) the structure for review of performance. See Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 538, 552 (Thomas Risse & Beth Simmons eds., 2002).

<sup>79</sup> Michael W. Reisman, *A Hard Look at Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 373, 374 (1988), available at [http://digitalcommons.law.yale.edu/fss\\_papers/750](http://digitalcommons.law.yale.edu/fss_papers/750).

<sup>80</sup> Kal Raustiala & David G. Victor, *Conclusions*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS (David G. Victor, Kal Raustiala & Eugene B. Skolnikoff eds., 1998).

Legal positivists perceive binding hard law treaties as real legal obligations, and judge soft law instruments as failed treaties.<sup>81</sup> This may be a simplified view, but it is based on accurate observations: binding hard law does usually carry both enforcement requirements and a norm of compliance. Normatively, hard instruments have the stamp and aura of law, like domestic law, and states are arguably more concerned with the reputational consequences of failing to comply with binding hard law.<sup>82</sup>

Practically, a binding instrument usually requires implementation and enforcement, where a soft instrument usually does not. Domestic systems must be brought into compliance with binding hard law. Domestic implementation, however, has larger compliance ramifications than merely telling domestic actors what they must do. Implementation also mobilizes domestic actors.<sup>83</sup> Giving international backing to domestic actors can cause shifts in the negotiating strengths of domestic constituents that “can in turn shift the compliance preferences of governments.”<sup>84</sup> Thus, hard law not only requires states to implement; it also empowers those domestic actors benefited by the new law to ensure that states are complying locally.

In sum, the benefit of binding hard law is both normative and structural. Normatively, states may be more likely to comply because the international norm is to comply with hard law. Structurally, states are usually required to implement hard law, and this not only brings domestic law into compliance with hard law, it also increases the number of actors encouraging states to comply by expanding incentives to domestic actors.

### C. *Soft Law*

Of course, international hard law also faces many challenges. Many scholars have convincingly argued that international soft law agreements are not merely “failed treaties,” but can in fact often be a superior institutional choice. For example, Abbott and Snidal claim that even though soft law may be less credible

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<sup>81</sup> George C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707 (2010).

<sup>82</sup> Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 583 (2005); cf. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S108–09 (2002) (examining the development of segmented reputations).

<sup>83</sup> Shaffer & Pollack, *supra* note 81, at 718.

<sup>84</sup> Raustiala & Slaughter, *supra* note 78, at 547.

than hard law, states often choose soft law as a “superior institutional arrangement” based on a number of different factors, including transaction costs, uncertainty, implications for national sovereignty, divergence of preferences, and power differentials between negotiating countries.<sup>85</sup>

The identified benefits of soft law are roughly as follows: soft law instruments can be less costly to negotiate. They can impose lower sovereignty costs on states, and greater flexibility for states to cope with uncertainty or diversity of views. They can also allow states to arrive at a “deeper” set of rules, since there is less worry about enforcement consequences in the implementation process.<sup>86</sup>

Additionally, soft law can be conceived of as a necessary step on the way to hard law, during which states may alter their interests or norms through experimentation.<sup>87</sup> Eventually, agreement on harder rules becomes possible. Rushing to hard law too soon may cause an instrument to soften in other ways.<sup>88</sup>

Finally, soft law can be employed where a hard law instrument already exists.<sup>89</sup> Soft law in this circumstance fills in the gaps in a hard law instrument, creating interpretive norms for use by states and interstate enforcement mechanisms such as the WTO dispute resolution system.

#### D. *The Relationship Between Hard and Soft Law*

The traditional understanding of the relationship between soft and hard law is that soft law may lead to hard law, or complement it by filling in interpretive gaps in existing hard law. Even from this understanding, we believe hard law is the better option for this instrument, for reasons outlined in the next section.

But we also believe that the traditional understanding is, in this case, incorrect. The conceptualization of soft law as filling gaps in hard law or complementing it fails to take into account the role of the full landscape of existing

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<sup>85</sup> Kenneth W. Abbott & Duncan Snidel, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

<sup>86</sup> Shaffer & Pollack, *supra* note 81, at 719.

<sup>87</sup> See Stephen J. Toope, *Emerging Patterns of Governance and International Law*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 98 (Michael Byers ed., 2000).

<sup>88</sup> Raustiala & Victor, *supra* note 80 (suggesting that in the case of environmental treaties, states create binding hard law with shallower terms that are ineffective at instigating behavioral change).

<sup>89</sup> Shaffer & Pollack, *supra* note 81, at 722.

laws. In this case, international copyright law developed outside of WIPO is binding, specific, and enforceable through trade measures. This external law constricts what states may do, leaving no real gap for soft law to fill. The context of existing multilateral and bilateral agreements on intellectual property leads us to conclude that binding law is the only way in which this particular instrument could be effective and cause compliance on the ground.

Scholarship on hard and soft law tends to assume that countries start from a clean slate. We believe that scholars and negotiating countries must observe and acknowledge the broader legal landscape before discussing the benefits of hard versus soft law.

#### IV. HARD LAW IS BETTER IN THIS CASE

In this section, we compare the benefits of hard and soft law for this particular instrument. We begin by examining the Joint Recommendations WIPO has used recently. Then we discuss why some countries preferred a joint recommendation. We argue, however, that hard law was the better choice for a number of reasons: it is less likely to create “dead letter”; the instrument is the result of consensus, not aspirations; and soft law will be inefficient, where the problem WIPO set out to address is in large part one of inefficiency. We also claim that hard law may help developing countries to implement new legislation or amendments to existing legislation that they cannot otherwise achieve.

In this specific case, two additional perspectives must be considered: the human rights perspective and the international copyright perspective. From the human rights perspective, hard law already exists, but has not been implemented domestically, so a Joint Recommendation would not aid in domestic interpretation of the law. From the international copyright perspective, existing hard-law agreements do not leave adequate room for soft-law experimentation. Thus we conclude, given these two added perspectives, that WIPO was correct when it decided that the instrument should be hard law.

##### A. *What Are the Joint Recommendations?*

Several member states suggested that WIPO use a Joint Recommendation to address the issue of access to copyrighted works by people with print disabilities.<sup>90</sup> In the intellectual property regime there are at least three international instruments embodied as “Joint Recommendations” by WIPO. The first is the Joint

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<sup>90</sup> SSCR/22/18, *supra* note 9, at 9, 18, 22; *Obama Administration*, *supra* note 14.



