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Article 30

Participation in cultural life, recreation, leisure and sport

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

Introduction

Article 30(3) CRPD addresses the relationship between human rights, intellectual property, and disability in the context of culture, cultural activity, and access to culture.[1] Of the millions of books that are published worldwide, it is only 1 and 7 percent that are made available each year to the 285 million persons in the world that are blind, partially sighted and print disabled.[2] This is the so-called problem of "global book famine". Article 30 addresses—inter alia—this problem, stressing 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".[3] This article aims to ensure that intellectual property rights will not prevent access of disabled people to cultural goods. In order to enhance equal participation in cultural life, disabled individuals need to be able, for example, to reproduce published materials into accessible formats, such as Braille, large print, and audio formats. Current intellectual property rules in most countries, however, prevent this, unless the use in question is authorized by the rightholders or permitted by law. Article 30 is part of a network of provisions within the CRPD that are of specific importance to intellectual property, namely those on access to information, participation in cultural life, and international cooperation.

Background and Travaux Preparatoires

Free access of disabled individuals to cultural goods ensures their equal participation in cultural life. As the World Blind Union (WBU) acknowledged during the third session of the CRPD negotiations, access of disabled individuals to cultural goods without hindrance from restrictive intellectual property laws "is of utmost importance for deafblind, blind and visually impaired persons." Indeed, unless specific exceptions to intellectual property rights permit certain uses for the benefit of disabled persons, any

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[1] With the relationship between disability and human rights having been addressed as early as 1994, and that between copyright and human rights in 2005. See General Comment No. 5 on persons with disabilities adopted by the Committee on Economic, Social and Cultural Rights, contained in Document E/1995/22, 9 December 1994; see also the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 4 March 1994.

[2] See World Blind Union (WBU) press release, 17 June 2013 <http://www.worldblindunion.org/English/news/Pages/JUne-17-Press-Release-for-WIPO-Book-Treaty.aspx>

[3] CRPD, preamble, para V.

use of cultural materials that enables access, such as copying a book in Braille, Moon, or audio format, would amount to an infringement of intellectual property rights. It is in this light that intellectual property could be seen as a barrier to accessing cultural materials.

Whilst most countries may have some exception to intellectual property rights for the benefit of the disabled in their national laws,[4] the need for an international instrument permitting the cross-border distribution of copies in accessible formats was identified as far back as the 1980s. Beyond proposals and studies, however, no concrete action was taken. For instance, on 25-27 October 1982, a WIPO and UNESCO Working Group on access by the visually and auditory handicapped to material reproducing works protected by copyright published a report outlining "model exceptions for national copyright laws" and highlighting concerns about the lack of a mechanism to facilitate access by disabled persons to copyright works.[5] For several years, these concerns had not attracted significant international interest,[6] even though they were also raised in further studies and reports prepared in response to the so-called "disability agenda".[7]

During the negotiations for article 30 CRPD, intellectual property was a tricky term. The debate as to whether the narrower term "copyright" should be included in article 30 CRPD intensified during the sixth session. Although the Facilitator stressed the need to investigate this issue further,[8] delegates did not reach an agreement, as the Chairman acknowledged,[9] and the broader term "intellectual property" was ultimately included in article 30. This broader stipulation indicates that delegates meant to ensure a high level of protection for the interests of disabled persons, although it would be mainly copyright law raising accessibility issues.

Since accessibility is central in this context, some delegates, such as the International Disability Caucus (IDC) in the seventh session and Australian NGOs in the

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[4] Examples include: Section 121, Title 1, 17 US Code (United States); Art 5(3)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, 10-19 (European Union); Decree No. 2017-253 of 27 February 2017, on the Exception to Copyright, Related Rights and the Rights of Database Producers for People with Disabilities (France); section 45a, Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 20 December 2016 (Federal Law Gazette I, p. 3037) (Germany); sections 31A-31F of the Copyright, Designs, and Patents Act 1988 (United Kingdom).

