

**CLOSING IN ON THE LIGHT AT WIPO: MOVEMENT
TOWARDS A COPYRIGHT TREATY FOR VISUALLY
IMPAIRED PERSONS AND INTELLECTUAL PROPERTY
MOVEMENTS**

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1. INTRODUCTION

Large-scale distribution of the written word has spurred an era of exponential societal and cultural development. Indeed, since the advent of the printing press, the spread of widely disseminated written discourse has bred heightened innovation as individuals build upon others' innovations through information exchange via mass print.¹ The rise of the modern Information Age has only

* Executive Editor, *University of Pennsylvania Journal of International Law*. J.D. Candidate, 2012, University of Pennsylvania Law School. Thank you to the Volume 33 Executive Board, all of our editors, and Professor Shyam Balganeshe for his thoughtful guidance. I owe particular gratitude to my parents who continue to support me in all that I do. Lastly, I also owe immense gratitude to Anna, who has stuck by my side and supported me throughout law school and beyond. Any mistakes are my own.

¹ For example, vast expansion of science and scholarship occurred in the wake of the printing press. See JOHN MAN, GUTENBERG: HOW ONE MAN REMADE THE WORLD WITH WORDS 254 (2002):

For the first time specialists could agree on their agendas and feed off each other Once, the norms of classical architecture were known only from a few hand-copied manuscripts Now Vitruvius, who laid down the rules of classical architecture around the time of Christ, could be reproduced in all major languages, and architects armed with the works of Vitruvius's modern disciples could eventually re-create Greek and Roman glories in estates

See also MARYANNE WOLF, PROUST AND THE SQUID: THE STORY AND SCIENCE OF THE READING BRAIN 216 (2007):

Learning to read released the species from many of the former limitations of human memory. Suddenly our ancestors could access knowledge that would no longer need to be repeated over and over again, and that could expand greatly as a result. Literacy made it unnecessary to reinvent the wheel and thus made possible the more sophisticated inventions that would follow, like a machine that can read to those who can't

accelerated the exponential dissemination of information.² Even in the present-day era of technological expansion, written discourse remains a preeminent form of knowledge and information exchange—an exchange that is vital to a well-functioning democratic society and continued societal growth.³ While written discourse remains the principal vehicle for exchanging society's most sophisticated knowledge, visually impaired persons ("VIPs")⁴ lack meaningful access to the vast majority of such written discourse in accessible formats, particularly those VIPs residing in developing countries.

The World Health Organization ("WHO") estimates that approximately 314 million VIPs reside throughout the world.⁵ Of

² See Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY* 17, 17 (Gaëlle Krikorian & Amy Kapczynski eds., 2010) ("[N]ew information-processing technologies have made certain kinds of knowledge and information increasingly critical to the accumulation and distribution of global wealth.").

³ See INT'L FED'N OF LIBRARY ASS'NS & INSTS. (IFLA) *Limitations and Exceptions to Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective*, 3 (Revised ed. 2004), available at http://www.ifla.org/files/clm/position_papers/ilp.pdf, which states:

A full and comprehensive exchange of information is necessary for the functioning of a healthy democracy. A society which is unable to access the knowledge required for a proper discussion of political, social, environmental or economic issues will not be able to achieve the kind of broad consensus upon which a healthy society is based

See also Gaëlle Krikorian, *Access to Knowledge as a Field of Activism*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY*, *supra* note 2, at 57, 58 ("Information and knowledge are the raw material of which immaterial goods, ideas, and inventions are made, and as such, they are key to individual as well as collective human development and welfare.").

⁴ This Comment typically refers to VIPs generally and does not confine itself to a specific definition of VIPs. As this Comment notes later, however, the scope of individuals who should be classified as VIPs for the purposes of a VIP treaty remains an issue of contention throughout the treaty negotiations. See *infra* notes 80, 88, 102, 112, 126 and accompanying text (discussing varying VIP definitions proposed in the various VIP treaty proposals).

⁵ World Health Organization [WHO], *Prevention of Avoidable Blindness and Visual Impairment*, Rep. by the Secretariat to the World Health Assembly, 62d sess, May 18–22, 2009, Annex, ¶ 1, WHO Doc. A62/7 (Apr. 2, 2009) [hereinafter WHO VIP Report], available at http://apps.who.int/gb/ebwha/pdf_files/A62/A62_7-en.pdf. Based on the most recent report of the Census Bureau, estimating the world's population at more than seven billion, VIPs make up roughly four percent of the world population. See *World POPClock Projection*, U.S. CENSUS BUREAU, <http://www.census.gov/population/popclockworld.html> (last visited Apr. 7, 2012). However, some scholars have suggested that the WHO may actually vastly underestimate the number of VIPs worldwide, indicating that VIPs may make up

these 314 million VIPs, the WHO further estimates that ninety percent reside in developing countries.⁶ Furthermore, a report of the World Intellectual Property Organization (“WIPO”) has reported that only roughly five percent of published written works are available in formats accessible to VIPs (“accessible written works”).⁷ In developing countries, the availability of accessible written works drops even sharper. One commentator has suggested that the percentage of accessible written works in developing countries may be as low as 0.5%.⁸

