# Addressing the Proposed WIPO International Instrument on Limitations and Exceptions for Persons with Print Disabilities:

# Recommendation or Mandatory Treaty?

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*Margot E. Kaminski*[1] *& Dr. Shlomit Yanisky-Ravid*[2]
*Information Society Project*
*Yale Law School*

**Abstract:**

This Working Paper addresses the proposed WIPO International Instrument on Limitations and Exceptions for Persons with Print Disabilities. We conclude that if WIPO wants to achieve compliance, this proposed instrument should be binding hard law. Enacting this agreement as soft law would undermine the goal of making copyrighted works accessible to persons with print disabilities.

Generally, hard law prevents instruments from becoming dead letter agreements. Soft law is a less appropriate solution where there is already consensus and specificity, as there is here. Soft law also creates inefficiencies, as countries try to determine how to satisfy its vaguer aspirations.

In the human rights context, because the UN Convention on Persons with Disabilities has not been implemented domestically, soft law will fail to mobilize domestic actors. Soft law also will not be sufficiently strong to protect the human rights of people with disabilities, traditionally a weaker sector.

In the international copyright context, hard law is necessary because of the complicated web of existing hard law in the field. If WIPO wishes for the proposed instrument to counter hard law established in other forums, it should make the instrument binding. Otherwise, developing countries will not implement the instrument, and WIPO will fail to reach those persons with print disabilities most in need of an international solution.

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[1] Executive Director of the Information Society Project at Yale Law School and Research Scholar in Law at Yale Law School.

[2] Professor of Law at the School of Law, Ono Academic College, in Kiryat Ono, Israel. Visiting Fellow at the Information Society Project at Yale Law School, 2011-12.

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## I. Introduction

The World Intellectual Property Organization (WIPO) at the United Nations is confronting an acknowledged problem of global scale: the inability of persons with print and other reading disabilities to obtain accessible versions of copyrighted works. There are an estimated 180 million people with print disabilities, and only some 5% of books are available in accessible formats in developed countries.[3] The percentage of accessible books in developing countries is much lower, estimated at less than one percent.[4] The licensing system for making written works accessible is inadequate and inefficient.[5] Persons with print disabilities are consequently denied access to educational material, literature, entertainment, and the free flow of ideas that constitute full participation in society.[6]

WIPO is thus considering an international instrument to enable accessibility for persons with print disabilities by providing specific limitations and exceptions to copyright.[7] There are four proposed drafts of the instrument, proposed by different groups,[8] and a Chair's text[9] that was drafted as the "basis for future text-based work."[10]

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[3] U.N. World Intellectual Property Organization [WIPO], Standing Committee on Copyright and Related Rights [SCCR], *Study on Copyright Limitations and Exceptions for the Visually Impaired*, 14, WIPO Doc. SCCR/15/7 (Feb. 20, 2007) (*prepared by* Judith Sullivan)[hereinafter *WIPO Study*].

[4] Press Release, World Blind Union, On Track for a "Books Without Borders" Treaty (June 30, 2011), *available at* http://www.worldblindunion.org/en/our-work/campaigns/Documents/World%20Blind%20Union%20-%20Press%20Release%2030%20June%202011.doc.

[5] *WIPO Study*, *supra* note 1, at 10 (noting that the shortage of access to copyrighted works is created by "difficulties in reaching licensing agreements" for accessible copies, "both regarding activity within a country and movement of accessible copies across borders").

[6] *See* Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Art. 30, 61st Sess., 76th plen. mtg., U.N. Doc A/RES/61/106 (Jan. 24, 2007) [hereinafter UN Convention] ("Participation in cultural life, recreation, leisure and sport. (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats").

[7] The Standing Committee on Copyright and Related Rights (SCCR) agreed at its twenty-second session in June, 2011 to recommend to the WIPO General Assembly that Members continue discussion of the proposed instrument with the aim to "agree and finalize a proposal on an international instrument on limitations and exceptions for persons with print disabilities in the 23rd session of the SCCR." WIPO, SCCR, *Draft Report*, 86 ¶ 5, WIPO Doc. SCCR/22/18 Prov. (July 15, 2011) (*prepared by* the Secretariat) [hereinafter SSCR/22/18].

[8] There are four proposals related to copyright limitations and exceptions and the needs of the visually impaired and other persons with print disabilities, submitted by the Member States of WIPO and the European Union as of March 16, 2011:

The draft instruments structurally vary in whether they are soft-law recommendations or binding hard law. The United States advocates a two-step process in which the first step will be a joint recommendation, "on the path" to a second step of binding international standards.[11] The European Union also proposes a joint recommendation.[12] Other delegations, including Argentina, Brazil, Ecuador, Paraguay, Mexico, and the African Group, advocate a binding hard-law treaty.[13]

This Working Paper addresses whether such an instrument would better function as a joint recommendation or a hard-law treaty, against the existing landscape of international copyright and human rights law. This Paper does not address the substantive details of the proposals at this preliminary phase.

Our conclusion is that the instrument should be a binding hard-law treaty, rather than a non-binding joint recommendation. First, non-binding recommendations can become "dead letter"—agreements that are signed but never actually complied with—and this problem is too important to be reduced to an ineffective instrument. Second, soft law is a less appropriate solution where there is consensus and specificity, rather than aspirations and need for experimentation. Third, soft law would be inefficient and incur unnecessary costs for countries, where consensus in a hard law instrument could be achieved. Fourth, in the human rights context, a hard-law treaty exists but has not been implemented, and thus a soft-law instrument could not fill an interpretive gap in domestic law the way it can in other areas where such instruments have been used by WIPO in the past. Fifth, in the copyright context, the field is crowded with multiple

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(1) Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU) (document SCCR/18/5);
(2) Draft Proposal of the United States of America for a Consensus Instrument (document SCCR/20/10);
(3) Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers (Africa Group) (document SCCR/20/11);
(4) Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability (European Union) (document SCCR/20/12).

*See* WIPO, SCCR, *Comparative List of Proposals Related to Copyright Limitations and Exceptions for the Visually Impaired Persons and Other Persons with Print Disabilities*, WIPO Doc. SCCR/22/8 (March 16, 2011) (*prepared by* the Secretariat) [hereinafter *List of Proposals*].

[9] WIPO, SCCR, *Proposal on an international instrument on limitations and exceptions for persons with print disabilities*, WIPO Doc. SCCR/22/16 (Nov. 4, 2011) (*prepared by* the Chair) [hereinafter *Chair's Proposal*].

[10] SCCR/22/18, *supra* note 7, at 86 (reporting that "the Committee asked the Chair to prepare a Chair's text for an international instrument on limitations and exceptions for persons with print disabilities (document SCCR/22/16), which would constitute the basis for the future text-based work to be undertaken by the Committee in its 23rd session").

[11] *Id*. at 23-24.

[12] *Id.* at 25.

[13] *Id.* at 24-25.

hard-law agreements in different forums, preventing experimentation and norm-setting that soft law ordinarily can provide.