[5] Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, Report UNESCO/WIPO/WGH/I/3, Paris, 3 January 1983, < http://unesdoc.unesco.org/images/0005/000539/053955eb.pdf >

[6] Abigail Rekas, 'Tracking The Progress of the Proposed WIPO Treaty on Exceptions and Limitations to Copyright to Benefit Persons with Print Disabilities' (2013) 4 European Yearbook of Disability Law 45.

[7] See e.g. in this regard Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (WIPO 2003) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805>; Nic Garnett, *WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions* (WIPO 2006) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952 >

[8] Consolidation of proposals submitted by the Facilitator as of 12 August 2005, Facilitator's draft Art 24 - Participation in cultural life, recreation, leisure and sport, <http://www.un.org/esa/socdev/enable/rights/ahcstata30ssfacilitator.htm>; See also the draft proposal of the International Disability Caucus (NGO) during this session (available at < http://www.un.org/esa/socdev/enable/rights/ahcstata30sscomments.htm#idc>) that refers to artistic property rights, which is traditionally meant to be confined to copyright: "States parties shall take all appropriate steps to ensure that laws protecting artistic property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials." Note that during the fourth session, the same NGO submitted a broader proposal encompassing both intellectual and artistic property rights.

[9] Report by the Chairman on draft article 24, 6th session, 139, available at < http://www.un.org/esa/socdev/enable/rights/ahcstata30ssrepchair.htm>

third session, suggested dealing with the removal of barriers to cultural information comprehensively in the relevant article dealing with "accessibility". This was also the position of the Working Group,[10] but there was no agreement and access to cultural goods remained under the heading of participation in culture.

At a broader level, article 30 is important as it brings forward questions on the theoretical relationship between intellectual property rights, human rights, and—more specifically—the rights of the disabled. Being complex and subtle,[11] it has become the subject of scholarly debate. Some scholars argue that intellectual property rights constitute a form of fundamental human rights,[12] while others suggest that some forms of intellectual property rights are equivalent to human rights.[13] Others contend that they are a barrier to the realization of fundamental human rights.[14] There is consensus, however, on the need to effectively weigh and balance these regimes of rights through appropriate policy and regulatory frameworks,[15] with a body of scholarship suggesting that, in the event of conflict, human rights should prevail over intellectual property rights. Drahos, for instance, argues that intellectual property rights are "instrumental rights" whereas human rights are "fundamental rights" that need to take precedence.[16] The UK Commission on Intellectual Property rights has also concluded in its report entitled "Integrating Intellectual Property Rights and Development Policy" that "the intellectual property right is best viewed as one of the means by which nations and societies can help to promote the fulfillment of human economic and social rights".[17]

In the event of conflict between human rights and intellectual property systems, the UN Commission on Human Rights unequivocally urges governments to adopt

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[10] Working Group draft text on draft article 24, 108 <http://www.un.org/esa/socdev/enable/rights/ahcstata30wgtext.htm>

[11] For a general discussion see Jingyi Li and Niloufer Selvadurai, 'Reconciling the enforcement of copyright with the upholding of human rights: a consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10), European Intellectual Property Review 653-664.

[12] Harry Goldsmith, 'Human Rights and Protection of Intellectual Property' (1968) 12(2) Trademark and Copyright Journal of Research and Education 889; Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1)(c)' in Evgueni Guerassimov (ed.), *Approaching Intellectual Property as a Human Right* (UNESCO Publishing 2001) 4.

[13] Peter K. Yu, 'Intellectual Property and Human Rights in the Non-multilateral Era' (2012) 64(4) Florida Law Review 1045, at 1070; Paul Torremans, 'Is Copyright a Human Right?' (2007) Michigan State Law Review 271; Mirela V. Hristova, 'Are Intellectual Property Rights Human Rights?: Patent Protection and the Right to Health' (2011) 93 Journal of the Patent and Trademark Office Society 339; Rochelle Cooper Dreyfuss, 'Patents and Human Rights: Where is the Paradox?' (2010) New York University, Law and Economics Research Paper No. 06-38.

