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**THE RATIFICATION AND IMPLEMENTATION OF THE
MARRAKESH TREATY:
A LOOK AT THE FUTURE OF SOUTH AFRICAN COPYRIGHT LAW**

by

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DECLARATION

I, Bram Van Wiele, hereby declare that the work on which this dissertation is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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ABSTRACT

This dissertation will analyse South African copyright law and its ability to facilitate blind, visually impaired, or otherwise print disabled people.

The Marrakesh Treaty intends to promote the making and distribution of copies of, among others, books in formats accessible to visually impaired persons. South Africa did not sign this Treaty yet, intends to sign and ratify this Treaty in the future.

This dissertation will analyse the current South African copyright law and policy related to visually impaired persons. To gain insight, this work will also analyse international framework, and foreign copyright law. The aim of this analysis will be to find ways of how the future of South African copyright law should look like, according to the Marrakesh Treaty, to be able to facilitate VIPs. This research also intends to expose the possible law and policy related barriers for non-ratification of the Marrakesh Treaty. Furthermore, this dissertation will analyse what the possible legal implications thereof will be.

The main goal of this dissertation will be to formulate a proposal on how the Marrakesh Treaty should be implemented in South African copyright law. This proposal will take into account possible barriers or policy related issues that arise from prior research.

Keywords: Marrakesh Treaty, Visually Impaired Persons, Copyright, Limitations and Exceptions, South Africa, Copyright Reform

PREFACE

This dissertation marks the end of a wonderful year in South Africa pursuing the LL.M degree.

I would like to thank my supervisor, Dr. Tobias Schönwetter for his support and his many valuable comments in writing this dissertation.

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TABLE OF CONTENTS

DECLARATION	ii
ABSTRACT	iii
PREFACE	iv
LIST OF ABBREVIATIONS	vii
CHAPTER I: INTRODUCTION	1
1.1 Overview	1
1.2 Research questions	4
1.3 Scope	4
1.4 Outline	5
1.5 Relevance of this research	6
CHAPTER II: FLEXIBILITY AND FACILITATION OF VISUALLY IMPAIRED PERSONS IN INTERNATIONAL TREATIES	7
2.1 International Copyright Treaties	7
2.1.1 Berne Convention: strong protection of intellectual property rights.....	7
2.1.2 TRIPS: a confirmation of rigorous IP rights protection	7
2.1.3 WIPO Copyright Treaty	8
2.2 Copyright limitations and exceptions: The three -step test	9
2.2.1 The concept of the three-step test.....	9
2.2.2 Berne Convention.....	10
2.2.3 TRIPS.....	12
2.2.4 WIPO Copyright Treaty	13
2.3 Conclusion	14
CHAPTER III: THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED	15
3.1 IP reform movements as a trigger	15
3.2 A growing concern at WIPO	16
3.3 Initial proposals	19
3.3.1 Latin American VIP Treaty Proposal.....	19
3.3.2 African VIP Treaty Proposal.....	20
3.3.3 European Union VIP Treaty Proposal.....	21
3.3.4 United States VIP Treaty Proposal.....	22
3.4 The content of The Marrakesh Treaty	22
3.4.1 Definitions.....	22
3.4.2 The Treaty's obligations	25
a) National law limitations and exceptions	25
b) Cross-border exchange	26
c) Importation	28
d) Other provisions	28

3.4.3	The implementation of the Treaty	29
3.4.4	The Berne gap	30
3.5	Opposition to a VIP Treaty	31
3.6	Conclusion	33
CHAPTER IV: FACILITATION OF VISUALLY IMPAIRED PERSONS IN SOUTH AFRICAN COPYRIGHT LAW		36
4.1	The current status of South African copyright law relating to visually impaired persons	36
4.1.1	Fair dealing.....	37
a)	Concept of fair dealing.....	37
b)	The Fair dealing - Fair use distinction and the US Chaffee amendment.....	37
c)	Fair dealing applied to VIPs.....	38
4.1.2	Copyright regulations	39
4.1.3	Parallel importation	40
4.2	The Electronic Communications and Transactions (ECT Act (2002)	41
4.3	Historic opportunities to facilitate visually impaired persons in South African copyright law	42
4.3.1	Draft Regulations (1999)	43
4.3.2	Amendments to the Copyright Act (2000)	43
4.4	Current copyright policy: Draft National Intellectual Property Policy	44
4.5	Conclusion	44
CHAPTER V: IMPLEMENTING THE MARRAKESH TREATY IN SOUTH AFRICAN COPYRIGHT LAW		46
5.1	The United Kingdom as an example	46
5.1.1	Overview	46
5.1.2	Amendments by the Copyright (Visually Impaired Persons) Act 2002.....	47
5.1.3	Amendments by the Copyright and Right in Performances (Disability) Regulations 2014	47
5.2	Analysing the ways of implementation in South African law.....	48
5.2.1	Reproduction.....	48
5.2.2	Adaptation	49
5.2.3	Distribution	49
5.2.4	Cross-border exchange	49
5.2.5	Technological Protection Measures	50
5.3	Practical implementation of the Marrakesh Treaty.....	50
5.4	Proposal for implementing the Marrakesh Treaty.....	51
CHAPTER VI: CONCLUSION AND RECOMMENDATIONS		57
BIBLIOGRAPHY		i

LIST OF ABBREVIATIONS

A2K	Access to Knowledge
ABC	Accessible Book Consortium
BERNE CONVENTION	The Berne Convention for the Protection of Literary and Artistic Works of 1886
DALRO	Dramatic, Artistic and Literary Rights Organisation
DSB	Dispute Settlement Body
DTI	South African Department of Trade and Industry
ECTA	Electronic Communications and Transactions Act
EU	European Union
FTA	Free Trade Agreement
IFRRO	International Federation of Reprographic Rights Organizations
IP	Intellectual Property
IPO	Intellectual Property Office (UK)
KEI	Knowledge Ecology International
MARRAKESH TREATY	Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled
MPAA	Motion Picture Association of America
PASA	Publishers' Association of South Africa
SACU	South African Customs Union
SCCR	Standing Committee on Copyright & Related Rights
(SA) COPYRIGHT ACT	South African Copyright Act 98 of 1978
TIGAR	Trusted Intermediary Global Accessible Resources (service)
TRIPS	Trade Related Aspects of Intellectual Property
TPMs	Technological Protection Measures
US	United States (of America)
VIPs	Visually Impaired Persons (including Blind and otherwise Print Disabled persons)

WBU	World Blind Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

“

The things I want to know are in books; my best friend
is the man who'll get me a book I ain't read.

”

ABRAHAM LINCOLN

CHAPTER I: INTRODUCTION

1.1 Overview

Imagine: you are a blind student pursuing a degree. You cannot accomplish your goal without being able to access books and other printed materials. While other, non-visually impaired people have access to thousands of books at their public or university libraries, visually impaired persons (VIPs) do not.¹ They remain dependent on other people to help them, unless they can get access to for example a Braille copy of the book. The problem of accessibility to published works by VIPs is known as the ‘Book Famine’.

According to an estimation of the World Health Organization (WHO) in 2013, the world counts approximately 285 million VIPs.² The WHO estimates that 90% of these 285 million VIPs live in low-income countries.³ For South Africa, during Census 2011, it was estimated that approximately 880 000 persons have no sight ability or have a lot of difficulty in doing so.⁴ These figures underline the necessity to adopt adequate measures to ensure accessibility of copyright works. The development dimension cannot be disregarded since a severe shortage of knowledge materials in accessible formats aggravates the social and economic constraints faced by VIPs in developing countries.

According to the World Blind Union (WBU)⁵, less than 7% are published in an accessible format, and thus available to VIPs.⁶ The amount of accessible works in

¹ The term ‘visually impaired persons’ (VIPs) will be used to cover ‘blind, visually impaired and, otherwise print disabled persons’.

² World Health Organization, Fact Sheet N°282, available at <http://www.who.int/mediacentre/factsheets/fs282/en>, accessed April 2014

³ Ibid.

⁴ Statistics South Africa ‘Census 2011’ (2011), available at <http://www.statssa.gov.za/publications/P03014/P030142011.pdf>, accessed April 2014.

⁵ The World Blind Union represents over 160 millions blind and visually impaired persons in 190 members countries, available at <http://www.worldblindunion.org/English/about-wbu/Pages/default.aspx>, accessed July 2014.

⁶ World Blind Union, June 17 Press Release for WIPO Book Treaty (17 June 2013) World Blind Union, available at <http://www.worldblindunion.org/English/news/Pages/JUNE-17-Press-Release-for-WIPO-Book-Treaty.aspx>, accessed June 2014; In 2007 the World Intellectual Property Organization (WIPO) estimated the amount of published written works that are available in accessible formats at 5 %. See World Intellectual Property Organization, Study on Copyright Limitations and Exceptions for the Visually Impaired, Standing Comm. Copyright and Related Rights, 15th sess, Sept. 11-13, 2006,

developing countries is even lower than 1%.⁷ National copyright laws of many countries put up barriers for making and distributing copies of works in accessible formats. For example, the making of a copy in Braille format, without the right holder's permission, might infringe the right holder's reproduction and adaptation rights. 'fair dealing' rights, or similar copyright limitations and exceptions, do often not sufficiently compensate for this. Regrettably, many countries do not have limitations and exceptions in place to facilitate access for VIPs. As a result, VIPs need to seek permission from the copyright holder, which can be a tedious and expensive procedure. As a result, VIPs cannot properly participate in educational, innovative or cultural activities. The former is contrary to one of the key purposes of copyright law, which is to stimulate creativity and innovation.

While some countries already have limitations and exceptions in their national law to facilitate access for VIPS, many have not.⁸ Furthermore, national copyright law related to VIPs are not sufficiently harmonised to provide for cross-border access.⁹ Until recently, no international instrument existed to require countries to take measures to improve VIP's access to copyright works. However, on 27 June 2013, the "Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled" (Marrakesh Treaty) was adopted by a Diplomatic Conference of the World Intellectual Property Organization (WIPO).¹⁰ This Treaty intends to make books and other published materials accessible to VIPs, thereby alleviating the book famine. The following day it was signed by 51 countries, including numerous African and Latin American countries.¹¹ South Africa was not one of them.

WIPO Doc. SCCR/15/7 (Feb. 20, 2007), available at

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf, accessed April 2014.

⁷ World Blind Union (footnote 7 above); According to some scholars, it might even be as low as 0,5 %: See D Nicholson 'Copyright vs. The Right to Read' Afr. Copyright & Access to Knowledge Project (ACA2K) Blog (27 May 2010), available at <http://www.aca2k.org/en/blog/viewpost/276.html>, accessed April 2014.

⁸ G Lung, WIPO, Copyright Exceptions for the Visually Impaired (2004) 3-4, available at http://www1.sp.senac.br/hotsites/arquivos_materias/materialGeidyLung_english.doc, accessed 4 July 2014

⁹ For an overview on different approaches on national copyright exceptions see P Hely 'A Model Copyright Exceptions Exemption to Serve the Visually Impaired: An Alternative to the Treaty proposals Before WIPO' 43 *Vand. J. Transnat'l L.* (2010) 1369 at 1391.

¹⁰ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 28, 2013, available at http://www.wipo.int/export/sites/www/treaties/en/ip/marrakesh/pdf/Marrakesh_Treaty.pdf, accessed July 2014.

¹¹ Of the 51 countries signing the Marrakesh Treaty, 41 were from the Africa or South America.

The Treaty, also referred to as the ‘Miracle of Marrakesh’, has been widely welcomed as a great step towards facilitating equitable access to copyrighted works for VIPs around the world. It can also be seen as a great success for WIPO because of the large amount of countries to sign this treaty immediately upon adoption. To quote Jens Bammel, Secretary General of the International Publishers Association: “For WIPO, Marrakesh has demonstrated that it is an organization fully capable of realizing international treaties even in new and difficult areas.”¹²

The Treaty will come into effect upon ratification by 20 countries and will then bind the countries that have ratified it. In its closing statement at the WIPO Diplomatic Conference in Marrakesh, South Africa stated:

“South Africa is embarking on the process of reviewing its copyright legislation and will accede to the Treaty when all internal processes are concluded.”¹³

When, hopefully in the nearby future, South Africa implements its new copyright legislation, it should be in compliance with the Marrakesh Treaty. It is therefore important to analyse possible legal and policy barriers for ratification. Furthermore, it is important to examine the process of implementation.

¹² Jens Bammel, Secretary General, International Publishers Association (IPA), *Beyond Marrakesh*, August 2013, available at http://www.wipo.int/wipo_magazine/en/2013/04/article_0003.html, accessed 8 September 2014.

¹³ Closing Statement by South Africa at WIPO Diplomatic Conference, Marrakesh, 27 June 2013 available at <http://libguides.wits.ac.za/loader.php?type=d&id=792887>, accessed April 2014.

1.2 Research questions

This dissertation tries to find answers to following research questions:

Main research question:

- i) How can the Marrakesh Treaty be implemented in South African law?

Sub research questions:

- i) Does current South African copyright law suffice to facilitate the visually impaired?
- ii) What are the reasons for not yet signing and ratifying the Marrakesh Treaty?
- iii) Are any of the reasons for not signing and ratifying the Marrakesh Treaty justified?
- iv) What changes are needed in South Africa's copyright law before ratifying the Marrakesh Treaty?

1.3 Scope

Although VIPs might not be the only people that experience discriminatory access to copyrighted works, this dissertation will, however, only focus on VIPs since they are the subject of the Marrakesh Treaty. This dissertation will not examine whether South African copyright law *should* facilitate access of VIPs, instead this dissertation will analyse the current law to determine *if*, and to what extent, South African copyright law currently *does* facilitate access for VIPs. This is done to propose amendments, in compliance with the Marrakesh Treaty, that better facilitate access of VIPs in the future. When analysing the possible barriers for ratification, the main focus will be on legal and policy barriers, and less on the practical hurdles that may exist. This dissertation will, when comparing with other countries, only examine the relevant law of the United Kingdom since its copyright law is the closest linked to South African copyright law.¹⁴

¹⁴ See T Pistorius 'Copyright law' in H Klopper *Law of Intellectual Property in South Africa* 1ed (2011) 149.

