

A critical examination of copyright limitations and exceptions for the visually impaired pertaining to literary works in South Africa in the local and global context

Jade Kouletakis

This an article published in the South African Intellectual Property Law Journal 2014, Vol 2

A CRITICAL EXAMINATION OF COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR THE VISUALLY IMPAIRED PERTAINING TO LITERARY WORKS IN SOUTH AFRICA IN THE LOCAL AND GLOBAL CONTEXT

JADE KOULETAKIS*

Teaching and Research Assistant, Faculty of Law, University of Cape Town[†]

1. INTRODUCTION

1.1 Contextualising the issue

According to the World Health Organization (WHO), in 2012 there were 285 million people that were visually impaired worldwide. By visually impaired, this term encompasses both the 39 million individuals who suffer from legal blindness, as well as the 246 individuals who suffer from low vision.¹ Of those people with some degree of visual impairment, over 90 per cent of them live in developing, poorer countries. About 19 million of those affected by visual impairments are children under the age of fifteen.² A survey conducted by the World Intellectual Property Organisation (WIPO) in 2006 found that fewer than 60 countries worldwide had limitations and exceptions clauses for the visually impaired written into their national copyright laws.³ This obviously fails to account for more recent amendments to some countries' copyright laws, such as India's recent adoption of the Indian Copyright (Amendment)

* BA LLB (University of Cape Town) LLM Intellectual Property Law (University of Cape Town).

[†] *Lecturer, Faculty of Law, University of the Western Cape.*

¹ World Health Organisation 'Visual impairment and blindness.' Available at <http://www.who.int/mediacentre/factsheets/fs282/en/> [Accessed 01 January 2014].

² *Ibid.*

³ World Intellectual Property Organisation 'Limitations and exceptions – access to books for the visually impaired.' Available at <http://www.wipo.int/pressroom/en/briefs/limitations.html#note> [Accessed 21 January 2014].

Act,⁴ but is nonetheless a good indication of the lack of initiative taken by countries to deal with the existing book famine when left to their own devices. According to recent studies done by the World Blind Union (WBU), in 2012 only 7 per cent of books published were made available in a format accessible to those who are visually impaired in developed (or rather, richer) countries, whilst less than 1 per cent of books published for the year were made available in developing, poorer countries.⁵ The situation is even worse in South Africa, where only 0.5 per cent of books ever published have been published in or converted to an accessible format for people with visual impairments.⁶ The fact that there are over 800 000 visually impaired persons in South Africa makes this number all the more shocking and unacceptable.⁷ This, in essence, is what has been known as the so-called ‘book famine’. It is within this practical framework that the arguments and suggestions of this expressed in this article must be situated.

Having established a practical background upon which to situate this article, we must now establish a legal one. This will be done by briefly providing an explanation of the nature of copyright and its implications for copyright owners and copyright users. The laws will be those of South Africa, as the article is focussed on the South African legal landscape and its implications and duties pertaining to the visually impaired.

1.2 The visually impaired and current copyright law

⁴ Act 27 of 2012.

⁵ World Blind Union ‘WIPO negotiations treaty for blind people.’ Available at <http://wbuap.org/index/archives/516> [Accessed 06 December 2014].

⁶ Mara Kardas Nelson ‘The rich turn a blind eye to poor readers.’ Available at <http://mg.co.za/article/2013-03-28-00-the-rich-turn-a-blind-eye-to-poor-readers> [Accessed 29 March 2014]; South African National Council for the Blind ‘Visually impaired persons have the right to read.’ Available at <http://www.sanfb.org.za/article/visually-impaired-persons-have-right-read> [Accessed 03 October 2014].

⁷ Ibid.

Copyright is a right given to an author or creator of an original work in terms of the Copyright Act of South Africa.⁸ It bestows upon the author a ‘bundle of rights’, which is made up of both economic and, in some jurisdictions (including South Africa), moral rights.⁹ The focus of this article will be on the former. The economic rights include the right to reproduce the work, the right to adapt and alter the work and so on.¹⁰ It is also the copyright owner who has the sole right to authorise such actions occurring in regard to his work.¹¹ The ways in which someone who is not the copyright owner may go about performing any one of these economic rights that make up the bundle of rights owned by the copyright owner, rest on the idea of gaining the permission of the copyright owner to do so. This can range from being granted a license in exchange for royalties being paid to the copyright owner, assignment, testamentary disposition, or by operation of the law.¹² Save for the last two, there would be some form of financial benefit enjoyed by the copyright owner in his licensing or assigning of the right, and other than by operation of the law, he is in no way obliged to transfer any of his rights within his bundle. In short, save for a few exceptions where a legal exception exists (eg fair dealing), the copyright owner may authorise someone who is not the copyright owner to exercise a right/rights in respect of his copyright protected work, and this may be granted in exchange for the payment of royalties or the fulfilment of contractual obligations which may or may not also sound in monetary terms.¹³

⁸ Act 98 of 1978. For a general overview of the Act, see: AJC Copeling *Copyright and the Act of 1978* (1978).

⁹ Tana Pistorius ‘Copyright law’ in A van der Merwe (ed) *Law of intellectual property in South Africa* (2011) 143 - 255; AJC Copeling (note 8) at 26 – 33.

¹⁰ Copyright Act (note 8) at s 6 pertaining to literary works only.

¹¹ Ibid.

¹² Ibid at s 22; AJC Copeling (note 8) 78 – 84.

¹³ Tobias Schonwetter et al ‘African Copyright and Access to Knowledge Project Country Report: South Africa.’ Available at <http://www.aca2k.org/attachments/ACA2K%20South%20Africa%20CR.pdf> [Accessed 09 September 2014].

Copyright is, by its very nature, territorial.¹⁴ This means that ‘an IP right is limited to the territory of the state granting it’.¹⁵ Whilst one work may meet the requirements to receive protection in terms of eg South African copyright laws, it need not be so in a different jurisdiction.¹⁶ This means that different individuals may own certain rights in respect of the same work, according to the jurisdiction.¹⁷ For example, I may have the right to publish J.K. Rowling’s latest book in South Africa, but someone else may have that same right in respect of publishing that same book in, say, America. However, the principle of national treatment, which is embodied in article 5(1) and 5(2) of the Berne Convention for the Protection of Literary and Artistic Works (henceforth Berne Convention),¹⁸ attempts to soften the territoriality principle somewhat. The principle of national treatment states that each Member State of the Berne Convention must grant the nationals of every other Member State the same privileges he would have if he were a national of the said Member State.¹⁹ In other words, a German citizen who authored a work in Germany would be given the same rights as a South African national if he tried to obtain copyright protection for that work in South Africa. The territorial principle of copyright creates problems when it comes to the cross border exchange of works, an issue that will be addressed later on.²⁰

¹⁴ *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) at para 15 – 17; Tana Pistorius (note 9) 145.