[14] See e.g. Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press 1967) 2. The position of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) is that intellectual property rights and human rights are of intrinsically different natures. See CESCR, General Comment No.17, UN Doc E/C.12/GC/17, 12 January 2006, para 2: "The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author".

[15] See further David Weissbrodt and Kell Schoff, 'The Sub-commission's Initiative on Human Rights and Intellectual Property' (2004) 22(2) Netherlands Quarterly of Human Rights 181; Daniel J. Gervais, 'TRIPS and Development' in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development* (OUP 2007).

[16] See Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development' in *Intellectual Property and Human Rights* (WIPO 1999) 13-41 available at <http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf>; *contra* Sharon E. Foster, 'Prelude to Compatibility between Human Rights and Intellectual Property' (2008–09) 9(1) Chicago Journal of International Law 171, 173.

[17] Commission on Intellectual Property Rights (UK), Integrating Intellectual Property Rights and Development Policy (2002), available at <http://www.iprcommission.org/papers/pdfs/final_report/cipr_exec_sumfinal.pdf>

provisions for the protection of the social function of intellectual property.[18] Indeed, intellectual property laws lay down sets of rights that grant authors and owners the power to authorize or exclude others from carrying out certain activities by reference to their protected products of intellect: this includes copying protected subject-matter, issuing copies to the public, or lending and renting. Intellectual property rights are usually drafted as exclusive property rights. The Universal Declaration of Human Rights states that "(e)veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[19] There are instances, however, where the exercise of human rights and fundamental freedoms—and the realization of public policy objectives—come in conflict with intellectual property rights. Examples include freedom of expression in light of parodied versions of copyright protected materials, or disability rights in light of the need to copy copyright materials in accessible formats, such as talking books, or materials copied in Braille, Moon, or audio formats. In cases where a conflict arises between private entitlements resulting from intellectual property rights and public interest objectives, including fundamental human rights, intellectual property rights often play second fiddle. There are indeed specific provisions included in intellectual property laws, the so-called permitted uses, that allow certain users to carry out activities that would otherwise result in infringement. These permitted uses represent a balancing act between the private interests of intellectual property owners and public policy objectives, including the protection of fundamental human rights.

All appropriate steps

State parties to the CRPD should ensure that disabled persons have the opportunity to utilize their creative, artistic, and intellectual potential to the greatest possible extent, and—to this end—access to cultural activities should be ensured. If necessary, special arrangements should be made to meet the needs of individuals with mental or sensory impairments, including communication aids for the deaf, literature in Braille and/or cassettes for the visually impaired and reading material adapted to the individual's mental capacity. The domain of cultural activities includes dance, music, literature, theatre, and plastic arts.[20]

The implementation of article 30(3) CRPD raises an obligation on member states to adopt appropriate measures with a view to ensuring that such essential uses shall be available. Although it is not specified what such "appropriate steps" could be, these most commonly take the form of permitted uses under intellectual property laws.

The obligation imposed by article 30(3) on state parties is limited in that it covers use of cultural materials only. In the third session, Australian NGOs suggested that the article should cover "all information, not just cultural information" and that hence it would be opportune to deal with the issue as a matter of "accessibility". Indeed, the interplay between intellectual property and rights of disabled individuals has largely to do with the need to enhance access to cultural materials, especially in the context of

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[18] United Nations High Commissioner for Human Rights, Intellectual Property and Human Rights, Sub-Commission on Human Rights Resolution 2001/21, 16 August 2001.

[19] Universal Declaration of Human Rights (adopted by the United Nations General Assembly on 10 December 1948), Art 27(2). Also see the very similar provision included in Art 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.)

[20] Plastic arts include three-dimensional and visual arts (paintings, sculptures, films, photographs).

copyright protected works. The suggestion of Australian NGOs did not make its way in the final version of the Convention, however. Article 30(3) is meant to cover cultural materials only and, in this light, it is more relevant to copyright law, compared to other intellectual property rights.

