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Seeing a Future for Accessible Reading Materials: The WIPO Treaty for the Visually Disabled

Marjorie Kennedy

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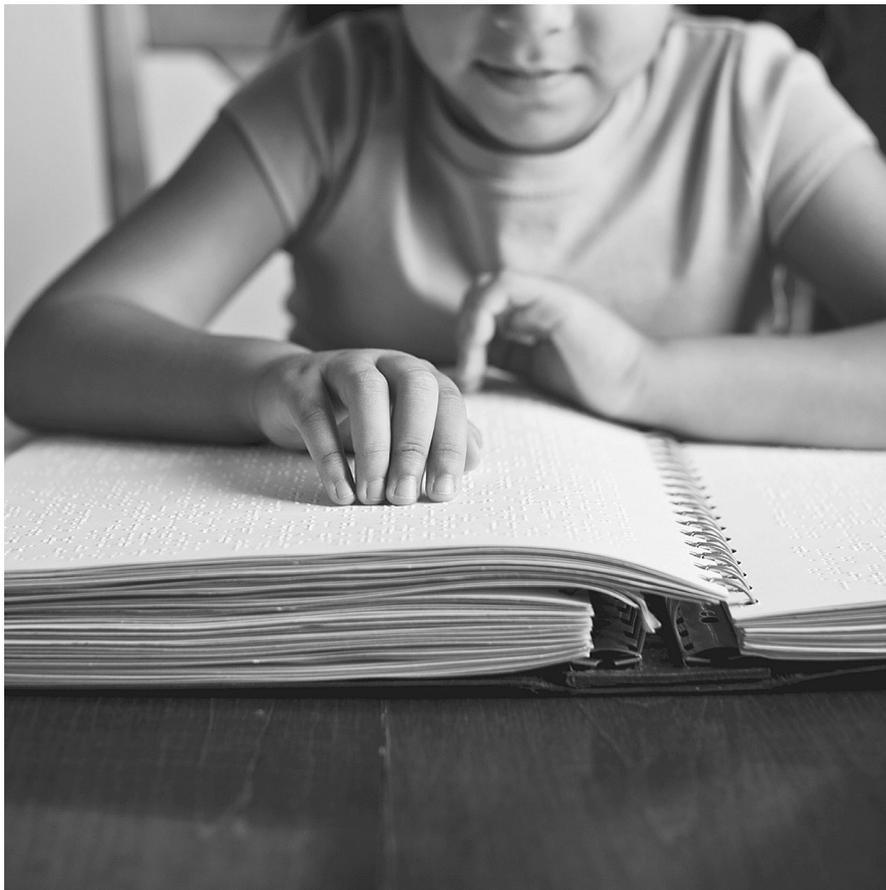
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FEATURE ARTICLE

**SEEING A FUTURE FOR
ACCESSIBLE READING
MATERIALS: THE WIPO
TREATY FOR THE VISUALLY
DISABLED**

by MARJORIE KENNEDY

When the final installment of the Harry Potter series was released in 2007, children stayed up all night to read the book. The employees of Bookshare, a nonprofit organization that provides accessible reading materials



for the blind, were also up all night, working to create an accessible version of the book for America's visually disabled.¹

Exceptions to copyright laws in the United States and many other countries allow organizations, like Bookshare, to create accessible reading materials for the blind, but these exceptions do not apply internationally.² Without copyright exceptions, these organizations cannot share the files with the visually impaired in other countries.³ As a result, five separate organizations around the world spent time and money to create identical accessible versions of *Harry Potter and the Deathly Hallows*.⁴

To address this issue, the World Intellectual Property Organization (WIPO) has proposed the creation of a treaty or international instrument to facilitate the creation and sharing of accessible books worldwide.⁵

WORLDWIDE BOOK FAMINE

There is a book famine that impacts the world's 285 million blind or visually disabled people.⁶ Approximately 90% of the world's visually disabled populations live in developing countries.⁷ And for these people, only 1% of published works are available in accessible formats.⁸

Similarly, the other 10% of visually disabled persons living in more modern countries can only access 5% of books.⁹ While non-profit organizations in the United States, Europe, and other countries around the world are creating databases of accessible reading materials, these materials cannot be shared with other countries without a treaty or international agreement.¹⁰

Accessible books are necessary not only for the blind, but also for any person who cannot use print for a variety of reasons, including visual impairment, dyslexia, developmental delays, or physical disabilities that interfere with holding a book.¹¹ Because these disabilities vary, different formats are required to make documents accessible.¹² Non-profit organizations provide versions of works in audio format, text-to-speech format, Braille Ready Format, and Digital Accessible Information System format.¹³ These organizations use software to create accessible formats of published materials, but they must work within their country's copyright laws.