It is our conclusion that choosing soft law here would constitute either withdrawal from or a waiver of the goal of creating international exceptions and limitations for blind people and people with print disabilities. We therefore assert that a binding hard-law treaty is the more appropriate instrument, if the goal of establishing compliance with proposed limitations and exceptions is to be achieved.

## II. Background on the Proposed Instrument

This section is intended as an introduction to the history of the instrument. Those with knowledge of the area may wish to skip to Section III.

We briefly sketch international copyright law and general justifications for limitations and exceptions. We then identify the specific problem the instrument seeks to solve: lack of access to copyrighted works by persons with print disabilities. This section concludes by briefly summarizing arguments for how the instrument fits into existing international copyright law.

### A. International Copyright Law and Limitations and Exceptions

The international framework for copyright protection defines rights intended to encourage and reward creativity.[14] It spans different forums, from WIPO to the World Trade Organization (WTO) to individual bilateral agreements to plurilaterals like the Anti-Counterfeiting Trade Agreement (ACTA).[15] International instruments addressing copyright were designed to promote harmonization among the countries by establishing uniform ways of protecting the rights of authors in their literary and artistic works. The ease of transferring copyrighted works across borders helped to inspire international regulation.[16] International copyright laws grant the owners of certain non-tangible works exclusive rights for a limited time. International standards include, for example, a minimum level of protection, and rules against discrimination based on national grounds.[17]

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[14] *WIPO Study*, *supra* note 1, at 12.

[15] *See* Margot E. Kaminski, *An Overview and the Evolution of The Anti-Counterfeiting Trade Agreement*, 21 ALB. L.J. SCI. & TECH. 385 (2011).

[16] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention] ("The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.") See also Article 1 of the Berne Convention. http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

[17] Berne Convention, *supra* note 15, at Art. 5(1), Art. 5(3), Art. 19.

Different states justify copyright under different theories. In the United States, for example, copyright has a utilitarian justification: it is meant to "promote the Progress of Science and useful Arts."[18] French copyright law, by contrast, treats copyrighted works as an extension of the personality of the author. Some have found distributive justice justifications for copyright, as well.[19] International copyright law attempts to reconcile these multiple theories, and scholars have observed that the language of international agreements shows that international copyright law is motivated at least by both natural law and utilitarian considerations.[20]

There is a natural tension in copyright, under any theory, between authors and users. One tension arises from a concern for achieving an appropriate balance between the authors of today and the authors of tomorrow.[21] This is done so that there is "enough and as good left in common for others" to acquire a natural right to intellectual property in the future.[22] Another tension arises from considering copyright law as an incentive system that benefits society as a whole: copyright should be limited to avoid squelching more creative production than it incentivizes. Utilitarian motives of enhancing benefits to society allow for more open-ended provisions of limitations, such as fair use or fair dealing.

This tension in copyright between the divergent interests of authors and users is the foundation of limitations and exceptions to copyright law.[23] On an international level, limitations and exceptions are preserved in the three-step test articulated in Article 9(2) of the Berne Convention, Article 13 of TRIPS, Article 10 of the WIPO Copyright Treaty, and Article 16(2) of the WIPO Performances and Phonograms Treaty. The three-step test is an abstract formula that permits unauthorized reproductions of copyrighted works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The three-step test on limitations and exceptions was formulated to allow countries to create or preserve their own domestic systems for limitations

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[18] U.S. CONST. art. I, § 8, cl. 8.

[19] *See* Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. Davis L. Rev. 803 (2007).

[20] MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 17 (2004) [hereinafter SENFTLEBEN].

[21] *Id*. at 38-39. See also *WIPO Study*, *supra* note 1, at 12 ("Creators in general are not working in a vacuum. Rather they are often building on, or being inspired by, earlier creativity . . . Users and creators are therefore not necessarily distinct groups having different needs and many people will at certain times be users and at other times be creators.").

[22] JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, book II chapter 5 § 27.

[23] SENFTLEBEN, *supra* note 19, at 3.

and exceptions, which substantially differ from country to country.[24] Countries' systems for limitations and exceptions (or "fair use" in the United States) must fit within the three-step test,[25] but no international instrument dictates which particular limitations and exceptions a country must minimally adopt.

## B. The Problem: The Market isn't Working and Existing Exceptions are Not Enough

As mentioned, the World Blind Union has estimated that there are around 180 million blind and partially sighted people in the world, and that fewer than 5% of published books are currently availably in formats useable by visually impaired people;[26] less in developing countries. Ninety percent of visually impaired persons live in countries of low or moderate incomes.[27]

The world today is going through rapid technological developments. In a knowledge-based world, access to copyrighted works has become more and more important to everyday life, and may improve total welfare. Thus, the accessibility of certain works has become a constituent part of full participation in society. The WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired[28] noted that the shortage of access to copyrighted works is created by "difficulties in reaching licensing agreements" for accessible copies, "both regarding activity within a country and movement of accessible copies across borders."[29] The unauthorized use of tools that enable access to unlicensed copyrighted works, such as software that converts from the written format to an accessible format, is, in many countries, copyright infringement.

Many countries have not adopted exceptions for visually impaired people. At the time of the WIPO Study, significantly fewer than half of WIPO Member States had laws relating specifically to the needs of visually impaired people.[30] Some fifty-seven countries do have specific provisions that permit assisting visually impaired people by making a

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[24] *Id.* at 1 ("A country's specific system of limitations, in general, seems to be a sacrosanct feature of domestic copyright laws".) *See also WIPO Study*, *supra* note 1, at 12 ("The nature and scope of exceptions and limitations to rights has been largely left to national policy makers to determine within broad permissive areas.").

[25] *See, eg.* WTO Doc. WT/DS160/R, dated 15 June 2000. At the time, the European Communities considered that Section 110(5) of the U.S. Copyright Act, which permits under certain conditions playing radio and television music in public places without a royalty, did not comply with the Berne Convention, and the WTO panel found that while one section did fall into the three-step test, the other did not and was in violation of US obligations under the Berne Convention.

[26] *WIPO Study*, *supra* note 1, at 14.

[27] *List of Proposals*, *supra* note 8, Preamble.

[28] *WIPO Study*, *supra* note 1.

[29] *Id*. at 10.

[30] *Id*. at 28.

copyright work available in an accessible form.[31] Such countries include traditionally more powerful negotiators such as Australia, Canada, the United States, France, Portugal, Spain, the UK, and Japan.[32] In six countries, exceptions are limited to Braille copies,[33] while nineteen countries limit exceptions to the production of Braille or other specialized formats,[34] while twenty-one countries do not limit the format at all.[35] The remaining eleven countries have other variations on the types of accessible formats possible; for example, Norway permits all formats except for sound.[36]

In addition to the fact that more than half of WIPO Member states lack any exception for visually impaired people, there is a lack of clarity regarding cross-border movement of copies of copyrighted works made under exceptions. This prevents the import and export of accessible works made legally within countries that do have exceptions.[37]

The existence and ratification of the UN General Convention on the Rights of Persons with Disabilities in 2006 ("UN Convention") did not significantly change the actual ability of persons with print disabilities to access copyrighted works, even though it appears to clearly address the issue.[38] Article 30 of the UN Convention obliges Member States to take appropriate measures to ensure that copyright law does not constitute an unreasonable or discriminatory barrier to access to cultural materials for persons with disabilities.[39] Article 30, however, uses general terms and states a principle—that intellectual property should not unreasonably or discriminatorily impede access to cultural materials in accessible formats—rather than proposing a specific mechanism.