¹⁵ *Gallo Africa* (note 14) at para 15; Alexander Puekert ‘Territoriality and Extraterritoriality in Intellectual Property Law’ in Gunther Handl & Joachim Zekoll (eds) *Beyond territoriality: transnational legal authority in an Age of Globalization* (2012) 1.

¹⁶ Alexander Puekert (note 15) 2.

¹⁷ *Ibid* 3.

¹⁸ 828 UNTS 222.

¹⁹ For a detailed analysis of the principle of national treatment see: Robert Brauneis ‘National treatment in copyright and related rights: how much work does it do?’ Available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2113&context=faculty_publications [Accessed 05 January 2014].

²⁰ Which is also part of the TRIPS Agreement.

It is therefore clear that copyright owners in South Africa (and the world over) are afforded many exclusive rights in regards to their intellectual property. These rights find local expression in South Africa's Copyright Act. However, these exclusive rights are not unlimited. The Copyright Act lists various limitations and exceptions to the rights of the copyright owners. What the nature of these limitations and exceptions are is somewhat contentious. Are they users' *rights* in regards to copyright protected works, or are they merely limitations to the scope of the copyright owners' exclusive rights (ie defences available to the copyright user)?²¹ The concept of users' rights is admittedly novel and not generally accepted. While Canadian courts have recently accepted fair dealing as a user right (rather than as a limitation on the rights of the copyright owner),²² South Africa and other jurisdictions have not adopted the concept of a users' right. There is therefore no widespread consensus on the matter (with no international instruments recognising users' rights). However, there is support for the idea of users' right to access copyright protected works in the South African context where constitutional rights are to be balanced against one another. For example, some prominent local academics have argued that section 16 of the Constitution adds weight to the claim of users' rights,²³ as well as section 29 with regard to educational materials,²⁴ and section 22.²⁵ It may therefore be contended that the rights of the visually impaired, as expressed in the Constitution and international instruments (some of which will be examined in this article), support the need for a users' right of access to literary works pertaining to educational materials to be accepted and then balanced against the recognised rights of the copyright owners. However, a much less controversial argument to make would be to propose that there

²¹ South African academics are not in agreement on this matter. Eg Tana Pistorius (note 9) 211 – 212 supports the former position, whilst Owen Dean *Handbook of South African copyright law* (1987) 1 – 51 supports the latter.

²² *CCH Canadian Limited v Law Society of Upper Canada* [2004] 1 SCR 339.

²³ Andrew Rens and Rebecca Kahn *Access to knowledge in South Africa: Part of the Access to Knowledge Research Series* (2009) 4; Caroline Ncube 'Harassing intellectual property for development: Some thoughts on an appropriate theoretical framework' (2013) 16 4 *PER* 369 at 380 – 381.

²⁴ Caroline Ncube (note 23).

²⁵ *Ibid* 378 – 380.

is the need for greater balance between the interests of visually impaired copyright users of educational literary works (in the shape of a specific exception with regard to such copyright users), and the recognised rights of the copyright owners. It is the latter position that the author seeks to further. That such a balance is permissible within the current legal landscape (ie regardless of one's stance on the issue of users' rights) is evident from the flexibilities found within the current legal framework, particularly the three step test.

The three step test can be found originally in the Berne Convention, where article 9(2) states that 'it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works *in certain special cases*, provided that such reproduction *does not conflict with a normal exploitation of the work* and *does not unreasonably prejudice the legitimate interests of the author*' (emphasis added).²⁶ It has since been modified and reproduced in other international instruments, such as article 13 of the Agreement on Trade-Related Aspects of International Property Rights (henceforth TRIPS),²⁷ and will be dealt with more thoroughly later in this paper. It is however clear from the outset that the three step test is expressed in open terms, allowing for much flexibility with regards to the limiting of the copyright owner's right over his work. It is this author's contention that such flexibility has not been adequately utilised in so far as the interests of the visually impaired are concerned, particularly in South Africa where such interests have been encapsulated in constitutionally-protected rights.

The aim of this article will be to demonstrate that South African law, as it stands in terms of the Copyright Act, fails to balance the interests of the visually impaired community when it comes to literary educational works against the rights of copyright owners. It does this by failing to provide an exception for such

²⁶ Berne Convention (note 18) at s 9(2).

²⁷ 1994 (1994) 33 *ILM* 1197.

circumstances in the Copyright Act, despite being capable of doing so. In failing to provide equal access between the visually impaired and able bodied users of literary educational works through the creation of such an exception, the South African government has failed to realise the theoretical justifications underpinning the law of copyright, as well as its obligations on both a national (in terms of the Constitution, legislation and case law) and international level. It will be asked what South Africa ought to do so as to better this situation by examining what the international community is doing in order to better establish an environment of equal access to literary works where the interests of the visually impaired community are better realised, specifically in terms of the recent Marrakesh Treaty, and what implications this may have for South Africa in its quest to better balance the interests of copyright users and owners in such a way that equal access is achieved.

1.3 Scope of analysis: depth over breadth

As previously stated, the focus of this article will be solely on copyright, particularly copyright pertaining to literary works. Literary works are defined in the Copyright Act as including, ‘irrespective of literary quality and in whatever mode or form expressed’, the following:

- (a) novels, stories and poetical works;
- (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays and articles;
- (d) encyclopaedias and dictionaries;
- (e) letters, reports and memoranda;
- (f) lectures, speeches and sermons; an
- (g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program.²⁸

²⁸ (Note 8) at s 1(1).

As has been expressly stated in the Copyright Act, textbooks are considered ‘literary works’ for the purposes of the Copyright Act. They will also be the literary work focussed on in this article. In the South African context, the lack of available textbooks is a serious issue for able bodied students let alone those with a visual impairment.²⁹ There is also the connection between education and the standard of life enjoyed by persons which must be noted.³⁰ The focus of this article will be on copyright protected literary works, with a focus on the South African context. The literary works that will be examined will consist exclusively of educational materials, such as textbooks.

The justification for limiting the scope of this article has both practical and sociological elements. Firstly, the aim of this article is to provide an in depth critical analysis of the law at present. In order to achieve this without making superficial claims one must make a choice as to whether one will focus on breadth or depth of the law. In other words, one must decide whether to examine each and every potentially contentious aspect of the given law in terms of its content and application (which would, for practical reasons, necessarily mean the level of engagement and critique with the given material will be greatly limited), or to only exam specific areas and issues within the law in greater detail. The author in this instance has chosen the latter.

Second, it must be noted from the outset that in the author’s research for this article, it became apparent to her that there is a lack of evidence on the specific effects the

²⁹ The author recommends the following for a contextual overview and critique of the textbook crisis in South Africa: Faranaaz Veriava ‘The 2012 Limpopo textbook crisis: a study in rights-based advocacy, the raising of rights consciousness and governance.’ Available at <http://www.section27.org.za/wp-content/uploads/2013/10/The-2012-Limpopo-Textbook-Crisis1.pdf> [Accessed 06 October 2014]; Servaas van der Berg and Ronelle Burger 'Education and socio-economic differentials: a study of school performance in the Western Cape' (2003) 71 3 *South African Journal of Economics* 496.

