

COPYRIGHT PROTECTIONS AND DISABILITY RIGHTS: TURNING THE PAGE TO A NEW INTERNATIONAL PARADIGM

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I INTRODUCTION: THE BOOK FAMINE

This article argues that governments around the world need to take immediate coordinated action to reverse the ‘book famine’.¹ There are over 129 million² book titles in the world, but persons with print disabilities can obtain less than 7 per cent of these titles in formats that they can read.³ The situation is most acute in developing countries, where less than 1 per cent of books are accessible.⁴ Two recent international developments – the United Nations *Convention on the Rights of Persons with Disabilities*⁵ and the new *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or*

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1 The term ‘book famine’ is widely used. Eg, Australian Human Rights Commission, *Australia Can Help End World Book Famine* (28 June 2012) <<https://www.humanrights.gov.au/news/stories/australia-can-help-end-world-book-famine>>.

2 This figure was reported by a Google engineer as part of the Google Books project: see Leonid Taycher, ‘Books of the World, Stand Up and Be Counted! All 129,864,880 of You’ on Google, *Google Books Search* (5 August 2010) <<http://booksearch.blogspot.com.au/2010/08/books-of-world-stand-up-and-be-counted.html>>.

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

4 Maryanne Diamond, WIPO Opening Remarks by Maryanne Diamond (18 June 2013) <<http://www.worldblindunion.org/English/news/Pages/WIPO-Opening-Remarks-by-Maryanne-Diamond.aspx>>; Diamond is the President of the World Blind Union.

5 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 46 ILM 443 (entered into force 3 May 2008) (‘CRPD’); this was ratified by Australia 17 July 2008 and entered into force 16 August 2008.

*Otherwise Print Disabled*⁶ (somewhat ironically nicknamed the ‘VIP Treaty’) – suggest that nation states are increasingly willing to take action to reverse the book famine. The *Marrakesh Treaty* promises to level out some of the disparity of access between people in developed and developing nations and remove the need for each jurisdiction to digitise a separate copy of each book. This is a remarkable advance, and suggests the beginnings of a possible paradigm shift in global copyright politics. Now that the *Marrakesh Treaty* has been concluded, however, we argue that a substantial exercise of global political will is required to (a) invest the funds required to digitise existing books; and (b) avert any further harm by ensuring that books published in the future are made accessible upon their release.

Part II of this article introduces the book famine and the exceptions-based copyright framework that perpetuates it. Massive advances in digitisation technologies, digital distribution networks, and adaptive reading technologies provide a clear indication that disparities of access can be greatly reduced. We argue that in the face of technological advances, the reason this famine persists into the 21st century is due to a regulatory paradigm that views disability rights through the lens of tolerance. Through this paradigm, disability rights have been seen as a limited exception to the rights and interests of copyright owners. In deference to the fears of copyright owners, nation states have been reluctant to take affirmative steps to systematically address the book famine. The approach that has instead been taken by most western nations relies on a set of limited exceptions to copyright which enable the ad hoc digitisation and distribution of books – this is a costly and inefficient process.

In Part III, we argue that the adoption of the *CRPD* and *Marrakesh Treaty* represents an important change in how lawmakers balance the demands of copyright owners against the interests of people with disabilities in particular, and a potential point of inflection in global copyright politics more generally. First, we introduce the *CRPD*, which has swept in a new disability politics that focuses on a social model of disability that views differences of access as predominantly social constructs. Through this paradigm, the perpetuation of the book famine is an active choice to refuse to provide accessible versions of books, particularly where the technology exists to do so at relatively little cost. The recent adoption of the *CRPD* signals an express desire by United Nations (‘UN’) member states to ‘take all appropriate measures’ to resolve the book famine and guarantee the human rights of people with disabilities to access cultural works⁷ and educational material.⁸ This new disability politics requires positive action by

6 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, opened for signature 28 June 2013, VIP/DC/8 (not yet in force) (‘*Marrakesh Treaty*’).

7 *CRPD*, above n 5, art 30(3).

8 *CRPD*, above n 5, art 24.

member states,⁹ which in turn requires a paradigm shift in global copyright politics.

In the second section of Part III, we show how the *Marrakesh Treaty* has grown out of this new disability politics. The World Blind Union and other Non Government Organisations (‘NGOs’) successfully argued that a World Intellectual Property Organization (‘WIPO’) treaty should be adopted that would require developing nations to introduce exceptions already in place in western countries, rather than merely permitting them to do so. The treaty also reduces some inefficiencies associated with the current system by enabling the cross-border flow of accessible books, eliminating the need for organisations within each jurisdiction to digitise a separate copy of each book. The treaty was strongly opposed by the predominantly United States-based copyright industries which, in the digital age, have benefited from the steadily increasing strength and breadth of international copyright laws. Lobbyists for these industries have expressed great fear that a shift away from a limited exceptions-based approach might lead to an erosion of their rights in other domains. In contradistinction to expansionary and absolutist trends in global copyright law, the adoption of the *Marrakesh Treaty* sends a strong message that the rights of persons with disabilities should be positively protected. Only time will tell whether this will, in fact, represent a critical moment of inflection for user-rights and the public interest in global copyright politics in general, or whether it will develop only an isolated exception to address the clear needs of people with print disabilities.

In Part IV, we examine the practical impact of the *Marrakesh Treaty*, and conclude that while they are significant, the new provisions in the treaty will not be sufficient to resolve the book famine. The *Marrakesh Treaty* might bring levels of access in developing nations, currently around 1 per cent, closer to the 7 per cent level that exists in some developed nations. Importantly, however, the treaty also sets the framework for reducing the disparity of access between people with print disabilities in developing nations and those in developed countries in the future. The important next step is making the remaining 93 per cent of books accessible. The *CRPD* imposes a positive obligation on nation states to fully exercise the flexibility available in international copyright law to actively address the book famine. The time has now come for a major investment in digitisation and regulations that will ensure that all books published in the future are made immediately accessible.

II THE LIMITED EXCEPTIONS-BASED APPROACH AND THE TOLERANCE REGULATORY PARADIGM

The digital age brings great promise for making the world’s knowledge and cultural works available to people with print disabilities. Previously, persons with

9 Paul Harpur, ‘Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change’ (2011) 45 *Valparaiso University Law Review* 1271.

disabilities accessed books through braille and books that had been read aloud (largely by volunteers) onto audio cassette tapes.¹⁰ This process was slow, bulky and extremely expensive. Technological advances over the last few decades have altered what is possible. Digital distribution now enables people with print disabilities to access books electronically through a variety of assistive technologies – including screen readers, large-font displays, and refreshable braille.¹¹

Unfortunately, persons with print disabilities have not yet been able to take full advantage of these technological advances, and the number and range of books that are accessible in electronic form remains low. Lack of access to textbooks and other educational works greatly hinders the education of people with print disabilities in primary, secondary¹² and tertiary levels.¹³ The situation is dire in western countries and much worse for the 90 per cent of visually-impaired people who live in developing countries.¹⁴

The inability of people with print disabilities to access the world's resources of written knowledge and culture has great flow-on effects in hindering their full participation in society. The further impact of this lack of access on the ability of people more generally to learn, to work, to express themselves, to read for leisure and enjoyment, and to make a contribution in each of these fields is immeasurable. As Abigail Rekas explains,

[t]he ability to access the written word is essential to the realization of many human rights. It provides the foundation to the right to political involvement, freedom of expression, the right to education and the right to access culture and take advantage of scientific progress.¹⁵

A commitment to equality for people with disabilities requires nations to work to eradicate the book famine.¹⁶ The end goal in equalising access must be to create accessible digital repositories, from which books in different formats – including physical large print and braille – can be extracted as required. Digital repositories have massive advantages in terms of distribution that physical accessible versions simply cannot match, and electronic means of accessing

10 See, eg, Learning Ally <<http://www.learningally.org>>; Royal National Institute of Blind People <<http://www.rnib.org.uk>>; Vision Australia <<http://www.visionaustralia.org.au>>.

11 For more details on assistive technologies, see *Assistive Technology* (14 October 2013) Wikipedia <http://en.wikipedia.org/wiki/Assistive_technology>.

12 Royal National Institute of the Blind, *Where's My Book? Tackling the Textbook Deficit Faced by School Pupils with Sight Loss* (November 2006) <http://www.rnib.org.uk/getinvolved/campaign/accesstoinformation/Documents/r2r_wheresmybookpdf.pdf>.

13 Paul Harpur and Rebecca Loudoun, 'The Barrier of the Written Word: Analysing Universities' Policies to Students with Print Disabilities' (2011) 33 *Journal of Higher Education Policy and Management* 153.

14 World Health Organisation, *Visual Impairment and Blindness* (October 2013) <<http://www.who.int/mediacentre/factsheets/fs282/en/>>.

15 Abigail P Rekas, 'Access to Books: Human Rights, Copyright and Accessibility' in Constantine Stephanidis and Margherita Antona (eds), *Universal Access in Human-Computer Interaction: Applications and Services for Quality of Life* (Springer-Verlag Berlin Heidelberg, 2013) 383.

16 Diamond, above n 4.

books are quickly becoming the preferred methods for many people with disabilities.¹⁷

The major accessibility barriers today are two-fold: it remains costly to digitise existing print books, and new electronic books ('ebooks') are often released in formats that exclude people with disabilities.¹⁸ Technological advances have decreased the costs of digitising print books, but the process remains expensive.¹⁹ Public funds have not been made available to digitise books on a large scale, and the one private attempt to do so by Google has stalled in the face of copyright infringement suits brought by rights-holders and their representatives.²⁰ Mobilising the resources to scan the massive collections of print works that have not yet been digitised is the first challenge in addressing the book famine.

The second challenge is ensuring that books that are published in the future are made accessible. Current regulatory policies enable digitisation but do not impose requirements that publishers make ebooks accessible.²¹ Most contemporary books are now produced electronically as part of normal publishing workflows. Many publishers are selling access to ebooks through digital distribution channels, but these are subject to encryption that restricts access to authorised devices. The encryption schemes of these platforms often prevent people with print disabilities from using adaptive technologies (including screen readers) to access the underlying text.²² While it remains difficult for ebooks with complicated graphics to be rendered accessible, manuscripts that are text-based (such as novels, monographs, and many textbooks) can be rendered accessible at the click of a button.²³ While some mass-market platforms, like Apple's iBooks, include accessible functionality, many still do not, although

17 For a discussion of how adaptive technologies are opening the book, see Harpur and Loudoun, above n 13, 153.

18 Bradley Guy Whitehouse, *Access to Books for the Visually Impaired: Minimising Charity and Maximising Choice* (PhD Thesis, Loughborough University, 2011) 48–9 (discussing accessibility of e-books platforms in academia).

19 See Pamela Samuelson, 'Google Book Search and the Future of Books in Cyberspace' (2010) 94 *Minnesota Law Review* 1308, 1311–12 (reporting an estimated cost for high quality scanning at \$30 per book).