Many of WIPO's member states have not complied with this general obligation, notwithstanding ratification of the treaty as a binding obligation. The WIPO Study pointed out in 2007 that "international agreements relevant to the rights of disabled people may already require countries to take the needs of disabled people into account when framing their copyright laws."[40] In practice, however, countries do not make such

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[31] *Id*. at 9.
[32] *Id*. at 30.
[33] *Id*. at 36.
[34] *Id*. at 38.
[35] *Id*. at 36.
[36] *Id*. at 39.
[37] *Id*. at 10.
[38] UN Convention, *supra* note 6.
[39] *Id*., art. 30. ("Participation in cultural life, recreation, leisure and sport. (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats; . . . (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.").
[40] *WIPO Study*, *supra* note 1, at 11.

accomodations. Thus, WIPO's members are justified in seeking to create a new, specific international instrument to establish international legal norms on both copyright exceptions and the cross-border exchange of special format copies.

### C. The Place for Such an Instrument Within the Three-step Test

Nothing in international law specifically provides for exceptions to copyright for the benefit of visually impaired people.[41] It is not, however, a strange concept for many countries. Nor is it a new concept. The study group that undertook the preparatory work for the 1967 Stockholm Revision Conference at which the three-step test was established surveyed existing limitations, and created a list of the fourteen most frequent limitations. These included "(9) reproduction in special characters for the use of the blind" and "(10) sound recordings of literary works for the use of the blind."[42] Thus, exceptions for the blind have widely existed across countries since before international copyright law was established.

Existing international copyright law may, in fact, have explicitly contemplated that an exception for the visually impaired would be covered by the three-step test. The study group presented a preliminary draft of limitations and exceptions that allowed exceptions "for specified purposes," [43] including "the interests of the blind."[44] The final version of the three-step test similarly contemplates exceptions "in certain special cases," and one might presume, given the widespread nature of the exception in countries at the time and recognition of it in the drafting process, that the interests of persons with print disabilities would constitute a special case.

While the three-step test may have been intended to allow copyright exceptions for access by persons with print disabilities, in practice its vagueness leaves countries confused, so they do not adopt such exceptions. The WIPO Study[45] observed that delivering accessibility for visually impaired people may be justified under current international exceptions,[46] but the framework of exceptions in international treaties and conventions related to copyright "is complex and confusing for those drawing up exceptions to rights for the benefit of visually impaired people."[47] The WIPO Study concluded that because of the uncertainty

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[41] *Id*. at 17.
[42] SENFTLEBEN, *supra* note 19, at 48 (citing to Doc. S/1, Records 1967, 112, footnote 1, and pointing out that enumerated limitations 1 to 6 were provided for in the earlier 1948 Brussels Act).
[43] *Id*. at 49 (citing to Doc. S/1, Records 1967, 112) (countries may "limit the recognition and exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works").
[44] *Id*. at 49 (citing Doc. S/1, Records 1967, 112).
[45] *WIPO Study*, *supra* note 1.
[46] *Id*. at 11.
[47] *Id*. at 134.

costs inherent in a broader exception like the three-step test, the only comprehensive solution is to outline exceptions that specifically provide for the needs of the blind or other visually impaired people.[48]

### D. The Proposed Solution

The proposed instrument—which, as mentioned, currently consists of four different proposed drafts in addition to the Chair's Proposal—will attempt to address the above problems. At the Twenty-Second Session of the Standing Committee on Copyright and Related Rights at WIPO, the Committee recognized "the aim to agree and finalize a proposal on an international instrument on limitations and exceptions for persons with print disabilities."[49]

## III. The Features of Hard Law and Soft Law

Now that WIPO has asserted its goal of creating an international instrument on limitations and exceptions for persons with print disabilities, the next question is what kind of instrument it will be. WIPO's traditional approach has been to favor treaties and conventions. Nevertheless, some years ago, WIPO adopted a series of "Joint Recommendations," mainly in the area of trademark law.

The present instrument may be pursued either as a recommendation (soft law) or as a binding treaty (hard law). Each creates different opportunities and obligations. In this section, we present the features of soft law and hard law that should be weighed. We assert that these features must be discussed in relation to the specific characteristics of the subject matter and sectors involved, as well as in relation to existing treaties.

### A. Definitions

The mechanisms of international agreements vary along a spectrum, from hard to soft. Abbott and Snidal define this spectrum along three dimensions: (i) the precision of the rules; (ii) obligation; and (iii) delegation to a third-party decision-maker.[50] "Hard" agreements bind

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[48] *Id*. at 28 (observing that it is "extremely unlikely that exceptions that do not specifically provide for the needs of blind or other visually impaired people would provide a comprehensive solution to the needs of those facing a print disability").

[49] SCCR/22/18, *supra* note 7, at 86.

[50] Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000). This is substantively similar to Kal Raustiala's consideration of (i) the substance of the agreement; (ii) the form of the agreement; and (iii) the structure for review of performance. *See* Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* THE HANDBOOK OF INTERNATIONAL RELATIONS 538, 552 (Thomas Risse & Beth Simmons eds., 2002) [hereinafter Raustiala & Slaughter].

parties to precise rules, and are often enforced by a third-party. Hard agreements may require parties to implement new laws in order to bring domestic law into compliance; otherwise, states may face an enforcement mechanism.

Similarly, Michael W. Reisman describes all lawmaking as communication of three elements: content, signals of authority, and communications of intent to make the law effective.[51] Law may be harder or softer along these dimensions. A given law may contain precise content, but exist among other signals that the enactors have no intention of making the law effective. Or it may look effective, but state a general less enforceable principle rather than precise content. For example, in the case of complex environmental treaties, states concerned with enforcement have created binding hard-law agreements with vaguer, shallower terms that are readily complied with, but are ineffective as regards behavioral change.[52]

It is thus worth recognizing that even a binding agreement may be softer or harder based on content, so how "hard" the agreement ultimately is depends on the rules it contains, in addition to their enforceability or implementation requirements.

## B. Hard Law

Hard law presents a number of benefits that ensure compliance.

Legal positivists see binding hard law as legal obligations, and soft law as failed treaties.[53] This is not a complex view, but it is also not completely inaccurate: binding hard law does carry both enforcement requirements and a norm of compliance. Normatively, hard instruments have the stamp and aura of law most similar to domestic law, and states are arguably more concerned with the reputational consequences of failing to comply with binding hard law.[54]

Practically, a binding instrument requires implementation and enforcement, where a soft instrument does not. On a basic level, domestic systems must be brought into compliance with binding hard law. Domestic implementation, however, has larger compliance ramifications

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[51] Michael W. Reisman, *A Hard Look at Soft Law*, 77 AM. SOC'Y INT'L L. PROC. 373, 374 (1988) *available at* http://digitalcommons.law.yale.edu/fss_papers/750 [hereinafter Reisman].