³⁰ Barbara Wolfe and Robert Haveman ‘Accounting for the social and non-market benefits of education’ (2002) 47 *Federal Reserve Bank of Boston Conference Series* 97.

barriers to accessing literary works by the visually impaired has had on the blind community. Most evidence is clothed in general non-committal language, such as stating that limited access to literary works means that visually impaired people are more likely to suffer at school,³¹ but there is a distinct lack of empirical evidence and numerical figures to strengthen these claims. This means that the true sociological effect of the current copyright regime in South Africa can only be inferred, because there is a need for more research to be done in this area in order to bolster arguments for change in the legal regime.

The justification for choosing to focus exclusively on educational materials is because of the connection between literary works in the form of textbooks, and the realisation of one's right to education. This connection does not exist when addressing it from the point of view of, for example, one's ability to access John Gray's 'Men are from Mars, Women are from Venus'. Whilst there may certainly be an argument that can be made regarding the visually impaired community's right to access all literary work, regardless of its nature, it is only when looking at literary works that serve the purpose of educating the community that one can see the stark interplay between foundational rights and the ability to access literary works, as well as the subsequent consequences of failing to do so. Section 29 of the Constitution gives everyone the right to basic education.³² In *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*,³³ our courts interpreted section 29 to be 'a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic

³¹ AbleChildAfrica 'Still not going to school: a review of the state of disabled children's access to education in Africa.' Available at <http://ablechildafrica.org/wp-content/uploads/2011/03/Still-not-going-to-school-report2.pdf> [Accessed 05 December 2013]; International Council for Education of People with Visual Impairment 'EFA-VI Global campaign – a shared challenge.' Available at http://www.icevi.org/efa/global_campaign%20.html [Accessed 20 December 2013]; WBU 'World Braille Day 2014.' Available at <http://www.worldblindunion.org/English/news/Pages/World-Braille-Day-2014.aspx> [Accessed 09 January 2014].

³² Constitution of South Africa, 1996.

³³ 1996 (3) SA 165 (CC).

education'.³⁴ In *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others*,³⁵ the court held that 'the state is [. . .] obliged, through reasonable measures, to make further education progressively available and accessible'.³⁶ People do not have the right to *access* basic education, but to basic education itself.³⁷ Part of having the right to education means there is an obligation on the government to make education accessible for all,³⁸ including those with visual impairments who are unable to access mainstream textbooks.³⁹ This means that the government must ensure 'appropriate steps are taken to make access easier for persons that were either' confined to inferior learning institutions (such as schools for the visually disabled) or denied access to learning institutions in the past.⁴⁰ If the right to education is not fully realised, other rights will also be implicated and the economy will suffer due to a shortage of skills and people who are able to fill the jobs that run a country.⁴¹

Next, the limitation regarding literary works must be justified. Whilst it must be conceded that textbooks are more than simply literary works (for example, the illustrations within the pages of the textbooks possibly being protected as artistic works in their own right), the primary works protected by copyright within most textbooks are in fact literary works as many textbooks do not have illustrations and,

³⁴ Ibid at para 9.

³⁵ 2011 (8) BCLR 761 (CC).

³⁶ Ibid at para 37.

³⁷ Ibid.

³⁸ See: Julian Jonker 'Access to learning materials in South Africa: the convergence developmental and rights-based arguments for access to knowledge.' Available at <http://www.yaleisp.org/wp-content/uploads/2009/10/A2K-in-SA.pdf> [Accessed 19 May 2013].

³⁹ South African Human Rights Commission '3rd Economic and social rights report 1999/2000.' Available at file:///C:/Documents%20and%20Settings/User/My%20Documents/Downloads/3rd_esr.pdf [Accessed 17 July 2013].

⁴⁰ Ibid.

⁴¹ Tobias Schonwetter et al (note 13).

even if they do, there will usually be accompanying text which explains the importance of the illustration and makes the reader able to adequately understand and interpret the illustration. It is for these reasons that the scope of this article shall be limited to literary works within textbooks.

1.4 The road to Marrakesh

The outline of this article will be as follows. The article will look at how the international community has met the challenge of achieving a balance between the rights of copyright users and the rights of copyright owners for the visually impaired. This has primarily been expressed through the recent creation of the Marrakesh Treaty, which will be critically examined in detail to assess its effect on the visually impaired community generally, and in South Africa in particular.

The next section will ask whether or not the Marrakesh Treaty provides all the answers to realising the right of equal access to copyright protected literary works for the visually impaired community in South Africa. This will include an evaluation of the practical implications of the Marrakesh Treaty in South Africa and will express the view that the road to achieving equal access to literary works between able bodied users of copyright protected literary works and visually impaired users is a long one.

The final section will conclude that, although visually impaired individuals in South Africa do indeed have the right to equal access to copyright protected literary works, and the Marrakesh Treaty provides a catapult to begin seeing the legislative changes required in order to realise this right, real grassroots change is a long way off.

2. THE MARRAKESH TREATY: BACKGROUND AND HISTORY

Having established the problematic situation in which the visually impaired community are forced to live, not only in South Africa but in many other countries, it

becomes pertinent to ask how the international community has taken steps to eliminate these shortcomings of the copyright system. It is within the above mentioned problematic climate that is the book famine that the international community has banded together with the aim of creating a multinational treaty to alleviate the said difficulties of the visually impaired on a global scale regarding access to copyrighted literary works.

Prior to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (henceforth ‘Marrakesh Treaty’ or ‘Treaty’), there was no direct international obligation on states to include any exceptions in their national copyright laws pertaining to the visually impaired. This is why South Africa is far from being the only country which does not provide any exceptions in its Copyright Act. Furthermore, the situation regarding cross-border exchange of accessible format reading materials has been left up to individual agreements established between states on agreed upon terms. There has been no international instrument which has set out an obligation that accessible format copies of literary works protected by copyright be able to be imported/exported, and what the possible conditions attached to such an obligation would be. This means there have been instances where resources, although being available for use by visually impaired individuals in another state, have been unable to be shared due to a lack of agreement between the two or more states. The Marrakesh Treaty aims to address these two problems, namely to oblige Member States to include exceptions in their national copyright legislation for the visually impaired, and to set out the possible conditions upon which the cross-border exchange of accessible format copies of copyrighted literary works may proceed. As Mihály Ficsor rightly says, the Marrakesh Treaty is unique and exceptional because it is an international co-operation agreement offering a legal and organisational framework for enhanced co-operation to promote practical availability of accessible

format copies.⁴² The aim of spending much time on the Marrakesh Treaty is to investigate what the international community is doing in regards to eliminating the book famine through making access to copyright protected literary works easier, and what the implications of this will or may be for South Africa's current copyright laws.