20 *The Authors Guild Inc v Google Inc*, 05 CIV 8136 (SDNY DC, 2011); for a discussion of the history of the failed settlement and the difficulty of attempting such an undertaking in Australia, see Kylie Pappalardo, 'Google Book Search Settlement: Implications for Australia' (2010) (unpublished) <<http://eprints.qut.edu.au/31879/>>.

21 See *Copyright Act 1968* (Cth) pt VB, s 200AB ('*Copyright Act*'); see also Nicolas Suzor, Paul Harpur and Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 *Media and Arts Law Review* 1.

22 National Federation of the Blind, *National Federation of the Blind and American Council of the Blind File Discrimination Suit Against Arizona State University* (25 June 2009) <<https://nfb.org/node/1129>>.

23 For a discussion of how textbooks can be rendered accessible on a large scale, see the US National Instructional Materials Access Center (NIMAC). The NIMAC holds accessible copies of all publications used in US K-12 education: National Instructional Materials Access Center, *Frequently Asked Questions* (16 October 2013) <http://www.nimac.us/faq_general.html>.

most publishers appear to be working to improve accessibility.²⁴ An exception currently exists in Australian law that permits circumvention of encryption for the assistance of people with print disabilities,²⁵ but this has not been widely used to enable greater access.²⁶ Because ebooks are not uniformly made accessible, the current system relies on volunteer groups, non-profit organisations, and educational institutions to wastefully invest resources to digitise books from print works when those books already have a digital form.

A The Current Model of Limited Exceptions is Inefficient and Ineffective

Current approaches to providing accessible books have not been effective at addressing the book famine at any acceptable scale. Publishers currently allow disability groups to make a limited number of books available on a voluntary basis. Bookshare, for example, works with Vision Australia and Guide Dogs Western Australia to provide access for up to 14 000 books that publishers have permitted to make available to blind Australians.²⁷ A small number of other books may be available directly from publishers when requested. For the bulk of books, however, people with print disabilities have to rely on exceptions that allow the creation of accessible books without the copyright owners' permission. Most western countries have some form of an exception that enables the digitisation and copying of copyright works for the benefit of people with print disabilities.²⁸ Australia's statutory scheme, contained in part VB of the *Copyright Act*, allows designated organisations to digitise printed works and copy electronic works in order to distribute them to persons with disabilities in accessible formats.²⁹ The scheme is set up as a compulsory licence and provides for

24 U S Department of Education, *Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities* (4 October 2013) <<http://www2.ed.gov/about/bdscomm/list/aim/publications.html>>.

25 *Copyright Act* s 116AN(9); *Copyright Regulations 1969* (Cth) r 20Z, sch 10A.

26 Anecdotally, one of the limitations with the circumvention exception appears to be that operators of institutional accessibilities may be either contractually prohibited or reluctant to disturb commercial relationships with publishers by exercising their legal abilities to circumvent technological protection measures for the benefit of people with print disabilities.

27 See Association for the Blind of Western Australia, *Bookshare Australia* <<http://www.guidedogswa.org/bookshare/>>; Vision Australia, *Bookshare* <<http://www.visionaustralia.org/living-with-low-vision/library/technology/bookshare>>.

28 Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, 15th sess, WIPO Standing Committee on Copyright and Related Rights, SCCR/15/7 (20 February 2007); see also WIPO Standing Committee on Copyright and Related Rights, *Analytical Document on Limitations and Exceptions*, 19th sess, SCCR/19/3 (7 September 2009); Maria Daphne Papadopoulou, 'Copyright Exceptions and Limitations for Persons with Print Disabilities: The Innovative Greek Legal Framework Against the Background of the International and European Developments' (14 September 2010) (unpublished) <<http://papers.ssrn.com/abstract=1874620>>.

29 *Copyright Act* s 135ZP; see also Suzor, Harpur and Thampapillai, above n 21.

equitable remuneration to be paid for each copy made, although no fee is currently charged.³⁰

In their normal operation, schemes like the part VB statutory licence predominantly enable institutions – particularly educational institutions – to make copies for specific persons as requested. This approach has not been successful at taking advantage of the opportunities presented by technological advances to reduce the book famine. Interestingly, the part VB statutory licence would likely permit an institution or NGO to undertake a massive digitisation project, if it had the funds and the will to do so.³¹ To date, however, digitisation has only proceeded on a limited, ad hoc basis. The statutory licence accordingly does not positively enable people with disabilities to access the world's recorded knowledge and cultural works. Charities, such as Vision Australia, provide access to a small number of cultural works for which they have made accessible versions.³² Students can gain access to some additional materials through educational institutions, but the system struggles to meet the demand to convert printed works into accessible formats.³³ Harpur and Loudoun found that Australian universities generally provide students with print disabilities their prescribed readings late and provide even less support to access recommended readings or research materials.³⁴ Persons with disabilities who seek access to copyright-protected works for work, leisure, political or general knowledge often confront substantial problems in obtaining access.³⁵ Under the current system, the high transaction costs of obtaining books acts to exclude people with disabilities from being able to read the bulk of published works.³⁶ Taken as a whole, ad hoc digitisation is failing to provide persons with print disabilities meaningful access to the written word.

The current set of statutory schemes are used as limited exceptions to the general monopoly of copyright owners. This exceptions-based approach aligns with the dominant approach of international copyright law that has governed the balance between the interests of copyright owners and social interests in accessing knowledge and cultural goods. International copyright law, set out in

30 See Copyright Agency Limited, *Statutory Licence for Institutions Assisting People with a Print Disability* (May 2013) <<http://www.copyright.com.au/assets/documents/licences/disabilities/statutory-licence-for-institutions-assisting-people-with-a-print-disability>>.

31 See Suzor, Harpur and Thampapillai, above n 21, 4–7.

32 See, eg, Vision Australia, *Books and Resources* <<http://www.visionaustralia.org/living-with-low-vision/library/books-and-resources>>.

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

34 Harpur and Loudoun, above n 13.

35 See, eg, Blind Citizens Australia, Submission No 157 to Australian Law Reform Commission, *Inquiry into Copyright and the Digital Economy*, November 2012, highlighting the challenges that blind people face under the current regime.

36 Guy Whitehouse, James Dearnley and Ian Murray, 'Still "Destined to be Under-Read"? Access to Books for Visually Impaired Students in UK Higher Education' (2009) 25 *Publishing Research Quarterly* 170, 176.

the *Berne Convention*³⁷ and extended and reinforced by *TRIPS*³⁸ and ‘TRIPS-Plus’ instruments,³⁹ sets minimum standards of broad exclusive rights for copyright owners; limits and exceptions to these broad rights are highly restrained.⁴⁰ The *Berne* three-step test, now entrenched in a multitude of overlapping international agreements,⁴¹ permits exceptions only ‘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.’⁴² This framework, by permitting only limited and narrowly tailored exceptions to copyright, subjugates any social measures designed to enhance access rights to the interests of copyright holders.⁴³ This paradigm is reinforced by a sense of crisis in copyright created by the spectre of cheap copying and new communication technologies.⁴⁴ This perceived crisis has resulted in a one-way ratcheting of copyright law towards greater protection⁴⁵ and has, to date, foreclosed more ambitious action by governments worldwide to address the book famine.

The part VB statutory licence dates back to 1989, when large scale repositories were not practically feasible,⁴⁶ and has only been updated with minor amendments for the new digital context.⁴⁷ In the most recent revisions of Australian copyright law in 2006, the Australian Government took a timid legislative approach to addressing the issue of inequality of access of people with print disabilities. In section 200AB, Australia introduced a ‘flexible dealing’ provision that would ostensibly enable greater access to people with print

37 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, [1978] ATS 5 (entered into force 5 December 1887) (*‘Berne Convention’*).

38 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, 33 ILM 81 (entered into force 1 January 1995) (*‘TRIPS’*).

39 See, eg, *Australia United State Free Trade Agreement*, opened for signature 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005); *Anti-Counterfeiting Trade Agreement*, opened for signature 1 May 2011 (not yet in force).

40 See Henning Grosse Ruse-Khan, ‘Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection’ (2009) 1 *Trade, Law and Development* 56.

41 For an excellent discussion of the overlapping and interlocking international IP regime, see Kimberlee Weatherall, ‘ACTA as a New Kind of International IP Lawmaking’ (2010) 26 *American University International Law Review* 839.

42 *Berne Convention* art 9(2).

43 See Grosse Ruse-Khan, above n 40 (discussing limits to the strength of copyright law, including in mandatory exceptions for the benefit of people with print disabilities).

44 See Julie E Cohen, ‘Pervasively Distributed Copyright Enforcement’ (2006) 95 *Georgetown Law Journal* 1.

45 Jessica Litman, *Digital Copyright* (Prometheus Books, 2006) 80; see also Diane Leenheer Zimmerman, ‘Adrift in the Digital Millennium Copyright Act: The Sequel’ (2001) 26 *University of Dayton Law Review* 279, 289–90; Rochell Cooper Dreyfuss, ‘TRIPS-Round II: Should Users Strike Back?’ (2004) 71 *University of Chicago Law Review* 21, 22; Raymond Shih Ray Ku, Jiayang Sun and Yiyang Fan, ‘Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty’ (2009) 62 *Vanderbilt Law Review* 1669, 1681.

46 Part VB was introduced into the *Copyright Act* by the *Copyright Amendment Act 1989* (No 32) (Cth) s 15.

47 See, eg, *Copyright Amendment (Digital Agenda) Act 2000* (Cth) ss 152–65, updating the print disability statutory licence to operate similarly with the new electronic ‘communication’ rights of copyright holders.

disabilities, amongst other things.⁴⁸ Unfortunately, the scheme has been an almost total failure. The exception is structured in such a way that it excludes copying that could be covered by the existing part VB statutory licence,⁴⁹ which forces existing institutions or NGOs to use the old scheme. The exception is limited only to uses that are ‘not made partly for the purpose of obtaining a commercial advantage or profit’, which limits the potential for any new commercial delivery models to emerge.⁵⁰ The exception is structured to enable ad hoc uses that make it easier for people to access copyright material, but it is complex and highly uncertain.⁵¹ Most problematically, for each use, people with a disability or those who assist them need to show both that the particular use ‘does not conflict with a normal exploitation’⁵² of the copyright material, and that ‘the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.’⁵³ Rather than declaring that certain forms of copying on behalf of people with disabilities are permissible under the *Berne Convention*, the legislation directly embeds the *Berne* three-step test in domestic law. By taking a test designed to guide and constrain the liberty of nations to determine domestic laws and using it to directly guide and constrain the actual operation of copyright law in practice, this essentially abdicates Australia’s ability and responsibility to determine which uses are within the ‘normal exploitation’ and ‘legitimate interests’ of copyright owners.⁵⁴ The result has been a provision designed to enhance flexibility that has been almost completely unused.⁵⁵

B The Flexibility Available in the Berne Three-Step Test

The failure of section 200AB is symptomatic of the political dominance of the exceptions-based approach to balancing copyright interests against social

48 See *Copyright Amendment Act 2006* (Cth) s 10.

49 *Copyright Act* s 200AB(6).

50 *Copyright Act* s 200AB(4).