1.4 Outline

This dissertation is divided into six chapters. After an introduction in chapter one, chapter two examines the existing international framework, which contains obligations regarding to copyright limitations and exceptions. Relevant treaties discussed are the Berne Convention, The Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty. In particular the three-step test found in these treaties is analysed.

Chapter three will closely analyse the Marrakesh Treaty. It will look at the causes that triggered this attempt to reform copyright law. Two major catalysts, the A2K movement and the WIPO Development Agenda, will be discussed. Hereafter, the dissertation will look at the four different treaty proposals that were put forward by different countries or groups. The analysis will aim to distinguish the key differences between these four proposals, linked to the interests of each country or group. Subsequently, we will see how different elements of these proposals made their way into the final, consolidated proposal.

This consolidated proposal, which eventually became the Marrakesh Treaty will then be discussed in detail. The chapter will closely look at some of the definitions, which are key to understanding the Treaty. Furthermore, the main treaty obligations will be analysed. The chapter will also examine the ways to now implement the Marrakesh Treaty. The issue of how the Treaty deals with the so-called ‘Berne gap’, which is important for countries such as South Africa who did not ratify one or more of the international copyright treaties, will be discussed. The chapter will also look whether the non-ratification of some of the international treaties is a barrier for South Africa to sign and ratify the Marrakesh Treaty. Finally, although it might seem strange, we will examine why some parties opposed to the Treaty and whether some of their arguments are justified.

Chapter four will examine how current South African copyright law facilitates access of VIPs. We will examine if and how the current copyright law, and in particular the copyright exceptions, meet the needs of the visually impaired. Furthermore, other relevant copyright provisions, such as parallel importation, will also be taken into

account. This chapter will also analyse attempts that were made in the past, and in current copyright policy to meet the needs of visually impaired persons.

Chapter five examines the ways South Africa could implement the Marrakesh Treaty. For inspiration, this dissertation will look at the United Kingdom and how their copyright law intends to implement the obligations set forward by the Marrakesh Treaty. Hereafter, this dissertation will try to put forward a draft proposal on how to implement the Marrakesh Treaty in South Africa.

In the final chapter, the dissertation will formulate answers to the proposed research questions. It will answer the question what the reasons are for not yet signing and ratifying the Marrakesh Treaty, and if these reasons are justified.

1.5 Relevance of this research

We cannot get around the fact that VIPs face serious barriers when trying to gain access to copyrighted material. Although many countries have already signed the Marrakesh Treaty, which allows better access for VIPs, South Africa has not yet signed this Treaty. However, South Africa has expressed its intent to sign, and later ratify, the Treaty in the future. This research is relevant and timely since it will analyse possible barriers for signing and ratifying this Treaty.

There has already been some, but not extensive, research on accessibility for visually impaired persons in South Africa. This research will contribute to the already existing body of knowledge by indicating the possible barriers and providing a draft for the implementation of the Marrakesh Treaty.

CHAPTER II: FLEXIBILITY AND FACILITATION OF VISUALLY IMPAIRED PERSONS IN INTERNATIONAL TREATIES

2.1 International Copyright Treaties

Copyright is a territorial right and thus governed by national law. Yet, copyright protection has, to a great extent, been harmonized. International bilateral, regional and multilateral treaties to which a country is a party provide the basis for its national law. We will discuss the treaties that are relevant to copyright exceptions for VIPs because they are related to the right of reproduction, adaptation and distribution.

2.1.1 Berne Convention: strong protection of intellectual property rights

Concluded in 1886, the Berne Convention is one of the primary treaties in international copyright law.¹⁵ The Berne Convention has 167 Contracting Parties, including South Africa. Since 3 October 1928, the Berne Convention is in force in South Africa.

The focus of the Berne Convention is, since its inception, protection-based. The preamble states: “being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works ...”.¹⁶ It is generally accepted that The Berne Convention merely sets down minimum standards of copyright protection. Thus, Contracting Parties are allowed to adopt more rigorous copyright law. Exceptions and limitations to a country’s copyright law may only be introduced when certain conditions are fulfilled. A set of important conditions is contained in the so-called three-step test.¹⁷

2.1.2 TRIPS: a confirmation of rigorous IP rights protection

The Agreement on Trade-Related Aspects of Intellectual Property Rights was concluded under the World Trade Organization (WTO) and came into effect on 1

¹⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886.

¹⁶ *Ibid.* at pmbl.

¹⁷ Art. 9(2) of the Berne Convention. See *infra* ‘2.2 The Three-step test’.

January 1995.¹⁸ It is seen as the most comprehensive multilateral agreement on intellectual property (IP). TRIPS incorporated substantial parts of the Berne Convention and copyright law and led to the adaption of strong IP rights protection.¹⁹ A version of the aforementioned three-step test is also found in TRIPS.²⁰

Since the TRIPS Agreement came into force, many countries have opted for even stronger IP protection by negotiating bilateral agreements, widely known as ‘TRIPS-plus’. To the detriment of most developing countries, developed countries have exploited this option into pressuring them to adopt stronger IP protection.²¹

2.1.3 WIPO Copyright Treaty

The WIPO Copyright Treaty (WCT) was adopted in 1996 by the member states of WIPO.²² The treaty tries addresses issues that have arisen by advances in information technology, chiefly by providing additional copyright protection.

In its preamble the necessity is stressed “to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”²³

At the moment, the Treaty has 92 Contracting Parties.²⁴ South Africa signed the WCT Treaty in 1997. South Africa has, despite pressure from the International Federation of Reprographic Rights Organizations (IFRRO), Publishers’ Associations of South Africa (PASA), and the Dramatic, Artistic and Literary Rights Organisation (DALRO), not yet ratified the WCT.²⁵ The three-step test contained in WCT is thus not applicable to South Africa. This said, this dissertation will briefly analyse the

¹⁸ The Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf, accessed 4 July 2014.

¹⁹ Art. 9(1) TRIPS; S Ricketson and JC Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* 2ed (2006) 353-355.

²⁰ See *infra* ‘2.2.3 TRIPS’.

²¹ CT Collins-Chase ‘The Case Against TRIPS-Plus Protection in Developing Countries Facing aids Epidemics’ (2008) 29 U. Pa. J. Int’l L. 763 at 778 – 779.

²² WIPO Copyright Treaty, Dec. 20, 1996, available at http://www.wipo.int/edocs/lexdocs/treaties/en/wct/trt_wct_001en.pdf, accessed 4 July 2014; P Goldstein *International Copyright Principles, Law and Practice* (2001) 32.

²³ WIPO Copyright Treaty pmbl.

²⁴ See http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16, accessed July 2014.

²⁵ IFRRO ‘Resolution: Passage of proposed Amendments to south African Copyright and Ratification of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted by the Annual General Meeting in Cape Town (2001), available at <http://www.ifrro.org/sites/default/files/Resolution-South-Africa.pdf>, accessed July 2014.

Three-step test contained in this Treaty. Later, this dissertation will also examine whether the non-ratification consists a barrier for ratifying the Marrakesh Treaty.

2.2 Copyright limitations and exceptions: The three –step test

2.2.1 The concept of the three-step test

The exclusive rights of the copyright holders are not unlimited. Fair use, fair dealing and limitations and exceptions limit the exclusive rights of the right holder.²⁶ These aforementioned systems allow users to make a fully or partial copy of a copyrighted work without the permission of the copyright holder, and are utmost important for a balanced and just copyright law.²⁷ This use will not constitute a copyright infringement if the use is “fair” or within an enumerated set of exceptions and limitations. The scope of fair use or fair dealing, and the copyright exceptions and limitations, differ from country to country.

Several multilateral, regional and bilateral agreements contain language that has become known as the “three-step test”.²⁸ The three-step test was first put forward in the 1967 revised version of the Berne Convention. Later, most international copyright treaties have incorporated some version of this text. For example, versions of this text are found in TRIPS, WCT, WPPT and several EU directives. This test restricts the freedom of the signatory countries when defining the national limitations and exceptions. It seems that the three-step test’s overarching objective is to prevent copyright limitations limiting the author’s rights too much.²⁹

The scope and language of the different versions varies to a certain degree. The Electronic Frontier Foundation argues that limitations and exceptions should allow minimally allow for inter alia facilitation of access to tangible information products.³⁰ Some countries are not bound by all versions of the test, this chapter will therefore analyse the different versions thereof and their applicability to VIPs.

²⁶ See *infra* ‘4.1.1 fair dealing’

²⁷ T Schönwetter ‘The three-step test within the copyright system’ (2006), available at <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1>, accessed June 2014.

²⁸ See for example Study on Copyright Limitations and Exceptions for Libraries and Archives, WIPO document SCCR/17/2, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf, accessed July 2014.

²⁹ M Senftleben *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004) 5.

³⁰ Electronic Frontier Foundation ‘The Three-step test’ available at https://www.eff.org/files/filenode/Three-Step%20Test_FNL.pdf, accessed July 2014.

2.2.2 Berne Convention

The ‘three-step test’ is laid down in Article 9(2) of the Berne Convention as a counterweight to the formal recognition of ‘omnibus’ right of reproduction at the Stockholm Conference.³¹

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

The first limb of the three-step test requires that the exception is “clearly defined and narrow in its scope and reach”.³² It is very likely that this requirement is fulfilled when redressing the inequitable levels of access for VIPs.³³

The second limb of the test requires examination whether the potential use would interfere with the core market of the copyright owner. As Ricketson and Ginsburg point out, the existence of the book famine proves that copyright owners have historically not met the needs of VIPs, and the question if they will do so in the future remains unanswered.³⁴ There is little evidence of their willingness and ability to do so, although they argued their intent to exploit this market.³⁵ The normative component in this test allows states to assert that the clear public interest in providing access to VIPs means that this is not a market that copyright holders should (be expected to) exploit.³⁶ For example, accessible repositories may not conflict with the core licensing markets of the copyright owners, yet there is the threat of accessible unencrypted copies leaking into the core licensing markets and causing harm to the

³¹ C Geiger, D Gervais and M Senftleben ‘The Three-Step Test revisited: How to Use the Test’s Flexibility in National Copyright Law’ (2013) 4-5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356619, accessed July 2014.

³² Ricketson and Ginsburg op cit (n19)13.11.

³³ Ibid 13.37. (people with disabilities is listed as an example of exception that might be justified under the Berne three-step test.)

³⁴ Ibid. at 754.

³⁵ See letter from Angelo Loukakis, Australian Society of Authors to Norman Bowman, Commonwealth Attorney-General’s Department, June 2012, 4, available at https://asauthors.org/files/submission/submission_to_a-g_june_2012.pdf, accessed June 2014.

³⁶ S Ricketson *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies, 2002) (2002) 35; R Wright ‘The ‘Three-Step Test’ and the Wider Public Interest: Towards a More Inclusive Interpretation’ (2009) *The Journal of World Intellectual Property* 600 at 614-15.

copyright owners.³⁷ At present, established repositories minimize this risk by limiting access to authorized users who have to provide medical documentation that states they have a visual disability.³⁸ Furthermore, the risk is should be minimized by the use of Digital Rights Management, yet these measures are most of the times easily circumvented.³⁹ Taken into account the aforementioned measures, it is unlikely that accessible repositories pose a risk to copyright owners.⁴⁰ Therefore it is arguable, and according to Harpur and Suzor likely, that the establishment of large-scale repositories would not conflict with the second limb of the test.⁴¹

The final, third limb of the test requires the balancing of any harm caused to the copyright owners by the exception against the benefits for the beneficiaries of the exception. The term ‘unreasonably prejudice’ involves a proportionality test, which would allow for some level of harm.⁴² Furthermore, the term ‘legitimate interests’ implies “a normative claim calling for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.”⁴³ The question then arises whether VIPs should compensate copyright owners for the use. Some countries do not require any compensation, other countries implement a free-use exception, and others chose to introduce a compulsory license with a potential fee.⁴⁴ If we return to the same example, it seems that the third limb does not prohibit the establishment of accessible depositories and thus, this part of the three-step test could also be fulfilled.

We can conclude that exceptions for people with disabilities can be aligned with the requirements under the Berne three-step test. Note that the Berne three-step test only applies to the right of reproduction. Furthermore, this version of the three-step test has

³⁷ P Harpur and N Suzor ‘Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm’ (2013) 36(3) *UNSW Law Journal* 745 at 755.

³⁸ *Ibid.* 755: giving the example of Bookshare.

³⁹ DB Robinson ‘Digital Rights Management Lite: Freeing Ebooks from Reader Devices and Software: Can Digital Visible Watermarks in Ebooks Qualify for Anti-Circumvention Protection Under the Digital Millennium Copyright Act?’ (2012) 17 *Virginia Journal of Law and Technology* 152 at 155.

⁴⁰ Harpur and Suzor op cit (n37); RS Kushalnagar ‘Balancing Perceptually Disabled Consumers’ Rights Against Copyright Holders’ Rights’ (1 September 2009) (unpublished), available at <http://ssrn.com/abstract=1475449>, accessed June 2014.

⁴¹ Harpur and Suzor op cit (n37).

⁴² Ricketson and Ginsburg op cit (n19) at 13.26.

⁴³ Canada-Patent Protection of Pharmaceutical Products, WTO Doc WT/DS114/R (17 March 2000) [7.69], available at http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf, accessed June 2014.