Article 30(3) does not create a positive obligation on governments to introduce a specific provision into their national intellectual property laws; instead, it creates a generic obligation, according to which state parties should ensure that "intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials".

This generic obligation has become mandatory in the aftermath of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.[21] This treaty (also known as VIP Treaty) was signed in 2013 under the auspices of the World Intellectual Property Organisation (WIPO) and it came into effect on 30 September 2016. In this light, it helps achieve the objectives of article 30(3) CRDP, having as its main goal "to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print disabled (VIPs)".[22] In line with the human rights protection outlined in the Universal Declaration of Human Rights and the Convention on the Rights of Persons with Disabilities, the Marrakesh Treaty upholds the principles of non-discrimination, accessibility, equal opportunity, and effective participation in society, whilst affirming the importance of protecting copyright as a reward for creation. The treaty delineates precise minimum standards of mandatory exceptions to copyright for the benefit of the blind, visually impaired, and print disabled. To this end—and unlike other multilateral international instruments that harmonise intellectual property rights in general—the VIP Treaty offers a vertical form of protection by specifically outlining a framework of exceptions and limitations to domestic copyright laws that permit certain uses of works from the blind, visually impaired, and print disabled. This includes making works available in accessible formats, such as Braille display and DAISY navigation.

Domestic laws tend to include relevant provisions that allow copying that takes place with a view to enhancing accessibility of the disabled to cultural goods. At the European level, an exception that permits copying works, and making them available, in formats accessible to the disabled is permitted under article 5(3)(b) of the 2001 Information Society Directive.[23] This article reads: "Member states may provide for exceptions or limitations to the rights provided for in articles 2 and 3 in the following cases: (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability".

Although this article is merely optional for EU member states to implement, various domestic laws include relevant provisions.[24] For instance, UK copyright law specifically addresses disability. Following joint lobbying from the publishing industry, the National Library for the Blind (NLB) and the Royal National Institute of Blind People (RNIB), an exception to copyright was included in the Copyright (Visually

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[21] A detailed analysis of the Marrakesh Treaty is available at Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, and Jerome H. Reichman, The World Blind Union Guide to the Marrakesh Treaty (OUP 2017).

[22] See WIPO website <http://www.wipo.int/treaties/en/ip/marrakesh/>

[23] See Art 5(3)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, 10-19 (Information Society Directive).

[24] See indicatively Lucie Guibault et al, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (IvIR, 2007) 17 et seq; also see <http://copyrightexceptions.eu/#Art.%205.2(a)>

Impaired Persons) Act 2002 (CVIPA 2002).[25] The relevant provision had the effect that accessible copies of a literary, dramatic, musical, or artistic work may be made by or for visually impaired persons without the consent of the copyright owner.[26] The exception related not only to visual impairment but extends to persons who are unable to hold a book.[27] More recently, however, the 2014 reform of UK copyright law came with an expansion of the scope of permitted uses for disabled individuals. Under the new provisions, which are incorporated in sections 31A-31F of the Copyright, Designs, and Patents Act, "'disabled person' means a person who has a physical or mental impairment which prevents the person from enjoying a copyright work to the same degree as a person who does not have that impairment, and 'disability' is to be construed accordingly." This means that the new provisions cover other types of impairment too, such as dyslexia. By virtue of the change of the law, the subject matter that can be copied into an accessible format is also much broader, covering a whole range of content, such as films and broadcasts. Although it is only legal to copy material if suitable accessible copies are not available, a wide set of activities is permitted including making Braille, audio or large-print copies of books, newspapers or magazines for visually impaired people; making subtitled films or broadcasts for deaf or hard of hearing people and adding audio descriptions to the same subject matter for visually impaired people; and making accessible copies for dyslexic individuals.