Recommendation Concerning Provisions on the Protection of Well-Known Marks (“Well-Known Marks Recommendation”).<sup>91</sup> The second is the Joint Recommendation Concerning Trademark Licenses (“Trademark Recommendation”).<sup>92</sup> The third is the Joint Recommendation Concerning Provisions on the Protection of Marks and Other Industrial Property Rights in Signs, on the Internet (“Internet Marks Recommendation”).<sup>93</sup>

A Joint Recommendation, within the WIPO context, has distinct characteristics. First, it is not intended to be a binding tool, nor it is capable of being formally ratified by the countries. Each Member State may consider the use of the provisions as guidelines rather than requirements.<sup>94</sup> Second, Recommendations are experimental in nature, and are envisioned as potentially eventually leading to hard law.<sup>95</sup> Third, the existing Recommendations are all based on existing hard law treaties or conventions, which were domestically implemented by the member countries.<sup>96</sup>

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<sup>91</sup> Well-Known Marks Recommendation, *supra* note 77.

<sup>92</sup> Joint Recommendation Concerning Trademark Licenses, WIPO Doc. 835 (Sept. 25, 2000–Oct. 3, 2000) [hereinafter Trademark Recommendation], available at [http://www.wipo.int/about-ip/en/development\\_iplaw/pdf/pub835.pdf](http://www.wipo.int/about-ip/en/development_iplaw/pdf/pub835.pdf).

<sup>93</sup> Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, WIPO Doc. 845(E) (Sept. 24, 2001–Oct. 3, 2001) [hereinafter Internet Marks Recommendation], available at [http://www.wipo.int/export/sites/www/about-ip/en/development\\_iplaw/pdf/pub845.pdf](http://www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub845.pdf).

<sup>94</sup> Well-Known Marks Recommendation, *supra* note 77, at 4. See also Internet Marks Recommendation, *supra* note 77, at 2 (“The determination of the applicable law itself is not addressed by the present provisions, but left to the private international laws of individual Member States.”).

<sup>95</sup> For example, the Well-Known Marks Recommendation, *supra* note 77, at 2, explains that the future program is to have a binding treaty on the subject. It is interesting to note that the Internet Marks Recommendation, *supra* note 77, is drafted as a detailed law, including even provisions regarding liability and remedies.

<sup>96</sup> All three recommendations are based on the provisions of the Paris Convention for the Protection of Industrial Property. Well-Known Marks Recommendation, *supra* note 77, at 4; Trademark Recommendation, *supra* note 92, at 4; Internet Marks Recommendation, *supra* note 77, at 4. The Trademark Recommendation, *supra* note 92, at 2, also relies on Trademark Law Treaty (TLT), as stated in its preface:

The Joint Recommendation aims at harmonizing and simplifying the formal requirements for the recordal of trademark licenses and therefore supplements the Trademark Law Treaty (TLT) of October 27, 1994, which is designed to streamline and harmonize formal requirements set by national or regional Offices for the filing of national or regional trademark applications, the recordal of changes, and the renewal of trademark registrations.

It is also worth looking to the subject matter of the existing joint recommendations, because international trademark law is different from international human rights law and international copyright law. The main goal of the Joint Recommendations has been to suggest a solution when an interpretive gap exists in implemented trademark law. In other words, Joint Recommendations have helped countries interpret gaps in implemented provisions by indicating WIPO's intent about what the original agreement on trademarks means. These three WIPO Joint Recommendations accompany three trademark hard law instruments, which have been widely implemented through national laws.<sup>97</sup> Some countries have adopted the Recommendations into their legal systems,<sup>98</sup> and some countries still choose to ignore them.<sup>99</sup>

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<sup>97</sup> The Madrid Protocol, Paris Convention for the Protection of Industrial Property, as well as the Trademark Law Treaty (TLT) are considered hard law treaties, and have been widely implemented.

<sup>98</sup> Given the non-binding nature of the Joint Recommendations, WIPO has not been able to establish an exhaustive list of countries or regional systems implementing these instruments. At the national level, the following could be mentioned as examples of texts implementing totally or partially the Well-Known Marks Recommendation. See for example: the pertinent provisions in the Trademark laws of: China, Honduras, Indonesia, India, Kyrgyz Republic, Mauritius, Mexico, Mozambique, Singapore, and the Russian Federation and partially in the United States, Lanham Act, 15 U.S.C. § 1051 (2002).

Elements of the Internet Marks Recommendation, *supra* note 77, have been referred to in several pertinent court decisions. See *1-800-Flowers Inc. v. Phonenames Ltd.*, [2001] EWCA (Civ) 721, (U.K.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Mar. 28, 2003, RG01/19552 (Fr.) (reporting on the case of *S.A. Produits Nestlé v. Société Mars Inc.*); Bundesgerichtshofs [BGR] [Federal Court of Justice] Oct. 3, 2004, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7e7dddc110b43f00c1b85559cc4dfa2e&nr=31708&pos=9&anz=22> (reporting on the case of *Re: the MARITIM Trade Mark*).

Aside from national laws and court decisions, a number of Free Trade Agreements (FTAs) between WIPO member States have also incorporated the Joint Recommendation on Well-known Marks. Examples of these are the following: US-Singapore FTA; US-Jordan FTA; and US-Chile FTA. States parties to these FTAs undertake to give effect to the said Joint Recommendation.

These are examples of implementations, but it should be noted that WIPO does not indicate a trend or pattern in terms of the adoption or the extent of implementation of these Joint Recommendations in WIPO Member States. However, it could in the future undertake such a survey if the Member States provide it with such a mandate. We thank Ms. Martha Friedli, Head of Trademark Law Section, WIPO, Geneva, for the clarification of this point.

<sup>99</sup> U.S. courts, for example, did not follow the joint recommendations. See, e.g., *ITC Ltd. v. Punchgini, Inc.*, 880 N.E.2d 852, 859 (N.Y. 2007) (not implementing the “famous marks” doctrine, as it was not incorporated into law by Congress).

In this case, unlike in the case of trademark law, there is no hard standard for copyright limitations and exceptions. Instead, there is a need for a new legal mechanism in the majority of countries, particularly developing countries. Many countries have not implemented Article 30 of the UN Convention, or fully exploited the potential of limitations and exceptions from international copyright.<sup>100</sup> Thus, to promote copyright accessibility, WIPO needs to craft a basis for the exception through hard law, and not just make complementary soft suggestions to existing domestic law. Moreover, WIPO was not the institutional author of the UN Convention. From this perspective, hard law and not a soft law is the appropriate tool.

### B. *Why Some Countries Favored a Joint Recommendation*

Some countries originally viewed a soft-law joint recommendation as the better choice of instrument.<sup>101</sup> These countries likely perceived a recommendation as the best path to win broad support, the easiest way to avoid conflicts, and the fastest way to solve deadlocks. A recommendation, because of its non-binding nature, might be seen as an easier way to achieve consensus and complete an international agreement.<sup>102</sup>

From the perspective of countries negotiating at WIPO, the question looked roughly like this: for this particular instrument, were the transaction costs, uncertainty, divergence of preferences, and power differentials low enough to bring this easily to a binding treaty? The answer in any international forum is almost always no. Then the question becomes: is there any urgency to the issue, or can negotiating countries calculate that experimentation through soft law makes more sense for now in developing norms that can more easily be agreed on later? Would rushing to a binding treaty be likely to alienate participating negotiators, or alter the terms within the instrument to make it ultimately less effective?