51 See Kimberlee Weatherall, ‘Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms’ (2007) 31 *Melbourne University Law Review* 967, 997–8.

52 *Copyright Act* s 200Ab(1)(c).

53 *Copyright Act* s 200Ab(1)(d).

54 Weatherall, above n 51, 967, 1000–2 (critiquing the bureaucratisation of recent exceptions introduced into Australian copyright law, including s 200AB); see also Suzor, Harpur and Thampapillai, above n 21, 7–9.

55 Most commentary to date has focused on the use (or non-use) of s 200AB for educational and cultural institutions, rather than organisations assisting people with print disabilities. It is clear, however, that the complex terms of s 200AB act to discourage institutions from relying on the flexible dealing provision. See Delia Browne, ‘Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment?’ (2009) 6 *SCRIPTed* 449, 454; Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) 221–4; see also Emily Hudson, ‘Fair Use and Section 200AB: What Overseas Experience Teaches Us About Australian Copyright Law’ (Conference Paper, VALA 2010 Conference, 10 February 2010); Australian Digital Alliance and the Australian Libraries Copyright Committee to Government 2.0 Taskforce, *Engage: Getting on with Government 2.0 Draft Report*, December 2009, 9 <<http://digital.org.au/sites/digital.org.au/files/documents/20091216ADAandALCC-Gov2.0Submission.pdf>>; Robert Burrell et al, Submission No 278 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 14 December 2012, 73.

objectives. Surprisingly, there is a significant degree of flexibility to address the book famine within the international copyright framework that is not currently being exercised by nation states. The *Berne* three-step test does not clearly prohibit nation states from positively enabling the establishment of accessible repositories. Small accessible repositories exist in many countries, and there is no reason to believe that encouraging the growth of these repositories or establishing new, public ones would contravene obligations under the *Berne Convention*. There is no question that persons with print disabilities constitute a ‘special case’ under the first limb of the three-step test.⁵⁶ This limb of the test requires that the exception is ‘clearly defined and narrow in its scope and reach’.⁵⁷ Redressing the inequitable levels of access of people with print disabilities generally fulfils both these criteria.⁵⁸

The second limb of the three-step test attempts to identify whether the potential use would interfere with the core licensing market of the copyright owner.⁵⁹ The existence of the book famine demonstrates that copyright owners have not historically met the needs of people with disabilities. Whether they may choose to do so in the future, however, is an open question.⁶⁰ Copyright owners have argued that they do intend to exploit this market,⁶¹ but evidence as to their willingness and ability to do so has not yet emerged. A recent decision in the United States (‘US’) District Court has found that the market for accessible copies was likely too small to be a ‘commercially viable endeavor’.⁶² Given the general reticence of copyright owners to provide accessible regimes so far, any

56 See Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004) 139.

57 Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2006) [13.11].

58 Ibid [13.37] (listing exceptions for people with disabilities as an example of ‘exceptions that might be justified’ under the *Berne* three-step test).

59 Here, the test ‘refers simply to the ways in which an author might reasonably be expected to exploit [their] work in the normal course of events’: Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987) 483.

60 A World Trade Organisation (‘WTO’) panel report interpreting this provision concluded that ‘one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance’: WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000) [6.180].

61 See, eg, Letter from Angelo Loukakis, Australian Society of Authors to Norman A Bowman, Commonwealth Attorney-General’s Department, June 2012, 4 <https://asauthors.org/files/submissions/submission_to_a-g_june_2012.pdf> (arguing that ‘[e]fforts towards satisfying the needs of people with visual disabilities ... are well advanced within Australia, and a number of Australian companies and organisations are producing useful materials’).

62 *The Authors Guild Inc v Hathitrust*, 902 F Supp 2d 445 (SDNY, 10 October 2012) 464. In this case, book publishers, including the Australian Society of Authors, brought suit against non-profit university libraries who received digitised books from Google. In holding that the digitisation was fair use for the purposes of, inter alia, providing access to people with print disabilities, Judge Baer at first instance found that the ‘[p]laintiffs’ argument about a potential market [for providing digital access to people with print disabilities] is conjecture.’: at 462. The case is currently under appeal to the Second Circuit.

claim that they will be able to adequately meet the needs of people with disabilities must be very carefully evaluated. Importantly, there is also a normative component to this test;⁶³ states have an ability to assert that the clear public interest⁶⁴ in providing access to people with disabilities means that the market is not one which copyright owners *should* be expected to exploit.⁶⁵

Assuming that accessible repositories do not conflict with the core licensing markets of copyright owners, the main other foreseeable harm is the threat that accessible (unencrypted) copies might leak into core licensing markets and reduce sales. Established repositories have minimised this risk by limiting access to authenticated users and requiring members to provide medical documentation that records the holder as having a print disability.⁶⁶ The level of risk also needs to be measured against the reality that technically savvy users are able to strip consumer Digital Rights Management ('DRM')⁶⁷ relatively trivially⁶⁸ through normal sales channels. Given these qualifications, it is hard to see that accessible repositories pose a serious additional risk to copyright owners.⁶⁹ It is accordingly at least arguable – and we think likely – that the establishment of large-scale repositories would not conflict with this limb of the three-step test.

The third step in the three-step test requires balancing any harm caused to authors by the proposed exception against the benefit that it would provide to people with a print disability. Some level of harm will be permissible; the term 'unreasonably prejudice' involves a proportionality balancing between the interests of people with disabilities and copyright owners.⁷⁰ Similarly, 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

63 *United States – Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (15 June 2000) [6.166]; see also Ricketson and Ginsburg, above n 57, [13.22] (arguing that satisfying this normative component in the negative requires 'a clear public-interest character that goes beyond the purely individual interests of copyright users').

64 Ricketson and Ginsburg, above n 57, [13.22].

65 See Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies, 2002) 35; Robin Wright, 'The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation' (2009) 12 *The Journal of World Intellectual Property* 600, 614–5.

66 See, eg. Bookshare, 'Qualifications' <https://www.bookshare.org/_/membership/qualifications>.

67 DRM is a form of encryption designed to ensure that only users are only able to view content on authorised devices. By controlling the encryption process, copyright owners can restrict the ability of consumers to copy and distribute copyright content. Accessible versions, on the other hand, need to be in 'clear text', which means that encryption restricts not only unlawful copying, but also screen readers and other adaptive technologies.

68 'A DRM-enabled ebook can be "cracked" in minutes by a technical novice': Dana B 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, 155.

69 For similar arguments, see Raja S Kushalnagar, 'Balancing Perceptually Disabled Consumers' Rights Against Copyright Holders' Rights' (1 September 2009) (unpublished) <<http://ssrn.com/abstract=1475449>>.

70 Ricketson and Ginsburg, above n 57, [13.26].

policies or other social norms'.⁷¹ The main issue here is whether copyright owners ought to be compensated for uses of their works by people with disabilities, even if these uses do not fall within their core licensing markets. This is a fundamentally political question, and there is room for nation states to consider whether rights-holders should be entitled to prevent access or to be compensated for the provision of access to people with print disabilities.⁷² In the current range of exceptions for people with disabilities, some countries do not require compensation and choose to implement a free-use exception; others, including Australia,⁷³ have chosen to introduce a compulsory licence with a potential fee.⁷⁴ At any rate, this issue is unlikely to be fatal to schemes creating accessible repositories: if nation states determine that compensation is required for copies of works accessed by people with disabilities on a large scale, this can be achieved as appropriate within domestic law.⁷⁵ Accordingly, it appears that this final limb of the three-step test could also be satisfied by states wishing to establish large-scale accessible repositories. It seems that the three-step test at the very least does not clearly prohibit states from establishing accessible repositories, and that there is significant room for states to argue that such repositories would be justified by the public interest.⁷⁶

Despite the indeterminacy and apparent flexibility available within international law,⁷⁷ nation states have so far been reluctant to press the issue. To

71 *Canada–Patent Protection of Pharmaceutical Products*, WTO Doc WT/DS114/R (17 March 2000) [7.69] <http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf>.

72 See Wright, above n 65, 611–12; Martin Senftleben, 'Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law' (2006) 37 *International Review of Intellectual Property and Competition Law* 407, 434..

73 *Copyright Act* s 135ZP.

74 See WIPO Standing Committee on Copyright and Related Rights, *Draft Text of An International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*, 25th sess, SCCR/10/11 (22 February 2013), 10–11 (arguing that 'in many cases [free use exceptions] are the most adequate way of obtaining a balanced solution', on the basis that the impact on rights-holder interests are relatively small and that the transaction and substantive licensing costs involved might be unjustifiably high.); for a comparison of global approaches, see also Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, 15th sess, WIPO Standing Committee on Copyright and Related Rights, SCCR/15/7 (20 February 2007).

75 See Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 9th sess, SCCR/9/7 (5 April 2003) 77.

76 For a discussion of the role of the public interest in the three-step test, see Wright, above n 65; see also Christophe Geiger et al, 'Declaration: A Balanced Interpretation Of The "Three-Step Test" In Copyright Law' (2010) 1 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 119, 121 (arguing that the three-step test should be interpreted in a 'balanced' manner, and particularly 'in a manner that respects the legitimate interests of third parties, including ... interests deriving from human rights and fundamental freedoms').

77 See Jonathan Griffiths, 'The "Three-Step Test" in European Copyright Law - Problems and Solutions' (Legal Studies Research Paper No 31/2009, Queen Mary University of London, School of Law, 22 September 2009) (explaining different national approaches to the interpreting the three-step test); see also Annette Kur, 'Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test' (2008) 8 *Richmond Journal of Global Law and Business* 287 (arguing that the three-step test can and should be interpreted more flexibly than it has been to date).

date, no significant public investment has been made in digitising in-copyright works to create accessible versions. The introduction of section 200AB in Australia recognised that more had to be done to help people with disabilities gain access to copyright material, but the legislation did little to make use of the flexibility that is apparently available in international law. At best, the reluctance of nation states to positively address the book famine shows a tendency to err on the side of copyright owners where there is uncertainty. Under the exceptions paradigm, the onus of proof has been on disability advocates who suggest that we ought to deviate from the status quo of strong monopoly rights and market solutions. Recent developments suggest that a new model of disability rights may have a significant impact on global copyright politics. In the next section, we describe a shift in international disability politics towards a social model of disability, and a human rights paradigm that requires positive intervention to address the pressing crisis of the book famine.

III THE NEW DISABILITY POLITICS

Historically, disability rights have been peripheral to copyright law. While copyright did not explicitly develop to exclude people with disabilities, now that the possibility of universal design and full access has become real,⁷⁸ current copyright law supports a publishing regime whose practical effect is to deliver wildly discriminatory levels of access. Over the last half-century, action to increase access for people with disabilities by nation states has mainly targeted instances of direct conflict between the interests of copyright owners and the rights of people with disabilities. Where it has become an issue, the focus has been on the modern liberal task of removing the barriers to digitisation and distribution. The new disability politics that has developed in recent decades, however, requires more than removing barriers; it requires taking positive action to ensure that people with disabilities have adequate access to educational and cultural resources.