In a global system where written discourse continues to underlie intellectual growth, this dearth of accessible written works deprives society of a significant group of potential innovators. VIPs, who would otherwise build upon ideas expressed in written works and subsequently contribute new innovations, cannot do so efficiently. Perhaps more fundamentally, VIPs’ lack of access to accessible written works also deprives them of a fundamental vehicle for participating in sophisticated discourse and cultural exchange.⁹ Likewise, VIPs in developing countries are particularly deprived of such cultural participation. Thus, under the existing system, VIPs—particularly those VIPs in developing countries—are deprived of a

an even larger percentage of the world population. See COPY/SOUTH RESEARCH GRP., *THE COPY/SOUTH DOSSIER: ISSUES IN THE ECONOMICS, POLITICS, AND IDEOLOGY OF COPYRIGHT IN THE GLOBAL SOUTH* 127-28 (Alan Story et al. eds., 2006).

⁶ WHO VIP Report, *supra* note 5.

⁷ World Intellectual Prop. Org. [WIPO], *Study on Copyright Limitations and Exceptions for the Visually Impaired*, Standing Comm. Copyright & Related Rights, 15th sess, Sept. 11-13, 2006, WIPO Doc. SCCR/15/7 (Feb. 20, 2007) (prepared by Judith Sullivan) [hereinafter *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired*], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf. Even accounting for any unforeseen data or statistical shortcomings, WIPO’s estimate still strongly underscores the scant availability of written works in formats accessible to VIPs.

⁸ Denise Nicholson, *Copyright vs. the Right to Read*, AFR. COPYRIGHT & ACCESS TO KNOWLEDGE PROJECT (ACA2K) BLOG (May 27, 2010, 9:13 AM), http://www.aca2k.org/index.php?option=com_idoblog&task=viewpost&id=27&Itemid=73&lang=en.

⁹ Indeed, VIPs’ inability to meaningfully access most written discourse arguably deprives them of the right under the Universal Declaration of Human Rights to meaningfully participate in cultural exchange. See Universal Declaration of Human Rights art. 27(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“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.”).

fundamental means for cultural participation and cannot as effectively contribute to societal innovation.

Copyright law, which provides rights holders exclusive rights over written works in order to stimulate innovation,¹⁰ restricts dissemination of accessible written works in many countries.¹¹ Indeed, as of 2007, less than half of WIPO's member states provided copyright limitations and exceptions for converting copyrighted works into VIP-accessible formats.¹² In this vein, international intellectual property law has long resisted erosion of the status quo of granting rights holders strong intellectual property ("IP") protections. Consequently, IP movements demanding greater flexibility in IP law (IP reform movements) have recently mobilized. Two such movements are the Access to Knowledge Movement ("A2K") and the WIPO Development Agenda.¹³ Forming in the background of these movements, WIPO is currently developing a treaty that would establish a copyright law exception amongst its member states for converting written copyrighted works into accessible written works to distribute to VIPs.¹⁴

¹⁰ See, e.g., JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6-7 (3d ed. 2010) (detailing copyright law's incentive-based normative underpinning).

¹¹ See COPY/SOUTH RESEARCH GRP., *supra* note 5, at 129-30 (discussing ways in which copyright law restricts dissemination of accessible written works). Another scholar explains that dissemination of accessible written works to VIPs can be

restricted by copyright since [such exclusive rights] belong to the exclusive economic rights of the rightholder and his permission must be acquired in advance, in the case of usage of a copyright protected work . . . Without copyright clearance and without the existence of an exception, print disabled encounter insurmountable obstacles accessing works and consequently receiving information.

Maria-Daphne Papadopoulou, Copyright Exceptions and Limitations for Persons with Print Disabilities: The Innovative Greek Legal Framework Against the Background of the International and European Developments 4 (Sept. 14, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1874620>.

¹² WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired, *supra* note 7, § 2.1.

¹³ Referring to the WIPO Development Agenda as a "movement" is somewhat misleading insofar as it is a formal adoption of WIPO. Nonetheless, for simplicity's sake, this Comment will still refer to the WIPO Development Agenda more broadly as a movement.

¹⁴ At the time of publication, a VIP treaty remains under negotiation and, therefore, this Comment will not account for any developments occurring after March of 2012.

Ultimately, this Comment will argue that even though a VIP treaty might seemingly affect only a limited class of individuals, it stands to signify an instrumental step forward towards acknowledging A2K and implementing the WIPO Development Agenda. Admittedly, no VIP treaty will be wholly without defect. Indeed, negotiations have stalled somewhat at times due to policy divides between developed and developing countries, and any final agreement will likely reflect significant compromise. Nonetheless, ratification of a VIP treaty should ultimately enrich and legitimize the standing of IP reform movements.