Other sources have cursorily addressed this question. The WIPO Study envisioned a model of soft law guidance eventually leading to binding hard law in the long term, offering the cautious recommendation that WIPO could “facilitate

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<sup>100</sup> CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 91 (2008).

<sup>101</sup> See *Obama Administration*, *supra* note 14. See Cameron Russel, *The Treaty for the Visually Impaired and Print Disabled—A Trojan Horse for Copyleft?*, in *INTELLECTUAL PROPERTY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* (Shlomit Yanisky-Ravid ed., forthcoming 2015), for an interesting discussion on the hidden motives underlining the negotiation.

<sup>102</sup> von Lewinski, *supra* note 19, at 85–91 (opposing binding treaty as taking a lot of time and efforts).

further discussion about copyright and the rights of disabled people as well as developing its draft model law for developing countries in the light of the recommendations in this Study.<sup>103</sup> However, the WIPO Study also noted that in the realm of the confusing international framework of limitations and exceptions, further debate in the form of hard law is “desirable on this issue in the long term.”<sup>104</sup>

Similarly, in discussing the possibility of a more general international instrument on limitations and exceptions, P. Bernt Hugenholtz and Ruth L Okediji concluded that a soft-law approach would be at least initially preferable. They reason that soft-law mechanisms are common in international economic regulation, and that soft law is generally easier to negotiate and adapt to future circumstances. They point out that soft law may eventually lead to a hard-law global framework.<sup>105</sup>

Here, however, the instrument was not a general instrument on copyright limitations and exceptions, but addressed the “needs of discrete, vulnerable members of society, such as those who are visually impaired.”<sup>106</sup> The fact that the instrument addresses a specific, relatively narrow problem means there is less need for experimentation in policy approaches than in the general instrument contemplated by Hugenholtz and Okediji.<sup>107</sup>

Silke von Lewinski, by contrast, offers a case against this treaty in particular.<sup>108</sup> First, von Lewinski claims that a binding copyright exceptions and limitations treaty will not be an efficient tool because it does not enable the flexibility countries need for different legal systems (“one size does not fit all”). She believes a mandatory treaty would block the future adoption of domestic law related to newly arising situations. Second, she claims that an international treaty would require a lot of effort and money for meetings, translation, and travel, which could be saved by replacing a treaty with expert advice on modification to national legislation. Third, she argues that an international treaty regarding exceptions and

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<sup>103</sup> WIPO Study, *supra* note 1, at 134.

<sup>104</sup> *Id.*

<sup>105</sup> P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, OPEN SOCIETY INSTITUTE 49 (2008), available at [http://www.ivir.nl/publications/hughholtz/limitations\\_exceptions\\_copyright.pdf](http://www.ivir.nl/publications/hughholtz/limitations_exceptions_copyright.pdf).

<sup>106</sup> *Id.* at 43.

<sup>107</sup> *Id.* at 42.

<sup>108</sup> von Lewinski, *supra* note 19, at 85–117.

limitations contradicts existing international conventions granting minimum exclusive copyrights to authors. To von Lewinski, giving exceptions and limitations to visually impaired persons shifts the focus in copyright law from building a minimum level of rights protection to a minimum level of limitations. Finally, von Lewinski claims that the idea of an international tool in favor of visually impaired persons is contrary to Article 20 and 19 of the Berne Convention, which leaves member states the freedom to grant “any greater protection” to authors.<sup>109</sup>

The basic assumption underlying all of von Lewinski’s reasoning is her objection to the concept of “user rights,” and thus to any attempt to find a better balance between copyright holders and the rights of specific users. von Lewinski believes that WIPO’s proposal, although dealing with the specific area of visually impaired persons, hid a broader agenda on limitations. She writes: “[a]ll of these . . . issues are diametrically opposed to the system of international copyright protection existing for more than 120 years and thus require further scrutiny.” According to her, users have no rights with respect to copyright, and thus cannot use international law to claim or enforce their rights. We disagree.<sup>110</sup>

As discussed above, copyright law must strike a complicated balance between author and user rights. Copyright law, as any other law, must also constantly adjust to technological advancement. What we have in the case of the visually impaired is an example of advancing technology, serving fundamental human rights, which cannot be used unless there are changes to copyright law worldwide.

Because copyright is now a strongly (though not perfectly) harmonized international legal regime, the solution to the problem of the “book famine” must be obtained through an international instrument.<sup>111</sup> The same arguments that supported harmonizing international copyright law to begin with support harmonizing its exceptions and limitations. It is more efficient to invest efforts in one international instrument than to implement individual and differing change in dozens of individual countries.

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<sup>109</sup> *Id.* at 87–89, 103–05, 09, 111–13.

<sup>110</sup> *Id.* at 99, 107.

<sup>111</sup> See discussion *supra* Part II.B.

von Lewinski's concerns about costs are misplaced. WIPO covers many expenses, based on its income from private entities that apply for WIPO's intellectual property tools.<sup>112</sup>

Representatives of publishers, mainly from the United States, had a strong lobby in the WIPO committee meeting. This lobby, like von Lewinski, claimed that soft law was a better solution because its constituents feared a "slippery slope" effect. Publishers were afraid that allowing explicit copyright exemptions and limitations to a specific group of people would crack copyright protection such that other broader and less justified exemptions would follow.<sup>113</sup> It is important to note that those publishers raising this argument nonetheless agreed to support the access rights of people with print disabilities.<sup>114</sup>

Objectively, it is hard to understand this perspective. Many of the touted benefits of soft law were noticeably inapplicable in this case. There was historical precedent for this particular limitation and exception in individual countries. There was little divergence of preferences, and many of the most powerful negotiating countries already at least in part comply with many of the proposed requirements.

And more importantly, in the next sections we show why soft law would in fact have been damaging to this instrument's stated goals.

### C. *Non-binding Soft Law Could Lead to "Dead Letter"*

The main drawback of a joint recommendation is that it would be non-binding. Abbott and Snidal conclude that parties might prefer soft law when their interests are to keep to a less legalized relationship.<sup>115</sup> A non-binding instrument, however, would have turned the fundamental concept, which all countries agreed upon, into an inert agreement.<sup>116</sup> Countries would not have had to adopt or implement a joint recommendation, so it would have changed little or nothing on the domestic level. If a joint recommendation had been negotiated, countries may have concluded that the problem has been resolved, and turned their attention

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<sup>112</sup> 2010 Financial Statements, WIPO General Assembly, 20th Sess., Sept. 26 to Oct. 5, 2011, WO/GA/40/12 (July 26, 2011), available at [http://www.wipo.int/edocs/mdocs/govbody/en/wo\\_ga\\_40/wo\\_ga\\_40\\_12.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_40/wo_ga_40_12.pdf) (last visited Aug. 19, 2012).