In addressing the Marrakesh Treaty, the first questions that will be tackled will deal with the nature of the treaty. It will be established whether or not the Marrakesh Treaty ought to have been a recommendation or a treaty, and whether or not it falls within the scope of article 13 of the TRIPS Agreement. The situating of the Marrakesh Treaty within current law and an analysis of its nature will follow, moving towards establishing the crux of the Treaty and what it means for the visually impaired. Next there will be an examination of the most contentious areas surrounding the Marrakesh Treaty, and an ongoing dialogue around what exactly South Africa ought to do in light of the Marrakesh Treaty. The article will then ask the question of whether or not the Marrakesh Treaty signals the end of the book famine, particularly in South Africa.

2.1 The nature of the Marrakesh Treaty: a treaty or a recommendation?

A question that must be addressed at the outset of the examination of the Marrakesh Treaty is the issue of why it is necessary to create a treaty rather than a recommendation to achieve the aims expressed and embodied in the Treaty.⁴³ Treaties are written international agreements between states, governed by

⁴² Mihály J. Ficsor 'Commentary to the Marrakesh Treaty on accessible format copies for the visually impaired.' Available at http://www.copyrightseesaw.net/archive/?sw_10_item=50 [Accessed 12 February 2014].

⁴³ Author notes this as a topic arising during her attendance at the Open A.I.R. Conference on Innovation and Intellectual Property in South Africa between 09 and 13 December 2013 held at the Breakwater Lodge, Cape Town.

international law.⁴⁴ They are a binding source of international law which ‘takes the place of legislation in the domestic sphere’.⁴⁵ Therefore the answer to the question of why the aims of the Marrakesh Treaty need to be expressed through the medium of a treaty rather than a recommendation is very simple, namely that a treaty is binding whereas a recommendation is not. A look back at the past gives every indication that a mere recommendation is and will continue to be of little effect. For example, between the creation of the 2010 Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability and present day,⁴⁶ countries have still not included specific provisions in their national copyright legislation pertaining to the visually impaired. Countries have shown through their actions – or rather, through their inactions – that they are not willing to freely take the initiative to provide for copyright exceptions for the visually impaired, and so there is no reason to think that another recommendation will yield any different outcome and effect. The ‘extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate’ as recommendations are not binding on states, although an accumulation of recommendations might have the effect of evidencing collective practice.⁴⁷ However, as an historical overview of the Marrakesh Treaty has shown, there is no reason to believe another recommendation will have any effect. It is therefore necessary for the use of a binding international instrument, which carries with it penalties for non-compliance, to be used as the primary means of realising the changes that years of prior negotiations have failed to realise. It is unquestionable that the binding instrument of a treaty is, in this case, absolutely necessary.

⁴⁴ Vienna Convention on the Law of Treaties, 1969 (1969) 8 *ILM* 679 at article 2(1)(a).

⁴⁵ *Ibid* at article 26 - 27.

⁴⁶ WIPO ‘Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability: Proposal by the Delegation of the European Union.’ Available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf [Accessed 19 May 2013].

⁴⁷ *Ibid* 31 – 32.

2.2 The Marrakesh Treaty and the Berne Convention: within or without?

Another preliminary question regarding the nature of the Marrakesh Treaty is its place in international law. In particular, it has been questioned whether or not the Marrakesh Treaty is a part of the Berne Convention.⁴⁸ Does the Marrakesh Treaty fit into the article 13 requirements of the TRIPS Agreement/article 9(2) of the Berne Convention, or is it something external, creating rules and boundaries of its own? This question is important in light of the fact that the three step test appears, in its various forms, in many international instruments which include article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement, article 10 of the WIPO Copyright Treaty,⁴⁹ and article 16 of the WIPO Performances and Phonograms Treaty.⁵⁰ The three step test therefore acts as an international standard, binding the vast majority of countries.

In regards to the question posed, it is submitted that the Marrakesh Treaty envisions itself as occupying the same legal framework as the Berne Convention and the TRIPS Agreement. In other words, the Marrakesh Treaty may be read in tandem with the Berne Convention and TRIPS Agreement. The various reasons for making this claim will now be examined as proof thereof. First, one must look at the preamble of the Marrakesh Treaty. The preamble reaffirms the ‘obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three step test for limitations and exceptions established in Article 9(2) of the Berne Convention’.⁵¹ It therefore makes direct

⁴⁸ Author notes this as being a topic of much debate at both the South African Government’s Department of Arts and Culture Consultative Workshop on Intellectual Property and the Beijing Treaty on Audiovisual Performances held on 14 October 2013 in Cape Town’s Slave Lodge, the 3rd Global Congress on Intellectual Property and the Public Interest and the Open A.I.R. Conference on Innovation an IP in Africa held from 09 to 13 December 2013 in Cape Town’s Breakwater Lodge.

⁴⁹ (1997) 36 *ILM* 65.

⁵⁰ (1997) 36 *ILM* 76.

⁵¹ WIPO ‘Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.’ Available at http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf [Accessed 02 August 2013].

reference to the three step test and makes it clear that part of the aim of the Treaty is to reaffirm and therefore reinforce the obligations Contracting Parties have in terms of article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.

Second, one must look at article 1 of the Marrakesh Treaty. This article states that ‘nothing in this Treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties’.⁵² The clear implication of this article is that it does not intend to limit rights but rather to increase them, which is keeping in line with the purpose of the Treaty.

Thirdly, one must look at article 11. Article 11 states the following:

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty.

This includes interpretive agreements pertaining to article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.⁵³ The Marrakesh Treaty, it is argued, sees itself as necessitating the realisation of interests held by the visually impaired which are in many cases not being realised by the international community which, in so far as this realisation is lacking, falls short of fully utilising the flexibilities afforded them via article 9(2) and article 13. This interpretation of the Marrakesh Treaty’s nature within the Berne Convention is one also supported by Mihály J. Ficsor, who states that:

It follows unequivocally from Article 1 that the Marrakesh Treaty does not derogate from the obligations under any other treaties; thus it does not change the scope of any exclusive rights provided in those treaties (of course, in the sense that it does not reduce it in a way other than through limitations and

⁵² Ibid at article 1.

⁵³ Ibid at article 11(a) – (b).

exceptions that are also applicable in accordance with the provisions of those treaties, and particularly in accordance with the three-step test). As regards the question of extension of rights provided in other treaties, there is no provision in the Treaty in view of which the slightest reason for such a question might emerge. The essence of the Treaty is exactly that it foresees limitations and exceptions to the *existing* rights provided in other treaties to the extent allowed by those treaties.⁵⁴

It is for the aforementioned reasons that I respectfully submit it is without question that the Marrakesh Treaty does indeed operate within the bounds of the three step test and both the Berne Convention and TRIPS Agreement.