[52] Kal Raustiala & David G. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS (David G. Victor, Kal Raustiala & Eugene B. Skolnikoff eds., 1998) [hereinafter Raustiala & Victor].

[53] George C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 Minn. L. Rev. 706, 707 (2010) [hereinafter Shaffer & Pollack].

[54] Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 583 (2005); *cf.* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S108-09 (2002) (examining the development of segmented reputations).

than merely telling domestic actors what they must do. Implementation mobilizes domestic actors.[55] Giving more strength to domestic actors causes shifts "in the preferences of societal actors" that "can in turn shift the compliance preferences of governments."[56] Thus, hard law not only requires states to implement; it also empowers domestic actors benefited by the new law to ensure that states are complying internally.

In sum, the benefit of binding hard law is both normative and structural. Normatively, states may be more likely to comply because the norm of hard law is compliance. Structurally, states are required to implement hard law, and this not only brings domestic law into compliance with hard law, it also increases the number of actors encouraging states to comply by expanding incentives to domestic actors to enforce the agreement internally.

## C. Soft Law

Of course, there can be problems with binding hard law. Many scholars have convincingly argued that soft law agreements are not just failed treaties, but can be a superior institutional choice. For example, Abott and Snidal claim that even though soft law is less credible than hard law, states often choose soft law as "superior institutional arrangements" based on a number of different factors, including transaction costs, uncertainty, implications for national sovereignty, divergence of preferences, and power differentials between negotiating countries.[57]

Reformulated, the benefits of soft law are roughly as follows: soft law instruments can be less costly to negotiate. They can impose lower sovereignty costs on states, and greater flexibility for states to cope with uncertainty or diversity of views. They can also allow states to arrive at a "deeper" set of rules, since there is less worry about enforcement consequences.[58]

Additionally, soft law can be conceived of as not just a possible but a necessary step on the way to hard law, during which states may alter their interests or norms through experimentation.[59] Eventually, agreement on harder rules becomes possible. Rushing to hard law too soon may cause an instrument to soften in other ways.[60]

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[55] Shaffer & Pollack, *supra* note 53, at 718.
[56] Raustiala & Slaughter, *supra* note 50, at 547.
[57] Kenneth W. Abbott & Duncan Snidel, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 423 (2000).
[58] Shaffer & Pollack, *supra* note 53, at 719.
[59] *See* Stephen J. Toope, *Emerging Patterns of Governance and International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 98 (Michael Byers ed., 2000).
[60] Raustiala & Victor, *supra* note 52 (suggesting that in the case of environmental treaties, states create binding hard law with shallower terms that are ineffective at instigating behavioral change).

Finally, soft law can be employed where a hard law instrument already exists.[61] Soft law in this circumstance fills in the gaps in a hard law instrument, creating interpretive norms for use by states and interstate enforcement mechanisms such as the WTO dispute resolution system.

### D. The Relationship between Hard and Soft Law

The traditional understanding of the relationship between soft law and hard law is that soft law may lead to hard law, or complement it by filling in interpretive gaps in existing hard law. Even within this traditional understanding, we believe hard law is the better option for this instrument, for reasons outlined in the next section. But this understanding of the relationship between soft and hard law fails to take into account the international landscape of existing laws surrounding the proposed instrument, and how they further impact the decision of what kind of instrument to use in this particular case. Those contextualizing understandings lead us to conclude that binding law is the only way in which this particular instrument can be effective and cause compliance on the ground.

## IV. Hard Law is Better in This Case

In this section, we compare the benefits of hard and soft law for this particular instrument. We begin by examining the Joint Recommendations WIPO has used recently. Then we discuss why WIPO might prefer a Joint Recommendation. We argue, however, that hard law is better for a number of reasons: it is less likely to create a "dead letter" agreement; the present instrument is the result of consensus, not aspirations; and soft law will be inefficient, where the existing problem is in large part one of inefficiencies.

In this specific case, two additional perspectives must be considered: the human rights perspective and the international copyright perspective. From the human rights perspective, hard law already exists, but has not been implemented domestically, so a Joint Recommendation would not help domestic interpretation of the law. From the international copyright perspective, the already existing hard law agreements do not leave room for soft-law experimentation. Thus we conclude, given these two added perspectives, the instrument should be hard law.

### A. What are the Joint Recommendations?

[61] Shaffer & Pollack, *supra* note 53, at 722.

WIPO has adopted at least three international instruments embodied as "Joint Recommendations." The first is the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks ("Well-Known Marks Recommendation").[62] The second is the Joint Recommendation Concerning Trademark Licenses ("Trademark Recommendation").[63] The third is the Joint Recommendation Concerning Provisions On The Protection Of Marks And Other Industrial Property Rights In Signs, On The Internet ("Internet Marks Recommendation").[64]

A Joint Recommendation, within the WIPO context, has distinct characteristics. First, it is not intended to be a binding tool, nor it is capable of being formally ratified by the countries. Each Member State may consider the use of the provisions as guidelines rather than requirements.[65] Second, Recommendations are experimental in nature, and are envisioned as potentially eventually leading to hard law.[66] Third, the existing Recommendations are all based on existing hard law treaties or conventions, which were domestically implemented by the countries.[67]

It is also worth looking to the subject matter of the existing joint recommendations, because international trademark law is different from

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[62] WIPO, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks *adopted by* Assembly of the Paris Union for the Protection of Industrial Property *and* General Assembly of the World Intellectual Property Organization, WIPO Doc. 833(E) (Sept. 1999), *available at* http://www.wipo.int/about-ip/en/development_iplaw/pub833.htm [hereinafter Well-Known Marks Recommendation].

[63] WIPO, Joint Recommendation Concerning Trademark Licenses *adopted by* Assembly of the Paris Union for the Protection of Industrial Property, *and* General Assembly of the World Intellectual Property Organization, WIPO Doc. 835 (Oct. 2000), *available at*: http://www.wipo.int/about-ip/en/development_iplaw/pdf/pub835.pdf [hereinafter Trademark Recommendation].

[64] WIPO, Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet *adopted by* Assembly of the Paris Union for the Protection of Industrial Property *and* General Assembly of the World Intellectual Property Organization, WIPO Doc. 845(E) (Oct. 2001), *available at*: http://www.wipo.int/about-ip/en/development_iplaw/pub845.htm [hereinafter Internet Marks Recommendation].

[65] Well-Known Marks Recommendation, *supra* note 62, at 4. *See also* Internet Marks Recommendation, *supra* note 64: "The determination of the applicable law itself is not addressed by the present provisions, but left to the private international laws of individual Member States."

[66] For example, the Well-Known Marks Recommendation, at page 2, explains that the future program is to have a binding treaty on the subject. It is interesting to note that the Internet Marks Recommendation is drafted as a detailed law, including even provisions regarding liability and remedies.