<sup>113</sup> Scheinwald, *supra* note 19, at 469 (describing publishers associations who were firmly against a treaty).

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

<sup>115</sup> Abbott & Snidel, *supra* note 85, at 456.

<sup>116</sup> See *List of Proposals*, *supra* note 10.

elsewhere. A joint recommendation could have perpetuated the lack of access to copyrighted products, as well as the lack of cross-border transfer of those products, because the problem would have appeared to have been addressed where in fact nothing changed on the ground.

The reason “dead letter” would have been so problematic here is that countries did and do appear to want to effect real change. The use of soft law sometime evidences a lack of true intent to solve a problem.<sup>117</sup> In many international settings, soft norms are created where countries never intend to make them effective.<sup>118</sup> In this case, however, the different drafts initially proposed by different negotiating groups all revealed a true intent to change the global legal situation regarding access to copyrighted products for those people with print disabilities.<sup>119</sup> It would have been unfortunate indeed if this genuine intent had not been parlayed into an effective international instrument.

*D. Soft Law is a Less Appropriate Solution Where There Is  
Already Consensus and Specificity, Rather than Aspirations*

Almost all sides agreed that the problem needed to be addressed. The specificity with which the proposed drafts addressed the problem also lead us to conclude that soft law would not have been the appropriate mechanism.

Soft law may be the right mechanism when a firmer solution is not available.<sup>120</sup> The difficulties of arriving at a clear solution may lead to the use of soft law, containing vague and imprecise terms. Soft law may also outline aspirational norms for issues, where the norm has not yet been established.<sup>121</sup> The mechanism of soft law is thus more appropriate for general, new, or temporary problems.

In this case, the subject matter is not general or vague. It is highly specific. The subject matter is not new or spurred solely by technological development. It was already included in the UN Convention discussed above, and has existed in

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<sup>117</sup> Reisman, *supra* note 79, at 376.

<sup>118</sup> *Id.* (“In many settings we have norms that are created with no intention of making them effective.”).

<sup>119</sup> *List of Proposals*, *supra* note 10.

<sup>120</sup> Reisman, *supra* note 79, at 375–76.

<sup>121</sup> José E. Alvarez, *The New Dispute Settlers: (Half) Truth and Consequences*, 38 TEX. INTL. L.J. 405, 421 (2003).

numerous domestic laws, and was contemplated when the three-step test was being established.

Many soft laws are so vague or aspirational as to be functionally unworkable. The four proposals for the international instrument regarding print disabilities, including the proposal of the European Union, each reflect concrete workable mechanisms.<sup>122</sup>

In short, the content of the draft proposals showed the following features even at an early stage: the specificity of the subject matter, and the consensus that the instrument should exist. Soft law is often used when specificity and consensus cannot be achieved. It therefore would have been inappropriate to use it here.

#### *E. Soft Law Would Have Been Inefficient*

Soft norms may incur long-term costs by being inefficiently vague, relative to hard law.<sup>123</sup> Countries, and domestic actors within countries, can incur huge costs in trying to figure out how soft law fits into the existing legal landscape. The WIPO Study observed that the problem of lack of access to copyrighted works by visually impaired people exists in large part because of inefficiencies: in licensing between private actors, but also in domestic understandings of complex international law. Soft law would not have mitigated these inefficiencies; it may, in fact, have added to them.<sup>124</sup>

Mandatory rules are needed mainly in a situation of market failure, when the free market cannot bring about the best solutions.<sup>125</sup> The local markets as well as the global markets had in this case failed to provide adequate solutions. Countries gave private actors the legal right to own and profit from their intellectual property—the same property to which those with print disabilities deserve access. The private actors holding the copyrights to these materials failed to make them available at a reasonable price to this sector, demonstrating that the appropriate-format market was not to them a market worth pursuing.<sup>126</sup> Global markets have

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<sup>122</sup> See *List of Proposals*, *supra* note 10.

<sup>123</sup> Reisman, *supra* note 79, at 377 (“[M]ost of the law that is made this way cannot be fulfilled in any effective fashion, and this will have a long-term cost.”).

<sup>124</sup> See WIPO Study, *supra* note 1.

<sup>125</sup> von Lewinski, *supra* note 19, at 71.

<sup>126</sup> Scheinwald, *supra* note 19, at 511, 453 (“[G]lobal estimates place the current cost of reduced productivity due to . . . [Print impaired] status at almost \$75 billion; this figure notably excludes the



also failed to enable the cross-border transfer of products from the place of origin to other places that need the products.

Non-binding instruments could have perpetuated uncertainty. Domestic actors might waste efforts and legal procedures in pursuing solutions suggested by a non-binding instrument, when it is not clear that or where a non-binding instrument takes precedent over existing domestic law or international requirements. The cost of interpretation would have fallen on implementing countries and their domestic actors, where a hard-law instrument would be clear that such measures must be implemented.

Sometimes soft law can help countries avoid risks with respect to deep political or economic involvement. Countries may agree to soft law in the first place in order to keep the opportunity to avoid such cost and risk. However, this instrument contained little such risk, even at an early negotiating stage. The risk was merely over the question of who is going to pay for the cost of the accessible products, not inherent in the subject matter of the instrument.

#### *F. Human Rights*

The above arguments addressed the benefits of hard law primarily by focusing on the instrument itself, in the context of WIPO as the negotiating forum. In fact, however, this instrument was formed against another two areas of existing international law: human rights law and international copyright law. This next subsection discusses the human rights context, which we argue differs substantially from subject matter areas where WIPO has used Joint Recommendations in the past.

In the human rights context, a hard-law treaty already exists that addresses this specific issue, but that treaty has failed to be effective because it has not been domestically implemented. There is no interpretive gap for a soft law instrument to fill in existing domestic law; the problem is that existing international requirements have not been domestically implemented. This presents a significant contrast to the areas of law addressed in previous Joint Recommendations, such as trademark, where WIPO both made the initial hard law, and then used Joint Recommendations to clarify its own hard-law treaty.

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collective cost savings to all nations of health care, medical equipment and welfare payments that they currently provide to [them].”).