3. ANALYSIS OF THE PRIMARY PROVISIONS IN THE MARRAKESH TREATY

In order to fully appreciate the importance of the Marrakesh Treaty, one must understand the implications of it for the visually impaired.⁵⁵ First the application of the Marrakesh Treaty must be identified by understanding who the beneficiaries are in terms of the Treaty. According to article 3:

A beneficiary person is a person who:

(a) is blind;

(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;

regardless of any other disabilities.

⁵⁴ Mihály J. Ficsor (note 42).

⁵⁵ For a general overview of the Marrakesh Treaty and its place in the 'new disability politics', see: Paul Harpur and Nicolas Suzor 'Copyright protections and disability rights: turning the page to a new international paradigm' (2013) 36 3 *University of New South Wales Law Journal* 745.

The limitations and exceptions promoted in the Marrakesh Treaty are to be confined to the benefit of the above-mentioned people. Interestingly, the initial version of the Marrakesh Treaty did in fact include exemptions for those suffering from other sensory disabilities other than visual impairments.⁵⁶ However, this was excluded from the final draft of the Marrakesh Treaty after the United States of America insisted they be excluded from the scope of the Treaty.⁵⁷ This means that people who are inflicted with other sensory disabilities, such as hearing loss, are excluded from the benefits enjoyed within the Marrakesh Treaty. However, certain countries may choose to alter their copyright laws in order to include those with other sensory disabilities. A case in point is Israel, which has published a Bill that contains a copyright exception following the Marrakesh Treaty (even though Israel is not yet a signatory to the Marrakesh Treaty), but broadens the scope of application to include other disabilities such as hearing loss.⁵⁸

The heart of the Marrakesh Treaty can be found in article 4(1)(a). According to this article, contracting parties to the Treaty:

Shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty,⁵⁹ to facilitate the availability of works in accessible format copies for beneficiary persons [and] the limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

⁵⁶ Eg WIPO (note 46) where disabilities that varied from dyslexia to the inability to hold a book were included in the scope of the proposed treaty.

⁵⁷ James Love 'Final text before Marrakesh, WIPO treaty for the blind.' Available at <http://keionline.org/node/1707> [Accessed 26 June 2013].

⁵⁸ Jeremy Phillips 'Israel publishes bill on disability-related exceptions.' Available at <http://the1709blog.blogspot.com/2013/12/israel-publishes-bill-on-disability.html> [Accessed 19 February 2014].

⁵⁹ For more information on the WIPO Copyright Treaty, see: Tana Pistorius 'Developing countries and copyright in the information age: the functional equivalent of the WCT' (2006) 9 2 *Potchefstroom Electronic Law Journal* 1.

This puts a general requirement on all contracting parties to amend their current copyright laws in so far as they fail to provide limitations and exceptions pertaining to the visually impaired converting traditional format literary works into accessible formats. In this way the Treaty addresses one of traditional manners in which legislation has failed to achieve equal access with regards to such works between able bodied individuals and the visually impaired community. It is important to note that the limitations and exceptions in the Marrakesh Treaty ‘do not extend to substantive modifications that would amount to adaptations’, an exclusive right given to the copyright owner of a literary work according to article 12 of the Berne Convention and which is omitted from article 4(1)(a) of the Marrakesh Treaty.⁶⁰ Therefore, all that is permitted is the transformation of the traditional formatted work into an accessible format, not the adaptation or alteration of the content of the original work itself. The integrity of the original work is to be respected at all times, and therefore issues of potential infringement on the moral integrity of the author ought not to arise.⁶¹

This would mean there will be a duty on South Africa, as a contracting party, to amend the archaic Copyright Act so as to bring it in line with the nation’s international obligations. As the South African Copyright Act currently does not include an exception for the visually impaired, and in this way visually impaired individuals are not able to freely access copyright protected literary works in the same way as their able bodied counterparts, the government would need to amend the Copyright Act to include such a provision. This provision would need to permit the visually impaired community to change literary works that are copyright protected into accessible formats free from any additional costs not suffered by the able bodied community.

⁶⁰ Mihály J. Ficsor (note 42).

⁶¹ Article 2(b)

One of the most novel aspects of the Marrakesh Treaty is the provision pertaining to the cross-border exchange of accessible format copies of copyright protected works. According to article 5(1):

Contracting parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

What article 5(1) means is that the territorial nature of copyright law is relaxed, allowing for a copyright exception pertaining to the import and export of reading material in accessible formats for the visually impaired. In practical terms, it is that there will be a newly created copyright exception allowing eg a visually impaired person in Country X to request a book in an accessible format via a local organisation, and for an organisation in Country Y - where the book happens to be available in the said format - to export the said book to the requesting organisation in Country X where the visually impaired person may have access to it. This is life changing for the visually impaired population. In a country like Argentina, which has over 50 000 books in accessible formats for the visually impaired community, not being able to share these books with the many neighbouring Spanish-speaking countries around it would become a wasteful thing of the past. This provision therefore allows for the avoidance of duplicate expenditure in having to make accessible format copies of the same work in the same language, which in turn makes it easier for the visually impaired community to have accessible format works available.⁶² On the other hand, allowing for parallel importation may have the effect of limiting the copyright owner's exclusive right of distribution in favour of visually impaired individuals over sighted individuals, although it has been argued that this

⁶² Mihály J. Ficsor (note 42).

potential drawback is outweighed by its overall benefits and limited scope within the Marrakesh Treaty (which will be dealt with below).⁶³

In order for South Africa to take advantage of the provisions regarding the cross-border exchange of works, it will need to include a provision in its national copyright legislation permitting the importation and exportation of such accessible works. The details of what such provision ought or ought not to include will be discussed later on in this article where the contentious areas of the Marrakesh Treaty are analysed.

However, noble as the aims of the Marrakesh Treaty doubtlessly are, it is not without some hotly contested points. Pertinent areas of controversy involve the requirement of commercial availability, the question of direct access to imported copies, and the TRIPS Agreement's three step test. All three of these issues will be individually and critically addressed in due course, with special mention as to how South Africa ought to go about implementing the Marrakesh Treaty in light of each of these contentions.

3.1 Main areas of contention

3.1.1 The commercial availability requirement

The first contentious area of the Marrakesh Treaty is the so called commercial availability requirement. This can be found in article 4(4) of the Marrakesh Treaty. It states that:

A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of

⁶³ Paul Harpur and Nicolas Suzor 'Copyright protections and disability rights: Turning the page to a new international paradigm' (2013) 36 3 *University of New South Wales Law Journal* 745 at 761 – 770.

ratification of, acceptance of or accession to this Treaty or at any time thereafter.