[67] All three recommendations are based on the provisions of the Paris Convention for the Protection of Industrial Property. The Trademark Recommendation also relies on Trademark Law Treaty (TLT), as stated in its preface: "The Joint Recommendation aims at harmonizing and simplifying the formal requirements for the recordal of trademark licenses and therefore supplements the Trademark Law Treaty (TLT) of October 27, 1994, which is designed to streamline and harmonize formal requirements set by national or regional Offices for the filing of national or regional trademark applications, the recordal of changes, and the renewal of trademark registrations."

international human rights law and international copyright law on limitations and exceptions. These three WIPO Joint Recommendations are part of international regulation of trademarks, which has been widely implemented through national laws.[68] The main goal of Joint Recommendations is to suggest a solution when an interpretive gap exists in the law. In other words, Joint Recommendations come into the picture to help countries interpret gaps in implemented provisions by indicating WIPO's intent about what the original agreement means. And some countries still choose to ignore them. [69]

In this case, there is a need for a new legal mechanism in the majority of countries, particularly developing countries. Many countries have not implemented Article 30 of the UN Convention, or limitations and exceptions from international copyright. Thus, to promote copyright accessibility, WIPO needs to craft a basis for the exception through hard law, and not just make complementary soft suggestions to existing domestic law, as the Joint Recommendations do for trademark. Therefore, hard law and not a Joint Recommendation is the appropriate tool.

## B. Why WIPO Might Favor a Joint Recommendation

WIPO might view a Joint Recommendation as the better choice. A Recommendation might be perceived as the best path to win the support of the countries, the easiest way to avoid conflicts, and the fastest way to solve deadlocks. A Recommendation, because of its non-binding nature, might be seen as an easier way in achieving agreement.

From the perspective of countries negotiating at WIPO, the question looks roughly like this: for this particular instrument, are the transaction costs, uncertainty, divergence of preferences, and power differentials low enough to bring this easily to a binding treaty? The answer in any international forum is almost always no. Then the question becomes: is there any urgency to the issue, or can negotiating countries calculate that experimentation through soft law makes more sense for now in developing norms that can more easily be agreed on later? Would rushing to a binding treaty might be likely to alienate participating negotiators, or alter the terms within the instrument to make it ultimately less effective?

Other sources have cursorily addressed this question. The WIPO Study envisions a model of soft law guidance eventually leading to binding hard law. The WIPO Study cautiously recommended that WIPO could "facilitate further discussion about copyright and the rights of

[68] The Madrid Protocol, Paris Convention for the Protection of Industrial Property, as well as the Trademark Law Treaty (TLT) are considered hard law.

[69] U.S. courts, for example, have ignored joint recommendations. See, for example, *ITC Limited v. Punchgini, Inc.* 880 N.E.2d 852 (N.Y. 2007) (not implementing the "famous marks" doctrine, as it was not incorporated into law by Congress).

disabled people as well as developing its draft model law for developing countries in the light of the recommendations in this Study."[70] However, the WIPO Study also noted that in the realm of the confusing international framework of limitations and exceptions, further debate in the form of hard law is "desirable on this issue in the long term."[71]

Similarly, in discussing the possibility of a more general international instrument on limitations and exceptions, P. Bernt Hugenholtz and Ruth L Okediji conclude that a soft-law approach is at least initially preferable. They reason that soft-law mechanisms are common in international economic regulation, and that soft law is generally easier to negotiate and adapt to future circumstances. They point out that soft law may eventually lead to a hard-law global framework.[72]

Here, however, the instrument is not a general instrument on limitations and exceptions, but addresses the "needs of discrete, vulnerable members of society, such as those who are visually impaired."[73] The particular subject matter of this instrument changes our consideration of whether soft law is the better approach.

There is consensus within WIPO that such an instrument should exist. There is historical precedent for this particular limitation and exception in individual countries. There is little divergence of preferences, and many of the most powerful negotiating countries already at least in part comply with many of the proposed requirements.

Many of the touted benefits of soft law are thus inapplicable in this case. And more importantly, in the next sections we show why soft law would in fact be damaging to this instrument's stated goals.

### C. Non-binding Recommendations Could Lead to "Dead Letter" Agreements

The main drawback of a Joint Recommendation is its non-binding nature. A non-binding instrument has the potential to turn the fundamental concept, which all countries agree upon,[74] into a "dead letter" agreement. Countries will not have to adopt or implement a Joint Recommendation, so it may change little or nothing on the domestic level. Once a Joint Recommendation exists, countries may conclude that the problem has been resolved, and turn their attention elsewhere. A Joint Recommendation might thus in fact perpetuate the lack of access to copyrighted products, because the problem will appear to have been

[70] *WIPO Study*, *supra* note 1, at 134.
[71] *Id*.
[72] P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, OPEN SOCIETY INSTITUTE 49 (commissioned monograph) (2008).
[73] *Id*. at 43.
[74] *See List of Proposals*, *supra* note 8.

addressed where in fact nothing has changed on the ground. This risk of dampening the existing potential to solve the problem would be avoided if WIPO chooses to pursue a detailed treaty.

The reason "dead letter" would be so problematic here is that countries do appear to want to effect real change. The use of soft law sometime evidences a lack of true intent to solve a problem.[75] In many international settings, soft norms are created where countries never intend to make them effective.[76] In this case, however, the different drafts all reveal a true intent to change the global legal situation regarding access to copyrighted products for those people with print disabilities. [77] It would be unfortunate indeed if this intent were not parlayed into an effective instrument.

### D. Soft Law is a Less Appropriate Solution Where There is Already Consensus and Specificity, Rather than Aspirations

The consensus that the problem needs to be addressed, and the specificity with which the proposed drafts address it, also lead us to conclude that soft law is not the appropriate mechanism.

Soft law may be the right mechanism when a firmer solution is not available.[78] The difficulties of arriving at a clear solution may lead to the use of soft law, containing vague and imprecise terms. Soft law may also outline aspirational norms for issues, where the norm has not yet been established.[79] The mechanism of soft law is thus more appropriate for general, new, or temporary problems.

In this case, as we can see from the different drafts being negotiated, the subject matter is not general. It is highly specific. The subject matter is not new or merely contemporary. It was already included in the UN Convention discussed above, and has existed in numerous domestic laws, and was contemplated when the three-step test was being established.

Many soft laws are so vague or aspirational as to be functionally unworkable. The four proposals for the international instrument regarding print disabilities, including the proposal of the European Union, reflect concrete workable mechanisms.[80]

In short, the content of the draft instruments shows the specificity of the subject matter, and the consensus that the instrument should exist.

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[75] Reisman, *supra* note 51, at 376.
[76] *Id*. at 376 ("In many settings we have norms that are created with no intention of making them effective").
[77] *List of Proposals*, *supra* note 8.
[78] Reisman, *supra* note 51, at 375-76.
[79] José E. Alvarez, *The New Dispute Settlers: (Half) Truth and Consequences*, 38 TEX. INTL. L.J. 405, 420 (2003).
[80] *See List of Proposals*, *supra* note 8.

Soft law is often used when specificity and consensus cannot be achieved. It is therefore inappropriate to use it here.

## E. Soft Law Will be Inefficient

Soft norms may incur long-term costs by being inefficiently vague, relative to hard law.[81] Countries, and domestic actors within countries, can incur huge costs in trying to figure out how soft law fits into the existing legal landscape. The WIPO Study observed that the problem of lack of access to copyrighted works exists in large part because of inefficiencies: in licensing between private actors, but also in domestic understandings of complex international law. Soft law will not mitigate these inefficiencies; it may, in fact, add to them.