⁴⁴ P Harpur and N Suzor op cit (n37) 756. For an example of a compulsory license with potential fee, see the Australian Copyrights Act s 135ZP.

never officially been interpreted. Finally, we have to remark that South Africa did not accede to article 9(2) of the Berne Convention. Yet, this three-step test automatically applies through article 13 TRIPS.⁴⁵

2.2.3 TRIPS

Article 13 of TRIPS contains the three-step test:

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

In general, this provision resembles the one found in the Berne convention. Yet there are some differences.

The third limb of the test in TRIPS requires that exceptions or limitations do “not unreasonably prejudice the legitimate interests of the right holder”. The wording here differs from the Berne Convention where they speak of “the legitimate interest of the author”. This is seen as a shift from centralizing the right of the creator towards the economic rights of companies that acquire copyright.

Where the Three-step test contained in the Berne Convention only applies to the rights of reproduction, the Three-step test in TRIPS applies to any of the exclusive rights associated with copyright. The test therefore gained a broader scope. In relation to copyright, this version of the test has been interpreted once by a WTO dispute settlement body (DSB) in a dispute involving a copyright exception in the US 2000.⁴⁶ The DSB interpreted the test narrow and restrictively limiting the possibility of providing statutory exceptions.

As mentioned, this provision automatically obliges South Africa to adopt art. 9(2) of the Berne Convention. The three-step test found in TRIPS is broader than test found in Berne, and latter thus falls within the scope of art. 13 TRIPS.

⁴⁵ See *infra* ‘2.2.3 TRIPS’

⁴⁶ WT/DS160/R, available at http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf, accessed July 2014.

2.2.4 WIPO Copyright Treaty

The three-step test is also found in the WCT. Article 10 provides:

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

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

The third limb does, like the Berne Convention, refer to ‘authors’ instead of ‘right holders’ found in TRIPS. Like art. 13 TRIPS, this provision is not confined to reproduction rights and also applies to distribution and adaptations right.

The Agreed Statement concerning Article 10 WCT provides:

“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”

The statement clearly emphasized the three-Step test as a flexible framework for the adoption of limitations and exceptions. It also maintains the legality of limitations and exceptions that are compatible with Berne without changing the role of the test.⁴⁷

As previously mentioned, the three-step test contained in this Treaty is not applicable to South Africa.⁴⁸

⁴⁷ C Geiger, D Gervais and M Senftleben op cit (n31) 11.

⁴⁸ See *supra* ‘2.1.3 WIPO Copyright Treaty’

2.3 Conclusion

The three-step test that we find in international copyright law leaves countries flexibility and freedom when adopting copyright exceptions.⁴⁹ Despite the aforementioned, not many countries have made use of these flexibilities to make copyrighted works available in accessible formats.⁵⁰

Almost all countries are bound by one of more forms of the three-step test. When implementing limitations and exceptions for the benefit of VIPs, the former will thus have to comply with this test. Later in this dissertation, we will examine how the Marrakesh Treaty makes this requirement and deals with the different versions and ratification paces of the treaties.⁵¹

⁴⁹ See A Kurr 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test' (2008) 8 *Richmond Journal of Global and Business* 287.

⁵⁰ P Harpur and N Suzor op cit n(37) 757.

⁵¹ See *infra* '3.4.3 The implementation of the Treaty'.

CHAPTER III: THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED

3.1 IP reform movements as a trigger

For the purpose of this dissertation we will discuss the two most important IP movements in relation to the Marrakesh Treaty: the Access to Knowledge (A2K) Movement and the WIPO Development Agenda.

The A2K Movement is “a loose collection of movements calling for enhanced balance and flexibility in IP law”.⁵² As pointed out by Williams, the A2K movement has two currents.⁵³ The first one, which is quite extreme, wishes to reorder IP law as to make IP protection the exception to an uninhibited exchange of knowledge.⁵⁴ The more moderate, second one aims for a more balanced IP law that better facilitates a more open and efficient transfer of knowledge.⁵⁵ In 2005, an A2K treaty applicable to VIPs was proposed to WIPO.⁵⁶ This proposal refers to disabled persons and provides support to the VIPs movement to increase availability and accessibility of written works.⁵⁷

The WIPO Development Agenda was adopted in 2007.⁵⁸ It ensures that development considerations make up an integral part of WIPO's work.⁵⁹ The Agenda puts forward 45 provisions, grouped within six clusters.⁶⁰ For the first time WIPO formally acknowledged developing countries' developmental concerns relating to IP law. Yet,

⁵² G Krikorian ‘Access to Knowledge as a Field of Activism’ in G Krikorian and A Kapczynski (eds) *Access to Knowledge in the Age of Intellectual Property* (2010) 70-71.

⁵³ S Williams ‘Closing in on the Light at WIPO: Movement Towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements’ (2011-2012) 33 *u. Pa. J. Int'l L.* 1035 at 1046-1047.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Draft Treaty on Access to Knowledge, Consumer Project on Tech. (May 9, 2005), available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf, accessed July 2014.

⁵⁷ Williams *op cit* (n53) 1048.

⁵⁸ Decision of the 2007 General Assembly, World Intellectual Property Organization, available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_34/wo_ga_34_16.pdf, accessed July 2014.

⁵⁹ For a general background on the Development Agenda see <http://www.wipo.int/ip-development/en/agenda/background.html>, accessed July 2014.

⁶⁰ See <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>, accessed July 2014.

it will remain toothless unless it is well implemented through efforts that account for developing countries.⁶¹

3.2 A growing concern at WIPO

Within the two aforementioned movements, a narrower, complementary movement arose, demanding for substantially better access for VIPs to written (copyright) works in accessible formats. Also, the WBU declared formally that it would “strive for the creation of international agreements which would allow the unhindered transfer of accessible material created in one country to blind [...] people in another country.”⁶²

Subsequently, the issue became an increasingly important topic at WIPO. Following the continuous set of studies, reports and discussion on limitations and exceptions⁶³, Chile, at the 12th meeting of the Standing Committee on Copyright & Related Rights (SCCR), put out a proposal regarding the subject 12 "Exceptions and Limitations to Copyright and Related Rights" (SCCR/12/3). Chile asked for the inclusion of “the subject of exceptions and limitations to copyright and related rights for the purposes of education, libraries and disabled persons” in the current agenda. During the next session, SCCR 13, the Delegation of Chile elaborated its proposal, specifying three areas of work to be undertaken in the SCCR.⁶⁴ These areas include (i) the identification, from the national intellectual property systems of member states, of national models and practices concerning exceptions and limitations; (ii) analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming therefrom; and (iii) establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community;

⁶¹ Williams op cit (n53) 1049.

⁶² Policy Position Agreed by the World Blind Union (WBU), the Daisy Consortium and IFLA Libraries for the Blind Section (LBS), World Blind Union et al. 2004, available at <http://www.worldblindunion.org/English/our-work/Position%20Statements/wbu%20ifla%20lbs%20and%20daisy%20Joint%20Policy%20Position.doc>, accessed April 2014.

⁶³ See for example Mann D *WIPO-Advancing Access to Information for Print Disabled People*, World Blind Union, 67th IFLA Council and General Conference, 16-25 Aug, 2001, (2001), available at http://keionline.org/sites/default/files/david_manon_wipo.pdf, accessed 4 July 2014; S Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7 (April 5, 2003), available at http://www.wipo.int/edocs/mdocs/copyright/en/scr_9/scr_9_7.pdf, accessed July 2014.

⁶⁴ WIPO, Proposal by Chile on the Analysis of Exceptions and Limitations, Standing Comm. Copyright & Related Rights, 13th sess, Nov 21-23, 2005, WIPO doc. SCCR/13/5 (Nov. 22, 2005), available at http://www.wipo.int/edocs/mdocs/copyright/en/scr_13/scr_13_5.doc, accessed April 2014.

especially to give access to the most vulnerable or socially prioritized sectors. At the 14th session of the SCCR a submission was put forward that stated: “In short, at present, neither the market nor technology appears to be supporting a basis for facilitating the access to information by visually impaired people in a way that is consistent with the general standards for the full social and economic integration of people with disabilities. [...] While they recognise the role of copyright law, visually impaired people have very specific needs in terms of access to information.”⁶⁵ Later, at the 15th session of the SCCR, a comprehensive WIPO study on limitations and exceptions for VIPs was prepared. According to the study: “Further debate about provision relating to exceptions in international treaties and conventions in the intellectual property area may be desirable in the long term, and developing countries may need further guidance about exceptions, but 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.”⁶⁶ A broad work program for limitations and exceptions was formally endorsed by Brazil, Chile, Nicaragua and Uruguay during the 16th SCCR session.

An important experts meeting was convened by the WBU and Knowledge Ecology International (KEI)⁶⁷ on 24 and 25 July 2008. The intention of this meeting was to consider a possible WIPO treaty for the VIPs. This meeting put forward the *World Blind Union Proposal WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons*.⁶⁸ On 28 October 2008 the proposal was presented to WIPO Director General Francis Gurry in a letter.⁶⁹ This WBU proposal was welcomed by a number of delegations, who referred to it during the 17th SCCR

⁶⁵ WIPO, Garnett N, Automated Rights Management Systems and Copyright Limitations and Exceptions, at 33, Standing Comm. Copyright & Related Rights, 14th sess, May 1-5, 2006, WIPO Doc. SCCR/14/5 (April. 27, 2006), available at

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.doc, accessed April 2014.

⁶⁶ WIPO, Sullivan J, Study on Copyright Limitations and Exceptions for the Visually Impaired, Standing Comm. Copyright and Related Rights, 15th sess, Sept. 11-13, 2006, WIPO Doc. SCCR/15/7 (Feb. 20, 2007), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf, accessed April 2014.

⁶⁷ Knowledge Ecology International (KEI), formerly known as Consumer Project on Technology (CPTech) is a non-profit non-governmental organisation that searches for better outcomes, including new solutions, to the management of knowledge resources, available at <http://www.keionline.org>, accessed July 2014.

⁶⁸ Available at http://www.keionline.org/misc-docs/tvi/tvi_en.html, accessed April 2014.

⁶⁹ Letter from Christopher E B Friend, Chair of the WBU Copyright and Right to Read Working Group, to WIPO Director Francis Gurry, available at http://www.keionline.org/misc-docs/tvi/wbu_coverletter_gurry.pdf, accessed July 2014.

session and expressed interest in further analysing it.⁷⁰

Between 2009 and 2010, arising from the aforementioned process, four VIP treaties, two binding and two non-binding, were proposed before WIPO. The two binding proposals, set forward by developing countries, were (i) a joint proposal by the Latin American countries and the WBU (Latin American VIP Treaty)⁷¹ and a proposal by the African Group (African VIP Treaty).⁷² Two non-binding treaties were proposed developed countries: by the European Union (EU) (European Union VIP Treaty)⁷³ and the United States (US) (United States VIP Treaty).⁷⁴ According to Hugenholtz and Okediji “a new international instrument on L&E’s offers a unique opportunity to coordinate, harmonize and balance the heightened (and new) standards of protection set forth in the successive Berne Convention Revisions, the TRIPS agreement and the WIPO Internet Treaties.”⁷⁵ We will briefly discuss and compare the content of these four aforementioned proposals below. This discussion will provide an overview of the different perspectives to mitigating the access problems faced by VIPs, and demonstrate how a compromise was reached with The Marrakesh Treaty.

⁷⁰ WIPO, 17th sess, Nov 3-7, 2008, WIPO Doc. SCCR/17/5 (May 25, 2009), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_5.pdf, accessed April 2014.

⁷¹ WIPO, *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, 18th sess, May 25-29, 2009, WIPO Doc. SCCR/18/5 (May 25, 2009), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.doc, accessed April 2014.

⁷² WIPO, *Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group*, Standing Comm. Copyright & Related Rights, 20th sess, June 21-24, 2010, WIPO Doc. SCCR/20/11 (June 15, 2010), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.doc, accessed April 2014.

⁷³ WIPO, *Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability, Proposal by the Delegation of the European Union*, Standing Comm. Copyright & Related Rights, 20th sess, June 21-24, 2010, WIPO Doc. SCCR/20/12 (June 17, 2010), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf, accessed April 2014.

⁷⁴ WIPO, *Draft Consensus Instrument, Proposal by the Delegation of the United States of America*, Standing Comm. Copyright & Related Rights, 20th sess, June 21- 24, 2010, WIPO Doc. SCCR/20/10 (June 10, 2010), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr-20/sccr_20_10.pdf, Accessed April 2014.

⁷⁵ P Hugenholtz and R Okediji ‘Conceiving an International Instrument on Limitations and Exceptions to Copyright’, Study Sponsored by Open Society Institute (OSI) (6 March 2008) at 27, available at http://www.soros.org/initiatives/information/acticles_publications/publications/copyright_20080506/copyright_20080506.pdf, accessed July 2014.

3.3 Initial proposals

3.3.1 Latin American VIP Treaty Proposal

As previously mentioned, the Latin American proposal was a joint effort of the WBU and three Latin American Countries: Brazil, which endorsed the work program for Limitations and exceptions during the 16th SCCR session, Ecuador and Paraguay. The proposal sought for broader copyright reforms.

According to Christopher Friend, chair of the WBU Copyright and Right to Read Working Group, the main aim of the proposal is to “facilitate greater access to works under copyright limitations and exceptions, and also motivate publishers to publish works in accessible formats.”⁷⁶

The Treaty proposal sets forward four conditions for rendering a copyrighted work into an accessible format copy. (i) The initial copy must have been obtained legally and may than (ii) only be rendered in an accessible format and (iii) exclusively supplied to VIPs (iv) on a non-profit basis.⁷⁷ Exceptions did apply to the last element of non-profit to allow commercial rental of accessible format copies.⁷⁸ Most noteworthy might be the proposal’s broad definition of VIPs. It starts of with defining VIPs as “a person who is blind or [...] has a visual impairment which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no visual impairment and so is unable to access any copyright work to substantially the same degree as a person without a disability.”⁷⁹ However, the proposal further broadens the scope by stating that “Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.”⁸⁰ From the wording of this definition it seems that the scope of the treat goes beyond just VIPs. This, together with stipulation that the treaty provisions automatically comply with existing copyright treaties and

⁷⁶ Letter from Christopher E B Friend op cit (n69).