An exception for the benefit of the disabled is also available under US copyright law. Section 121 of the US Copyright Code introduces a specific exception for reproductions for the blind or other people with disabilities,[28] supplementing the general "fair use" doctrine[29] available under US copyright law. Under this doctrine, which lays down a judicial test to determine which uses are permitted or not on a case-by-case basis, the interests of disabled individuals may be taken into consideration. The landmark *Google Books* case[30] illustrates this point. In this case, Google's unauthorized digitizing of millions of copyright-protected works, the creation of a search functionality, and display of snippets from those works were held to be non-infringing fair uses. As Judge Chin of the US District Court for the Southern District of New York observed in his opinion, Google Books expands access to books since

> "traditionally underserved populations will benefit as they gain knowledge of and access to far more books. Google Books provides print-disabled individuals with the potential to search for books and read them in a format that is compatible with text enlargement software, text-to-speech screen access software, and Braille

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[25] In force since 31 October 2003.

[26] Subject to limitations: see Sections 81-83, Copyright, Designs, and Patents Act (CDPA) 1988.

[27] The (then) section 31F(9): "Visually impaired person" means a person- (a) who is blind; (b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; (c) who is unable, through physical disability, to hold or manipulate a book; or (d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading."

[28] Section 121, Title 1, 17 U.S.C.

[29] 17 U.S.C. § 107. Courts shall consider four factors to determine a permissibility of a use:

1. "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work."

[30] See *The Author's Guild et al v Google Inc,* 05 Civ. 8136 (DC), 2013 WL 6017130, at 11 (S.D.N.Y. 14 November 2013).

devices. Digitization facilitates the conversion of books to audio and tactile formats, increasing access for individuals with disabilities."[31]

The Second Circuit affirmed the fair use finding on October 2015,[32] holding that the project provides a public service without violating intellectual property law. The US Supreme Court declined to review the case,[33] leaving the lower court's decision standing.

The *Google Books* case follows yet another decision affirming fair use of copyright materials for the benefit of the print disabled. This is the *HathiTrust* case.[34] Print disability was there defined as "any disability that prevents a person from effectively reading printed material. Blindness is one example, but print disabilities also include those that prevent a person from physically holding a book or turning pages."[35] In this case, the Second Circuit held that access of materials scanned by the Google Books project and made available to affiliate libraries of the HathiTrust project qualified as fair use. In this light, it affirmed in part the decision of the US District Court[36] and upheld the principles of equality of opportunity, full participation, independent living, and economic self-sufficiency that the Americans with Disabilities Act means to preserve.[37]

In accordance with international law

Although there is a web of international law provisions ensuring that everyone shall enjoy the right to equal participation in cultural life without discrimination,[38] the relationship between human rights, intellectual property and disability was first addressed

[31] See *The Author's Guild et al v Google Inc,* 05 Civ. 8136 (DC), 2013 WL 6017130, at 11 (S.D.N.Y. 14 November 2013); *The Authors Guild et al v Google Inc*, 13-4829-cv (2d Cir. 16 October 2015).

[32] *The Author's Guild et al v Google Inc,* 05 Civ. 8136 (DC), 2013 WL 6017130, at 11 (S.D.N.Y. 14 November 2013) 11.

[33] *The Authors Guild et al v Google Inc*, 13-4829-cv (2d Cir. 16 October 2015).

[34] *The Authors Guild v HathiTrust*, 902 F.Supp.2d 445 (SDNY October 10, 2012), aff'd in part in *The Authors Guild v HathiTrust* (2d Cir. 10 June 2014).

[35] *The Authors Guild v HathiTrust* (2d Cir. 10 June 2014) 7-8.

[36] *The Author's Guild et al v HathiTrust et al,* 11 CV 6351 (HB), at 21 (S.D.N.Y. 14 November 2013) 21.

[37] 42 U.S.C. § 12101(7). Similarly, the Chafee Amendment demonstrates Congress's intent that copyright law make appropriate accommodations for blind and print-disabled individuals. See 17 U.S.C. § 121.