For many years, UN treaties addressing human rights did not address the rights of people with disabilities.<sup>127</sup> Disabilities may be seen as medical or social phenomena, and as long as disabilities were viewed as a medical issue, the solution was perceived to be medical treatment rather than the protection of rights.<sup>128</sup> The social approach focuses instead on disabilities as social phenomena. Under this understanding, disability results from the interaction of persons with impairments with attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others.<sup>129</sup> This understanding led to a rights-based paradigm, focusing on both human rights and human dignity.<sup>130</sup>

Understanding the role of society in protecting the rights of people with disabilities empowers people with disabilities to transfer what was traditionally viewed as a medical need into claimable rights.<sup>131</sup> Recently, the notion of protecting the rights of people with disabilities started to impact international organizations, such as the United Nations.<sup>132</sup>

The United Nations adopted the UN Convention of rights of people with disabilities in 2006.<sup>133</sup> The UN Convention refers to access by people with

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<sup>127</sup> Aaron A. Dhir, *Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity with Disabilities*, 41 STAN. J. INT'L L. 181, 182, 184 (2005). Many conventions protect racial minorities, migrants, women, and children.

<sup>128</sup> Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 9, 13 (Theresia Degener & Yolán Koster-Dreese eds., 1995). For further elaboration on this point, see generally Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABILITY, HANDICAP & SOC'Y 5 (1987).

<sup>129</sup> UN Convention, *supra* note 5, pmb1.

<sup>130</sup> Degener, *supra* note 128, at 27.

<sup>131</sup> Dhir, *supra* note 127, at 194–96.

<sup>132</sup> Many books published recently reflect the change in attitude regarding the rights of people with disabilities. Although many of them deal with mental abilities, a lot can be learned about different types of disabilities. See FRANCES OWEN & DOROTHY GRIFFITHS, CHALLENGES TO THE HUMAN RIGHTS OF PEOPLE WITH INTELLECTUAL DISABILITIES 23–32 (2009); MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITIES LAW: WHEN THE SILENCED ARE HEARD 8–14 (2012); BERNADETTE MCSHERRY & PENELOPE WELLER, RETHINKING RIGHTS-BASED MENTAL HEALTH LAWS 52–54, 69–74 (2010).

<sup>133</sup> UN Convention, *supra* note 5.

disabilities to cultural products protected by intellectual property.<sup>134</sup> One hundred and sixty countries ratified the UN Convention.<sup>135</sup> Nevertheless, the existence and ratification of the UN Convention did not significantly change the situation on the ground. Many of WIPO's member states did not comply with the UN Convention by subsequently creating copyright limitations and exceptions.<sup>136</sup>

The broad, nonspecific nature of the UN Convention provision did not prove itself capable of creating real change. Even though it is intended to be binding law, the UN Convention uses general statements, without specific details as to implementation. For example, the UN Convention does not explain the right way to make changes in access rights—whether it should be done through new provisions or new laws, or as part of limitations and exceptions to copyright. We refer to this type of instrument, used by UN Convention, as hard-soft law.

We conclude that an international instrument that is both binding and detailed is necessary to improve the implementation rate of the UN Convention's requirements.

In the context of human rights law, then, WIPO's recently approved (although not yet ratified) international instrument should be viewed as a second hard-law attempt layered onto the UN Convention that should add a further step of hardness to the previous instrument.<sup>137</sup> This would make it effective as hard-hard law. Were WIPO to have established only soft law on top of the UN Convention, nothing would have changed. Countries that had not already implemented the UN Convention's Article 30 would have no way to incorporate the new Joint

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<sup>134</sup> UN Convention, *supra* note 5, art. 30 ("Participation in cultural life, recreation, leisure and sport. (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats . . . (3) States Parties shall take all appropriate steps, in accordance with international law, 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.").

<sup>135</sup> There were 153 signatories to the Convention, and 106 ratifications. *See* Convention and Optional Protocol Signatures and Ratifications, United Nations, *available at* <http://www.un.org/disabilities/countries.asp?navid=17&pid=166>.

<sup>136</sup> SCCR/22/18, *supra* note 9, at 14.

<sup>137</sup> *US Signs WIPO Marrakesh Treaty On Copyright Exceptions For The Blind*, INTELLECTUAL PROPERTY WATCH (Oct. 11, 2013, 4:14 PM), <http://www.ip-watch.org/2013/10/11/us-signs-wipo-marrakesh-treaty-on-copyright-exceptions-for-the-blind/>.

Recommendation into domestic law through interpretation, because there are in many countries no existing domestic provisions to be thus interpreted.<sup>138</sup>

The fact that such access rights are human rights adds another important point to the discussion: it emphasizes the strength of the access right, which in itself mandates hard law. As discussed, disabilities are now understood under a rights-based paradigm, focusing on human rights and human dignity.<sup>139</sup> Under the human rights framework, countries must ensure meaningful rights of access to culture and its products. If people with disabilities all over the globe have rights to access culture products, that right should be cemented by an international hard-hard convention.<sup>140</sup>

As in many human rights contexts, there is a power imbalance between those who have the right (persons with disabilities) and those that must protect it (here, countries and the private sector). People with disabilities face collective action problems in ways that publishers, for example, do not. In the human rights framework, the rights of weaker sectors must be protected through international hard law, or they will be negotiated away by stronger sectors or diffused through soft law.

Human rights treaties often regulate the protection of the rights of the weaker sector and the obligations and duties of the stronger sector. This complex structure is more likely to work when each party is legally bound to perform its obligations, and weaker parties are entitled to demand performance. Soft law does not provide this structure.

### *G. International Hard Law May Help Developing Countries Implement Legislation*

Many visually impaired persons live in developing countries. Presumably, those countries are the primary targets of any new international agreement, because

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<sup>138</sup> We discuss in the next subsection whether a Joint Recommendation could be “implemented” through limitations and exceptions, and conclude that it would not be, but we do not see limitations and exceptions as part of human rights law, so we do not discuss it here.

<sup>139</sup> Degener, *supra* note 128, at 27.

<sup>140</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948) (“Article 27 (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”). The International Covenants on Human Rights has proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind. See Jenny Morris, *Impairment and Disability: Constructing an Ethics of Care Which Promotes Human Rights*, 16 HYPATIA No. 4, 1–16 (2001).

many of them currently lack flexibilities in their copyright law to permit the creation or importation of accessible materials. The international binding tool adopted by WIPO can help ensure that developing countries change their national legislation. Additionally, the international arena often favors the interests of developed countries over developing countries; this binding tool empowers developing countries faced with an international framework that otherwise does not protect their citizens.

Hard law is a preferable tool when states want to bypass domestic political conflict over particular issues.<sup>141</sup> Certain developing countries face internal difficulties in motivating national parliaments to modify their intellectual property laws. Domestic organizations of disabled persons may lack the resources to lobby for adding exceptions and limitations rules to existing national legislation. In these cases, a binding international tool might be necessary to effect change.

From the international perspective, special consideration should be given to the impact of international agreements on developing nations, where the need to stimulate economic growth and improve living conditions is not just a local interest but a global interest. When developing nations initially joined international intellectual property instruments protecting copyrights and patent rights (such as TRIPS), the argument was made that those agreements mainly served the interests of developed countries.<sup>142</sup>

Here, the international community could deliberately use a binding international instrument to serve the interests of citizens of developing countries.<sup>143</sup> There is precedent for such a step in the Doha Declaration, which recognized that TRIPS in some cases collided with fundamental public health concerns, particularly in the developing world.