⁷⁷ Latin American VIP Treaty proposal op cit (n71) at Annex, art. 4(a)(1)-(4).

⁷⁸ Ibid Annex, art. 4(c)(1)-(3).

⁷⁹ Ibid Annex, art. 15(a).

⁸⁰ Ibid Annex, art. 15(b).

conventions,⁸¹ was a cause for concern.

The proposal desires “full and equal access to information and communication for the visually impaired”, which connects to the aim of the A2K movement.⁸² It also emphasizes the development-side of a VIP Treaty by citing the WIPO Development Agenda: “Implementation of the Treaty shall be [...] taking into account the priorities and the special needs of developing countries, as well as the different levels of development of Contracting Parties.”⁸³

This proposal seeks, just like the African Treaty proposal, for a concrete and binding solution to meet the needs of VIPs.⁸⁴ In contrary, the EU and the US proposals only seek a non-binding and more guiding solution.⁸⁵

3.3.2 African VIP Treaty Proposal

The African treaty proposal, just as the Latin American proposal, sought for broader copyright reforms. As Williams points out, the requirement for copyright exceptions under the African proposal were about the same as the Latin American proposal.⁸⁶ The definition of VIPs however, is even broader: “a disabled person means any person suffering from visual impairment or a physical, mental, sensory or cognitive incapacity”.⁸⁷ Thus, the definition does not just include VIPs, but may also include illiteracy. This already broad definition is then broadened even further by adding a similar provision as the Latin American proposal: “Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format”⁸⁸ Furthermore, the African treaty proposes numerous exceptions, e.g. for private use and research, educational and research institutions, computer programs, certain instances of visual and sound performances, etc.⁸⁹ It also authorises circumvention of technical protection measures for the beneficiaries.⁹⁰

⁸¹ Ibid Annex, art. 3.

⁸² Ibid pmb.

⁸³ Ibid Annex, art. 2(e).

⁸⁴ See *infra* ‘3.3.2 African VIP Treaty Proposal’.

⁸⁵ See *infra* ‘3.3.3 European VIP Treaty Proposal’ and ‘3.3.4 US VIP Treaty Proposal’.

⁸⁶ Williams op cit (n53) 1054.

⁸⁷ African VIP Treaty proposal op cit (n72) art. 21(a).

⁸⁸ Ibid art. 21(b).

⁸⁹ Ibid art. 6-10.

⁹⁰ Ibid art. 13.

This proposal, like the Latin American one, also shows its support for implementing the WIPO Development Agenda.⁹¹ It further underscores on the fact that developing countries need flexibilities and exceptions without any legal or technical hindrances.⁹²

3.3.3 European Union VIP Treaty Proposal

The European Union's 2010 proposal focussed, as one can imagine, explicitly on VIPs without broadening the scope to other disabled persons. Also, the EU's definition of VIPs was much more narrow than the proposals put forward by the developing countries.⁹³ The proposal furthermore stated that the copyright exceptions "may only be applied in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."⁹⁴ In this wording we can clearly see a reflection of the Berne three-step test.⁹⁵

In line with its already restrictive approach, the EU put forward an additional hurdle, which can also be found in the U.S. proposal.⁹⁶ According to article 4 the dissemination of accessible written works may only occur through "a trusted intermediary." The latter is defined as "an approved institution whose activities must have the consent of both, persons with a print disability and rights holders such as publishers. Trusted Intermediaries facilitate the production of works in accessible formats, and/or their cross border transfer in a controlled manner."⁹⁷ This additional requirement might place a significant, possibly insurmountable burden on developing countries. As Williams mentions, developing countries lack sufficient resources to establish viable trusted intermediaries.⁹⁸ As restrictive might be the fact that trusted intermediaries must be approved by rights holders, who might oppose to this process. Another far-reaching provision is found in article 2 of the proposal, which prohibits the copyright exceptions "to the extent that there are sufficient and adequate market solutions for persons with a print disability."⁹⁹

⁹¹ Ibid pmb1.

⁹² Ibid.

⁹³ EU VIP Treaty proposal op cit (n73) art. 1(ii).

⁹⁴ Ibid art. 2.

⁹⁵ See *supra* '2.2 The three-step test'.

⁹⁶ See *infra* '3.3.4 United States VIP Treaty Proposal'.

⁹⁷ EU VIP Treaty proposal op cit (n73) art. 1(iv).

⁹⁸ Williams op cit (n53) 1057.

⁹⁹ EU VIP Treaty proposal op cit (n73) art. 2.

Article 2 also required that “member states *should* provide [...] an exception to the right of reproduction” (italics added), whereas the two aforementioned proposals only use the word *shall*.¹⁰⁰

We can conclude that the EU proposal is more restrictive than the developing countries’ proposals. Yet, it shows some acknowledgement of A2K issues and the WIPO Development Agenda. As previously mentioned, this proposal, together with the US Treaty proposal, seeks a non-binding solution; whereas the two aforementioned proposals seek a concrete and binding solution.¹⁰¹

3.3.4 United States VIP Treaty Proposal

The US proposal, which like the EU proposal also dates from 2010, showed a similar restrictive approach. Their definitions of VIPs and accessible formats were the most restrictive among all the proposals.¹⁰² They limited for example accessible formats to Braille, large print and audio, while this definition is left open by the developing countries. Just like the EU proposal, trusted intermediaries were required for the distributions of most of the written works.¹⁰³ The US asked for the former with an exception of Braille, while the EU made it mandatory.¹⁰⁴

3.4 The content of The Marrakesh Treaty

When discussing the content of the Marrakesh Treaty (henceforth: the Treaty),¹⁰⁵ the dissertation will follow the structure of the Treaty, and mainly focus on the relevant provisions for this dissertation.

3.4.1 Definitions

Articles 2 and 3 set forward the definitions of this Treaty. Article 2 defines the terms “works”, “accessible format copy” and “authorized entity” while Article 3 determines

¹⁰⁰ Ibid.

¹⁰¹ See *supra* ‘3.3.1 Latin American VIP Treaty proposal’ and ‘3.3.2 African VIP Treaty proposal’.

¹⁰² US VIP Treaty op cit (n74) art. 1.

¹⁰³ Ibid arts. 2(A) and 3(B).

¹⁰⁴ For more information on ‘trusted intermediaries’ see WIPO, Sullivan J, Study on Copyright Limitations and Exceptions for the Visually Impaired, Standing Comm. Copyright and Related Rights, 15th sess, Sept. 11-13, 2006, WIPO Doc. SCCR/15/7 (Feb. 20, 2007), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf, accessed April 2014.

¹⁰⁵ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 28, 2013, available at http://www.wipo.int/export/sites/www/treaties/en/ip/marrakesh/pdf/Marrakesh_Treaty.pdf, accessed July 2014.

who are “beneficiary persons”, the persons who are entitled to benefit from this Treaty.

We will first analyse the term “beneficiary persons” because this central term is used in the other definitions. “A beneficiary persons is a person who: is (a) blind; (b) has a visual impairment or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment [...] or; (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities.” The scope of this definition is very broad, which can only be welcomed. To be able to qualify under Article 3(b) for a “disability which cannot be improved” it is not necessary to have used all possible procedures and treatments.”¹⁰⁶ Band points out that when a disabling visual impairment cannot be improved by the use of corrective lenses, it should qualify.¹⁰⁷

The term “works” is defined as literary and artistic works, as determined by the Berne Convention,¹⁰⁸ in the form of text, notation and/or related illustrations, published or otherwise made publicly.¹⁰⁹ We note that audio formats, e.g. audio books, are included in this definition.¹¹⁰ As Band points out, audiovisual works, i.e. films, do not fall within the scope of this definition, but textual works embedded in audiovisual works, i.e. educational multimedia DVDs, would.¹¹¹

These works can be converted into an “Accessible format copy”, which is defined as “a copy of a work in an alternative manner form which gives a beneficiary person

¹⁰⁶ Marrakesh Treaty op cit (n105) Agreed statement concerning Article 3(b).

¹⁰⁷ J Band ‘A User Guide to the Marrakesh Treaty’ 4, available at <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-0913final.pdf>, accessed July 2014.

¹⁰⁸ Article 2,1° of the Berne Convention states: The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

¹⁰⁹ Marrakesh Treaty op cit (n105) art. 2(a).

¹¹⁰ Ibid Statement concerning Article 2(a).

¹¹¹ Band op cit (n107).

access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.”¹¹² Further requirements for these copies are set out in this definition: “The accessible format copy (1) is used exclusively by beneficiary persons and (2) it must respect the integrity of the original work [...]” (numbers added). By use of the terminology “used exclusively by”, the Treaty makes clear that the accessible format can only be used by VIPs, and not, like many digital formats, also by non-VIPs.

The “authorized entity”, which will be the producer and distributor of the accessible format copies, is defined as “an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit bases.”¹¹³ The definition clarifies that “it also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.” Band gives an example: “both a specialized agency providing services to the blind and a general-service library with an institutional program to promote accessibility would constitute authorized entities.”¹¹⁴ For the term “entities recognized by the government” it is clarified that these “may include entities receiving financial support from the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit bases.”¹¹⁵

Article 2(c) puts forward four objectives for authorized authorities to establish and follow its own practises. These objectives are “(i) to establish that the persons it serves are beneficiary persons; (ii) to limit to beneficiary persons and/or authorized entities its distribution and making available of accessible format copies; (iii) to discourage the reproduction, distribution and making available of unauthorized copies; and (iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons in accordance with Article 8.”¹¹⁶ We follow Band in his opinion that the purpose and effect of this specification is unclear, and that this statement could function as a descriptive statement, a

¹¹² Marrakesh Treaty op cit (n105) art. 2(b).

¹¹³ Ibid art. 2(c).

¹¹⁴ Band op cit (n107) 6.

¹¹⁵ Marrakesh Treaty op cit (n105) Agreed statement concerning Article 2(c).

¹¹⁶ Ibid art. 2(c).

normative statement, or a permissive limitation.¹¹⁷ A descriptive statement would mean that authorized entities *in general* establish and follow these types of practises.¹¹⁸ When considered as a normative statement, authorized entities *should* establish and follow these types of practises. If it should be seen as a permissive limitation, contracting parties may choose to provide the exceptions in the Treaty only to authorised authorities that have satisfied these four objectives.¹¹⁹

3.4.2 The Treaty's obligations

a) *National law limitations and exceptions*

In Article 4, the Treaty sets down the requirement for Contracting Parties to provide a limitation or exception in their national copyright “to the right of reproduction, the right of distribution, and the right of making available [...] to facilitate the availability of the works in accessible format copies for beneficiary persons.”¹²⁰ As a result, accessible format copies of copyrighted works can be made without the copyright holder’s consent, as long as the reproduction is exclusively for use of the beneficiary persons. This Treaty thus mandates, rather than permit like most international instruments, copyright exceptions.¹²¹ Optional, Parties may provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.¹²²

The Treaty leaves it to the Contracting Parties on how they meet this obligation. It may be fulfilled as described in Article 4(2). Nevertheless, Parties may also comply with this obligation “by providing other limitations or exceptions in its national copyright law”¹²³

Article 4(2) consists of two parts. The first part relates to authorized entities and is subject to four conditions:

¹¹⁷ Band op cit (n107) 6.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Marrakesh Treaty op cit (n105) art. 4(1)(a).

¹²¹ H Grosse Ruse-Khan ‘Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection’ (2009) 1 Trade, Law and Development 70; R L Okediji ‘The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries’, Issue Paper No 15, March 2006, International Centre for Trade and Sustainable Development and United Nations Conference on Trade and Development, 6, available at <http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf>, accessed June 2014.

¹²² Marrakesh Treaty op cit (n105) art. 4(1)(b).

¹²³ Ibid art. 4(3).

“(a) Authorized entities shall be permitted, without the authorization of the copyright rightholder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met:

(i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work; (ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person; (iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and (iv) the activity is undertaken on a non-profit basis”¹²⁴

The second part of Article 4(2) states that a beneficiary person, or someone acting on his behalf may make an accessible format copy of the work for use of the beneficiary person.

b) Cross-border exchange

The Treaty also requires the Contracting Parties to permit the distribution and making available, by an authorized entity, of an accessible format copy made under a limitation or exception in another Contracting Party.¹²⁵ Thus, authorized entities must be permitted to export an accessible format copy to another Contracting Party. This arrangement is particularly very beneficial for developing countries since the production of accessible format copies can be a financial burden. Yet, once a developing country ratifies the Marrakesh Treaty, VIPs in this country will have easy access to foreign copies. To facilitate this process, participation in the WIPO-initiated Trusted Intermediary Global Accessible Resources (TIGAR) project is highly recommended.¹²⁶ While at the moment, in order to allow the exchange of electronic files for accessible books, permission clearance of the right holder is necessary, this

¹²⁴ Marrakesh Treaty op cit (n105) art. 4(2)a.

¹²⁵ Ibid art. 5(1).

¹²⁶ The TIGAR (Trusted Intermediary Global Accessible Resources) service, hosted at WIPO, makes it easier for participating institutions to search internationally for books in accessible formats, and to exchange them across national borders. It currently contains over 238,000 titles in accessible formats in some 55 languages. The South African Library for the Blind has already made its titles available for search and exchange in TIGAR, <http://www.accessiblebooksconsortium.org/tigar/en/>, accessed July 2014.

will change after the implementation of the Marrakesh Treaty. Right holders' permission will then not be required anymore in countries that have ratified the Treaty.