COPYRIGHT EXCEPTIONS WORLDWIDE

Currently, the international enforcement of copyright laws is governed by the World Intellectual Property Organization's (WIPO) Berne Convention¹⁴ and World Intellectual Property Organization Copyright Treaty (WCT).¹⁵ The Berne Convention establishes that "[w]orks originating in one of the contracting States [. . .] must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals," and sets a minimum level of rights that are automatically reserved to the author and will be protected for a minimum duration of 50 years after the author's death.¹⁶ The Berne Convention also establishes a three-step test for copyright exceptions.¹⁷ The WCT updates the Berne Convention to cover technological advances and the Internet.¹⁸

The European Union issued a policy directive in 2001 stating that EU member states may create exceptions in copyright law for accessible materials.¹⁹ The directive also urged that it is “important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.”²⁰

The 2006 United Nations Convention on the Rights of Persons with Disabilities lists access to cultural materials in accessible formats as a human right and states that 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.”²¹ Worldwide, “only 57 countries—representing fewer than half of WIPO’s 184 Member States—[have created] specific exceptions in their national laws for the benefit of the visually impaired.”²²

Many European nations, including Great Britain and Spain, have exceptions to intellectual property laws that allow for accessible materials for the visually impaired²³. While this is a step in the right direction, the problem is “[a]bout ninety percent of the world’s visually impaired live in developing countries”²⁴ Without a treaty or international agreement, the accessible reading materials in the United States, Europe, and Australia cannot reach the vast majority of the world’s print disabled.²⁵ Although the Spanish accessibility organization ONCE “has more than 100,000 titles in accessible formats and Argentina has over 50,000, these titles cannot be shared with the 19 Spanish-speaking countries across Latin America.”²⁶ Libraries in Colombia, Nicaragua, Mexico, Uruguay and Chile have fewer than 9,000 accessible books—combined.²⁷

COPYRIGHT EXCEPTIONS IN THE UNITED STATES

The United States is one of the countries that has created an exception for accessible reading materials.²⁸ Within the United States, non-profits are able to create and distribute accessible versions of copyrighted works under the Chafee Amendment.²⁹ The Chafee Amendment, named after Senator John Chafee who proposed it, provides an exception from intellectual property laws for reproductions for the visually disabled.³⁰ The amendment states that “it is not an infringement of copyright for an authorized entity to reproduce or to dis-

tribute copies or phonorecords of a previously published, nondramatic literary work [. . .] in specialized formats exclusively for use by blind or other persons with disabilities.”³¹

Operating under the Chafee Amendment, the nonprofit organization Benetech runs Bookshare, an accessible digital library with more than 160,000 accessible titles available.³² The creator of Bookshare, Jim Fruchterman, was inspired when his teenage son showed him the music sharing software Napster. Fruchterman was then running Arkenstone, the largest maker of reading systems for the blind.³³ He realized that “[h]undreds of Arkenstone users were scanning the exact same book over and over again. What if they could share the books they scanned over the Internet? Then we’d save many, many hours of effort and greatly increase the availability of books”.³⁴ Fruchterman’s shorthand description of Bookshare was “Amazon.com meets Napster meets Talking Books for the Blind, but legal!”³⁵

Bookshare has grown to serves 230,000 people and works with 10,000 schools, school districts and other nonprofits and agencies.³⁶ Many publishers provide digital copies so Bookshare does not have to scan.³⁷ Currently, Bookshare distributes about 50,000 titles internationally through publisher agreements, but it is “where Bookshare was in the U.S. 8 or 9 years ago.”³⁸