The binding international agreement on these issues recognizes the hurdles developing countries face both domestically and internationally. Practically speaking, such an agreement helps ensure the adoption of domestic legislation in developing countries, and also recognizes that the interests of the citizens in

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<sup>141</sup> Abbott & Snidel, *supra* note 85, at 431.

<sup>142</sup> Ruth Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 735 (1996); Ruth Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 111–12 (1995); *see also* Ruth Gana, *Two Steps Forward: Reconciling Nigeria's Accession to the Berne Convention and the TRIPs Agreement*, 27 IIC 476 (1996).

<sup>143</sup> *See List of Proposals*, *supra* note 10.

developing countries, which often get short shrift on the international stage, deserve to be backed by binding, detailed international law.

## V. INTERNATIONAL COPYRIGHT

We now turn to the status of international copyright law. Our basic assumption is that among the principal motivations for an international instrument on copyright exceptions and limitations for visually impaired persons is the need to recognize limitations to copyright as internal to the copyright system and core to its effective functioning.<sup>144</sup> We conclude that in the copyright context, the international field is crowded with multiple hard-law agreements negotiated in different forums, preventing local low-cost experimentation and norm-setting that soft law can ordinarily provide. Because many developing countries do not implement limitations and exceptions available to them under TRIPS and the Berne Convention, but do implement hard law requirements from other agreements, a Joint Recommendation, or even a binding treaty with vague provisions, would likely have had little impact on the domestic level.

International copyright has been enacted in an increasingly complicated landscape in which states forum shop to find the best forum for their interests.<sup>145</sup> Intellectual property has been addressed by WIPO, by the WTO in TRIPS, in TRIPS-plus bilateral free trade agreements, and increasingly in TRIPS-plus plurilateral agreements such as ACTA or the currently negotiated Trans Pacific Partnership Agreement (TPP). The rules in different regimes speak to each other, sometimes explicitly. For example, TRIPS imports the Berne Convention's three-step test for limitations and exceptions.<sup>146</sup> Individual bilateral agreements also officially recognize existing law, as discussed further below.

When a state does not like the standards in a particular forum, it will shift to a more favorable forum. WTO is a harder-law forum, because of the availability of dispute-resolution. It is arguable that the recent plurilaterals represent even harder law, because they involve both enforcement and a greater power imbalance

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<sup>144</sup> P. Bernt Hugenholtz & Ruth L. Okediji, *Contours of an International Instrument on Limitations and Exceptions*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 473 (Neil Weinstock Netanel ed., Oxford Univ. Press 2009) (in favor of general exceptions and limitations to copyright by international instrument).

<sup>145</sup> Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT'L L.* 1, 6 (2004).

<sup>146</sup> See Berne Convention, *supra* note 21, at art. 9(2); TRIPS, *supra* note 21, at art. 13.

between negotiating parties, such that compliance by the weaker party is easier to achieve.

The network of intellectual property (IP) agreements evinces a trend of “upward harmonization” aimed at making IP rights stronger, especially in developing countries.<sup>147</sup> Regardless of one’s assessment of the ultimate impact of such harmonization, it is clear that it leaves less room for copyright limitations and exceptions. Developing countries face substantial difficulties in implementing TRIPS flexibilities even under TRIPS alone.<sup>148</sup> We argue that the added layer of TRIPS-plus bilateral agreements makes determining appropriate flexibilities even more costly and difficult for those developing countries that are party to both TRIPS and free trade bilateral agreements.

Against the existing international IP regime complex,<sup>149</sup> binding (hard) law was thus the better choice for this instrument. The traditional benefits of soft law are foregone in the international copyright environment because the instrument will have to interact with hard law developed in other forums. Soft law in this context becomes harder to negotiate, and less flexible. The exploratory norm-setting trumpeted by soft-law advocates is less viable against the hard-law requirements emerging from other forums.

Part of this concern arises because both this instrument and hard law are directed at developing countries, which tend not to fully exploit the room existing in soft-law when confronted with hard-law obligations.

We delve into this in greater detail below.

*A. International Copyright is a “Regime Complex,” Which Changes the Normal Interaction Between Soft and Hard Law*

International copyright is subject to what scholars call a “regime complex”—governance by multiple institutions with different actors and agendas. Several features of regime complexes impact the traditional relationship between hard and soft law. First, negotiations in one forum do not begin with a blank slate, or even

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<sup>147</sup> Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector*, 97 CALIF. L. REV. 1571, 1571 (2009).

<sup>148</sup> *Id.* at 1574.

<sup>149</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004) (describing a “regime complex” as “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area”).

with the most recent history of negotiations in that particular forum. Instead, they are influenced by developments in related forums. Second, states will engage in “forum shopping,”<sup>150</sup> finding the best forum for advancing their political interests. Powerful states are particularly adept at forum shopping.<sup>151</sup> Third, legal inconsistencies arise between the legal regimes in different forums, sometimes as a result of deliberate state policy for the creation of “strategic inconsistencies.”<sup>152</sup>

These features mean that states will choose to deploy hard and soft law to interact not only as complements, but also as “mutually undermining antagonists.”<sup>153</sup> This works roughly as follows. States shop for the forum that is most conducive to their interests, and establish law there that is in dialogue with law in other forums, often even referencing that other law in the text of new agreements. The choice of hard or soft law in the new forum is made with the knowledge that it speaks across forums. Because the law is established as the result of a forum shift to better pursue a state’s interests, it is likely to speak in opposition to law in the other forums rather than in harmony with it.

When hard and soft laws are antagonistic rather than complementary, an interesting transformation happens. Soft-law regimes harden, “losing the purported soft-law advantages of flexibility and informality,” and hard-law regimes may be softened, as states and tribunals are encouraged to look at the legal provisions and norms from neighboring regimes.<sup>154</sup>

### *B. Traditional Soft-law Benefits are Foregone in the Context of International Copyright Law*

The existing IP regime complex could have prevented a soft law instrument from evincing many of the traditional benefits of soft law. Soft law is often praised as being easier to negotiate. Here, the cost of negotiating the instrument was

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<sup>150</sup> Helfer, *supra* note 145, at 6 (“[D]eveloping countries and their allies are shifting negotiations to international regimes . . . more closely aligned with these countries’ interests”).

<sup>151</sup> Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596–97 (2007).

<sup>152</sup> DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 5–6 (2007).

<sup>153</sup> Shaffer & Pollack, *supra* note 81, at 728. Shaffer and Pollack explain that “distributive conflicts among states, and in particular among powerful states, coupled with the coexistence of hard- and soft-law regimes within a regime complex . . . is most likely to undermine the smooth and complementary interaction of hard and soft law depicted in so much of the literature.” *Id.* at 741.