[38] See e.g. International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27), Art 15(1)(a): "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life"; International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969, in accordance with Article 19), Art 5(e)(vi): "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to (…) guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:… (e) Economic, social and cultural rights, in particular: (vi) The right to equal participation in cultural activities".
Other soft-law responsibilities arising from international law can be found in the Declaration on the Rights of Disabled Persons (1975), Proclaimed by UNGA Res 3447 (XXX), 9 December 1975; the World Programme of Action Concerning Disabled Persons (1982), UNGA Res 37/52, 3 December 1982; the Resolution regarding Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991), UNGA Res 46/119, 17 December 1991, regarding Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, available at <http://www2.ohchr.org/english/law/principles.htm>; and the Resolution regarding the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (1993), UNGA Res 48/96, 20 December 1993, regarding the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, available at <http://www.un.org/esa/socdev/enable/dissre00.htm>

at the international level in article 30 CRPD. It is, however, supplemented by the "soft-law" provisions incorporated in other international instruments that may not address intellectual property, or copyright, directly but represent a strong political and moral commitment of governments to take action with a view to ensuring that disabled individuals are given equal opportunities. This broad moral framework that applies to the abled in relation to the disabled ought to take into account formal obligations arising from international instruments on intellectual property law, including copyright.[39]

There are important treaties laying down minimum standards of intellectual property protection at international level. Patent protection is offered through the Paris Convention 1883,[40] the Patent Law Treaty 2000,[41] and the Patent Cooperation Treaty 1970.[42] Trade marks are protected in the Paris Convention 1883,[43] the Trademark Law Treaty 1994,[44] and the Madrid Agreement 1891[45] and the Madrid Protocol 1989.[46]

The most relevant intellectual property right that is affected in the context of access to cultural materials is copyright and there has been an ongoing discussion about introducing this term instead of the broader term intellectual property in article 30 CRPD.[47]

Copyright also derives from a framework of international treaties. The oldest of these is the Berne Convention of 1886,[48] which lays down the substantive minima of protection. In its latest revised version, it stipulates a minimum term of protection for the author of a work of 50 years *post mortem auctoris* (after the death of the author)[49] and lays down exclusive rights, such as the right to reproduction. Rights are subject to a narrow set of exceptions and limitations[50] that are justified on the basis of fundamental rights or public policy reasons. It is the exceptions and limitations that would permit users—abled or disabled—to access, reproduce, and create cultural works because they go beyond the copyright holder's property right (scope limitations) or serve as defences for a particular use (copyright exceptions). The few exceptions available in the Berne Convention do not expressly permit uses of works for the benefit of the disabled, as they are too narrow in scope. However, there is a general provision offered in this Convention that would allow contracting states to include exceptions to the reproduction right. This is the so-called three-step test, which serves as a legislative standard with relatively narrow scope.[51] According to article 9(2) of the Berne Convention, it is possible

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39 See in general Thomas Cottier et al (eds.), *Human Rights and International Trade* (OUP 2005); Uma Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law', in Jonathan Griffiths and Uma Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses* (OUP 2005).

40 Paris Convention for the Protection of Industrial Property 1883 (as amended on 28 September 1979).

41 Patent Law Treaty (adopted at Geneva on 1 June 2000).

42 Patent Cooperation Treaty (done at Washington on 19 June 1970, amended on 28 September 1979, modified on 3 February 1984, and on 3 October 2001).

43 Paris Convention for the Protection of Industrial Property 1883 (as amended on 28 September 1979).

44 Trademark Law Treaty (adopted at Geneva on 27 October 1994).

45 Madrid Agreement Concerning the International Registration of Marks 1891 (as amended on 28 September 1979).

46 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks 1989 (adopted at Madrid on 27 June 1989, as amended on 3 October 2006 and on 12 November 2007).

47 See below [xxx].

48 Berne Convention for the Protection of Literary and Artistic Works 1886 (completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979).

49 Berne Convention for the Protection of Literary and Artistic Works 1886, Art 7(1).

50 Berne Convention for the Protection of Literary and Artistic Works 1886, Art 9.

51 See indicatively Martin Senftleben, *Copyright, Limitations and the Three-Step Test* (Kluwer 2004); Jonathan Griffiths, 'Rhetoric and the "Three-Step Test": Copyright Reform in the United Kingdom' (2010) 32(7)

for contracting states to permit reproduction of works protected by the Convention insofar as the reproduction:

1. concerns only certain special cases;
2. does not conflict with a normal exploitation of the work; and
3. does not unreasonably prejudice the legitimate interests of the author.