A Global Disability Politics have Shifted to a Social Model

The focus on accessibility as limited exceptions perpetuates the subordination of persons with print disabilities. The exceptions allow accessible copies to be made on an ad hoc basis, enabling people with disabilities to use adaptive technologies to gain access to individual titles through authorised institutions. Because the creation of accessible copies is still costly and slow, obtaining access remains the exception, rather than the norm. The current approach in copyright law, which we call the ‘exceptions paradigm’, can be said to tolerate limited

78 *CRPD* art 2 defines ‘[u]niversal design’ as the ‘design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.’

unauthorised dealings with copyright material to try to reduce inequalities confronting persons with disabilities.

Regulation that approaches the needs of people with disabilities through a lens of tolerance has attracted considerable scholarly critique. Wendy Brown, for example, argues that tolerance is generally used to describe a situation where a divergence is morally repugnant, but endured under sufferance for a greater good.⁷⁹ Brown observes that in most professional fields, tolerance is used to describe the existence of an undesirable element. In engineering or statistics, for example, tolerance indicates the point at which an impure factor will create a serious defect. In plant physiology, tolerance describes the point at which a substance will be fatal to life. Tolerance by definition ‘involves managing the presence of the undesirable, the tasteless, the faulty – even the revolting, repugnant, or vile.’⁸⁰ Laws that promote tolerance focus upon the necessity of coping with difference. Laws that tolerate difference do not address the infrastructure that creates power imbalances and inequalities.

Disability scholars emphasise the limitations of models that tolerate difference without addressing the root causes of inequalities.⁸¹ This has led to the emergence of the social model of disability, which explains that it is not an impairment that causes disablement, but the way in which society is constructed.⁸² Through this model, it becomes clear that the major problem facing people with print disabilities in gaining access to print materials for culture, education and employment is an active societal choice to continue to refuse to provide accessible versions of books, particularly where the technology exists to do so at relatively little cost. The example of the accessibility features of Amazon’s Kindle ebook reader is an excellent case study here. When Amazon first released its Kindle reader, it included a screen reader and was fully accessible for persons with low vision and blindness. Following pressure from publishing houses, Amazon decided to allow publishers to disable the accessibility feature.⁸³ This decision resulted in persons who rely on screen readers being disabled and excluded from using this ebook reader. The social model highlights that in this situation, a person is not print-disabled because of their low vision or other impairment; the cause of disablement was the decision by Amazon to allow publishers to turn accessibility features off.

79 Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press, 2006) ch 2.

80 Ibid 25.

81 Lee Ann Basser and Melinda Jones, ‘The Disability Discrimination Act 1992 (Cth): A Three-Dimensional Approach to Operationalising Human Rights’ (2002) 26 *Melbourne University Law Review* 254, 262; Michael Stein et al, ‘Accommodating Every Body’ (2014) 82 *University of Chicago Law Review* (forthcoming) (contending that workplace accommodations should be predicated on need or effectiveness instead of group identity status).

82 Tom Shakespeare, ‘Cultural Representation of Disabled People: Dustbins for Disavowal?’ in Len Barton and Michael Oliver (eds), *Disability Studies: Past Present and Future* (The Disability Press, 1997) 217, 233.

83 National Federation of the Blind, *Make Kindle E-Books Accessible* (2013) <<https://nfb.org/kindle-books>>.

A similar story can be told about the failure of nation states to affirmatively ensure access for people with print disabilities. We have the technology now to digitise existing works, and it is even easier to ensure that all works sold now and in the future in electronic form are made accessible. The fact that nation states have not yet been willing to take the steps required to ensure adequate levels of access is a failure of political will. The social model of disability casts the major barriers to accessibility as socially constructed; the responsibility for providing access accordingly rests squarely on policymakers.

B The *CRPD* and the Potential Paradigm Shift in Global Copyright Politics

The adoption of the *CRPD* by the United Nations, and the rapid ratification of this Convention by states, demonstrates that a new disability politics has emerged.⁸⁴ The *CRPD* relevantly begins from the proposition of ‘[r]ecognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms’.⁸⁵ In order to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’,⁸⁶ the *CRPD* attempts to ‘promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities’.⁸⁷ By emphasising the social model of disability,⁸⁸ the *CRPD* creates obligations upon state signatories to adopt proactive laws and policies.⁸⁹

Relevantly for our purposes, the Convention includes a number of rights that require signatories to address the book famine by taking ‘measures to the maximum of [their] available resources’.⁹⁰ Article 21 of the *CRPD* requires that member states

shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

84 Eve Hill and Peter Blanck, ‘Future of Disability Rights Advocacy and “The Right to Live in the World”’ (2009) 15 *Texas Journal on Civil Liberties and Civil Rights* 1, 29–30; Gerard Quinn, ‘Resisting the “Temptation of Elegance”: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?’ in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 215.

85 *CRPD* Preamble para (v).

86 *CRPD* art 1.

87 *CRPD* Preamble para (y).

88 See, eg, the Preamble to the *CRPD*, which recognises that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’: *CRPD* Preamble para (e).

89 Paul Harpur, ‘Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27 *Disability and Society* 1, 1.

90 *CRPD* art 4(2).

The impact of this particular provision is somewhat diluted by its requirement to only ‘urg[e] private entities’⁹¹ and ‘encourag[e] the mass media’⁹² to make information and services available in accessible formats. The right to education in article 24(3), by contrast, provides persons with disabilities a strong right to education ‘to facilitate their full and equal participation in education and as members of the community’, and article 27(1) entitles persons with disabilities to have the ‘opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.’ These provisions strengthen a claim to access educational and professional material to enable persons with disabilities to participate in the workforce ‘on an equal basis with others’.⁹³

Most relevantly, in article 30, the *CRPD* directly addresses the rights to participate in culture, recreation and leisure. Article 30(1) entitles persons with disabilities to ‘take part on an equal basis with others in cultural life’, and requires that member states ‘shall take all appropriate measures to ensure that persons with disabilities ... [e]njoy access to cultural materials in accessible formats’.⁹⁴ ‘Cultural material’ here can be read widely to include literature, artefacts, radio, screen and television productions, performance and visual arts.⁹⁵ Article 30(3) goes further, directly addressing the manner in which member states balance the potential conflict with copyright:

States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

In this way, the *CRPD* continues and further entrenches access to cultural materials as a human right in international law, as first codified in article 15 of the International Covenant on Economic, Social and Cultural Rights which entered into force in 1976.⁹⁶

Taken together, these provisions in the Convention impose a strong positive obligation on member states to ensure that persons with disabilities enjoy access

91 *CRPD* art 21(c).

92 *CRPD* art 21(d).

93 *CRPD* arts 24, 27.

94 *CRPD* art 30(1).

95 The concept of cultural material is broadly defined in a range of international agreements. Eg, *Convention for the Safeguarding of the Intangible Cultural Heritage*, signed 17 October 2003, MISC/2003/CLT/CH/14 (entered into force 20 April 2006); *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, signed 14 May 1954, 249 UNTS I-3511 (entered into force 7 August 1956).

96 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); see also Janet E Lord and Michael Ashley Stein, ‘Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play’ (2009) 27 *Boston University International Law Journal* 249, 256:

The Convention responds to traditional models, situates disability within a social model framework and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities. Such an understanding of disability rights sharply contrasts with earlier human rights instruments, which were neither disability rights-based nor social model oriented.

to culture and knowledge on an equal basis, including to material protected by copyright.⁹⁷ Article 30 in particular is an extremely important provision that marks a point of inflection for a potential paradigm shift in the balance between intellectual property ('IP') and disability rights. For many years, the *Berne Convention* and related agreements have marked the minimum standard of copyright protection.⁹⁸ Copyright industry groups have vehemently opposed suggestions that international treaties should require a maximum limit to the strength of copyright. But this is exactly what the *CRPD* requires. Nothing in the *CRPD* suggests that the *Berne* three-step test needs to be modified to enable greater access to people with disabilities. As discussed above, the three-step test provides sufficient flexibility for states to create accessible repositories.⁹⁹ Rather, the *CRPD* requires this flexibility to be exercised to increase access. In effect, this creates a 'ceiling' on international IP law in the context of disability access rights.¹⁰⁰ This paradigm inversion is the principle battleground of global IP politics that engulfed negotiations for the new *Marrakesh Treaty* and any suggestion that states should be required to do more to assist people with disabilities.

C Opposition To the Marrakesh Treaty and Any Further Action

The debates leading up to the adoption of the *Marrakesh Treaty* in June 2013 clearly demonstrate the tension between the limited-exceptions paradigm in global copyright politics and the social model of disability. The *Marrakesh Treaty* attempts to extend the exceptions to infringement that currently exist in developed nations to developing nations, and to reduce some of the duplicative effort that is required under the current scheme by enabling accessible books to be shared across national borders. Nothing in the *Berne Convention* or other international treaties would prevent these measures. The exceptions that already exist for digitising and disseminating copyright works for the benefit of people with disabilities are generally considered to be compliant with the *Berne* three-

97 Archbishop Silvano Tomasi, the Vatican's permanent observer to UN agencies, has cited both the International Declaration of Human Rights and Blessed John Paul II's encyclical *Laborem Exercens* to support calls for copyright reforms to address the book famine: Clare Myers, 'Blind People are Suffering From "Book Famine", Says Vatican Official', *Catholic Herald* (online), 21 June 2013 <<http://www.catholicherald.co.uk/news/2013/06/21/blind-people-are-suffering-from-book-famine-says-vatican-un-envoy/>>.