<sup>154</sup> *Id.* at 710–11.



already high, even if the result would have been nonbinding. The situation was similar to what happened in the United States' involvement in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions:<sup>155</sup> states are not fooled by the fact that an instrument presents itself as soft law. Instead, they are aware of its potential significance for their interests in other forums. Thus, the instrument would have been difficult to negotiate regardless of whether it was binding.

Second, soft law is usually praised for allowing norm experimentation. But if the instrument had been soft law, it would not have left room for norm experimentation by countries, because a web of hard copyright law already exists in the area. The result of this web is that many countries, particularly developing countries, have implemented hard law but have not exploited the softer law aspect of limitations and exceptions. To be effective, the treaty has to stand up against this emerging hard-law regime of bilaterals and plurilaterals.

*C. Because Language Has Been Soft, Limitations and Exceptions Have Not Been Adopted to the Full Extent by Developing Countries*

Because the existing language on copyright limitations and exceptions has been vague, or “soft,” developing countries have not taken full advantage of copyright limitations and exceptions.<sup>156</sup> The three-step test permits a great range of limitations and exceptions, including but not limited to: personal use, criticism, educational purposes, reproduction by the press, ephemeral recordings, library exceptions, exceptions for computer interoperability, and exceptions for people with disabilities.<sup>157</sup> However, most developing countries provide only a limited range of limitations and exceptions, and make little use of flexibilities that could help improve access to education or distance learning.<sup>158</sup> Few developing countries have employed the mechanisms of the Berne Appendix, which permits compulsory licensing to promote access to works published abroad.

The lack of limitations and exceptions in developing countries stems at least in part from the fact that specific examples are not spelled out in the text of

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<sup>155</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions pmbL, Oct. 20, 2005, 45 I.L.M. 269; see Shaffer & Pollack, *supra* note 81, at 771–73.

<sup>156</sup> DEERE, *supra* note 100.

<sup>157</sup> *Id.* at 90.

<sup>158</sup> *Id.* at 91.

international law. Because the language of the limitations and exceptions three-step test itself is soft—permissive and imprecise—countries with little existing copyright law and low capacity for implementation are unlikely to expound on its details when implementing hard law.

*D. Bilaterals and Plurilaterals Contain Even Fewer Provisions on Limitations and Exceptions*

This problem—the lack of implementation of limitations and exceptions—is exacerbated by the fact that many of the newer TRIPS-plus agreements contain very little language on copyright limitations and exceptions. These newer agreements do, however, contain a lot of language creating harder copyright law. We discuss a few examples of this: the Anti-Counterfeiting Trade Agreement (ACTA), the Korea-US Free Trade Agreement (KORUS FTA), and the Chile-US Free Trade Agreement (Chile FTA).

ACTA, a plurilateral agreement, does not contain the three-step test. The only explicit mention of limitations and exceptions occurs in Article 27.8, concerning electronic rights management systems. There, ACTA explains that a party may adopt or maintain “appropriate limitations and exceptions” to measures implementing the requirements for electronic rights management, and that any obligations are without prejudice to the limitations, exceptions, or defenses available under a Party’s law.<sup>159</sup> Article 1 of ACTA also states that “[n]othing in this Agreement shall derogate from any obligations of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement.”<sup>160</sup> This presumably incorporates the three-step test into ACTA, or at least prevents ACTA’s positive provisions from overruling it.

With respect to ACTA, any new proposed instrument needs to provide an obligation rather than a suggestion to have an impact on ACTA signatories, because Article 1 defers only to the other “obligations” of Parties, under existing agreements. Were the Marrakesh Treaty to have been not binding, it would not have been seen as an “obligation,” and thus would have no chance of carving a hole in the ACTA hard-law copyright regime. Even as a hard-law treaty, the new WIPO instrument may be deemed by ACTA signatories to not be an “existing agreement,” giving rise to an argument that the Marrakesh Treaty should not be deferred to.

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<sup>159</sup> Anti-Counterfeiting Trade Agreement, art. 27.8, Oct. 1, 2011, 50 I.L.M. 243 [hereinafter ACTA], available at [http://www.mofa.go.jp/policy/economy/i\\_property/pdfs/acta1105\\_en.pdf](http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf).

<sup>160</sup> *Id.* at art. 1.

However, it is arguable that the Marrakesh treaty falls under existing agreements as part of the WIPO regime, in further articulating exceptions and limitations covered in the Berne Convention. What is important to note is that ACTA does not defer to WIPO interpretations, only to obligations. If WIPO had adopted a joint recommendation instead of a treaty, ACTA signatories may have had a hard time arguing that ACTA parties would be permitted to follow its recommendations.

We now turn to some of the bilateral agreements as further examples of this problem. The Korea-US Free Trade Agreement (KORUS FTA) recognizes the WIPO regime. It requires both parties to ratify or accede to the Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.<sup>161</sup> This recognition of the WIPO regime lays the groundwork for recognition of another binding WIPO treaty. There is no reference, by contrast, to any WIPO soft law. The KORUS FTA imports the Berne three-step test in footnote 11.<sup>162</sup> Because this test originated in WIPO, WIPO interpretations of the test through subsequent agreements are arguably authoritative. The more binding the WIPO interpretation, the more effective it is likely to be in expounding on this provision.

As a last example, we turn to the Chile-US Free Trade Agreement (Chile FTA). The Chile FTA is arguably a less restrictive bilateral. It contains a section on copyright limitations and exceptions.<sup>163</sup> That section in turn has a footnote that explicitly links the three-step test to WIPO's interpretive mechanism: the three-step test articulated in the FTA "neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention, the WIPO Copyright Treaty (1996), and the WIPO Performances and Phonograms Treaty (1996)."<sup>164</sup> This ties the enforcement of this bilateral to WIPO's interpretation of limitations and exceptions.

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<sup>161</sup> Free Trade Agreement, U.S.-S. Korea, art. 18.1.3(c), June 20, 2007, 46 I.L.M. 642 [hereinafter KORUS], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

<sup>162</sup> *Id.* at art. 18.4.1 n.11 ("Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.").

<sup>163</sup> Free Trade Agreement, U.S.-Chile, art. 17.7.3 n.17, June 6, 2003, 42 I.L.M. 1026 [hereinafter Chile FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

<sup>164</sup> *Id.*

The Chile FTA also contains a provision on non-derogation, explaining that “[n]othing in this Chapter concerning intellectual property rights shall derogate from the obligations and rights of one Party with respect to the other by virtue of . . . multilateral intellectual property agreements concluded or administered under the auspices of the World Intellectual Property Organization (WIPO).”<sup>165</sup> This contemplates deference to future WIPO agreements, in addition to present ones. Thus the Chile FTA gives WIPO more authority, and explicitly contemplates deference to future hard-law agreements developed in the WIPO regime. WIPO has the opportunity with this present instrument to establish a new obligation to counterbalance the requirements of bilateral trade agreements such as the Chile FTA.