The three-step test, was also repeated in the TRIPS Agreement, which expands the test to all exclusive rights, whilst taking a narrower approach by stipulating that members should "confine limitations or exceptions to exclusive rights to certain special cases … .".[52] There has been a pronounced reluctance to look to other (relevant) international treaties such as the CRPD when interpreting the scope of state obligations under WTO agreements.[53]

Copyright is also protected at international level through the provisions of the WIPO Copyright Treaty of 1996.[54] This treaty has increased the level of protection afforded to authors by creating more rights, i.e. the right of communicating works to the public,[55] and by introducing provisions against the circumvention of technological protection measures.[56] This increased protection of copyright at international level has not accommodated the mandatory introduction of any permitted uses, not to mention any specific exceptions for disabled people. Instead, article 10(1) of the treaty allows contracting parties to provide for exceptions to or limitations of the rights granted under the treaty insofar as they meet the requirements of the three-step test. In principle, this may accommodate exceptions to the right of communicating works to the public or to the anti-circumvention provisions for the benefit of the disabled.

Article 7 of the Marrakesh VIP Treaty specifically addresses the rights of disabled individuals in light of the circumvention of technological protection measures. It reads:

> "Contracting parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty".

Laws protecting intellectual property rights

European Intellectual Property Review 309-312; Christophe Geiger, 'Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37(4) IIC 371-406; 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(4) IIC 407; Kamiel J. Koelman, 'Fixing the Three-Step Test' (2006) 28(8) European Intellectual Property Review 407-412; André Lucas, 'For a Reasonable Interpretation of the Three Step Test' (2010) 32(6) European Intellectual Property Review 277-282; Christophe Geiger et al., 'Declaration - a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39(6) IIC 707-713.

[52] TRIPS, Art 13.

[53] See also Ernst-Ulrich Petersmann, 'Human Rights and International Trade: Defining and Connecting the Two Fields' in Thomas Cottier et al (eds.), *Human Rights and International Trade* (OUP 2005) 29; Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by World Trade Law: A Reply to Petersmann' (2002) 13 EJIL 815-844; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 EJIL 753-814.

[54] WIPO Copyright Treaty (adopted in Geneva on 20 December 1996).

[55] WIPO Copyright Treaty 1996, Art 8.

[56] WIPO Copyright Treaty 1996, Art 11; see also Patricia Akester, 'The Impact of Digital Rights Management on Freedom of Expression: The First Empirical Assessment' (2010) 41(1) IIC 31.

Copyright was one of the central issues that delegates had to consider when discussing the scope of article 30. In the proposals on the then draft article 24, the Facilitator had stressed that "more investigation is needed to choose between intellectual property rights or copyright, taking into account the best interest of PWDs".[57] It is probably because these interests of persons with disabilities were taken into consideration that a more protectionist approach was adopted through the choice of the broader term "intellectual property rights". As acknowledged in the report by the Chairman during the sixth session, "[a] proposal to replace 'intellectual property rights' with 'copyright' received strong support, but there was no general agreement."[58] It was in the seventh session that the Chairman suggested retaining the "reference to 'intellectual property rights', which is broader—the qualifications later in the provision ("do not constitute an unreasonable or discriminatory barrier") circumscribe its application, as does making it subject to international law."[59] The choice of the term intellectual property rights ensures that appropriate exceptions and limitations for the benefit of disabled individuals shall apply to all areas of intellectual property law, despite the fact that copyright is arguably the most relevant area of intellectual property protection in the context of access to cultural goods. Possibly, another relevant area is the EU database right,[60] which prevents the unauthorized extraction and/or re-utilization of substantial parts of a database.