98 See Grosse Ruse-Khan, above n 40.

99 See Part I(b) of this article.

100 Grosse Ruse-Khan, above n 40, 62.

step test.¹⁰¹ Similarly, international copyright law does not require countries to prohibit the unlicensed importation of accessible books.¹⁰² Nation states are free to make changes to domestic law to permit the cross-border flow of accessible books for the blind.¹⁰³

Even though the limited goals of the *Marrakesh Treaty* are compliant with international law, the treaty was systematically attacked by international media conglomerates. Copyright owners sought strongly to limit any exception to cases where they were not providing access on commercial terms, reserving their right to enter into the market to serve people with disabilities at a future date.¹⁰⁴ Australia is one of the countries in which the exception for people with print disabilities is limited to cases where an accessible copy is not ‘available within a reasonable time at an ordinary commercial price’.¹⁰⁵ These arguments usually relied on a form of technological determinism, noting that while blind people had been poorly served by the market to date, ‘[w]ith each passing day, via the Internet and other digital technologies, the blind and visually impaired are being provided with more options, more alternatives and more opportunities’.¹⁰⁶ Just as the market might be about to flourish, copyright owners argued, enhancing exceptions for blind people would lead copyright owners to ‘have understandable

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- 101 See Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, 15th sess, WIPO Standing Committee on Copyright and Related Rights, SCCR/15/7 (20 February 2007); Senftleben, above n 56, 259, 269 (arguing that art 5(3)(b) of the European Copyright Directive, which allows European Union (‘EU’) states to create exceptions for non-commercial uses for the benefit of people with a disability, is compliant with the *Berne* three-step test. The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 is on the harmonisation of certain aspects of copyright and related rights in the information society); cf Ricketson, above n 75 (doubting whether the EU exception would satisfy the three-step test without a provision to compensate copyright owners).
- 102 See Ricketson and Ginsburg, above n 57, [11.46] (arguing that the *Berne Convention* does not require prohibiting the importation of copies lawfully made in their country of origin).
- 103 Jane C Ginsburg and June M Besek, Comment to US Copyright Office, *Facilitating Access for the Blind or Other Persons with Disabilities: Notice of Inquiry and Request for Comments* (13 November 2009) <<http://www.copyright.gov/docs/sccr/comments/2009/comments-2/ginsburg-besek-columbia-law-school.pdf>>.
- 104 See, eg, Emails from the Publishers Association Ltd to the UK Intellectual Property Office, 20 November 2012–28 March 2013 <<http://www.scribd.com/doc/140886790/Redacted-UK-IP-Office-Pub-Assoc-Emails-digitized-searchable-versio>>; James Love, ‘UK IPO Office Releases Emails That Show Close Collaboration With Publishers on WIPO Treaty for the Blind’ on *Knowledge Ecology International: James Love’s Blog* (11 May 2013) <<http://keionline.org/node/1719>>; James Love, ‘Disney, Viacom and Other MPAA Members Join Book Publishers to Weaken a Treaty for the Blind’, *Huffington Post* (online), 23 April 2013 <http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m_b_3137653.html>; Jim Fruchterman, ‘Poisoning the Treaty for the Blind’, *Huffington Post* (online) 7 May 2013 <http://www.huffingtonpost.com/jim-fruchterman/poisoning-the-treaty-for-_b_3225181.html>.
- 105 *Copyright Act* s 135ZP(6A).
- 106 Keith Kupferschmid, Software & Information Industry Association, Submission to US Copyright Office, *Facilitating Access To Copyrighted Works For The Blind Or Persons With Other Disabilities: Notice of Inquiry and Request for Comments*, 13 November 2009, 2 <<http://www.copyright.gov/docs/sccr/comments/2009/comments-2/keith-kupferschmid-software-information-industry-association.pdf>>; See also Keith Kupferschmid, Software & Information Industry Association, Reply Comments to US Copyright Office, *Facilitating Access To Copyrighted Works For The Blind Or Persons With Other Disabilities: Notice of Inquiry and Request for Comments*, 4 December 2009, 6 <<http://www.copyright.gov/docs/sccr/comments/2009/reply-2/15-keith-kupferschmid.pdf>>.

doubts about the wisdom of investing in the production of accessible versions for the market.¹⁰⁷

Reserving commercial rights was probably the most important substantive point of opposition to the treaty, as publishers (and the Australian Attorney-General's Department) sought to defend the basic proposition that exceptions to copyright should only apply in cases of market failure.¹⁰⁸ The Australian Society of Authors ('ASA') went so far as to state that voluntary licensing by Australian authors meant that 'Australian copyright law or publishing practice' was not 'an impediment to access for the visually impaired in this country.'¹⁰⁹ This approach, emphasising market-based solutions, drastically underestimates the extent of the book famine; even if private efforts are 'well advanced', as the ASA contends,¹¹⁰ it is undisputable that people with print disabilities remain very poorly served, in Australia and worldwide, by the private market. In their efforts to limit the scope of the treaty, publishers sought treaty language that would threaten to reduce existing exceptions and limit the operation of institutions currently providing accessible copies of works by prohibiting the distribution of works that become commercially available in accessible form.¹¹¹ Ultimately, a compromise was reached; the EU and Australia, among other states, insisted on the ability to confine the mandatory exception 'to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market'.¹¹² Importantly, however, no obligation was introduced that would require organisations who assist people with print disabilities in foreign countries to determine whether accessible works were commercially available in that country before providing them with access.¹¹³

107 Allan Adler, Association of American Publishers Inc, Reply Comments to US Copyright Office, *Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities: Notice of Inquiry and Request for Comments*, 4 December 2009, 6 <<http://www.copyright.gov/docs/scctr/comments/2009/reply-2/19-allan-adler.pdf>>.

108 Letter from Richard Glenn, Attorney-General's Department to Angelo Loukakis, Australian Society of Authors, 27 March 2013 <https://asauthors.org/files/submissions/signed_glenn_-_loukakis_asa_-_response_to_asa_submission_-_wipo_vip_tr....pdf>; Gordon and Bahls call the assumption that exceptions should only exist in cases of market failure the 'fared use fallacy': see Wendy J Gordon and Daniel Bahls, 'The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy' (2007) 3 *Utah Law Review* 619, 622; see also Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 *Columbia Law Review* 1600.

109 Loukakis, above n 61, 2.

110 Ibid 4.

111 See Knowledge Ecology International, *KEI Position on Commercial Availability, Marrakesh Note 5* (17 June 2013) <<http://keionline.org/node/1751>>. National Federation of the Blind, *The Petition Supporting WIPO Treaty for the Blind and Print Disabled* (2013) <<https://nfb.org/civicism/petition/sign?sid=2>>.

112 *Marrakesh Treaty* art 4(4).

113 Catherine Saez, 'New Draft Text Shows Progress on WIPO Treaty on Books for the Print-Disabled' *Intellectual Property Watch* (online), 25 June 2013 <<http://www.ip-watch.org/2013/06/25/new-draft-text-shows-progress-on-wipo-treaty-on-books-for-the-print-disabled/>>.

The other major copyright industries also opposed significant portions of the treaty. Publishers of audiovisual works, in particular, were successful in limiting its operation to only literary works (books and other texts), related illustrations, and audiobooks. As originally proposed, the treaty also sought to improve access to films and television broadcasts by enabling audio descriptions and to provide access to deaf people by enhancing subtitling. In 2009 the Obama administration cut these issues out of negotiations, focusing the treaty on the ‘more mature’ issues of print disabilities.¹¹⁴

The most interesting points of opposition to the treaty were not those focused on its substantive merits, but the broader concerns about the effect the treaty would have on global copyright politics. Publishers of audiovisual works, for example, staunchly opposed the treaty; the Motion Picture Associate of America, which represents Disney, Viacom and other media organisations has engaged its substantial lobbying power to further limit the treaty, even after audiovisual works were excluded from its scope.¹¹⁵ The copyright industries, broadly defined, have consistently sought to retain the integrity of an international copyright system that creates strong rights and only allows limited exceptions. The industries are particularly concerned about any provisions that would require nation states to introduce mandatory exceptions into domestic law.¹¹⁶ Previously, while states were free to create exceptions to increase access to people with print disabilities, this process was relatively piecemeal. Most western countries already have these exceptions, but developing nations do not. In their opposition to the *Marrakesh Treaty*, the US copyright industries – including the Association of American Publishers, the Independent Film and Television Alliance, the Motion Picture Association of America, the National Music Publishers’ Association, and the Recording Industry Association of America – were not so much concerned about the specific exceptions for people with print disabilities as with ensuring that any changes to copyright laws remain narrow and relatively isolated, reinforcing a global level of deference to rights-holder interests. The submission by the US copyright industries to the US Copyright Office reinforces their insistence that the piecemeal approach be retained:

We strongly endorse and support reasonable efforts to increase the practical and functional access of blind and visually impaired persons to works protected by copyright. But among the strategies least likely to advance the goal of increased access by the blind and visually impaired is the path down which the draft treaty points: to begin to dismantle the existing global treaty structure of copyright

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

115 James Love, ‘Disney, Viacom and Other MPAA Members Join Book Publishers to Weaken a Treaty for the Blind’, *Huffington Post* (online) ,23 April 2013 <http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m_b_3137653.html>.

116 Steven J Metalitz, Submission No 19 to US Copyright Office, *Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities: Notice of Inquiry and Request for Comments*, 13 November 2009.

law, through the adoption of an international instrument at odds with existing, long-standing and well-settled norms.¹¹⁷

The ‘existing, long-standing and well-settled norms’ at question here are those that reinforce the continued dominance of the limited-exceptions paradigm, which permits only ad hoc digitisation and distribution to redress the inequities in access that blind people face. The US copyright industries strongly opposed the ‘giant step’ of the *Marrakesh Treaty* of introducing a mandatory exception to copyright law:

By requiring the recognition of a specific, detailed exception to copyright protection, the draft treaty would break the mould of every previous treaty instrument that forms part of the long-standing global framework of copyright norms.¹¹⁸

Copyright industry groups fear any changes that threaten to weaken the basic presumption that any exceptions to the copyright monopoly must be limited and strictly optional. The copyright industries are unable to directly argue against limited exceptions to provide access to blind people, and by extension they cannot strongly oppose digital repositories that take advantage of those exceptions. The industry sees any attempt to require greater access in domestic or international law, however, as an ideological threat. This ideological tension at WIPO is evident in the removal of language in an early draft of the *Marrakesh Treaty* that would have explicitly recognised that member states could meet the requirements of the treaty through either a new specific exception or through a generic US-style ‘fair use’ clause. Fair use, as it exists in the US, provides a flexible approach to enable courts to balance the rights of copyright owners against the social interests in increasing dissemination.¹¹⁹ Rights-holders have never been particularly comfortable with fair use, and have opposed its introduction into other countries, including Australia.¹²⁰ In a large part, this is because fair use has become a proxy for paying more attention to ‘user rights’¹²¹ and the social interests in dissemination and access to information that must be balanced against private interests in copyright returns. In a 2006 report that focuses on the copyright interests of developing countries, Ruth Okediji concludes that ‘[t]he important role of limitations and exceptions to copyright’s fundamental purpose should become a more central part of the structure and operation of the international copyright system.’¹²² An email from the United Kingdom (‘UK’) Publishers Association to the UK Intellectual Property Office

117 Ibid 2.

118 Ibid 3(emphasis in original).

119 Copyright Act of 1976, 17 USC § 107 (1976).

120 For a review of the arguments against fair use, see Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No 79 (2013) 71–9.

121 For discussion of the importance of ‘user rights’ in copyright, see L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (University of Georgia Press, 1991).

122 Ruth 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, 34 <<http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf>>.

refers to Okediji's report and notes: '[p]erhaps this helps explain why we are all so concerned about the insertion of fair use into the Treaty text'.¹²³ While fair use itself is not highly problematic for publishers in the US context, the implication is that publishers' fear measures may lead to the weakening of the copyright system in other contexts. Opposing such change is crucial from the copyright industries' perspectives, particularly since there is growing global concern that current IP laws may not provide the best deal for the majority of nations who are net importers of IP,¹²⁴ for consumers,¹²⁵ or for the large section of the economy that depends on IP as an input to innovation.¹²⁶

The US copyright industry representatives explain their fear that the *Marrakesh Treaty* is the thin end of a wedge which threatens the dominance of copyright law:

[V]iewed in context, the ... treaty appears to many as the not-so-thin edge of a wedge to be driven into the long-standing structure of global copyright norms. It advocates a U-turn in the approach to global copyright norms that would almost certainly not be restricted to the issue of access for the visually impaired, or even for the disabled community generally. Adoption of this proposal would be used to justify its 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.¹²⁷

This, then, is the ultimate source of opposition to addressing the book famine at a global level. While the *Marrakesh Treaty* was never intended to interfere with the minimum rights of copyright owners in international law, it was seen as a threat because it challenges the limited exceptions paradigm. This is seen perhaps most clearly in a letter by Business Europe to WIPO, raising fears that the *Marrakesh Treaty*:

123 See Email from the Publishers Association Ltd to the UK Intellectual Property Office, 5 March 2012 <<http://www.scribd.com/doc/140886790/Redacted-UK-IP-Office-Pub-Assoc-Emails-digitized-searchable-versio>>.