In other words, article 4(4) permits - but does not require - Contracting Parties to confine the limitations or exceptions given to the visually impaired population to circumstances where the accessible format work 'cannot be obtained commercially under reasonable terms for the beneficiary persons in that market'. One of the by-products of a country availing itself of the commercial availability requirement is that article 5(1) will not apply to accessible format copies which may be obtained commercially and under reasonable terms.⁶⁴ Article 5(1) states that:

Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

It is important to note that in the Marrakesh Treaty's predecessor, the Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities,⁶⁵ reference was made in an alternative provision found in article D (which dealt with the cross-border exchange of accessible format copies) to 'reasonable price' rather than 'on reasonable terms'.⁶⁶ This is titled as being 'Alternative A', and reads that:

The Member State/Contracting Party may limit said distribution or making available of published works which, in the applicable accessible format, cannot be otherwise obtained within a reasonable time and at a reasonable price, in the country of importation.

⁶⁴ Ibid.

⁶⁵ WIPO 'Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities.' Available at http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_3_rev.pdf [Accessed 17 May 2013].

The Draft Text gives a proposed definition of ‘reasonable price for developed countries’ as ‘mean[ing] that the accessible format copy of the work is available at a similar or lower price than the price of the work available to persons without print disabilities in that market’. Regarding ‘reasonable price for developing countries’, it is proposed that this ‘means that the accessible format copy of the work is available at prices that are affordable in that market, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities’. There is absolutely no express mention of ‘reasonable price’ anywhere in the Marrakesh Treaty. It is therefore important to ask what the implication of this change is. Was it a superficial alteration, or does it have any meaningful significance, and if so, what?

According to Pescod of the WBU, the institution accepts the need for a clause on commercial availability like the one in article C (which dealt with national law limitations and exceptions on accessible format copies) that will allow countries which already have such a clause in their national law to keep it. ‘What we have a big issue with, and reject, is a clause for commercial availability in articles D and E’. he said.⁶⁷ Article D dealt with the cross-border exchange of accessible format copies and article E dealt with the importation of accessible format copies.⁶⁸ To this end, it would seem Pescod ought to be satisfied as the placement of the said clause is now only to be found in its updated version under article 4 (the present version of article C). However, it is the choice of language and not the placement of the clause that is of immediate and current concern. It is submitted that, whilst ‘on reasonable terms’ is clearly broader in scope than ‘at a reasonable price’, many of the criticisms levelled at and problems identified with article D’s ‘Alternative A’ language may also apply to the newer, article 4(4) version of the commercial availability requirement and that the change is thus of little practical benefit for the visually impaired.

⁶⁷ Catherine Saez ‘In UN talks on treaty for the blind, concern about heavy focus on rightholders’ interest.’ Available at <http://www.ip-watch.org/2013/04/20/in-un-talks-on-treaty-for-the-blind-concern-about-heavy-focus-on-rightholders-interests/> [Accessed 17 June 2013].

⁶⁸ WIPO (note 65).

The commercial availability requirement has quite rightly been labelled as being ‘unworkable’. First, such a clause puts the burden on institutions providing reading materials to the visually impaired to check whether the text is already available in South Africa commercially and, if so, puts the additional burden on them to determine whether or not it is available under ‘reasonable terms’. For institutions that are not made up of trained legal experts and which have limited resources (both human and financial), these demands are near impossible to satisfy, rendering the institutions practically paralysed to assist the visually impaired in any meaningful way for fear of facing a myriad of legal actions. This is an insurmountable obstacle for such organisations. This is especially evident when looking at developing nations, for example an organisation in South Africa wanting to send a book in an accessible format to another part of Africa. In such an instance the organisation would have no resources to perform the required checks, and so would effectively be unable to satisfy the said request due to purely pragmatic and economic reasons.⁶⁹ Further, there is no definition for what ‘accessible’ means, or how ‘accessible’ a work must be before it will be considered to have been available in an accessible format. There is also the problem of compatibility issues. For example, where a work is only available in an accessible format on an iPad it would be unreasonable, especially in a developing country like South Africa, to expect a blind person to purchase an iPad simply so they can have access to a particular work. However, this may or may not be enough to deem the said work ‘commercially available’ for the purposes of the Treaty, despite the clear practical absurdity. It is especially ludicrous in a developing country like South Africa where there are still many members of the population without access to such basic necessities as electricity and clean sanitation, and where most of the blind population are without a means of employment. What this all

⁶⁹ Catherine Saez (note 67).

translates to is that the transaction costs for the visually impaired will be much higher than those for sighted readers, which defeats the supposed aim of the Treaty.⁷⁰

However, as with all things, there are two sides to every story. The argument in support of the commercial availability requirement is that it is necessary in order to incentivise commercial publishers to originally publish accessible formats of their works.⁷¹ However, this ignores the fact that over 90 per cent of the world's visually-impaired population resides in poorer developing countries,⁷² and that the blind make up a significant portion of the poor. These people would probably not be able to afford commercially available accessible copies in any case.⁷³ So, even if costs were cut and the audio-book was made cheaper, it would still be significantly out of the price-range of the poorer communities that make up a large part of the visually impaired in the first place. This means transaction costs for the visually impaired will be much higher than those for sighted readers – which defeats the supposed aim of the Treaty.⁷⁴ Changing the terminology from 'reasonable price' to 'reasonable terms' hardly helps the matter. This is because what exactly the necessary 'terms' that need to be assessed are remains to be seen. However, one may suppose that it would include the price of the said item, thereby widening the scope of discretion but still including the offending term in the wider net which potentially encompasses more of a value judgement on the part of the courts. Furthermore, even if it does not include the price of the said item, it still places an onerous duty on the entities entrusted to provide accessible materials to the visually impaired, and ignores time and money

⁷⁰ William New 'Mixed reactions among participants in WIPO talks on treaty for the blind.' Available at <http://www.ip-watch.org/2013/04/22/mixed-reactions-among-participants-in-wipo-talks-on-treaty-for-the-blind/> [Accessed 17 May 2013].

⁷¹ Mihály J. Ficsor (note 42).

⁷² World Health Organisation (note 1).

⁷³ After much searching, the author was unable to find a textbook published in both braille and standard formats. However, as a result of discussions with publishers, the author established that reproducing a mathematics textbook into braille would cost R750.00 and up, on condition that the textbook is available to the publisher with permission to do so.

⁷⁴ William New (note 70).

constraints at play with such institutions, as well as their lack of legal expertise. In this way it burdens the already resource-constrained entities to such an extent that it might become practically impossible for them to fulfil their mandate of providing access to as many visually impaired people as possible.

It is therefore suggested that South Africa exercise its ability to not include such a clause in its national law, as to do so would be to defeat the aim of the Marrakesh Treaty. Including such a clause in the South African Copyright Act would put undue burdens on non-profit organisations providing accessible format copies of literary works protected by copyright law. The ambiguity as to how such a commercial availability requirement will be interpreted by courts and its potential application to developing countries with vast economic divides that coexist in the same geographical area, makes it a provision that is ill-suited to South Africa if we are to attain the outcomes envisioned by our signing the Marrakesh Treaty.