A WIPO treaty would allow Bookshare to spread its mission by enabling more countries to participate in the book sharing process and make locally relevant works available.³⁹ Fruchterman states that with a WIPO treaty “we would be able to provide the technical infrastructure for many countries to build their own accessible libraries [. . .] with the books published in their countries, in their languages.”⁴⁰ The treaty would also legalize cross-border sharing, “which would both greatly reduce duplicative work in developed countries, and make huge libraries (Bookshare, but also other digitized libraries) available to developing countries.”⁴¹

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS DISCUSSIONS

A formal discussion of the creation of exceptions and limitation for production of copyrighted works in accessible formats re-emerged during the Twenty

Fourth Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR) in July 2012.⁴²

In early October, members at the WIPO General Assembly approved the treaty proposed by the SCCR, creating a path toward a diplomatic conference in 2013.⁴³ The issue and proposed treaty was discussed at the SCCR intercessional meeting in October and is on the agenda for the intercessional in late November.⁴⁴ An extraordinary General Assembly is scheduled for December 2012 to vote on whether the treaty will be subject to negotiation at a diplomatic conference in 2013.⁴⁵

The working document from the intercessional talks in October shows that many portions of the text are in dispute.⁴⁶ Progress was slow, and it is difficult to get consensus on issues because countries have varying goals for the instrument.⁴⁷ The talks have been mainly closed to the public, but sources report that the United States and European Union are standing in the way of the treaty.⁴⁸

The Obama administration supported the treaty in 2009,⁴⁹ but has since been accused of bowing to the will of the publishing industry.⁵⁰ James Love of Knowledge Ecology International stated that “if blind people were financing [Obama’s] campaign, they would have had a treaty a year ago.”⁵¹ Fruchterman believes that if the U.S. came out in strong support of a treaty, “the global consensus would move to pass an effective treaty that helped people with disabilities while protecting the interests of the publishing industry.”⁵²

Publishing agencies have long been opposed to the treaty, and the International Publishers Association stated in 2006 that copyright exceptions are “the crudest and the bluntest tool in a large toolbox” and are “19th century solutions to 21st century problems.”⁵³ The United States Chamber of Commerce also spoke out in opposition, stating that “[w]here resources are already scarce, the existence of copyright-exemptions further reduces incentives to invest in the production and distribution of works in accessible formats to market.”⁵⁴

However, Matthew Sag, associate professor at Loyola University Chicago School of Law specializing in Intellectual Property law, states that the treaty “will not hurt authors, will not hurt publishers, and will be an enormous benefit to people who have been underserved for so long.”⁵⁵

Opponents of the treaty are not against accessible reading materials for the print disabled, but they “really don’t want to establish a precedent of developing a series of treaties that specifically focus on trying to set forth minimal limitations and exceptions to the rights of copyright owners.”⁵⁶ Their concern is that they do not want the treaty to become “the precedent that is the nose of the camel under the tent”⁵⁷ Nineteen rightholders’ organizations issued a joint statement urging that the instrument be flexible, narrowly construed, and adhere to the Berne Convention.⁵⁸

The countries have not agreed on whether this instrument would be a binding treaty or a soft approach such as a joint recommendation.⁵⁹ A joint recommendation is a nonbinding set of recommendations that do not need to be ratified by the states.⁶⁰ Those countries opposed to a treaty are more likely to support a nonbinding instrument because countries could construe the exception more narrowly.⁶¹

Proponents of the treaty want the instrument to be binding, and the World Blind Union is “not after a trophy treaty.”⁶² A 2011 Yale University study found that a binding treaty is necessary in this case to keep the treaty from becoming a dead letter agreement.⁶³ There are three consequences to a non-binding treaty: (1) many nations will never get around to enacting the legislation, (2) nations may view the suggested legislation as a ceiling, and (3) countries will negotiate away the power in international agreements.⁶⁴

CONCLUSION

As urged by musician Stevie Wonder in his address to the WIPO in 2010, we must “declare a state of emergency and end the information deprivation that continues to keep the visually impaired in the dark.”⁶⁵ The lack of reading materials for the visually disabled has been ignored far too long, and it is time for worldwide action.

There is broad support for providing accessible reading materials for the visually disabled, and nations must collaborate to create a workable treaty.

NOTES

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