Important is that once the Treaty is ratified by the US, it will enable access to thousands of English and Spanish language books digitized by volunteers and held by Bookshare.org.¹²⁷ Similar collections by other institutions will also be made available.¹²⁸ Millions of books digitized by Google, and held by the HathiTrust library, might also be made available, if permitted to retain them under the US Fair Use doctrine.¹²⁹ However, most of these books were simply scanned and did not go through extra processes such as optical character recognition and error checking.

The Treaty, once again, leaves it to the Contracting Parties to decide how they meet this obligation. It may be fulfilled according to Article 5(2), but a party may also comply with this obligation “by providing other limitations or exceptions in its national copyright law”¹³⁰

The method set forward by the Treaty is found in Article 5(2):

“A Contracting Party may fulfill Article 5(1) by providing a limitation or exception in its national copyright law such that:

(a) authorized entities shall be permitted, without the authorization of the rightholder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another Contracting Party; and (b) authorized entities shall be permitted, without the authorization of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;

provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.”

¹²⁷ Harpur and Suzor op cit (n37) 769.

¹²⁸ Ibid.

¹²⁹ Ibid; *The Authors Guild Inc v HathiTrust*, 902 F. Supp. 2d 445 (SDNY, 10 October 2012).

¹³⁰ Marrakesh Treaty op cit (n105) art. 5(3).

In the situation where a Contracting Party has no obligations under three-step test in the Berne Convention, Article 5(4) clarifies that when receiving an accessible format copy, authorized entities must ensure that these copies are only reproduced, distributed or made available for VIPs in that Contracting Party's jurisdiction.¹³¹ It further clarifies that situation where a Contracting Party is not a members of the WCT.¹³²

c) *Importation*

The importation equivalent of Article 5 can be found in Article 6. It states that a Contracting Party shall permit beneficiary persons, someone acting on their behalf, or an authorized entity, to import an accessible copy, to the extent that the national law of the Contracting Party allows making an accessible format copy.¹³³ BAND clarifies this: "Accordingly, if a Contracting Party's national law permitted authorized entities, but not beneficiary persons, to make accessible format copies, under Article 6 that Contracting Party would only be required to permit authorized entities to import accessible format copies."¹³⁴ The Contracting parties enjoy the same flexibilities implementing this provision as stated in Article 4.¹³⁵

d) *Other provisions*

Article 7 determines that contracting parties may adopt remedies against the circumvention of effective technological measures. In doing so, parties must ensure that these measures are appropriate and necessary as to not 'prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.' Band points out that the requirement for 'the right-holder to provide the authorized entity with a key to open the digital lock' would satisfy this Article.¹³⁶

The contracting parties should, when implementing limitations and exceptions provided by the Treaty, "endeavor to protect the privacy of beneficiary persons on an equal basis with others".¹³⁷

¹³¹ Ibid art. 5(4).

¹³² See *infra* '3.3.4 The Berne Gap'.

¹³³ Marrakesh Treaty op cit (n105) art. 6.

¹³⁴ Band op cit (n107) 11.

¹³⁵ Marrakesh Treaty op cit (n105) Agreed statement concerning Article 6.

¹³⁶ Band op cit (n107) 11.

¹³⁷ Marrakesh Treaty op cit (n105) art. 8.

Furthermore, provisions to facilitate cross-border exchanges are contained in Article 9. Contracting parties should encourage the voluntary sharing of information to assist authorized entities in identifying one another. The International Bureau of WIPO, which performs the administrative tasks relating to this Treaty shall “establish an information access point for this purpose.”¹³⁸ The Treaty further demands Contracting Parties to “undertake to assist their authorized entities engaged in activities under Article 5 to make the sharing of information among authorized entities ... to interested parties and members of the public as appropriate.” The article clarifies that this can also be done “through making available information on their policies and practices, including related to cross-border exchange of accessible format copies ...”¹³⁹ It should be noted, however, that there is no mandatory registry requirement.¹⁴⁰ The sole purpose of this provision is providing a possibility to assist authorized entities in both finding each other and making their policies and practices available.

3.4.3 The implementation of the Treaty

The principles concerning the implementation of The Treaty are set forward in Articles 10 and 11. Contracting Parties have flexibility in determining the appropriate method of implementation,¹⁴¹ yet this flexibility is limited by existing treaty obligations.¹⁴²

Article 10(3) states that “Contracting parties may fulfil their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practise.” According to this Article, “These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs”

When adopting the aforementioned measures, Contracting Parties must comply with their obligations under the Berne Convention, the TRIPS Agreement and the WCT,¹⁴³ and in particular the three-step test, found in the three aforementioned treaties. This

¹³⁸ Ibid art. 9(1).

¹³⁹ Ibid art. 9(2).

¹⁴⁰ Ibid footnote 12, Agreed statement concerning Article 9.

¹⁴¹ Ibid art. 10.

¹⁴² Ibid art. 11.

¹⁴³ Ibid arts. 1 and 11.

was a thorny issue during the negotiations.¹⁴⁴ Finally, halfway through the negotiations, an agreement was reached.¹⁴⁵ The inclusion of the three-step test has been welcomed by publishers, because it maintains the checks and balances in copyright law.¹⁴⁶

Apart from the aforementioned, flexibility is given regarding the scope of the limitations and exceptions that are set forward. Countries may choose to confine limitations and exceptions to works “which, in the particular accessible format, cannot be obtained commercially under reasonable terms for the beneficiary persons in that market.”¹⁴⁷ Should South Africa want to opt for this, it should carefully consider whether the VIPs’ access to these works is not financially or practically restricted by the reasonable terms under which these works can be obtained. For example, a commercially available accessible format might be excessively priced. It is thus important that the commercially available works are available at a price that is reasonable for the beneficiary persons in a certain country. In doing so, we note that the commercial availability standard can be applied on a format-by-format base. Countries may also provide in their national law that limitations and exceptions are subject to remuneration.¹⁴⁸ However, if we follow the language of Article 4(4), the amount of remunerations should be reasonable for the beneficiary persons in that country.

3.4.4 The Berne gap

The Marrakesh Treaty also addresses issues arising as a result of the so-called ‘Berne Gap’. This term refers to countries, which are not part of (some) international treaties governing copyright, including the Berne Convention, TRIPS and the WCT. South Africa, for instance, has implemented the Berne Convention and TRIPS, however, it has only signed but not ratified the WCT. During the Marrakesh negotiations there

¹⁴⁴ C Saez ‘Test Of Political Flexibility In Final Lap For WIPO Treaty For The Blind’, Intellectual Property Watch, available at <http://www.ip-watch.org/2013/06/14/test-of-political-flexibility-in-final-lap-for-wipo-treaty-for-the-blind/>, accessed July 2014.

¹⁴⁵ C Saez ‘WIPO Negotiators Reach Breakthrough On “3-Step Test” In Treaty For Blind’, Intellectual Property Watch, available at <http://www.ip-watch.org/2013/06/24/wipo-negotiators-reach-breakthrough-on-3-step-test-in-treaty-for-blind/>, accessed July 2014.

¹⁴⁶ J Bammel, Secretary General, International Publishers Association (IPA), WIPO, Beyond Marrakesh, available at http://www.wipo.int/wipo_magazine/en/2013/04/article_0003.html, accessed July 2014.

¹⁴⁷ Marrakesh Treaty op cit (n105) art. 4(4).

¹⁴⁸ Ibid art. 4(5).

was a lot of distrust concerning the three-step test embedded in these treaties. Countries that did not ratify TRIPS and the WCT are not bound to the three-step test related to other than reproduction rights, such as distribution rights. Because there was a concern that these countries might misuse the Marrakesh Treaty in cross-border situations, this issue had to be addressed by the Treaty.

Article 5(4)(b) clarifies the obligations of the parties under the situation where a party is not a member of the WCT. The distribution and making available of accessible format copies can then be limited “to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder”. Thus, this clause imposes a three-step test obligation to non-WCT members, but not beyond their obligations under the Marrakesh Treaty.¹⁴⁹ Furthermore, nothing in the Marrakesh Treaty creates an obligation for Contracting Parties to join the WCT or comply with any of its provisions, nor does it prejudices any rights, limitations and exceptions contained in the WCT (see footnote 9, Agreed statement concerning Article 5(4)b). Note that ‘Contracting Parties’ only refers to those contracting parties to the Marrakesh treaty who have not yet joined the WCT and thus have no existing obligations under that treaty. This implies that South Africa can hold on to its position of not ratifying the WCT, yet be able to comply with the obligations set forward by the Marrakesh Treaty.

3.5 Opposition to a VIP Treaty

Considering its purpose, it is not obvious that anyone would object to the adoption of a VIP treaty. Yet, several actors have, for different reasons, done that.¹⁵⁰ Most criticism derived from interest groups representing copyright holders. Not surprisingly, they were concerned about the erosion of the existing standard of copyright protection. Although a VIP treaty relates almost exclusively to written works, stakeholders in other fields, such as the film and music industry, also showed

¹⁴⁹ Ibid footnote 8, Agreed statement concerning Article 5(4)b.

¹⁵⁰ See i.a. comment the Association of American Publishers; Motion picture Association of America; Independent Film and Television Alliance; National Music Publishers’ Association; and Recording Industry Association of America. Note that most criticism was lodged as a response on the Latin American proposal, which was originally the first and only proposal before WIPO.

their concern.¹⁵¹ These industries kept lobbying, even when audiovisual works were excluded from the scope of the treaty.¹⁵²

Some critics were concerned that a VIP treaty would lead the way for continual undermining of IP rights. In a letter to the US Copyright Office, the copyright industry¹⁵³ expressed its concern as follows: “Adoption of this proposal would be used to justify a radical approach – mandating in national law exceptions and limitations that reach far beyond what would be even permissible under global norms today – in many other fields of copyright law.”¹⁵⁴

Other actors, in particular the Motion Picture Association of America (MPAA), were concerned that the terms of the VIP treaty were overly broad.¹⁵⁵ The fact that the Latin American proposal would apply to many forms of visual impairment raised these concerns. It went further by saying that this broad definition might “allow unauthorized duplication and distribution of copyright works – even for commercial purposes – and the circumvention of technological protection measures can be invoked by any person who is self-defined as having any form of disability.”¹⁵⁶

The MPAA also argued that removal of copyright barriers would not increase access to written works for VIPs.¹⁵⁷ However, a study before WIPO states that removal of these copyright barriers might at least make access easier.¹⁵⁸ As Williams points out, just because other factors exacerbate VIP’s lack of access to accessible written works

¹⁵¹ See i.a. National Music Publishers’ Association; and Recording Industry Association of America.

¹⁵² J Love, Disney, Viacom and Other MPAA Members Join Book Publishers to Weaken a Treaty for the Blind, Huffington Post (online), 23 april 2013, available at http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m_b_3137653.html, accessed June 2014.

¹⁵³ Independant Film and Television Alliance; National Music Publishers’ Association; and Recording Industry Association of America.

¹⁵⁴ See Comment Steven J. Metalitz, Partner, Mitchell Silderberg & Knupp LLP on behalf of copyright industry organizations, to Maria Pallante, Assoc. Register, Policy & Int’l Affairs, U.S. Copyright Office, regarding Notice of Inquiry and Request for Comments on the Topic of Facilitating Acces to Copyrighted Works for the Blind or Others Persons with Disabilities, 74 Fed. Reg. 52507, at 5 (Nov. 13, 2009), available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/steven-j-metalitz-aap-ifta-mpaa-nmpa-riaa.pdf>, accessed June 2014.

¹⁵⁵ FE Attaway, Comments of the Motion Picture Association of America 4 (Nov. 13, 2009), available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/fritz-attaway-mpaa.pdf>, accessed June 2014.

¹⁵⁶ Ibid 9.

¹⁵⁷ MPAA comment op cit (n150) at 3.

¹⁵⁸ WIPO op cit (n6)133.

does not mean that a VIP treaty cannot play a meaningful role in mitigating the problem.¹⁵⁹

Finally, it had been argued that a VIP treaty would undermine the rights holder's incentive to create and thus fewer books will be written. Microsoft for example stated "The reticence of authors and publishers' (sic) to licence this activity is caused in part by fears that it may [...] undermine the economic incentive for the creation and distribution of books."¹⁶⁰ The MPAA has, without providing empirical evidence, argued that the proposed treaty would have a potentially devastating impact to the creation of works and thus "society as a whole would be left with fewer works to access."¹⁶¹ These arguments do not seem to have much ground. At least fifty-seven countries already have copyright exceptions for VIPs in place, and until today none of these have reported any impact on the creation of works.¹⁶² Furthermore, it seems very unlikely that non-VIPs would make use of accessible written works under the treaty. Most of them would still like to purchase, and read in, the original format.¹⁶³

3.6 Conclusion

It is no surprise that the first proposal came from the developing world. VIPs are concentrated in developing countries and therefore the need for better access in those countries is more urgent. The dismissive stance of developed countries hindered impossible the broad treaty hoped for by the developing countries. Yet, in the end, the Marrakesh Treaty seems to strike a fair balance.

The Marrakesh Treaty provides for exceptions, which allow VIPs better access to written works. It allows, under certain conditions, for the making and distributing of accessible format copies. Furthermore, these accessible format copies can be transferred across national borders. Nothing in international (copyright) treaties, such as the Berne Convention and TRIPS, would prevent these exceptions. Already

¹⁵⁹ Williams op cit (n53) 1069.

¹⁶⁰ Comment by Laura Ruby, Director, Accessibility Policy & Standards, Microsoft Corp. And Jule Sigall, Senior Copyright Counsel, Microsoft Corp., to Maria Pallante, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office, regarding Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Others Persons with Disabilities 4 (Nov. 13, 2009), available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/jule-sigall-microsoft-corporation.pdf>, accessed June 2014.

¹⁶¹ MPAA comment op cit (n150) 3.

¹⁶² WIPO op cit (n6) at § 2.1.