Non-binding instruments can create uncertainty regarding their status. Domestic actors may waste efforts and legal procedures in pursuing solutions suggested by a non-binding instrument, when it is not clear that a non-binding instrument takes precedent over existing domestic law or international requirements. The cost of interpretation falls on implementing countries and their domestic actors, where a hard-law instrument would be clear that such measures must be implemented. It would also be clear that a hard-law instrument could compete with the provisions of other copyright law in the area, as discussed further in subsection G below.

Sometimes soft law can help countries avoid risks with respect to deep political or economic involvement. Countries may agree to soft law in the first place in order to keep the opportunity to avoid such cost and risk. However, this instrument contains little such risk. The risk is merely over the question of who is going to pay for the cost of the accessible products, not inherent in the nature of the instrument.

## F. Human Rights

The above arguments addressed the benefits of hard law primarily by focusing on the instrument itself, in the context of WIPO as the negotiating forum. In fact, this instrument is being formed against two areas of existing international law: human rights law, and international copyright law. This next subsection discusses the human rights context, which we argue differs substantially from areas where WIPO has used Joint Recommendations in the past.

In the human rights context, a hard-law treaty exists, but has not been domestically implemented. Thus there is no interpretive gap for a soft law instrument to fill in domestic law. This differs substantially from

[81] Reisman, *supra* note 51, at 377 ("most of the law that is made this way cannot be fulfilled in any effective fashion, and this will have a long-term cost").

the way Joint Recommendations can work in other areas of law, like trademark.

For many years, UN treaties addressing human rights did not address the rights of people with disabilities.[82] Disabilities may be seen as medical or social phenomena, and so long as disabilities were viewed as a medical issue, the solution was perceived to be medical treatment rather than the protection of rights.[83] The social approach focuses instead on disabilities as social phenomena. Under this understanding, disability results from the interaction of persons with impairments with attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others.[84] This understanding led to a rights-based paradigm, focusing on human rights and human dignity.[85]

Understanding the role of society in protecting the rights of people with disabilities empowers people with disabilities to transfer what was traditionally viewed as a medical need into claimable rights.[86] Recently, the notion of protecting the rights of people with disabilities started to impact international organizations, such as the United Nations.[87]

The United Nations adopted the Convention on the Rights of Persons with Disabilities in 2006 ("UN Convention").[88] The UN Convention refers, in general, to access by people with disabilities to cultural products protected by intellectual property.[89] The UN Convention

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[82] Aaron A. Dhir, *Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity with Disabilities*, 41 STAN. J. INT'L L. 181, 182, 184 (2005) [hereinafter Dhir]. Many conventions protect racial minorities, migrants, women, and children.

[83] Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, *in* HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 13 (Theresia Degener & Yolan Koster-Dreese eds., 1995) [hereinafter Degener]. For further elaboration on this point, see generally Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABILITY, HANDICAP & SOC'Y 5 (1987).

[84] UN Convention, *supra* note 6, Preamble.

[85] Degener, *supra* note 83.

[86] Dhir, *supra* note 82, at 194-96.

[87] Many books published recently reflect the change in attitude regarding the rights of people with disabilities. Although many of them deal with mental abilities, a lot can be learnt about different types of disabilities. *See* FRANCES OWEN & DOROTHY GRIFFITHS, CHALLENGES TO THE HUMAN RIGHTS OF PEOPLE WITH INTELLECTUAL DISABILITIES 23-32 (2009). MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITIES LAW: WHEN THE SILENCED ARE HEARD 8-14 (2012). BERNADETTE MCSHERRY & PENELOPE WELLER, RETHINKING RIGHTS-BASED MENTAL HEALTH LAWS 52-54, 68-72 (2010).

[88] UN Convention, *supra* note 6.

[89] UN Convention, *supra* note 6, Art. 30 ("Participation in cultural life, recreation, leisure and sport. (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities: (a) Enjoy access to cultural materials in accessible formats . . . (3) States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not

was ratified by 106 countries.[90] Nevertheless, the existence and ratification of the UN Convention did not significantly change the situation with respect to access to copyrighted works for persons with print disabilities. Many of WIPO's member states did not comply with the UN Convention by subsequently creating limitations and exceptions.[91]

The general nature of the UN Convention provision thus did not prove itself capable of creating real change. Even though it is hard law, the UN Convention adopts general non-binding statements, without specific details as to implementation. For example, the UN Convention does not explain the right way to make changes in access rights—whether it should it be done by new provisions or new laws, or as part of limitations and exceptions. We refer to this type of instrument, used by UN Convention, as hard-soft law. We conclude that an international instrument that is both binding and detailed is necessary at this stage for improving the implementation rate of the UN Convention.

In the context of human rights law, then, WIPO's proposed international instrument should be viewed as a second attempt layered onto the UN Convention that should add a further step of hardness to the previous instrument. This would make it effective as hard-hard law. If WIPO establishes soft law on top of the UN Convention, nothing will change. Countries that did not implement the UN Convention's Article 30 will have no way to incorporate the new Joint Recommendation into domestic law through interpretation, because there are no existing domestic provisions to be thus interpreted.[92]

The fact that such access rights are human rights adds another important point to the discussion: it emphasizes the strength of the access right, which in itself mandates hard law. As discussed, disabilities are now understood under a rights-based paradigm, focusing on human rights and human dignity.[93] Under the human rights framework, countries must ensure meaningful rights of access to culture and its products. If people with disabilities all over the globe have rights to access culture products, that right should be cemented by an international hard-hard convention.[94]

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constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.").

[90] There were 153 signatories to the Convention, and 106 ratifications. *See* Convention and Optional Protocol Signatures and Ratifications, http://www.un.org/disabilities/countries.asp?navid=17&pid=166.

[91] SCCR/22/18, *supra* note 7, at 14.

[92] We discuss in the next subsection whether a Joint Recommendation could be "implemented" through limitations and exceptions, and conclude that it would not be, but we don't see limitations and exceptions as part of human rights law so do not discuss it here.

[93] Degener, *supra* note 83.

[94] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ("Article 27 (1) everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"). The International Covenants on Human Rights has proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind. *See* Jenny

As in many human rights contexts, there is a power imbalance between those who have the right (persons with disabilities) and those that must protect it (here, countries and private sectors). People with disabilities face collective action problems in ways that publishers, for example, do not. In the human rights framework, the rights of weaker sectors must be protected through international hard law, or they will be negotiated away by stronger sectors or diffused through soft law.

Human rights treaties often regulate the protection of the rights of the weaker sector and the obligations and duties of the stronger sector. This complex structure is more likely to work when each party is legally bound to perform its obligations, and weaker parties are entitled to demand performance. Soft law does not provide this structure.

## G. International Copyright

We now turn to the status of international copyright law. We conclude that in the copyright context, the field is crowded with multiple hard-law agreements in different forums, preventing low-cost experimentation and norm-setting that soft law can ordinarily provide. Because developing countries do not implement limitations and exceptions available to them under TRIPS and the Berne Convention, but do implement hard law requirements from other agreements, a Joint Recommendation is likely to have little impact on the domestic level.