Intellectual property can be seen as a barrier between a cultural work and its enjoyment by the disabled in that it confers to the right holder the power to authorise or prohibit the use of the work. These exclusive rights give the right holder the power to either license a use or exclude third parties from that use. They are, however, limited in scope by the so-called exceptions and limitations to intellectual property rights that permit users to carry out some activities without seeking consent from the right holder(s) or clearing a license. For instance, law permits copying a book in a format that is accessible to the disabled to the extent that exceptions and limitations allow. The legal nature of exceptions and limitations varies from jurisdiction to jurisdiction but most commonly they serve as defences against allegations of infringement. In the United

[57] Consolidation of proposals submitted by the Facilitator, as of 12 August 2005 Facilitator's draft Article 24 - Participation in cultural life, recreation, leisure and sport, < http://www.un.org/esa/socdev/enable/rights/ahcstata30ssfacilitator.htm>; See also the draft proposal of the International Disability Caucus (NGO) during this session that refers to artistic property rights, which is traditionally meant to be confined to copyright (available at < http://www.un.org/esa/socdev/enable/rights/ahcstata30sscomments.htm#idc>): "States Parties shall take all appropriate steps to ensure that laws protecting artistic property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials." Note that during the fourth session, the same NGO had a broader proposal encompassing both intellectual and artistic property rights.

[58] Report by the Chairman on draft article 24, 6th session, 139, available at < http://www.un.org/esa/socdev/enable/rights/ahcstata30ssrepchair.htm>

[59] Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Seventh session, New York, 16-27 January 2006, Letter dated 7 October 2005 from the Chairman to all members of the Committee, UN Doc A/AC.265/2006/1, 14 October 2005, 105.

[60] In Europe, databases are protected by copyright and by the so-called sui generis database right. Copyright subsists in original databases and the sui generis protection exists in recognition of the investment that is made in compiling a database. The sui generis right offers a protection that is comparable to copyright even though it is a distinct form of protection. The sui generis right was introduced in the EU via Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, L 77, 27 March 1996, 20-28 (Database Directive). The Directive offers the following definition to the term 'database': 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.' See Art 1(2).

States, Courts have judicially affirmed that the fair use doctrine is an affirmative defence to a claim of copyright infringement, with the proponent carrying the burden of proof as to all issues in dispute.[61]

Unreasonable or discriminatory barrier to access cultural materials

As explained earlier, intellectual property can constitute a barrier to access cultural materials by the disabled. State parties should ensure that such a barrier does not become "unreasonable or discriminatory". There was a considerable discussion during the CRPD negotiations as to which terms to use in this context, with some delegates favouring one term against the other. For instance, the Canadian government suggested deleting the term unreasonable in the seventh session. In the end, both terms were used in article 30(3) CRPD.

The wording indicates that reasonable barriers are permitted. This could include instances where a cultural object is unavailable in a particular language or prohibitively costly. What is more, it is possible that some cultural materials cannot be produced in an accessible format to be used by disabled people. Article 30 CRPD makes clear, however, that all forms of diversity should be accommodated. Accessible formats include, but are not limited to, Braille, Moon, large print, e-books and audio books with special navigation, audio description and radio broadcasts.

In its comments on then draft article 24 entitled "Participation in cultural life, recreation, leisure and sport", the Working Group indicated that "the Ad Hoc Committee may wish to consider whether and how the concept of accessibility could be expanded under this draft Article".[62] Indeed, as already explained, some NGOs, including the International Disability Caucus (IDC) in the seventh session and Australian NGOs in the third session, suggested that it is preferable to deal with the removal of barriers to information comprehensively in the relevant provision dealing with accessibility. There was no consensus to this end, however, and a separate article on intellectual property was retained under the heading "Participation in cultural life, recreation, leisure and sport".

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[61] *American Geophysical Union v Texaco Inc*, 60 F.3d 913, 918 (2d Cir. 1994); see also *Campbell v Acuff-Rose Music Inc.*, 510 U.S. 569, 590 (1994).

[62] Working Group draft text on draft article 24, 108 <http://www.un.org/esa/socdev/enable/rights/ahcstata30wgtext.htm>