124 See Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (Yale University Press, 2012); see also Okediji, above n 122.

125 See Jessica Litman, 'Real Copyright Reform' (2010) 96 *Iowa Law Review* 1.

126 Thomas Rogers, Andrew Szamoszegi and Capital Trade Inc, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2010) Computer & Communications Industry Association <http://www.wired.com/images_blogs/threatlevel/2010/04/fairuseconomy.pdf> (reports on innovation industries); John Houghton and Nicholas Gruen, Lateral Economics, *Exceptional Industries: The Economic Contribution to Australia of Industries Relying on Limitations and Exceptions to Copyright* (August 2012) Australian Digital Alliance <<http://digital.org.au/media/167>>; John Houghton and Nicholas Gruen, Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the Case for Flexible Copyright Exceptions and Extended Safe Harbour Provisions* (August 2012) Australian Digital Alliance <<http://digital.org.au/media/166>>.

127 Metalitz, above n 116; see also Letter from Intellectual Property Owners Association to Teresa Staneck Rea, Acting Under Secretary of Commerce for Intellectual Property and Director of the US Patent and Trademark Office, 15 April 2013, 1 <http://keionline.org/sites/default/files/2013.4.15IPO_Letter_WIPO_VIP_Treaty.pdf> (raising concerns that 'the VIP treaty negotiations could also set a dangerous precedent for other areas of IP law').

is strongly supported by the same group of NGOs and advanced emerging economy countries that pursue a general IPR-weakening agenda at WIPO and other international forums. They would rely on the harmful precedent set by its hasty conclusion.¹²⁸

This fear is reinforced by advocates for a major shift in WIPO's approach. Luis Villaroel, who advised Ecuador in the treaty negotiations, explained, for example, that 'if we change the culture, we will not only be solving the problem for the blind but also for the libraries, for educators, and so on.'¹²⁹ Seen in this way, the *Marrakesh Treaty* might be an instance of 'regime-shifting'¹³⁰ by those who seek more limits on IP rights. By introducing mandatory limitations in this particular forum, it is possible that this will enhance the relative power of developing countries and human rights advocates in other fora and social contexts.

The extent to which rights-holders' fears will be realised is as yet unclear. The successful conclusion of the *Marrakesh Treaty*¹³¹ was a resounding victory for supporters of disability rights in particular. The broader issue of further embedding human rights limitations on international IP norms, however, remains a significant challenge.¹³² The treaty is just one instance of a complex and deeply contested ideological debate about the role of IP in society.¹³³ It comes at a time of significant opposition to the continued expansion of the scope and force of IP, exemplified in recent years by pronounced political impasse in international fora; the failure of the Anti-Counterfeiting Trade Agreement¹³⁴ and the watering down of maximilast IP language in the Trans-Pacific Partnership Agreement at a plurilateral level; and of the coordinated but decentralised resistance that led to

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- 128 Letter from Markus J Beyrer, Business Europe to Michel Barnier, Commissioner for Internal Market and Services, European Commission, 14 May 2013, 2 <http://keionline.org/sites/default/files/BusinessEurope_v_Blind_2013-00525-E.pdf>.
- 129 Luis Villaroel (Speech delivered at 'The 2013 Marrakesh Treaty: Providing Access to Copyrighted Works for the Blind and Print Disabled', Washington College of Law, American University, 12 September 2013) <<http://www.pijip-impact.org/events/marrakesh/>>.
- 130 See Laurence R Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1; Laurence R Helfer, 'Regime Shifting in the International Intellectual Property System' (2009) 7 *Perspectives on Politics* 39.
- 131 The negotiations concluded in Marrakesh on 28 June 2013 with the signature of a new treaty (Australia has not yet signed). The treaty will enter into force three months after 20 signatory states have ratified it: *Marrakesh Treaty* art 18.
- 132 See, eg, the ongoing A2K and access to medicine debate, which requires balancing the human right to health against the interests of patent holders: Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave MacMillan, 2002); Lea Shaver, 'The Right to Science and Culture' (2010) 2010 *Wisconsin Law Review* 121; Matthew Rimmer, 'Patents for Humanity' (2012) 3 *World Intellectual Property Organization WIPO Journal* 196; see also Laurence R Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 *U.C. Davis Law Review* 971.
- 133 See Francis Gurry, 'Re-Thinking the Role of Intellectual Property' (Speech delivered at the University of Melbourne, 22 August 2013) <http://www.wipo.int/export/sites/www/about-wipo/en/dgo/speeches/pdf/dg_speech_melbourne_2013.pdf>.
- 134 See Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the *Anti-Counterfeiting Trade Agreement*' (2011) 33 *Sydney Law Review* 229; Duncan Matthews and Petra Žikovská, 'The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union' (2013) 44 *International Review of Intellectual Property and Competition Law* 626.

the defeat of the *Stop Online Piracy Act* in the US.¹³⁵ In terms of reaching compromise on a contested issue in a way that places express limits on IP rights, the treaty certainly counts as a concrete win for WIPO's embattled development agenda.¹³⁶ It is certainly possible that the *Marrakesh Treaty*, as an example of the successful intrusion of human rights and development goals in global IP politics,¹³⁷ might just signal a moment of critical inflection on the otherwise expansionary curve of international IP. Importantly, however, the Treaty is just one part of a very complex and ongoing debate, and it may ultimately represent only a discrete instance of international cooperation to meet the clearly defined and clearly limited needs of people with print disabilities.

D Obligations Under the New *Marrakesh Treaty*

The new *Marrakesh Treaty*, as adopted, has three main functions. First, it makes it mandatory for signatories to adopt copyright exceptions for the non-profit creation and distribution of accessible versions of works for the benefit of people with print disabilities.¹³⁸ This provision requires all signatories to bring their copyright legislation into line with the standard already followed by developed countries. This is remarkable as the *Marrakesh Treaty* is one of the rare international instruments that make exceptions to mandate, rather than permit, exceptions to copyright's exclusive rights – imposing a ceiling on the strength of copyright interests.¹³⁹ It is probable that Australian copyright law is already compliant with this requirement through the combination of the part VB statutory licence¹⁴⁰ and section 200AB, so no change to domestic law is likely to be required by this aspect of the *Treaty*.

Second, the *Treaty* requires signatories to allow lawfully made accessible copies to be distributed by organisations assisting people with print disabilities to similar organisations in other signatory countries or directly to disabled individuals in those countries.¹⁴¹ The *Treaty* also requires WIPO to establish information-sharing procedures to enhance cooperation between member states by establishing a voluntary register of institutions assisting people with print disabilities.¹⁴² These provisions reduce the marked inefficiency of the current system, which requires that institutions in each country digitise their own accessible copies of each work. This also allows economies of scale by enabling

135 See Annemarie Bridy, 'Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA' (2012) 30 *Cardozo Arts & Entertainment Law Journal* 153.

136 WIPO General Assembly, *Proposal of Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, 31st sess, 15th extraordinary, WO/GA/31/11 (27 August 2004) <http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf>.

137 Peter Drahos, 'An Alternative Framework for the Global Regulation of Intellectual Property Rights' (2005) 21(4) *Journal Fuer Entwicklungspolitik (Austrian Journal of Developmental Studies)* 44.

138 *Marrakesh Treaty* art 4.

139 Grosse Ruse-Khan, above n 40, 70; Okediji, above n 122, 6.

140 *Copyright Act* pt VB.

141 *Marrakesh Treaty* arts 5, 6 (the articles relate to export and import, respectively).

142 *Marrakesh Treaty* art 9.

institutions in some countries to provide works directly to beneficiaries in other countries. Importantly, this is likely to have a strong positive effect by allowing comparatively well-funded organisations in some countries to support people, particularly in developing countries, who do not have strong institutional support.¹⁴³ A change to Australian law will be required to enable institutions assisting people with print disabilities under part VB to import and export accessible format copies, and a further amendment or new provision will be required to enable people with print disabilities to receive international copies from international institutions.

Finally, the *Treaty* requires that states introduce exceptions to their anti-circumvention schemes (where applicable) to ensure that those schemes '[do] not prevent beneficiary persons from enjoying the limitations and exceptions'¹⁴⁴ that the *Treaty* provides for. This is particularly important to enable people with disabilities (or their representatives) to circumvent digital locks (DRM) placed on ebooks and other works, so that they can utilise adaptive technologies to access the work. Under the Australia-US Free Trade Agreement ('*AUSFTA*'), Australia's circumvention exception for people with print disabilities must be reviewed every four years, and disability advocates must have 'credibly demonstrated' 'an actual or likely adverse impact'.¹⁴⁵ Australia's obligation under *AUSFTA* will prevent any permanent exception being created; disability groups will be required to continue to bring evidence during each review cycle to secure an exception.

The *Marrakesh Treaty* makes an important contribution to improving access to people with print disabilities worldwide. Effectively, it requires developing countries to adopt the limited exceptions that western countries have, enabling ad hoc digitisation and other measures to provide access to people with disabilities. While this is a very important development, its 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. Upon ratification by the US, the *Treaty* will enable access to several hundred thousand English and Spanish language books digitised by volunteers and held by Bookshare.org, as well as similar collections by other smaller institutions. The HathiTrust digital library holds up to ten million more digital copies of books digitised by Google,¹⁴⁶ which will also be able to be made available if it is permitted to retain them under US Fair Use law.¹⁴⁷ Conceivably, then, the *Treaty* may enable access

143 See Love, above n 115.

144 *Marrakesh Treaty* art 7.

145 *Australia-United States Free Trade Agreement*, Australia-United States of America [2005] ATS 1 (signed and entered into force 1 January 2005) art 17.4(7)(e)(viii).

146 See HathiTrust Digital Library <<http://www.hathitrust.org/about>>. Note that these books have been scanned, but have not necessarily undergone Optical Character Recognition (OCR) and error checking. Significant additional work may be required to make these books accessible.

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

to up to 15 per cent of the world's books. This is a significant step forward but is not, on its own, sufficient to redress the book famine.

The greatest achievement of this treaty, however, is not in its immediate impact, but in the framework it establishes. The major challenges in the immediate future will be to begin the global process of digitising the wealth of written human knowledge and to ensure that new works are made accessible from the outset. Digitising existing works at a scale required to adequately address the book famine will be an extremely costly endeavour. While the treaty does not clearly enable or require nation states to support this process, it does provide a framework for making it as efficient as possible, by removing national barriers to the flow of accessible works. A global coordinated effort will be required to systematically address the book famine, and the *Marrakesh Treaty* ensures that international law does not impede this effort.