¹⁶³ Williams op cit (n53) 1072.

existing national copyright exceptions relating to VIPs are considered to be in compliance with the three-step test we find in, among others, the Berne Convention.¹⁶⁴ Furthermore, Ricketson and Ginsburg argue that the Berne Convention does not require countries to prohibit unlicensed importation of accessible written works.¹⁶⁵

The contribution made by the Marrakesh Treaty to improve access to printed works for VIPs cannot be underestimated. Contracting Parties are required to adopt limited exceptions that many (developed) countries already have, which enable ad hoc digitisation and other measures that help VIPs to gain access to the aforementioned works.¹⁶⁶ Harpur and Suzor emphasize that although the Treaty is an important step into the right direction, “[I]ts terms provide only incremental advancements that will not systematically tackle the book famine. In a best-case scenario, the Treaty will equalise the level of access enjoyed by blind people around the world up to the level enjoyed by US residents.”¹⁶⁷ The impact of the Treaty might not be noticeable within a few years. Yet, the framework established by the Treaty must be seen as its greatest achievement. It is now up to the (future) contracting parties to tackle the following major challenges. They have to start digitising the existing works and ensure that new works are made accessible right from the start. This will however be a very costly. The cost of digitising one book is estimated at 30 USD,¹⁶⁸ which means the cost of digitising all of the 129 million books worldwide would add up to 4 billion USD.¹⁶⁹

Even though the treaty is in compliance with existing international treaties, some copyright holders opposed to the adoption thereof. Right holders were concerned that such a treaty would undermine their rights and market share, with profit loss as a result. They also saw the treaty as the beginning of weakening IP rights in general. Eventually some limitations were added to earlier proposals. For example, the scope was limited to literary works, related illustrations, and audiobooks. Furthermore,

¹⁶⁴ WIPO, Sullivan J, Study on Copyright Limitations and Exceptions for the Visually Impaired, Standing Comm. Copyright and Related Rights, 15th sess, Sept. 11-13, 2006, WIPO Doc. SCCR/15/7 (Feb. 20, 2007), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf, accessed April 2014.

¹⁶⁵ Ricketson and Ginsburg op cit (n19) 11.46.

¹⁶⁶ Harpur and Suzor op cit (n37) 769.

¹⁶⁷ Ibid.

¹⁶⁸ See Pamela Samuelson ‘Google Book Search and the Future of Books in Cyberspace’ (2010) 94 *Minnesota Law Review* 1308 at 1311-12.

¹⁶⁹ Harpur and Suzor op cit (n37) 771.

access to films and televisions shows for deaf people by enhancing subtitling were cut out of the negotiations at an early stage.¹⁷⁰ Yet, it does not seem that these actors can directly argue against limited copyright exceptions to provide access to VIPS.¹⁷¹

It is also important to point out that for South Africa no problem arose because of the non-ratification of the WCT or WPPT. The Treaty took account of the ‘Berne gap’ and provided the necessary provisions relating to these countries.

¹⁷⁰ KEI Staff, ‘Audiovisual Materials in the Classroom and the WIPO Treaty for Copyright Exceptions for Persons with Disabilities’, Knowledge Ecology International: KEIs Staff’s Blog (8 June 2013), available at <http://keionline.org/node/1738>, accessed June 2014.

¹⁷¹ Harpur and Suzor op cit (n37) 765.

CHAPTER IV: FACILITATION OF VISUALLY IMPAIRED PERSONS IN SOUTH AFRICAN COPYRIGHT LAW

4.1 The current status of South African copyright law relating to visually impaired persons

Current South African copyright law is governed by the Copyright Act 98 of 1978. This Act does not make any mention of persons with disabilities, neither in the definitions nor throughout the Act. Because the Copyright Act does not provide specific provision for VIPs, we will therefore analyse the general limitations and exceptions found in Section 12 and 13 of the Act. Some authors, like Dean, argue that these limitations and exceptions are not a right in South African law, but merely a defence.¹⁷² In essence he argues that an act of infringement is committed, which is then exempted. Other authors, like Pistorius, are of the opinion that fair dealing is a right, not merely a defence.¹⁷³ First, she states that the purpose of fair dealing is to balance public and private rights, and because it benefits the public, it should be liberally construed.¹⁷⁴ Second, she argues that when reading the heading of section 12 of the Copyright Act, it refers to exceptions from protection, not exceptions from liability.¹⁷⁵ Third, she argues that “the right to quote from works and to quote summaries of works is provided for in section 12(3): such quoting would *not necessarily* constitute reproduction of a substantial part of the work.”¹⁷⁶

The Copyright Act prohibits parallel importation.¹⁷⁷ Yet, brief attention will be given to this issue because of its relevance to the across-border facilitation of accessible works in the Marrakesh Treaty.

¹⁷² OH Dean *Handbook of South African Copyright Law* 1-51.

¹⁷³ Pistorius op cit (n14) 211.

¹⁷⁴ Ibid 211-212.

¹⁷⁵ Ibid 212.

¹⁷⁶ Ibid.

¹⁷⁷ S23(2) of the Copyright Act.

4.1.1 Fair dealing

a) *Concept of fair dealing*

General copyright limitations and exceptions in South African copyright law are governed by ‘fair dealing’. This concept is used in most Commonwealth countries such as the UK, South Africa and Australia. To be able to fall under the scope of fair dealing, the work must be used fairly in respect of the stipulated purposes. The justified purposes can be research, private study and criticism, review and reporting of current events.¹⁷⁸

The term itself is not defined in the Copyright Act, which lends itself, and leads to, different interpretations. “Only a court can determine what is ‘fair’ depending on the facts and circumstances of each individual case, and thus the law cannot presume to set out the limits to be observed. Those limits that have arisen have done so through case law and international acceptance.”¹⁷⁹

b) *The Fair dealing - Fair use distinction and the US Chaffee amendment*

‘Fair dealing’ differs from the US ‘fair use’ doctrine because the former is narrower in scope and more restrictive in application. Section 107 of the US Copyright Act states that fair uses of a copyrighted work shall not constitute a copyright infringement. Such use can be, but are not limited to, criticism, commenting and research. When judging whether a use is fair, at least four factors shall be taken into account: (i) the purpose and character of the use; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used; and (iv) the effect on the value or potential market of the work.

The US already has specialised law, the Chafee Amendment, in place that allows for the reproduction and distribution of accessible formats for beneficiary persons:

“(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords

¹⁷⁸ S12(1) of the Copyright Act 98 of 1978.

¹⁷⁹ E Gray and M Seeber *PICC Report on Intellectual Property Right in the Print Industries Section* (2004) 42.

are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”¹⁸⁰

This amendment thus allows authorized entities to make accessible copies and distribute them. Even if this amendment were not in place, making an accessible format copy of a copyrighted work for a beneficiary persons would be considered as a fair use.¹⁸¹ While this amendment does not allow beneficiary persons to make an accessible copy for personal use, this action would also be considered as a fair use.¹⁸² Furthermore, the US also has specialized law in place to allow for the exportation and importation by authorized entities of accessible format copies.¹⁸³ If the aforementioned would not apply, fair use would still permit these actions.¹⁸⁴ Fair use would also allow for direct importation by the beneficiary person himself.

c) *Fair dealing applied to VIPs*

The *fair dealing* provision laid down in Section 12(1) of the Copyright Act is difficult to apply to VIPs. First, the use needs to be for one of the stated purposes, such as research, private study and criticism, review and reporting of current events. Under certain circumstances, this provision allows for the making of a reproduction of a work. Partly sighted persons, for example, could be allowed to make a single copy in enlarged format for research or private study.¹⁸⁵ However, most VIPs do not just need a copy – reproduction – of the work, but more importantly require a modified, accessible version – adaptation – which can preferably be shared – distributed – across borders. The three aforementioned exclusive rights – reproduction, adaptation and distribution – are key to making accessible format copies available to VIPs. Section 12(9) of the Copyright Act stipulates that the provisions of section 12 (1)- (7) also apply to adaptations of a work. Yet, adaptation will also only be allowed for one of the justified purposes, a requirement that limits the use of VIPs significantly.

¹⁸⁰ 17 U.S.C. § 121(a).

¹⁸¹ J Band *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, (2012) 59 J. Copyright Soc’y U.S.A. 453 at 461-462 (2012); Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) 21-22, available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>, Accessed July 2014.

¹⁸² Ibid.

¹⁸³ 17 U.S.C. § 602(a)(2) and the Chafee Amendment.

¹⁸⁴ Ibid.

¹⁸⁵ D Nicholson *Accommodating Persons With Sensory Disabilities in South African Copyright Law* LLM (Wits) (2012) 103.

Exceptions to the right of distribution are still not covered.

The fourth exclusive right addressed in the Marrakesh Treaty, the right of public performance, plays a less essential role. Parties to the Marrakesh Treaty may provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons, but are not obliged to do so. The focus of this dissertation will therefore be on the rights of reproduction, adaptation and distribution.

In the light of the above, it is clear that the essential requirements to allow conversion of works into accessible format, such as Braille or conversion from text to speech, are not fulfilled. As mentioned, VIPs require accessible format copies which, in turn, require an adaptation. The distribution of these accessible formats also plays an essential role. We can conclude that the main exception in South African copyright law does not facilitate VIPs. This is one of the reasons, as pointed out by Schönwetter, why the South African Copyright Act is seen as outdated.¹⁸⁶ Whereas fair use takes into account several factors in examining whether the use is 'fair', without it having to be a purpose specified by law, fair dealing is more restrictive and does in general not allow adaptation and distribution for use by VIPs.

4.1.2 Copyright regulations

According to section 13 of the Copyright Act a reproduction of a work can be made "as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright." These exceptions are a modified version of the US 1976 "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals".¹⁸⁷ The latter states the minimum standards for educational use under the US fair use doctrine. Yet, South Africa adopted a modification of these Guidelines without adopting the relevant fair use provisions, and without bringing them in accordance with the rest of the South African Copyright act. This led to regulations that are seen

¹⁸⁶ T Schönwetter *Safeguarding a fair copyright balance - contemporary challenges in a changing world: Lessons to be learnt from a developing country perspective* Ph.D. (UCT) (2009) 145.

¹⁸⁷ Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, available at <http://library.ciu.edu/sites/library/files/GuidelinesClassroomCopying.pdf>, accessed June 2014.

to be ambiguous, cumbersome and nebulous.¹⁸⁸

Under certain circumstances, current South African copyright regulations allow the making of a copy of an entire work or a substantial part thereof. At present, these circumstances only cover private study and the personal or private use of the person using the work.¹⁸⁹ Other purposes provided for in section 12(1) are not provided for in section 13. Furthermore, only certain works may be copied under regulations.¹⁹⁰

The exceptions provided in section 13 are very restrictive and difficult to rely on, especially for VIPs. As it is the case for section 12, section 13 also lacks provisions that allows for adaptation and distribution. Conversion of works into accessible formats such as Braille or text-to-speech, are therefore not allowed. Therefore, we can conclude that the exceptions provided by section 13 do not sufficiently facilitate VIPs access t copyright works. VIPs, and most other actors as well, are forced to rely mainly on section 12(1).¹⁹¹

4.1.3 Parallel importation

Parallel importation is a legal process that “refers to the import of goods outside the distribution channels contractually negotiated by the manufacturer.”¹⁹² For example, in South Africa a certain right holder sells his books for 20 USD, but in India the same right holder sells the same books for 10 USD The question then rises if South Africa can legally import these cheaper books from India without the right holder’s consent. According to section 23(2) of the Copyright Act:

"[C]opyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work—

(a) imports an article into the Republic for a purpose other than for his private and domestic use;

[...]

if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.”¹⁹³

¹⁸⁸ Nicholson op cit (n185) 105.

¹⁸⁹ Pistorius op cit (n14) 213.

¹⁹⁰ Ibid 214.

¹⁹¹ See *supra* ‘4.1.1 Fair dealing’.

¹⁹² See International Exhaustion and Parallel Importation, available at http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm, accessed June 2014.

¹⁹³ Section 23(2) of the Copyright Act 98 of 1978.

Put differently, the person who, with the required knowledge and without the copyright owner's consent, imports an article in South Africa that could not have been made in South Africa without infringing copyright commits an indirect copyright infringement under the aforementioned section.¹⁹⁴

This prohibition constitutes a barrier to access to learning materials,¹⁹⁵ and creates yet another access barrier for VIPs. Accessible copies of copyrighted works from third countries cannot legally be imported in South Africa without the consent of the right holder unless the importation is for private and domestic use only, i.e., "confined to the user himself or herself or, at the most, use that does not extend beyond his or her domestic circle."¹⁹⁶ The aforementioned exception is not sufficient to provide VIPs the accessible formats that they need. The parallel importation of accessible format copies needs to be allowed for authorized entities, who then can import large amounts of these accessible format copies.

We can conclude therefore that section 23(2) of the Copyright Act creates a significant barrier for VIPs in terms of accessing accessible format copies created abroad. The prohibition of parallel import is detrimental for the availability of accessible works and is contradicting to a large extent the Marrakesh Treaty's objective of allowing cross-border exchange of accessible formats.

4.2 The Electronic Communications and Transactions (ECT Act (2002))

The ECT Act contains strict provisions relating to technological protection measures (TPMs) and the prohibition of circumvention measures. In addition to the Act, the Minister has issued regulations for the proper implementation thereof.¹⁹⁷ TPMs are the use technological tools that restrict the use or access to a work. They can however be removed, disabled or circumvented in several ways.

Section 86 of the ECT Act prohibits the circumvention of TPMs.¹⁹⁸ This section "outlaws the unlawful production, sale 'of offer to sell', design, procurement,

¹⁹⁴ *Frank & Hirsch (Pty) Ltd A Roopanand Brothers (Pty) Ltd*, 1993 (4) SA 279 (A).