3.1.2 The need for direct access to accessible copies

The next problem is one more pragmatically relating to the access of accessible copies. According to article 5(1) (which deals with the exportation of accessible works) of the Marrakesh Treaty:

Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

In defining what is meant by an ‘authorized entity’, article 2(C) states that it is:

[A]n entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

In terms of importation, article 6 states the following:

To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder.

In other words, the Marrakesh Treaty only permits and requires Contracting Parties to allow ‘authorized entities’ to export accessible format works to a beneficiary person or authorised entity in another Contracting Party. The situation is different when it comes to importing accessible copies, as article 6 allows for the importation of those works to occur via an authorised entity or by the beneficiary person himself or herself, provided this is permitted according to the Contracting Party’s national law. In other words, if the national law allows for only an ‘authorized entity’ to make an accessible format copy of a work, then only an authorised entity need be allowed to import a work. The importance of the authorised entities is that they make sure ‘accessible format copies *may truly be available* to the beneficiaries with visually impairment’, as well as that they ensure ‘that those copies *may only be available* to the beneficiaries’.⁷⁵

It is once again prudent that South Africa allow beneficiary persons to make an accessible format copy of a work and to therefore be enabled to directly access imported works rather than requiring them to access works through authorised entities. There are various reasons why to not do so would be a grave mistake. If beneficiary persons are required to make use of an authorised entity as a ‘middle-man’, the practical implication may again stifle the effectiveness of the Marrakesh Treaty. Practically, this means the request for a work is made by an individual in Country X to a local institution, which then requests the work from an institution in Country Y. Once the work is brought into Country X from Country Y, it is delivered

⁷⁵ Mihály J. Ficsor (note 42).

to the local institution and it is for the institution to deliver the work to the visually impaired person requesting it. The problem with this is again a resource-based one. With approximately 80 per cent of the visually impaired population living amongst the 19 million South Africans residing in remote rural areas according to the South African National Council for the Blind,⁷⁶ the resources needed by institutions to deliver reading materials to such individuals would be immense. The fact that article 6 defers the situation to a Contracting Party's national law is a clear nod of validation to the resource difficulties that would be experienced by many predominantly developing, poorer countries such as South Africa or India if there were no alternative method of distribution. It is therefore strongly urged that South Africa utilise the option of direct access to imported copies by beneficiary persons rather than requiring access to be made through authorised entities. It would be impractical and unreasonable for us not to adopt this approach and would greatly water down the effectiveness of our being a Contracting Party to the Treaty if we were unable to adequately distribute the newly-available accessible copies of literary works.

3.1.3 Article 13 of the TRIPS Agreement: the three step test

The so called three step test is a complex piece of legal jargon that has caused much uncertainty and controversy in the international arena.⁷⁷ This controversy has extended to the Marrakesh Treaty.

⁷⁶ Growing Tomorrow 'SA National Council for the Blind: Support in rural areas.' Available at <http://www.agritv.co.za/articles/sa-national-council-for-the-blind-support-in-rural-areas/> [Accessed 14 February 2014].

⁷⁷ For a full account of the three step test and all the issues surrounding its interpretation and application, see: Anette Kur 'Limitations and exceptions under the three step test – how much room to walk the middle ground?' in Annette Kur and Marianne Levin (eds) *Intellectual property rights in a fair world trade system: proposals for reform of TRIPS* (2011) 208; William Baude et al 'Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa' (2006) 7 *African Journal of Information and Communication* 82; Michael Blakeney 'A critical analysis of the TRIPS Agreement' in Meir Perez Pugatch (ed) *The intellectual property debate: perspectives from law, economics and political economy* (2006) 17 at 17 – 31.

A difficulty identified with the three step test is the so called ‘three step test gap’ pertaining to countries that are not parties to any of the agreements embodying the three step test. The answer to dealing with this gap is expressed in article 5(4)(a):

When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party’s jurisdiction

In other words, where the receiving party is not obliged under any of the three international instruments to make use of the three step test, such a party will only be permitted to reproduce, distribute and make available the accessible format work within its own borders. Its scope of conduct, therefore, is territorially limited.

Whilst some have demanded the inclusion of the TRIPS Agreement’s three step test in the Marrakesh Treaty, there are others who have vehemently argued against it. As seen in an examination of the Dispute Settlement Body’s interpretation of the three step test,⁷⁸ the three step test is a default position ie if another alternative standard is used, this will not necessarily infringe the three step test. The Berne Convention itself identifies certain different standards to be applied to different literary and artistic works. For example, it identifies the ‘news of the day’ as a complete exception in article 2(8). Regarding teaching, article 10(2) states the following:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

These are just two examples of intrinsic exceptions to the three step test identified within the Berne Convention itself. Therefore, goes the argument of those who did

⁷⁸ World Trade Organisation ‘United States – section 110(5) of the US Copyright Act.’ Available at http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf [Accessed 23 January 2013].

not want the three step test included in the Marrakesh Treaty, the idea that the three step test is a complete and blanket rule goes contrary to the source of the three step test. Different standards are not alterations of the three step test, but an exception to the three step test itself as identified by the legal source of the test. The argument has been made by groups such as James Love's Keionline that a treaty for copyright limitations and exceptions for the visually impaired is not the place in which to mention the three step test at all.⁷⁹ The WBU too has expressed worry and dissatisfaction with the debate surrounding such legal matters as the three step test threatens to overshadow the humanitarian aspects of the Marrakesh Treaty.⁸⁰

It is submitted that whether or not the three step test is included in the Treaty is of little practical consequence due to the flexibility and openness of the three step test.⁸¹ In terms of South Africa this is even more so because South Africa is a party to both the Berne Convention (in terms of substantive provisions this is the case regarding the Brussels version) and the TRIPS Agreement, the limitations of article 5(4)(a) will not apply to it.

In conclusion, the Marrakesh Treaty brings with it many opportunities to eliminate the book famine. On paper, it appears to be the answer to the lack of equal access problem that has been the subject of this article. However, it will soon be shown that the promise of the Marrakesh Treaty does not necessarily live up to the realities.

4. FUTURE PROBLEMS AND OBSTACLES TO EXPECT AT THE END OF THE MARRAKESH RAINBOW

⁷⁹ James Love 'Disney, Viacom and other MPAA members join book publishers to weaken a treaty for the blind.' Available at http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m_b_3137653.html [Accessed 19 May 2013].

⁸⁰ Catherine Saez (note 67).

⁸¹ Mihály J. Ficsor (note 42).

It remains to be seen whether or not the Marrakesh Treaty is the answer to the long unheard prayers of the visually impaired community, or if more than the signing of a treaty is required to make the kind of change necessary for the wrongs of many decades to be rectified. It is submitted that the Marrakesh Treaty does not signal the end of the problem as we know it. To think otherwise would be absurdly utopic. There are still many challenges to be faced by the international community at large and especially developing countries like South Africa in order for the Marrakesh Treaty to achieve its ultimate aim. These obstacles will be discussed below.