IV POSITIVE APPROACHES TO OVERCOMING THE BOOK FAMINE

Together, the *CRPD* and the *Marrakesh Treaty* establish a strong statement that the international community is prepared to take action to resolve the inequities that blind people face in accessing cultural and educational works. After member states ratify the *Marrakesh Treaty* and implement its changes to domestic law, the next step must be to start the difficult process of ensuring that past and future books are available in accessible forms. This part explains the extent of member state obligations under the *CRPD* and introduces two proposals: a large-scale global digitisation project, and an obligation on publishers to make accessible copies available for all in-print works. While addressing the book famine likely requires a globally-coordinated approach, we focus here on some tentative proposals that Australia might investigate to fulfil its obligations under the *CRPD*.

A State Obligations Under the *CRPD* to Invest in Digitisation

Member states of the *CRPD* are under a positive obligation to 'take all appropriate measures to ensure that persons with disabilities ... [e]njoy access to cultural materials in accessible formats',¹⁴⁸ to the extent permitted by the *Berne Convention*, *TRIPS* and other applicable international law. We argue that accessible repositories are the most effective and most efficient mechanisms for promoting access and that the *CRPD*, in effect, obliges Australia to take advantage of the flexibility in the three-step test to create or procure the creation of such repositories.

The digitisation of books is a classic public goods provisioning problem. Current copyright policy has not proved effective in stimulating private investment in accessible digitisation. Since the public benefit of providing books

148 *CRPD* art 30(1).

to blind people – equity, education, empowerment, and justice for blind people – is greater than the private return that investors could extract from charging for access to an accessible repository, and since the relative size of the market for accessible copies is relatively low, it is likely that firms will continue to substantially under-invest in the creation of repositories. This implies that the state must take some role in the provision of digital repositories.¹⁴⁹ The simplest option for efficiently digitising existing works is probably through direct state provision. The cost of digitising books on such a large scale will be high; at a minimum, probably around \$30 per book¹⁵⁰ – or nearly \$4 billion for the 129 million books worldwide, not counting the additional costs in sourcing and transporting books not available in major centralised libraries.

If public funds are not available for large-scale accessible repositories, there are other potential solutions to the public goods problem of digitisation, but they may not be as simple to implement as direct public investment. One option that has been suggested might be to create a statutory licence that enables private investment in digitising published books on a commercial basis.¹⁵¹ Whether such an arrangement would be practical, of course, depends on whether a publicly acceptable compromise could be reached between the potential digitisers and the publishing industry in a way that provides sufficient incentives for the digitiser to invest the substantial resources required. The difficulties faced by the Google Books project so far makes this possibility highly uncertain,¹⁵² particularly since few companies other than Google have the resources or the interest in such a massive undertaking.

A potentially cheaper alternative approach might be to encourage the mass digitisation of existing works by a decentralised network of individual volunteers. At least before the Google Books project, approximately 90 per cent of accessible versions of published works were produced by the voluntary and non-profit sector.¹⁵³ Bookshare, a non-profit organisation,¹⁵⁴ provides a key example of the benefits of distributed digitisation. Bookshare's model is apparently highly dependent on volunteer labour: volunteers scan copies of books

149 Joseph E Stiglitz, 'Knowledge as a Global Public Good' in Inge Kaul, Isabelle Grunberg and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press, 1999) 308, 311.

150 Samuelson, above n 19, 1311–12 (reporting estimated costs for Google's digitisation project).

151 Pamela Samuelson, 'Legislative Alternatives to the Google Book Settlement' (2010) 34 *Columbia Journal of Law & the Arts* 697, 705; see also Patrick Hely, 'A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals before WIPO' (2010) 43 *Vanderbilt Journal of Transnational Law* 1369, 1409–10 (suggesting that digitisers be granted a limited exclusive right over the newly digitised copy, allowing them to recoup their investment by selling the accessible copy).

152 For an excellent overview, see James Grimmelmann, 'The Elephantine Google Books Settlement' (2011) 58 *Journal of the Copyright Society of the USA* 497.

153 Comments of Disability Organizations of or for Print-Disabled Persons in Support of the Proposed Settlement, *The Authors Guild Inc v Google Inc*, 05 CV 8136 (SDNY DC, 8 September 2009), 1 <<http://thepublicindex.org/docs/letters/NFB.pdf>>.

154 Bookshare is funded through a combination of philanthropic corporate sponsorship and a small annual fee from members, see Bookshare, *Major Donors* <<https://www.bookshare.org/aboutUs/majorDonors>>; Bookshare, *Membership Options* <<https://www.bookshare.org/membershipOptions>>.

they have access to at home with consumer-grade scanners and optical character recognition (OCR) software; different volunteers proofread the scanned text and correct any scanning errors; and volunteers with specialist academic knowledge also write descriptions of pictorial information in textbooks.¹⁵⁵ This is an example of ‘commons-based peer production’.¹⁵⁶ Bookshare’s repository is produced collaboratively by large numbers of people with varied motivations without the traditional hierarchical contractual structures that characterise firm-based or market-based production. In policy terms, volunteer-based decentralised peer production might complement massive public or private digitisation efforts, but the difficulty of coordinating a network of volunteers means that it will be unlikely to provide adequate coverage of the bulk of print books on its own.

In terms of fulfilling Australia’s obligations under the *CRPD*, the most practical option appears to us to be to directly invest public funds in the digitisation of books, and to enlist the aid of other nations in doing the same. Certainly, the costs of a massive public digitisation scheme will be high. The benefits of providing access to the wealth of written knowledge and culture to the world’s blind population, by contrast, will also be high, although not as easily quantified. Enabling access is both a massive intrinsic good and a driver for much greater economic, cultural, and democratic participation in society by people with print disabilities. The advantages of public repositories could also extend far beyond providing access to people with print disabilities.¹⁵⁷ Public investment in digitising society’s existing works would be highly beneficial for the public preservation of knowledge and culture, to ensure that these works are available for future generations, and to ensure that we can extract the maximum benefit from their re-use once their copyright has expired.¹⁵⁸ Such a large-scale undertaking will by necessity require a globally-coordinated approach. In a best case scenario, digitisation could proceed in parallel across a large number of countries with resources to undertake it, using the new framework established in the *Marrakesh Treaty* to share works and populate accessible repositories around the world.

Whether a massive public digitisation project is an ‘appropriate measure’ under the *CRPD* is unclear. As discussed above, it would probably be permissible under current international law. It follows that Australia and other member states are obliged under the *CRPD* to seriously investigate the practicalities of undertaking that effort. For Australia, this means that if it turns out that this can be done at a reasonable cost – particularly if Australia is able to enlist other

155 Bookshare, *Volunteer Overview* <https://www.bookshare.org/_/volunteer/overview>.

156 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006) 60–3.

157 Robert Darnton, *Can We Create a National Digital Library?* (28 October 2010) *The New York Review of Books* <<http://www.nybooks.com/articles/archives/2010/oct/28/can-we-create-national-digital-library/?pagination=false>>; Robert Darnton, *Google’s Loss: The Public’s Gain* (28 April 2011) *The New York Review of Books* <<http://cyber.law.harvard.edu/futurelawlib/sites/futurelawlib/images/Darnton-NYROB-GoogleLossPublicsGain.pdf>>.

158 See Diane Leenheer Zimmerman, ‘Can Our Culture Be Saved? The Future of Digital Archiving’ (2006) 91 *Minnesota Law Review* 989; Samuelson, above 149.

countries in assisting in preserving and making accessible the world's written knowledge and cultural resources – then the next step is to investigate the potential harm that such a project may impose on copyright owners. This must be done in a clear, transparent manner that carefully considers and evaluates the likely impact of the scheme. The *CRPD*'s positive obligation means that it is no longer sufficient to take the word of copyright owners that they are ready, willing, and able to exploit markets for people with disabilities in the near future. Absent evidence that copyright owners are actually serving these markets in a way that comprehensively addresses the book famine, the obligation to take 'all appropriate measures' suggests that member states should find ways, through public investment or otherwise, to ensure that the world's literary resources are digitised and made accessible. To the extent that a given measure is harmful to the interests of authors and publishers, we must weigh that impact against the likely benefit to persons with print disabilities. In this sense, whether a given measure is appropriate is likely a question of proportionality. If it is accepted that people with print disabilities are experiencing a 'book famine', the crisis seems severe. Given this crisis, we might legitimately expect that a degree of harm to authors and publishers may be acceptable if it is necessary to increase access to people with disabilities. Exactly what level of harm is acceptable, however, is a policy question that can only be evaluated in all of the circumstances.

At a minimum, the positive obligation conferred by the *CRPD* requires Australia to consider the costs of a massive public digitisation program. This investigation should begin immediately. Negotiations for a globally-coordinated approach should also begin immediately, and there is no reason why Australia should not attempt to take the lead.¹⁵⁹ Pursuing a globally-coordinated approach is, of course, an extremely challenging international collective action problem. Progress is likely to be slow, but the task of digitisation must ultimately be undertaken. We think that the benefits of digitisation are likely so large that even in the absence of a coordinated approach, Australia should begin the process of digitisation immediately, ensuring that the works that are most valuable and relevant to Australians with print disabilities are accessible as soon as possible. A large part of the motivation behind the *Marrakesh Treaty*, however, was to enable states to tackle the book famine in the developing world. In order to ensure that books are digitised and made accessible for the benefit of the entire human population, with adequate representation of the works of other cultures, a globally-coordinated approach is fundamentally required.

B Making Future Works Accessible

The second challenge in addressing the book famine is ensuring that works published or republished in the future are made accessible in an efficient manner.

159 See Australian Human Rights Commission, 'Australia Can Help End World Book Famine' (28 June 2012) <<https://www.humanrights.gov.au/news/stories/australia-can-help-end-world-book-famine>> (reporting that Disability Discrimination Commissioner, Graeme Innes, urged the Australian Government to 'change its position and take the lead in ending this "book famine"').

This requires imposing some obligation on publishers, who are in the best position to provide high quality, clear-text digital copies. In most cases, because books are created electronically, this can be done at almost no marginal cost. Because sourcing ebooks directly from publishers does not require wasteful digitisation from print materials, the efficiency gains are significant, and this is probably the only long-term solution to the book famine in terms of books not yet published. The two principle alternatives are to require publishers to make accessible books commercially available, or to require publishers to deposit accessible versions with public or NGO repositories.

1 An Obligation Under the New Marrakesh Treaty

One regulatory option may be to require retailers who are selling books in the Australian market to make an accessible electronic version on comparable commercial terms. If it were a legal obligation for retailers selling books to also ensure that accessible versions were available, private commercial accessible repositories would be likely to emerge. This obligation would require a change to anti-discrimination law. Section 24 of the *Disability Discrimination Act 1992* (Cth) states that providers of goods, services and facilities have a duty not to directly or indirectly discriminate.¹⁶⁰ These duties contain an obligation to make reasonable adjustments on request.¹⁶¹ This duty has never been interpreted to require publishers to provide accessible books. The nearest duty is that upon website developers to provide an accessible retail experience.¹⁶² The duty does not require providers of goods to alter the nature of their goods or services.¹⁶³ Accordingly, retailers do not currently have a duty to create accessible ebooks.