¹⁹⁵ A Rens, A Prabhala and D Kawooya *Intellectual Property, Education and Access to Knowledge in Southern Africa* (2006) 62, available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>, accessed June 2014.

¹⁹⁶ Pistorius op cit (n14) 204.

¹⁹⁷ H Britz and M Ackermann *Information, Ethics & the Law* 84.

¹⁹⁸ Art. 86 Electronic Communications and Transactions Act.

possession, adaptation, distribution or utilisation of a device (including a computer program or component) designed primarily to overcome security measures for the protection of data or to perform any act with regard to a password or access code to enable unauthorised access or interference with data.”¹⁹⁹ To concern of some commentators, this prohibition is absolute.²⁰⁰ Visser, for instance, points out that the Act includes no exceptions, no technical exceptions, nor exceptions in favour of research and education.²⁰¹ Section 86 of the Act disadvantages VIPs as it also prohibits circumvention technologies that could, for example, be used to convert text to speech. A blind person that bought an e-book, protected by a TPM, would then not be able convert this book – which he lawfully owns – into a spoken version, because it would it would require circumvention of the TPM. Article 7 of the Marrakesh Treaty requires Contracting Parties to make sure that when applying effective remedies against the circumvention of effective TPMs, this legal protection will not prevent VIPs from enjoying the limitations and exceptions provided for by the Treaty. The ECT Act thus only aggravates the problem of accessibility to copyrighted works for VIPs.

But the implications of this go beyond copyright works. While under normal conditions works fall into the public domain after the copyright time had expired, and thus become available for everyone, the ECT Act effectively enables persons to make public domain works inaccessible through TPMs.²⁰² As a result, VIPs and the public in general will not be able to make accessible copies of works that are in the public domain if they are protected by TPMs.

4.3 Historic opportunities to facilitate visually impaired persons in South African copyright law

Over time, South Africa has attempted to better facilitate VIPs in its copyright law. This section will provide a short overview of the relevant attempts.

¹⁹⁹ Brit zand Ackermann op cit (n197) 93.

²⁰⁰ C Visser ‘Technological Protection Measures: South Africa goes Overboard, Overboard’ (2006) 7 *SAJIC* 55 at 62.

²⁰¹ Ibid.

²⁰² Ibid 60; T Schönwetter and C Ncube ‘New hope for Africa?: Copyright and access to knowledge in the digital age’ (2011) 13(3) *Info* 64 at 68.

4.3.1 Draft Regulations (1999)

In August 1998, Draft Regulations to amend Section 13 of the Copyright Act were published by the Department of Trade and Industry (DTI).²⁰³ The provisions relating to persons with disabilities were drafted very restrictively. The Draft defined a ‘disabled reader’ as “a blind person, a person with severely impaired sight, a person unable to hold or handle books or to focus or move his or her eyes, or a person suffering from a perceptual handicap.”²⁰⁴ Consequently, a lot of opposition arose from the library and tertiary education sector, followed by a strong lobby campaign against these restrictive Draft Regulations in general.²⁰⁵ The library and tertiary education sector, which were previously excluded from the law-making process, were then included in the new process.²⁰⁶ Later, the Draft Regulations were completely withdrawn by the DTI.

4.3.2 Amendments to the Copyright Act (2000)

In May 2000, amendments to the Copyright Act and other IP laws were proposed.²⁰⁷ None of the amendments was explicitly aimed at facilitating access of VIPs, yet some amendments would have had an indirect, prejudicial impact. For example, amendments to Section 12 would have restricted VIPs’ access by not allowing legal entities including organisations that help VIPs, to do a ‘restricted act’ using copyrighted works.²⁰⁸ Most of the amendments were withdrawn by the DTI, except for the proposed amendments to Section 9 of the Copyright Act. The latter, relating to broadcasts and sound recordings, was included in the Copyright Amendment Act 9 of 2002. IFRRO, PASA and DALRO adopted a resolution to pressure the government into passing the other amendments as well, albeit without success.²⁰⁹

²⁰³ Government Gazette no. 19112, 7 august 1998.

²⁰⁴ Ibid art.1(1)(e).

²⁰⁵ Nicholson op cit (n185) 107.

²⁰⁶ Ibid.

²⁰⁷ Government Gazette no 21156, notice 1805, 10 May 2000.

²⁰⁸ Nicholson op cit (n185) 108.

²⁰⁹ IFRRO ‘Resolution: Passage of proposed Amendments to south African Copyright and Ratification of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted by the Annual General Meeting in Cape Town (2001), available at <http://www.ifrro.org/sites/default/files/Resolution-South-Africa.pdf>, accessed July 2014.

4.4 Current copyright policy: Draft National Intellectual Property Policy

On 4 September 2013, about 3 months after the conclusion of the Marrakesh Treaty, the DTI released a draft intellectual property policy for South Africa. This draft stipulates key considerations for law reform in this area in the coming years, however, it does not make any mention of the Marrakesh Treaty or the limitations and exceptions required by it. This omission, arguably owed to oversight or ignorance, is regrettable in that it means that a major issue in copyright law was not considered. We can only hope that in light of South Africa's statement at the WIPO Diplomatic Conference in Marrakesh factoring in the Marrakesh Treaty in future law amendments appeared so obvious that the drafters felt no need to make mention of it.

What the draft does say, however, is that South Africa should not sign international copyright treaties that may compromise its stance on social and development goals. This reticent policy is in line with the recommendation of the Commission on Intellectual Property Rights concerning developing countries and the impact of intellectual-property standards on their development.²¹⁰ The main issues here at stake are the WIPO Copyright Treaty (WCT), which according to the DTI is too restrictive, and the WIPO Performances and Phonograms Treaty (WPPT). South Africa did sign, but not ratify both the instruments. This reluctance in relation to international treaties could be a factor in the ratification process of the Marrakesh Treaty. Yet, the reasons for not ratifying the WCT, inter alia that the treaty is too restrictive, do not apply for the Marrakesh Treaty. The implementation of the latter would only benefit the country and its citizens. It remains extremely regrettable that such a major step in copyright law has been let out of this draft.

4.5 Conclusion

After analysing current South African copyright law, we can infer that, at present, VIPs' access to copyright works is not sufficiently looked for under South African copyright law.²¹¹ Whereas the fair use doctrine in the US might suffice to allow for use by VIPs, fair dealing is too restrictive and, for example would only allow reproduction for private study. Amendments to the current copyright law are therefore

²¹⁰ See Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy', available at

http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf, accessed April 2014

²¹¹ See for example Nicholson op cit (n185).

needed. At present, South Africa is reviewing its intellectual property law, which will hopefully lead to more enabling legislation.

Recent historic attempts to amend copyright law have not been very successful. The introduction of other laws that impact on copyright law, more in particular the ECT Act, seem to be detrimental effects for VIPs that are contrary to the spirit of the Marrakesh Treaty.

It is therefore clear that the current copyright law in South Africa is unsatisfactory in as far as access opportunities of VIPs are concerned and future law review processes need to take this into account. Legislation needs to be adopted which not only allows copying of works for the benefit of beneficiary persons, but also for adapting, distributing and importing these works. The next chapter will attempt to provide practical suggestion in implementing the Marrakesh Treaty.

CHAPTER V: IMPLEMENTING THE MARRAKESH TREATY IN SOUTH AFRICAN COPYRIGHT LAW

This chapter's aim is to put forward a proposal for implementing the Marrakesh Treaty in South African copyright law. Therefore, it will first analyse the copyright limitations and exceptions relating to VIPs in the UK. Using the former as inspiration, it will then analyse the changes needed in South African copyright law, and put forward a way of implementing these changes into the existing laws.

5.1 The United Kingdom as an example

5.1.1 Overview

South African copyright law is historically linked closely to the UK's copyright law. Although there are important differences, the UK's copyright law is still an important guidance for South African copyright law.²¹² Kelbrick even argues that the influence of the UK's copyright law is even greater than that of the other IP rights.²¹³

The UK is one of the 51 signatories of the Marrakesh Treaty. Copyright law in the UK is governed by the Copyright, Designs and Patents Act 1988 (CDPA).²¹⁴ In 2002, the CDPA was amended by the Copyright (Visually Impaired Persons) Act 2002 to allow VIPs to make copies of work in a format suitable to their needs.²¹⁵ In March 2014, secondary legislation in the form of five statutory instruments that amend relevant sections of the CDPA was put forward. The draft statutory instrument relating to exceptions for VIPs amends the existing law to ensure compliance with the Marrakesh Treaty.²¹⁶ We will analyse the UK's legislation, and the amendments thereto, with the aim to use it as guidance for amending South Africa's copyright law.

²¹² Pistorius op cit (n14) 149.

²¹³ R Kelbrick 'The historical development of civil copyright remedies in selected Commonwealth jurisdictions' (1997) 30 *CILSA* 2, 131.

²¹⁴ Copyright, Designs and Patents Act 1988 ch. 48.

²¹⁵ Copyright (Visually Impaired Persons) Act 2002 ch. 33.

²¹⁶ The Copyright and Rights in Performances (Disability) Regulations 2014, available at http://www.legislation.gov.uk/ukdsi/2014/9780111112694/pdfs/ukdsi_9780111112694_en.pdf, accessed April 2014.

5.1.2 Amendments by the Copyright (Visually Impaired Persons) Act 2002

In 2002, the UK's Copyright Act was amended to meet the needs of VIPs. These amendments allow individuals and charities to make books available in accessible formats for VIPs. Where a book was not available in an accessible format, it could be provided to VIPs without infringing copyright. These amendments allow for an individual to make an accessible format copy for personal use, and for a third person to make a copy for the benefit of the visually impaired individual. These amendments were a good starting point but did not fully comply with the provisions of the Marrakesh Treaty. To align the law with the Marrakesh Treaty, all of these amendments will need to be substituted or severely adjusted. This was done in 2014 by introducing amendments to the CDPA.

5.1.3 Amendments by the Copyright and Right in Performances (Disability) Regulations 2014

The Copyright and Rights in Performances (Disability) Regulations is one of the five instruments that amend the CDPA. "These instruments update the framework of exceptions to copyright and rights in performances, expanding the freedoms in copyright law that allow third parties to use copyright works (such as text, film or music) for a variety of economically and socially valuable purposes, without permission of the copyright owner."²¹⁷ Notable is that these regulations apply to disabled persons, where as in the past these exceptions only applied to VIPs. The regulations extend the scope of the already existing copyright exceptions for the visually impaired.²¹⁸ As a result, it is possible to make an accessible copy for the benefit of VIPs. Individuals are allowed to make a copy for personal use, and certain institutions are allowed to make accessible format copies and distribute them. These regulations go further than required by the Marrakesh Treaty by inter alia providing exceptions for the making of accessible copies of broadcasts.

²¹⁷ Intellectual Property Office, Explanatory Memorandum to The Copyright and Right in Performances (Personal Copies for private Use) Regulations 2014, The Copyright and Right in Performances (Research, Education, Libraries and Archives) Regulations 2014, The Copyright and Right in Performances (Quotation and Parody) Regulations 2014, The Copyright and Right in Performances (disability) Regulations 2014 and The Copyright (Public Administration) Regulations 2014, 1, available at http://www.legislation.gov.uk/ukdsi/2014/9780111112694/pdfs/ukdsiem_9780111112694_en.pdf, accessed July 2014.

²¹⁸ See *supra* '5.1.2 Amendments by the Copyright (Visually Impaired Persons) Act 2002'

It is important to note that, at the present, these exceptions only apply when accessible format copies are not commercially available. This stance is in line with Article 4(4) of the Marrakesh Treaty, which allows to confine copyright limitations and exceptions to works that cannot be obtained commercially under reasonable terms. The UK's Intellectual Property Office (IPO) points out: "This ensures that copyright owners retain the right to provide copies in accessible formats, and have an incentive to do so."²¹⁹

To assist Parliament, the IPO has also provided an illustrative draft of the Copyright, Designs and Patents Act 1988.²²⁰ "This draft incorporates the proposed legislative changes, but is not a formal consolidation of the Act, and as such has no legal authority."²²¹ Yet, the draft can provide a useful base to assist for the drafting of the final legislation in the UK and South Africa. Furthermore, this draft will be used as a basis for the proposal put forward by this dissertation.

5.2 Analysing the ways of implementation in South African law

5.2.1 Reproduction

South African Copyright law allows, under fair dealing and other copyright limitations and exceptions, for the reproduction of copyrighted works without the consent of the copyright holder. As discussed, fair dealing only allows for this action under certain circumstances such as research, private study and criticism, review and reporting of current events. Making a copy for the use of VIPs will thus only constitute fair dealing if it falls under one of the permitted uses. The use for VIPs, per se, is not mentioned and therefore does not constitute fair dealing as such.

One option to implement the Marrakesh Treaty would be to introduce a general clause approach, like the US fair use doctrine, into South African law. This would allow the making of copies for VIPs without being qualified as an illegal act.

²¹⁹ Intellectual Property Office (IPO) op cit (n217) 8 at 7.14.5.

²²⁰ Intellectual Property Office (IPO), Copyright, Designs and Patents Act 1988 As amended by the legislation indicated overleaf, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308729/cdpa1988-unofficial.pdf, accessed July 2014.

²²¹ Intellectual Property Office and Viscount Younger of Leckie, Changes to copyright law, available at <https://www.gov.uk/government/news/changes-to-copyright-law>, accessed July 2014.

As the law currently stands, a less radical option would be to amend the Copyright Act with separate provisions for VIPs that would allow for the reproduction, adaptation and distribution for the benefit of VIPs.

5.2.2 Adaptation

Section 12(9) of the Copyright Act states that the provisions of section 12 (1) - (7) also apply to adaptations of a work. These adaptations are also only allowed for the justified purposes, such as research and private study, found in the provisions. VIPs are therefore extremely limited as far as making of adaptations is concerned because it has to be for one of the permitted purposes. The making of an adaptation for the benefit of VIPs per se is not mentioned, as a result, separate provisions specially relating to making adaptations for the benefit of VIPs are desired.