International copyright has been enacted in an increasingly complicated landscape in which states forum shop to find the best forum for their interests.[95] Intellectual property has been addressed by WIPO, by the WTO in the TRIPS agreement, in TRIPS-plus bilateral free trade agreements, and increasingly in TRIPS-plus plurilateral agreements such as ACTA or the currently negotiated TransPacific Partnership Agreement (TPP). The rules in different regimes speak to each other, sometimes explicitly. For example, TRIPS imports the Berne Convention's three-step test for limitations and exceptions.[96] Individual bilateral agreements also officially recognize existing law, as discussed further below.

When a state does not like the standards in a particular forum, it will shift to a more favorable forum. WTO is a harder-law forum, because of the availability of dispute-resolution. It is arguable that the recent plurilaterals represent even harder law, because they involve both

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Morris, *Impairment and Disability: Constructing an Ethics of Care Which Promotes Human Rights*, 16 HYPATIA No. 4 (2001).

[95] Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 6 (2004) [hereinafter Helfer].

[96] *See* Berne Convention, *supra* note 15, art. 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) [hereinafter TRIPS], Art. 13.

enforcement and a greater power imbalance between negotiating parties, such that compliance by the weaker party is easier to achieve.

The network of intellectual property (IP) agreements evinces a trend of "upward harmonization" aimed at making IP rights stronger, especially in developing countries.[97] Regardless of one's assessment of the ultimate impact of such harmonization, it is clear that it leaves less room for limitations and exceptions. Developing countries face substantial difficulties in implementing TRIPS flexibilities even under TRIPS alone.[98] We argue that the added layer of TRIPS-plus bilateral agreements makes determining appropriate flexibilities even more costly and difficult for those developing countries that are party to both.

Against the existing international IP regime complex,[99] binding (hard) law is thus the better choice for the proposed instrument. The traditional benefits of soft law are foregone in this environment because the instrument will have to interact with hard law developed in other forums. Soft law in this context becomes harder to negotiate, and less flexible. The exploratory norm-setting trumpeted by soft-law advocates is less viable against the hard-law requirements emerging from other forums.

Part of this concern arises because both this instrument and hard law are directed at developing countries, which tend not to fully exploit the room existing in soft-law when confronted with hard-law obligations.

We delve into this in greater detail below.

### i. International Copyright is a Regime Complex, Which Changes the Interaction Between Soft and Hard Law.

International copyright is subject to what scholars call a "regime complex"—governance by multiple institutions with different actors and agendas. Several features of regime complexes impact the traditional relationship between hard and soft law. First, negotiations in one forum do not begin with a blank slate, or even with the most recent history of negotiations in that particular forum. Instead, they are influenced by developments in related forums. Second, states will engage in "forum shopping,"[100] finding the best forum for advancing their political interests. Powerful states are particularly adept at forum shopping.[101] Third, legal inconsistencies arise between the legal regimes in different forums,

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[97] Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CAL. L.REV. 1571, 1571 (2009).
[98] *Id.* at 1574.
[99] Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004) (describing a "regime complex" as "an array of partially overlapping and nonhierarchical institutions governing a particular issue-area").
[100] Helfer, *supra* note 97, at 6 ("[D]eveloping countries and their allies are shifting negotiations to international regimes . . . more closely aligned with these countries' interests").
[101] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596-97 (2007).

sometimes as a result of deliberate state policy for the creation of "strategic inconsistency."[102]

These features mean that states will choose to deploy hard and soft law to interact not only as complements, but as "mutually undermining antagonists."[103] This works roughly as follows. States shop for the forum that is most conducive to their interests, and establish law there that is in dialogue with law in other forums, often even referencing that other law in the text of new agreements. The choice of hard or soft law in the new forum is made with the knowledge that it is speaking across forums. Because the law is established as the result of a forum shift to better pursue a state's interests, it is likely to be speaking in opposition to law in the other forums rather than in complement with it.

When hard and soft laws are antagonistic rather than complementary, an interesting transformation happens. Soft-law regimes harden, "losing some of the purported advantages of soft law, such as experimentation and flexibility," and hard-law regimes may be softened, as states and tribunals are encouraged to look at the legal provisions and norms from neighboring regimes.[104]

### ii. Traditional Soft-law Benefits are Foregone in the Context of International Copyright Law

The existing IP regime complex prevents the proposed instrument from evincing many of the traditional benefits of soft law. For one, it is already clear that because of the significant interests of states, the cost of negotiating the instrument will be high, even if the result is nonbinding. The situation is similar to the United States's involvement in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions:[105] states are not fooled by the fact that an instrument presents itself as soft law. Instead, they are aware of its potential significance for their interests in other forums. Thus, the instrument will be difficult to negotiate regardless of whether it is binding.

Second, the proposed instrument will not leave room for norm-experimentation by countries, because a web of hard law already exists in the area. The result of this web is that many countries, particularly developing countries, have implemented hard law but have not exploited

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[102] DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 5-6 (2007).

[103] Shaffer & Pollack, *supra* note 53, at 728. Shaffer and Pollack explain that "distributive conflicts among states, and in particular among powerful states, coupled with the coexistence of hard- and soft-law regimes within a regime complex . . . is most likely to undermine the smooth and complementary interaction of hard and soft law depicted in so much of the literature." *Id*. at 741.

[104] *Id*. at 710-711.

[105] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions pmbl., Oct. 20, 2005, 45 I.L.M. 269. *See* Shaffer & Pollack, *supra* note 53, at 771-773.

the softer law aspect of limitations and exceptions. To be effective, the proposed instrument has to stand up against this emerging hard-law regime of bilaterals and plurilaterals.

### iii. Because Language Has Been Soft, Limitations and Exceptions Have Not Been Adopted to the Full Extent by Developing Countries.

Because the existing language on limitations and exceptions has been vague, or "soft," developing countries have not taken full advantage of copyright limitations and exceptions.[106] The three-step test permits a great range of limitations and exceptions, including but not limited to: personal use, criticism, educational purposes, reproduction by the press, ephemeral recordings, library exceptions, exceptions for computer interoperability, and exceptions for people with disabilities.[107] However, the majority of developing countries provide only a limited range of limitations and exceptions, and make little use of flexibilities that could help improve access to education or distance learning.[108] Few developing countries have employed the mechanisms of the Berne Appendix, which permits compulsory licensing to promote access to works published abroad.

The lack of limitations and exceptions in developing countries stems at least in part from the fact that specific examples are not spelled out in the text of international law. Because the language of the limitations and exceptions three-step test itself is soft—permissive and imprecise—countries with little existing copyright law and low capacity for implementation are unlikely to expound on its details when implementing hard law.

### iv. Bilaterals and Plurilaterals Contain Even Fewer Provisions on Limitations and Exceptions.

This problem—the lack of implementation of limitations and exceptions—is exacerbated by the fact that many of the newer TRIPS-plus agreements contain very little language on limitations and exceptions. These newer agreements do, however, contain a lot of language creating harder copyright law. We discuss a few examples of this: the Anti-Counterfeiting Trade Agreement (ACTA), the Korea-US Free Trade Agreement (KORUS FTA), and the Chile-US Free Trade Agreement (Chile FTA).