4.1 Technological barriers to access

The first barrier to the effectiveness of the Marrakesh Treaty is the lack of access to technology. In South Africa, only 17.4 per cent of the total population have access to the internet.⁸² As the populations of developed countries have access to more and better technology, they will be the first to benefit from the provisions of the Marrakesh Treaty. This means that the visually impaired populations in the developing countries - like South Africa - will have to wait to feel the benefits of the Marrakesh Treaty. This problem means that the majority of visually impaired persons, who happen to reside in developing countries, will have to wait to be relieved of their suffering. Therefore the majority of visually impaired people will need to wait to feel the benefits of the Marrakesh Treaty whilst the minority enjoy it first.

The above-mentioned is the result of a wider battle that needs to be brought to the forefront of the Marrakesh Treaty's agenda, namely the technological battle that is being faced by developing countries. It is unacceptable that 82.6 per cent of South Africans are not a part of the inaptly named worldwide web, or global village. Whether one chooses to view this from the point of view of a visually impaired

⁸² Internet World Stats 'Africa internet usage and population statistics.' Available at <http://www.internetworldstats.com/stats1.htm> [Accessed 18 February 2014].

person not being able to access literary works, or an able-bodied person not being able to access works on the internet, it is merely a different symptom of the same problem, which is poverty. There is a dire need for the development of low-cost (the author shies away from the term ‘cheap’ because of its oft-times unfair connotation regarding quality) devices that will make the visually impaired from low-income countries able to utilise the Marrakesh Treaty to its fullest extent sooner rather than later. This is a battle that needs to be advocated more and brought to the forefront of the Marrakesh Treaty’s dialogue. Only then will it garner international support.

4.2 Time delays in implementation

Another issue with regards to the effectiveness of the Marrakesh Treaty’s agenda is the time delay in getting the Marrakesh Treaty ratified. For example, in South Africa there has been no mention of ratifying the Marrakesh Treaty in the draft South Africa National Intellectual Property Policy, which was made available after the Marrakesh Treaty had been finalised.⁸³ The sluggish nature of ratification can be seen in the fact that South Africa has been a signatory to the World Copyright Treaty for over a decade, yet has still not ratified it.⁸⁴ The longer politics delay the implementation of the Marrakesh Treaty, the more visually impaired persons lose out during the wait. This is not acceptable. There needs to be pressure put on countries to fully appreciate the magnitude of the problems the Marrakesh Treaty aims to resolve, and to accordingly act swiftly.⁸⁵

4.3 Technical and legal jargon

⁸³ Draft National Policy on Intellectual Property Notice 918 of 2013.

⁸⁴ World Intellectual Property Organisation ‘WCT notification no. 2: WIPO Copyright Treaty Signatories.’ Available at http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_2.html [Accessed 05 August 2014].

⁸⁵ However, it must be acknowledged that the South African government has taken some proactive steps with regards to the Marrakesh Treaty. The author herself was invited to the Consultative Workshop on Intellectual Property and the Beijing Treaty on Audio-visual Performances hosted by the Department of Arts and Culture on 14 October 2013 at the Slave Lodge in Cape Town, where the Marrakesh Treaty took center stage.

The Marrakesh Treaty is not the most reader-friendly piece of law. It is not written in plain language, and is therefore difficult for people who are not legal experts to comprehend. As the Marrakesh Treaty deals with largely non-expert individuals, this means that most people affected by the Marrakesh Treaty will be unable to adequately independently make sense of the rights and limitations embodied in the Marrakesh Treaty. They will largely be reliant on second-hand accounts. This is problematic because with every interpretation of a law, something is lost in translation. It also means that only people who have access to these second-hand accounts (eg taking into account technological barriers, language barriers etc) will be somewhat aware of what the Marrakesh Treaty means for them. A lack of plain language also means that it is more difficult for organisations like the WBU to effectively mobilise around the issues embodied in the Marrakesh Treaty. It is important that interest groups like Legal Friends of the Blind understand the implications of the Marrakesh Treaty so they can meaningfully implement it, as well as so the people who are ultimately the beneficiaries can be empowered. This is particularly relevant in regards to beneficiaries urging the government to act swiftly, as pointed out in the above section.

4.4 Evidentiary backing of argumentative claims

As stated upfront, there is a distinct lack of evidence on the specific effects the barriers to accessing copyright protected literary works by the visually impaired has had on the blind community. In order for the Marrakesh Treaty's wider developmental agenda to be pushed, this will need to be rectified. There needs to be research which clearly maps the connection between restrictive access to literary works due to disability, and the subsequent lack of realised rights (eg education, employment etc). This lack of clear work showing a conclusive connection has been noted in other literature,⁸⁶ and must be addressed in the future.

⁸⁶ The Copy/South Research Group *The Copy/South dossier: issues in the economics, politics, and ideology of copyright in the global south* (April 2006).

5. CONCLUSION: THE LONG AND WINDING ROAD

South Africa has failed to find the balance between the rights of copyright owners and the rights of copyright users, specifically when those users are members of the visually impaired community. The South African government has failed in providing equal access to copyright protected literary works to the visually impaired community. This failure to deliver on the obligations owed to the visually impaired community in providing equal access to copyright protected literary works in the form of textbooks in terms of the Constitution, legislation and case law has potential effects on the other rights of the visually impaired community, particularly in regards to the right to education, freedom of expression, dignity and so on. This needs to change.

One of the primary ways forward would be for South Africa to follow suit with the international community in trying to realise the right to equal access owed to the visually impaired community on a global scale is to sign and accede to the Marrakesh Treaty. Once having done so, South Africa will need to make suitable amendments to its current body of national copyright legislation so as to realise its duties in terms of the Marrakesh Treaty. Once signing and acceding to the treaty, South Africa will have to be wise about the ways in which it chooses to implement the provisions in the Marrakesh Treaty, for if it is not then the entire exercise might very well amount to nought. Merely signing and ratifying the Marrakesh Treaty will not be enough. In implementing the Marrakesh Treaty, South Africa must take into account the forewarnings highlighted in this article. Namely, South Africa would need to make use of certain avenues the Marrakesh Treaty has for the realisation of its rights through alternative measures, such as bypassing the need for authorised entities to act as middle-men in the importation of accessible format reading materials, and excluding the commercial availability requirement from its national legislation. If it does not make these tactful decisions, then its accession to the Marrakesh Treaty will have been greatly watered down and it will probably fail to rectify the wrongs of the

current copyright legislation. Such an outcome would not only be morally unacceptable, but legally dubious at best. As Sam Cooke famously sang in his hit 'A Change is Gonna Come' regarding the American Civil Rights Movement, 'it's been a long, long time coming, but I know a change is gonna come'.