Changing anti-discrimination law to require the sale of accessible copies on equivalent terms might be a simple method to address the ongoing accessibility problem. However, there are good reasons to think that imposing duties on retailers of books to make accessible books available is not likely to be the best option. For retailers who are currently selling access to ebooks in Australia, the costs of compliance are unlikely to be unreasonable. Apple's iBooks platform, for example, includes accessibility features, and Amazon's Kindle previously included text-to-speech features; it seems reasonable to conclude that the costs of implementing accessible features are relatively small, at least for major retailers. Smaller Australian retailers who only sell hardcopy books, however, may be subject to unreasonable burdens to create the infrastructure to support accessible electronic delivery, particularly if they are unable to use established repositories. These costs may not be easy to recoup in the very small market for accessible

160 *Disability Discrimination Act 1992* (Cth) ss 5(1)–(2).

161 *Disability Discrimination Act 1992* (Cth) ss 5(2), 6(2).

162 *Maguire v Sydney Organising Committee for the Olympic Games* (2000) EOC 93.

163 With respect to retail website accessibility in the US, Kessler explains that 'the rule does not require a given site to change the actual goods or services it provides, merely the way that they are presented via the coding of the website': Nikki D Kessler, 'Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites are "Places of Public Accommodation"' (2008) 45 *Houston Law Review* 991, 1027.

books, and the net result may be to drive book prices up, lessening access to culture and knowledge across society. There is also a significant risk that an Australian anti-discrimination law would be ineffective against major international retailers – like Amazon and Apple – with no formal Australian presence. Finally, the system would also introduce new financial burdens on people with print disabilities, who currently do not have to pay for accessible copies under the part VB statutory licence. The measure is worth investigating, but may not be the most appropriate approach.

2 *Mandatory Deposit*

An alternative to requiring retailers to make books accessible may be to require publishers to provide an accessible version to public repositories. This method has been implemented on a limited scale in the US, where publishers are generally required by contract to provide K–12 and post-secondary educational material in accessible formats to a central database.¹⁶⁴ The ideal approach in Australia, in terms of maximising books collected and minimising costs on publishers, would be to graft an obligation onto the mandatory deposit obligations that are already imposed on publishers.

Australian law requires publishers of books in Australia to deposit a copy of the book with the National Library of Australia ('NLA'),¹⁶⁵ and many states have similar requirements for state libraries.¹⁶⁶ Mandatory deposit rules exist to ensure that the state is able to maintain a nation's 'historical, literary and cultural record'.¹⁶⁷ National and state libraries provide an important archive of published material for future generations. In the digital era, as the preferred or canonical form of books is increasingly electronic, states must explore the possibility of electronic deposit requirements or risk 'missing a significant and unrecoverable portion of their cultural heritage'.¹⁶⁸ A number of international jurisdictions have

164 *Individuals with Disabilities Education Act 2004*, 20 USC § 1412–3. The repository is entitled the 'National Instructional Materials Access Center'. For more information on the National Instructional Materials Access Center, see the Center's informational website <<http://www.nimac.us/>>; see also Richard C Herrera, 'Policing State Testing Under No Child Left Behind: Encouraging Students with Disabilities to Blow the Whistle on Unscrupulous Educators' (2007) 80 *Southern California Law Review* 1433; Megan Roberts, 'The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators' (2008) 55 *University of California Law Review* 1041.

165 *Copyright Act* s 201.

166 See *Copyright Act 1879* (NSW) ss 5–7; *Publications (Legal Deposit) Act 2004* (NT) s 7; *Libraries Act 1988* (QLD) s 68; *Libraries Act 1982* (SA) s 35; *Libraries Act 1984* (Tas) s 22; *Libraries Act 1988* (Vic) s 49; *Legal Deposit Act 2012* (WA) s 13.

167 Brian Lang, Chairman of the Conference of Directors of National Libraries Working Group and Chief Executive of the British Library, *The Legal Deposit of Electronic Publications*, UN Doc CII-96/WS/10 (December 1996) 20 <<http://www.unesco.org/webworld/memory/legaldep.doc>>.

168 Michael Seadle, 'Copyright in the Networked World: Digital Legal Deposit' (2001) 19 *Library Hi Tech* 299, 302.

now adopted electronic mandatory deposit rules.¹⁶⁹ Western Australia has already introduced a requirement for the deposit of digital items published on the internet by Western Australian residents, but this provision is only active upon direction by the Western Australian State Librarian.¹⁷⁰ While preservation of electronic material is not free from problems,¹⁷¹ it seems likely to provide archives with significant advantages over collecting and preserving print publications that are bulky and decay over time.

The Commonwealth Attorney-General's Department ('AGD') is currently considering implementing mandatory electronic deposit at a Federal level.¹⁷² Copyright industry groups have expressed some concern about the further distribution of deposited materials, particularly if materials become broadly available in public libraries.¹⁷³ Other objections to the scheme apparently centre on the allocation of costs and difficulties in dealing with the mass of material published on the internet.¹⁷⁴ For this reason, the version proposed by the AGD in an early consultation paper would be limited to mandatory deposit of electronic 'physical' goods, such as DVDs and CD-ROMs; ebooks would only be subject to deposit on demand, primarily in order to ensure that all online publications are not automatically made subject to the scheme.¹⁷⁵

If mandatory electronic deposit were introduced, and publishers were required to lodge copies of ebooks with the NLA, a long-term solution to the future book famine may be possible. Conceivably, the Commonwealth could insert another exception into the *Copyright Act* that would permit or require the NLA to make those electronic copies available to institutions assisting persons with a disability which are already able to operate digital repositories in Australia.¹⁷⁶ Importantly for our purposes, since a provision requiring mandatory deposit of electronic versions is not technically an exception to copyright, the three-step test is not enlivened. As long as the grant of copyright protection is not

169 Conference of Directors of National Libraries, 'British Library: International Survey on Electronic Legal Deposit' (Annex to Scope note for Discussion Group A, CDNL Annual Meeting, 12 August 2010) <http://www.cdnl.info/Legal_Deposit/CDNL_2010_-_BL_international_survey_on_e-Legal_Deposit.pdf>.

170 *Legal Deposit Act 2012* (WA) s 13.

171 See Ross Harvey, *Preserving Digital Materials* (De Gruyter Saur, 2nd ed, 2011) ch 3.

172 See Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, 7 March 2012.

173 See Australian Society of Authors, Submission to Attorney-General's Department, *Extending Legal Deposit*, 18 April 2012; Australasian Performing Right Association (APRA) and Australasian Mechanical Copyright Owner's Society (AMCOS), Submission to Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, 13 April 2012; The Association of Learned and Professional Society Publishers, Submission to Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, April 2012; Copyright Agency Ltd, Submission to Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, 13 April 2012; Australian Publishers Association, Submission to Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, 2012.

174 See, eg, Australian Broadcasting Corporation, Submission to Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, 20 April 2012; Google Australia and New Zealand, Submission to Attorney-General's Department, *Consultation Paper: Extending Legal Deposit*, 11 April 2012.

175 See Attorney-General's Department, above n 172, 7.

176 *Copyright Act* s 135ZP.

made conditional on deposit, there is no conflict with international law, subject to the requirement that any copying and communication by repositories is compliant with the three-step test.

A mandatory deposit approach to populating accessible public repositories would have important benefits. Most significantly, it would be effective and relatively inexpensive. Pursuing this option would ensure that all future books were available to specialist repositories in accessible forms. It would efficiently allow people with print disabilities to be served through existing institutions that have already put in place authentication systems and distribution networks. It would also impose very little additional burden on publishers, who will in almost all cases already have electronic versions of books as part of their normal publishing workflows.

The current AGD consultation does not explicitly consider the ability to use legal deposit as a route to populate accessible repositories. We think that this should be reviewed immediately, and opened up to detailed public consultation. It is likely that publishers will raise some of the similar objections that they have raised to the *Marrakesh Treaty*, particularly since resources deposited into repositories must be deposited without encryption. Storing electronic documents without encryption is vital to both preservation and accessibility purposes – accessible repositories require the removal of any DRM by their nature. The Australian Society of Authors has strongly objected to the removal of DRM in any electronic deposit scheme, citing the crisis in copyright:

[T]he ASA is also opposed to the stripping of technological protection measures, for the reason that copyright integrity – both as property and moral right – of Australia’s authors and illustrators is currently under significant stress or attack by inimical interests, and that any and all measures need to be applied to counter these, including by libraries or new forms of digital repositories who store copyright material on their servers.¹⁷⁷

Just as copyright owners’ fears of mandatory exceptions cannot be justified in light of the book famine, the argument that ‘any and all measures’ should be applied to protect copyright, even if that means blind people are excluded, must not be accepted. Public consultation should be undertaken to ensure that a legal deposit scheme includes adequate safeguards to limit access to copyright materials, but the ongoing book famine must be reversed.

V CONCLUSION

People with a print disability have a fundamental right to access cultural works for their education, work, play and pleasure. Currently, our system is failing to provide this basic opportunity. The dominance of international content industries in global copyright debates have historically confined disability rights to ad hoc limited exceptions to the general copyright monopoly. The *CRPD*

177 Australian Society of Authors, above n 173, 3; see also Australian Publishers Association, above n 173, 5.

suggests that a paradigm shift is necessary to reframe accessibility debates. By introducing positive obligations on member states to ‘take all appropriate measures to ensure that persons with disabilities [can enjoy] access to cultural materials in accessible formats’,¹⁷⁸ the *CRPD* requires states to move beyond ad hoc exceptions to copyright and towards internationally coordinated large-scale systematic attempts to reverse the book famine. The book famine in Australia and abroad should be a key policy priority, and the *CRPD* provides a clear positive obligation to address it. The *Marrakesh Treaty* sets out a framework for international cooperation in this regard. The *Marrakesh Treaty* ensures that all signatories will be obliged to introduce a minimum baseline exception that allows visually-impaired people to receive, make, and use accessible copies of works. Importantly, the *Marrakesh Treaty* also allows the cross-border flow of accessible books, laying the groundwork for a globally-coordinated approach to pooling accessible books digitised around the world.

While the *Marrakesh Treaty* is an important step forward, much more needs to be done. This article canvasses a number of potential measures that Australia might implement to comply with the *CRPD* and begin to remove the inequitable barriers that blind people face in accessing written works. We believe that the most important measures are to (1) invest heavily in the digitisation of existing works; and (2) require that publishers or retailers of works published or republished in the future deposit those works in an accessible form with a public repository. The second of these, fortunately, can be achieved at little cost. The first requires a significant expenditure of public funds. Both are necessary to address the book famine in any substantive fashion. Most importantly, both will require a significant exercise of political will to overcome the entrenched limited exceptions paradigm in global copyright politics.

178 *CRPD* art 30(1)(a).