ACTA, a plurilateral agreement, does not contain the three-step test. The only explicit mention of limitations and exceptions occurs in

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[106] CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 91 (2008).
[107] *Id*. at 90.
[108] *Id*. at 91.

Article 27.8, concerning electronic rights management systems. There, ACTA explains that a party may adopt or maintain "appropriate limitations and exceptions" to measures implementing the requirements for electronic rights management, and that any obligations are without prejudice to the limitations, exceptions, or defenses available under a Party's law.[109] Article 1 of ACTA also states that "[n]othing in this Agreement shall derogate from any obligations of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement."[110] This presumably incorporates the three-step test into ACTA, or at least prevents ACTA's positive provisions from overruling it.

With respect to ACTA, any new proposed instrument needs to provide an obligation rather than a suggestion to have an impact on signatories, because Article 1 defers only to the "obligations" of Parties, under existing agreements. If the proposed agreement is not binding, it cannot be seen as an "obligation," and thus would have no chance of carving a hole in the ACTA hard-law regime. ACTA signatories may argue that the new WIPO instrument is not an "existing agreement," and therefore should not be deferred to, but it is arguable that the proposed agreement falls under existing agreements as part of the WIPO regime, in further articulating exceptions and limitations in the Berne Convention. What is important to note is that ACTA does not defer to WIPO interpretations, only to obligations. If the Joint Recommendation is not an obligation but guidance, ACTA signatories may have a hard time arguing that parties may follow it, in light of other hard law requirements ACTA contains.

We now turn to some of the bilateral agreements as further examples of this problem. The Korea-US Free Trade Agreement (KORUS FTA) recognizes the WIPO regime. It requires both parties to ratify or accede to the Berne Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.[111] This recognition of the WIPO regime lays the groundwork for recognition of another binding WIPO treaty. There is no reference, by contrast, to any WIPO soft law. The KORUS FTA imports the Berne three-step test in footnote 11.[112] Because this test originated in WIPO, WIPO interpretations of the test

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[109] Anti-Counterfeiting Trade Agreement, art. 27.8, Informal Predecisional/Deliberative Draft of October 2, 2010, *available at* www.ustr.gov/webfm_send/2338.

[110] *Id*. at art. 1.

[111] Free Trade Agreement, U.S.-S. Korea, art. 18.1.3, June 20, 2007, 46 I.L.M. 642, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Section_Index.html [hereinafter KORUS].

[112] *Id*. art. 18.4.1 n. 11 ("Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.")

through subsequent agreements are arguably authoritative. The more binding the WIPO interpretation, the more effective it is likely to be in expounding on this provision.

As a last example, we turn to the Chile-US Free Trade Agreement (Chile FTA). The Chile FTA is arguably a less restrictive bilateral. It contains a section on limitations and exceptions.[113] That section in turn has a footnote that explicitly links the three-step test to WIPO's interpretive mechanism: the three-step test articulated in the FTA "neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention, the *WIPO Copyright Treaty* (1996), and the *WIPO Performances and Phonograms Treaty* (1996)."[114] This ties the enforcement of this bilateral to WIPO's interpretation of limitations and exceptions.

The Chile FTA also contains a provision on non-derogation, explaining that "[n]othing in this Chapter concerning intellectual property rights shall derogate from the obligations and rights of one Party with respect to the other by virtue of . . . multilateral intellectual property agreements concluded or administered under the auspices of the World Intellectual Property Organization (WIPO)." This contemplates deference to future WIPO agreements, in addition to present ones. Thus the Chile FTA gives WIPO more authority, and explicitly contemplates deference to future hard-law agreements developed in the WIPO regime. WIPO has the opportunity with this present instrument to establish a new obligation to counterbalance the requirements of bilateral agreements such as the Chile FTA.

In sum, international copyright law now includes a snarl of smaller hard-law agreements. These agreements establish hard law requirements, but no mandatory specific limitations and exceptions. Developing countries have not adopted the range of limitations and exceptions permitted under TRIPS and the Berne Convention. Developing countries have, however, adopted the other hard law requirements imposed by bilateral free trade agreements. The hard-law bilateral agreements generally recognize WIPO hard-law treaties and other "obligations," but for the most part do not acknowledge WIPO Joint Recommendations or other soft law.

Thus, for developing countries that are party to plurilateral or bilateral hard-law agreements, it is necessary that WIPO mandate new limitations and exceptions as binding hard law. Otherwise, developing countries may not implement the new instrument out of fear of how it will interact with their bilateral obligations. At the least, a soft law instrument would generate massive inefficiencies as developing countries try to determine how it fits into their hard-law obligations.

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[113] Free Trade Agreement, U.S.-Chile, art. 17.7.3, n. 17, June 6, 2003, 42 I.L.M. 1026, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter Chile FTA].

[114] *Id*.

## H. The Agreement's Proposed Language as a Safety Valve

Deciding whether the agreement will be a Joint Recommendation or a binding treaty is not the end of the matter. As discussed in Section III(A), agreements vary in hardness across multiple dimensions, and one of those dimensions is content. We have focused on the dimension of obligation—whether countries are obligated to implement the agreement—because it is an important first decision, and it is difficult to enter the conversation about precise content at this stage. However, it is worthwhile to make a brief observation about the structure of the currently proposed content and how it affects the hardness of the agreement.

The current proposed content appears to offer a balance of flexibility and precision. The prepared draft contains provisions that are flexible rather than precise, with broad obligatory standards followed by examples of precise rules that would meet those standards.[115]

If negotiating countries ultimately decide on content that resembles what has been proposed, this creates an additional safety valve for the usual concerns about hard law, while still exploiting its benefits. Countries under the proposed draft language must adhere to high-level principles, but are given options on how to do this. This proposal both retains flexibility for countries—a benefit of softer law—and lowers implementation costs by providing a concrete example of successful implementation.

## V. Conclusion

We conclude that if WIPO wants to achieve compliance on a domestic level, this instrument should be implemented in binding hard law. Generally, hard law prevents the creation of dead letter, while soft law is a less appropriate solution where there is already consensus and specificity, rather than aspirations and need for experimentation. Soft law also creates inefficiencies, as countries try to determine how to satisfy its aspirations. In the human rights context, because the UN Convention on Persons with Disabilities has not been implemented domestically, soft law will not fill in interpretive gaps the way it is meant to, and will fail to mobilize domestic actors. Soft law also will not be sufficiently strong to protect the human rights of a weaker sector.

In the international copyright context, hard law is necessary because of the complicated web of hard law existing in different forums. If WIPO wishes for the proposed Instrument on Limitations and Exceptions for Persons with Print Disabilities to successfully interact with hard law established in other forums, it should make the instrument

[115] *See Chair's Proposal*, *supra* note 9.

binding. Otherwise, developing countries are less likely to implement it, and the instrument will be both less rigorously complied with and less effective in achieving its outcome.