5.2.3 Distribution

Where the Copyright Act barely covers the reproduction and adaptation of copyright works for the benefit of VIPs, it does not at all allow for the distribution of the former. The exceptions in the Copyright Act, more specifically the fair dealing provisions, are drafted so restrictively that distribution of any copyrighted works will almost always constitute a copyright infringement. An amendment is therefore necessary that would allow for the distribution of accessible format copies by authorized entities.

5.2.4 Cross-border exchange

Section 23(2) of the Copyright Act, which prohibits parallel importation, creates a significant barrier for cross-border exchange of works made accessible for VIPs. This provision is therefore detrimental to the availability of accessible format copies. Accessible format copies of copyrighted works from third countries cannot legally be imported in South Africa without the right holder's consent. The exception of private and domestic use is too strict to provide an adequate level of accessibility. Authorized entities, who do not fall under this exception, need to be able to import large amounts of accessible format copies for the benefit of VIPs.

An exception is therefore needed that allows for the parallel importation of accessible format copies.

5.2.5 Technological Protection Measures

The Marrakesh Treaty allows requires that Contracting Parties ensure that these measures are appropriate and necessary as to not ‘prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.’²²²

South Africa has, with ECTA, very restrictive provisions in place regarding the circumvention of TPMs.²²³ In its current form, therefore, the ECT Act may not allow beneficiary persons to enjoy the limitations and exceptions provided in the Marrakesh Treaty.²²⁴ To be able to ratify the Marrakesh Treaty, at the very minimum, amendments to ECT Act are necessary in the form of an express exception for VIPs.

5.3 Practical implementation of the Marrakesh Treaty

The legal implementation of the Marrakesh Treaty will only be the beginning. It is then up to South Africa and the other countries to put this Treaty into practise. This will, among other things, require the actual making accessible format copies and their distribution nationally and internationally. According to some, however, developing countries lack the capacity to fully take advantage of the Marrakesh Treaty.²²⁵

To help developing countries with implementing the Treaty in practise, the Accessible Book Consortium (ABC) was established. The ABC has three main objectives. The first is to create an international book exchange, the TIGAR service. TIGAR is hosted at WIPO and makes it easier for the participating institutions to search internationally for, and exchange accessible formats of books. At present, the service contains over 238,000 titles in 55 languages.²²⁶ The service is free of charge for as well the participating institution as well as the end-user.²²⁷ The South African Library for the Blind is one of the participating institutions.

Second, the ABC aims at capacity building. It provides training and assistance for organisations that serve people with print disabilities to produce and distribute

²²² Marrakesh Treaty op cit (n105) art. 7.

²²³ See *supra* ‘4.2.3 The Electronic Communications and Transactions (ECT) Act (2002)’.

²²⁴ Ibid.

²²⁵ See C Saez ‘Developing Countries Lack Capacity To Take Advantage Of Marrakesh Treaty’, Intellectual Property Watch, available at <http://www.ip-watch.org/2013/12/18/developing-countries-lack-capacity-to-take-advantage-of-marrakesh-treaty/>, accessed July 2014.

²²⁶ See <http://www.accessiblebooksconsortium.org/tigar/en/>, accessed July 2014.

²²⁷ Ibid.

educational materials in accessible formats in national languages.²²⁸ Furthermore, it trains these organisations how to use the TIGAR service to obtain books in accessible formats that are available internationally.²²⁹ The ABC also organises training workshops, helps with the establishment of local libraries, and builds links amongst different agencies and organisations.²³⁰

Lastly, the ABC promotes inclusive publishing. This process aims “to promote publishing processes through which publishers deliver "born accessible" publications that are fully accessible to all readers, including people with print disabilities.”²³¹

5.4 Proposal for implementing the Marrakesh Treaty

This section will propose amendments to South African law to make it in compliance with the Marrakesh Treaty. The amendments to the Copyright Act are based on the findings in the previous chapters, the UK’s Copyright and Rights in Performances (Disability) Regulations,²³² and a ‘model statute for implementation of the Marrakesh Treaty.’²³³ The amendments to the ECT Act are based on findings in the previous chapters and the US’ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.²³⁴

The language used in the proposal in general overlaps with the language used in the UK’s Regulation. The former was adapted using the model statute to create a more coherent whole that fits into the South African Copyright Act. Furthermore, to meet the needs of VIPs living in South Africa, some additional requirements found in the UK’s Regulation, such as that accessible formats can only be made and distributed when they are not commercially available, are left out of this proposal.

South African legislation could be amended as follows:

²²⁸ See http://www.accessiblebooksconsortium.org/capacity_building/en/, accessed July 2014.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ See http://www.accessiblebooksconsortium.org/inclusive_publishing/en/, accessed July 2014.

²³² The Copyright and Rights in Performances (Disability) Regulations 2014, available at http://www.legislation.gov.uk/ukdsi/2014/9780111112694/pdfs/ukdsi_9780111112694_en.pdf, accessed April 2014.

²³³ J Band and P Jaszi ‘Model Statute for Implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled’, available at <http://infojustice.org/wp-content/uploads/2013/09/MODEL-STATUTE-FOR-MARRAKESH-IMPLEMENTATION.pdf>, accessed July 2014.

²³⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260–65,262 (Oct. 26, 2012).

ACT

To amend the Copyright Act No. 98, 1978 and the Electronic Communications and Transactions Act, 2002, so as to insert definitions and provisions relating to copyright exceptions for blind, visually impaired, and otherwise print disabled persons in accordance with the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.

1. Definitions

(1) In section 1 of the Copyright Act No. 98 of 1978, before “adaptation” insert –

“Accessible format copy” means a copy of a work in an alternative manner or form which gives a visually impaired person access to the work. An accessible copy—

- (a) may include facilities for navigating around the version of the work, but
- (b) must not include any changes to the work which are not necessary to overcome the problems suffered by the person with a visual impairment or other print disability for whom the accessible format copy is intended.

(2) In section 1 of the Copyright Act No. 98 of 1978, after “author” insert –

“Authorised entity” means—

- (a) an entity that is authorized or recognized by the government, or receives financial support from the government, to provide education, instructional training, adaptive reading or information access to the visually impaired persons on a non-profit basis; or
- (b) a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

“Visually impaired person” means a person who:

- (a) is blind;
- (b) has a visual impairment or a perceptual reading disability which cannot be improved to give visual function substantially equivalent to that of a persons who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a persons without an impairment or disability. ; or
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; but

- (d) does not include a person who suffers from an impairment of visual functions which can be improved by the use of corrective lenses, to a level that is normally acceptable for reading without a special kind of light;

regardless of any other disabilities.

- (3) In section 1 of the Copyright Act No. 98 of 1978, after “sound recording” insert –

“Supply” of a copy includes making it available for use, otherwise than for direct or indirect economic or commercial advantage, on terms that it will or may be returned.

“Works” means literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media, including such works in audio form.

2. Amendments to the Copyright Act

In the Copyright Act No. 98 of 1978, after section 12 insert –

12A Making and importing of accessible format copies by individuals

- (1) This section applies if a visually impaired person, or someone acting on his or her behalf, has lawful possession or lawful use of a copy of the whole or part of a work.
- (2) The making of an accessible copy of the copy of the work referred to in subsection (1) does not infringe copyright if—
 - (a) the copy is made by the visually impaired person or by a person acting on his or her behalf,
 - (b) the copy is made for the visually impaired person’s personal use, and
- (3) If a person makes an accessible copy under this section on behalf of a beneficiary person and charges the disabled person for it, the sum charged must not exceed the cost of making and supplying the copy.
- (4) The importation of an accessible copy of the copy of the work referred to in subsection (1) does not infringe copyright if—
 - (a) the copy is imported by the visually impaired person or by a person acting on his or her behalf,
 - (b) the copy is imported for the visually impaired person’s personal use, and
 - (c) the same kind of accessible copies of the work are not commercially available on reasonable terms by or with the authority of the copyright owner.

- (5) Copyright is infringed by the transfer of an accessible copy of a work made under this section to any person other than—
- (a) a person by or for whom an accessible copy of the work may be made under this section, or
 - (b) a person who intends to transfer the copy to a person falling within paragraph (a), except where the transfer is authorised by the copyright owner.
- (6) An accessible copy of a work made under this section is to be treated for all purposes as an infringing copy if it is held by a person at a time when the person does not fall within subsection (4)(a) or (b).
- (7) If an accessible copy made under this section is subsequently dealt with—
- (a) it is to be treated as an infringing copy for the purposes of that dealing, and
 - (b) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.
- (8) In this section “dealt with” means sold or let for hire or offered or exposed for sale or hire.

12B Making and distribution of accessible format copies by authorised entities

- (1) If an authorised entity has lawful possession of a copy of the whole or part of a published work, the entity may, without infringing copyright, make an accessible format copy of the work, obtain from another authorized entity an accessible format copy, and supply those accessible format copies of the work to visually impaired persons by any means.
- (2) An authorised entity which is an educational establishment conducted for profit must ensure that any accessible copies which it makes under this section are used only for its educational purposes.
- (3) An accessible format copy made under this section must be accompanied by—
- (a) a statement that it is made under this section, and
 - (b) a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).
- (4) If an accessible copy is made under this section of a work which is in copy-protected electronic form, the accessible copy must, so far as is reasonably practicable, incorporate the same or equally effective copy protection (unless the copyright owner agrees otherwise).
- (5) An authorised body which has made an accessible copy of a work under this section may supply it to another authorised body which is entitled to make accessible copies of the work under this section for the purposes of enabling that other body to make accessible copies of the work.

- (6) If an authorised body supplies an accessible copy it has made under this section to a person or authorised body as permitted by this section and charges the person or body for it, the sum charged must not exceed the cost of making and supplying the copy.
- (7) If an accessible copy made under this section is subsequently dealt with—
 - (a) it is to be treated as an infringing copy for the purposes of that dealing, and
 - (b) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.
- (8) In this section “dealt with” means sold or let for hire or offered or exposed for sale or hire.

12BA Making and distribution of intermediate copies by authorised bodies

- (1) An authorised body which is entitled to make an accessible copy of a work under section 12B may, without infringing copyright, make a copy of the work (“an intermediate copy”) if this is necessary in order to make the accessible copy.
- (2) An authorised body which has made an intermediate copy of a work under this section may supply it to another authorised body which is entitled to make accessible copies of the work under section 12B for the purposes of enabling that other body to make accessible copies of the work.
- (3) Copyright is infringed by the transfer of an intermediate copy made under this section to a person other than another authorised body as permitted by subsection (2), except where the transfer is authorised by the copyright owner.
- (4) If an authorised body supplies an intermediate copy to an authorised body under subsection (2) and charges the body for it, the sum charged must not exceed the cost of making and supplying the copy.

12BB Cross-border exchange of accessible format copies by authorized entities

- (1) An authorised body which is entitled to make an accessible copy of a work under section 12B may, without infringing copyright, import, distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity or to the visually impaired persons themselves in another country.
- (2) Subsection (1) does not apply when the originating authorized entity, prior to the distribution of making available, did know or had reasonable grounds to know that the accessible format copy would be used for other than visually impaired persons.

12BC Accessible and intermediate copies: records and notification

- (1) An authorised body must keep a record of—
 - (a) accessible copies it makes under section 12B,
 - (b) intermediate copies it makes under section 12BA, and
 - (c) the persons to whom such copies are supplied.

- (2) An authorised body must allow the copyright owner or a person acting for the copyright owner, on giving reasonable notice, to inspect at any reasonable time—
 - (a) records kept under subsection (1), and
 - (b) records of copies made under sections 12BA and 12BB.

- (3) Within a reasonable time of making an accessible copy under section 12B, an authorized body must—
 - (a) notify any body which—
 - (i) represents particular copyright owners or owners of copyright in the type of work concerned, and
 - (ii) has given notice to the Secretary of State of the copyright owners, or the classes of copyright owner, represented by it; or

 - (b) if there is no such body, notify the copyright owner (unless it is not reasonably possible to ascertain the name and address of the copyright owner).

3. Amendments to the Electronic Communications and Transaction Act

In section 86 of the Electronic Communications and Transactions Act 2002, insert -

- (6) The circumvention of effective technological protection measures by authorized entities, visually impaired persons, or someone acting on his or her behalf, is permitted exclusively for the purpose of enjoying the exceptions provided in Section 12 of the Copyright Act no. 98 of 1978.

CHAPTER VI: CONCLUSION AND RECOMMENDATIONS

Due to the 'Book Famine', visually impaired persons are experiencing difficulties to gain access to copyrighted works and the need to accessible format copies of copyrighted works remains, high. To meet these needs, ratification of the Marrakesh Treaty is recommended.

South Africa did, because it is reviewing its national copyright law, not yet sign and ratify the Marrakesh Treaty. This dissertation analysed the possible legal and policy barriers for the ratification of the Treaty. This dissertation concludes that there are no insurmountable legal or policy barriers that should keep South Africa from signing and later ratifying the Treaty. Yet, practical problems might arise, for example to keep records of all visually impaired persons, and actually create accessible format copies. The Accessible Books Consortium might help to solve some of these problems and implement the Marrakesh Treaty on a practical level.

Current South African copyright law is, however not yet sufficient to facilitate the needs of VIPs and comply with the obligations under the Marrakesh Treaty. Amendments to the Copyright Act and the ECT Act are necessary. This dissertation provides a proposal for amending the aforementioned Acts and thereby complying with the Marrakesh Treaty.

At present South Africa is formulating its national policy approval towards intellectual property law. Hopefully, the South African government seizes the opportunity and amends its national copyright law to the lives of hundred thousands of VIPs in the country.

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