In sum, international copyright law now includes a snarl of smaller hard-law agreements. These agreements establish hard law copyright requirements, but no mandatory specific limitations and exceptions. Developing countries have not adopted the range of limitations and exceptions permitted under TRIPS and the Berne Convention. Developing countries have, however, adopted the other hard law requirements imposed by bilateral free trade agreements. The hard-law bilateral agreements generally recognize WIPO hard-law treaties and other “obligations,” but for the most part do not acknowledge WIPO Joint Recommendations or other soft law.

Thus, for developing countries that are party to plurilateral or bilateral hard-law agreements, it was necessary that WIPO mandate new copyright limitations and exceptions as binding hard law. Otherwise, developing countries might not have implemented the new instrument out of fear of how it will interact with their bilateral obligations. At the least, a soft law instrument would have generated massive inefficiencies as developing countries tried to determine how it fits into their hard-law obligations in other regimes.

## VI. HOW THE MARRAKESH TREATY IS SITUATED AGAINST OTHER LIMITATIONS AND EXCEPTIONS

The task of developing a global approach to limitations and exceptions is one of the most difficult challenges facing the international copyright system today.<sup>166</sup> Some argue for broad international language, in the interest of preserving the autonomy of individual countries and the existence of alternate systems such as fair

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<sup>165</sup> *Id.* at art. 17.1.5.

<sup>166</sup> See Hugenholtz & Okediji, *supra* note 144, at 473.

use. Others argue for the specific enumeration of limitations and exceptions, to ensure that minimum exceptions are preserved internationally. The current discussion over an international exception for visually impaired persons need not force a decision on these issues. As a binding agreement, clarifying that exceptions for the visually impaired are internationally mandated, the treaty reflects an existing consensus among most developed countries and extends that consensus to developing countries only with respect to this one specific exception. The remaining scope of limitations and exceptions will not be affected by such a treaty.

Okediji and Hugenholtz, for example, identify three attributes that should be reflected in a general international instrument on exceptions and limitations, should such an instrument ever be created. They claim that any international instrument on copyright exceptions and limitations should be (i) flexible; (ii) judicially manageable; and (iii) leave ample space for national cultural autonomy. Therefore, they conclude that softer law might be preferable. This reasoning does not apply to the Marrakesh Treaty for the visually impaired. Recognizing an exception for the visually impaired and mandating that countries implement it domestically does not prevent countries from creating additional copyright exceptions, and thus does not deprive domestic copyright systems of their potential flexibility. In other words, the current instrument mandates a minimum, but does not define an entire copyright limitations and exceptions system. The current Treaty leaves space for cultural autonomy, as this exception does not rely on cultural presumptions about parody or reuse. Instead, it articulates a consensus view about a limitation concerning a fundamental human right articulated by the UN. Therefore, for this particular instrument, hard law does not present the problems Okediji and Hugenholtz anticipated being raised by a hard law instrument.

Deciding whether the agreement would be a binding treaty instead of a joint recommendation was clearly not the end of the matter, even with regards to the debate over hard and soft law. As discussed in Section III(A), international agreements vary in hardness across multiple dimensions, and one of those dimensions is the specificity of content. We have focused most of this paper on the dimension of obligation—whether countries are obligated to implement the agreement or permitted to ignore it as mere suggestion—because it was a crucial first decision.

However, the depth of detail in the content of the treaty was also important. As mentioned above, hard law may appear at different levels of hardness.<sup>167</sup> There are three main criteria of an agreement's "hardness": obligations and the intent to be obligated, precise content, and third party authority and enforcement power.

International law is thus not simply hard or soft, but rather harder or softer. Not only do laws vary from harder to softer, but they may also be harder or softer in different ways. Countries can agree on a binding tool containing precise definitions, but decide not to employ enforcement tools. They can alternatively employ an enforcement power, but make broad statements that are easily interpreted to permit a wide variety of behavior. Even if an agreement is binding and must be implemented, it can still be harder or softer along other dimensions.

The concluded Marrakesh Treaty is not only binding, it also contains specific requirements that contemplate real-world application. The treaty requires member states to enact a domestic copyright exception if they lack one.<sup>168</sup> But it addresses a number of very specific issues in depth, including digital locks (TPM) and cross-border exchange.<sup>169</sup>

The concluded treaty, like all WIPO treaties, is not subject to an enforcement power. However, it enables "authorized entities"—non-profits, for-profits that provide works on a non-profit basis, and government agencies—to export accessible works.<sup>170</sup> This enablement empowers those authorized entities as domestic actors who will be interested in getting the exceptions locally adopted. The treaty also empowers the visually impaired to seek local implementation, by permitting them to import accessible works.<sup>171</sup> The treaty thus empowers local actors, treaty in hand, to approach their governments in the name of interests recognized in the treaty.

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<sup>167</sup> See Alan Boyle, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 141, 142 (Malcolm D. Evans ed., 2d 2006); see also Hugenholtz & Okediji, *supra* note 144, at 474 (for example, if an international agreement reflects the parties' intent to be bound, then in principle such an agreement could also constitute hard law even if technically it is not labeled as a treaty).

<sup>168</sup> See Marrakesh Treaty, *supra* note 74, at art. 4.

<sup>169</sup> *Id.* at arts. 5–7.

<sup>170</sup> *Id.* at art. 2(c).

<sup>171</sup> *Id.* at arts. 5, 6.

## VII. CONCLUSION

WIPO's member states were correct when they decided to use a hard-law instrument to protect access rights for visually impaired people. The choice of making the instrument a treaty will prevent the creation of yet more inert international law. Soft law would not have been sufficiently strong to protect the human rights of those with print disabilities. And in the international copyright context, hard law was necessary because the treaty needed to push back against the complicated web of hard law already existing in different forums. A softer approach would have resulted in a decreased likelihood of implementation by developing countries as well as an ineffective instrument that would have been both less rigorously complied with and less effective in achieving its outcome.

As of the writing of this paper, the Marrakesh Treaty has been signed by fifty-seven countries, including the United States but not the EU, and it has not yet been ratified.<sup>172</sup> What remains to be seen now is whether domestic policies and politics will permit ratification and implementation of this international solution to a human rights problem of global proportion.

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<sup>172</sup> *SOS: Unclear, torturous path for EU ratification of Marrakesh Treaty*, TRANSATLANTIC CONSUMER DIALOGUE IP POLICY COMMITTEE BLOG, <http://tacd-ip.org/archives/1082> (last visited Nov. 11, 2013).