Section 2 of this Comment will briefly discuss certain components of international copyright law. It will focus on copyright law's traditional focus on protecting rights holders, even as developing countries call for increased flexibility. Section 3 will discuss IP reform movements with a particular focus upon A2K and the WIPO Development Agenda. Section 4 will examine the VIP treaty proposals currently before WIPO. The proposals include two initial developing country proposals, two initial developed country proposals, as well as a subsequent 2011 proposal that seeks to strike a compromise between the four initial proposals. Discussion of the proposals in Section 4 will underscore how developing countries attempt to render IP law more flexible while developed countries attempt to maintain more restrained approaches. It will also highlight ways in which VIP treaty proposals enhance and/or endorse A2K and the WIPO Development Agenda. Finally, Section 5 addresses some of the critiques that opponents have put forth in opposition to adopting an international VIP treaty.

2. INTERNATIONAL COPYRIGHT LAW'S TRADITIONAL ADHERENCE TO STRONG PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

2.1. *The Berne Convention and the 1967 Stockholm Conference*

The Berne Convention is the primary treaty underlying international copyright law.¹⁵ Since its founding, its primary

¹⁵ See, e.g., MARTIN SENFILEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 43 (2004) ("[T]he Berne Convention can be characterized as a limited kind of international copyright codification."). The Berne Convention has been signed by 165 countries. *Contracting Parties*, WORLD INTELL. PROP. ORG.,

guiding objective has been “to protect . . . the rights of authors in literary and artistic works”¹⁶ Consequently, the Berne Convention has not expressly required that countries promulgate balanced IP legal systems.¹⁷ Indeed, consistent with its rights protection-oriented spirit, it has been interpreted to authorize signatories to implement *more stringent* copyright laws,¹⁸ while limitations and exceptions may not be introduced unless specific conditions are met under the “three-step test.”¹⁹

The Berne Convention periodically undergoes revisions.²⁰ During the 1967 Stockholm Conference to Amend the Berne Convention (“Stockholm Conference”) the Berne Convention’s developing countries²¹ pushed for copyright reforms aimed at

http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Apr. 7, 2012).

¹⁶ Berne Convention for the Protection of Literary and Artistic Works pmbl., Sept. 9, 1886, 102 Stat. 1853, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. See also Sam Ricketson, *International Conventions and Treaties*, in THE BOUNDARIES OF COPYRIGHT: ITS PROPER LIMITATIONS AND EXCEPTIONS 2, 6 (Libby Baulch et al. eds., 1998) (laying out the guiding principles of the Berne Convention).

¹⁷ Ricketson, *supra* note 16, at 6.

¹⁸ For instance, the Berne Convention is generally described as implementing *minimum* standards of protection rather than maximum standards. See e.g., Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must be Repealed*, 40 HOUS. L. REV. 763, 789 (2004) (noting that the Berne Convention merely establishes minimum standards of protection, and allows signatories the ability to implement stronger protections at their discretion).

¹⁹ Under Article 9(2) of the Berne Convention, a country may provide an exception to its copyright laws if it meets what is now commonly referred to as the Berne “three-step test.” Berne Convention, *supra* note 16, art. 9(2). Under the three-step test, limitations and exceptions must be limited “(1) to ‘certain special cases,’ (2) ‘which do not conflict with a normal exploitation of the work,’ and (3) which ‘do not unreasonably prejudice the legitimate interests of the right holder.’” P. Bernt Hugenholtz & Ruth L. Okediji, *Contours of an International Instrument on Limitations and Exceptions*, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 473, 482 (Neil Weinstock Netanel ed., 2009).

²⁰ Revisions generally occur approximately once every twenty years. SENFTLEBEN, *supra* note 15, at 44. For an overview of the several Berne Convention revisions, see 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 85-149 (2d ed. 2006) (providing an in-depth treatment of the Berne Convention’s various revisions).

²¹ At the time, developing countries only constituted approximately one-third of the Berne Convention’s members. RICKETSON & GINSBURG, *supra* note 20, at 121. In the prior amendment conference, however, developing countries only consisted of approximately four percent of the signatories to the Berne Convention. *Id.* Notably, the United States was not a signatory of the Berne Convention until 1988. See *Copyright Law of the United States of America and Related*

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providing heightened accommodation to their developmental needs. For Example, a coalition of developing countries demanded that the Berne Convention better accommodate their “economic, social, cultural, and technological needs.”²² Within that coalition, India, for example, called for copyright flexibilities to better assist it in achieving social progress, such as increasing literacy.²³

Western response to the developing countries’ proposals, nonetheless, aptly personified the Berne Convention’s resistance to making concessions towards copyright balance. The United Kingdom insisted that maintaining strong copyright regimes far outweighed any benefits of establishing new flexibilities to aid developing countries.²⁴ Ultimately, the Western signatories largely succeeded in striking down concessions to developing countries and, notwithstanding certain concessions made during the 1971 revision,²⁵ the Berne Convention has mostly eschewed facilitation of any additional copyright balance.²⁶

Laws Contained in Title 17 of the United States Code, U.S. COPYRIGHT OFF., <http://www.copyright.gov/title17/92appii.html> (last visited Apr. 7, 2012).

²² Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 476 (2009).

²³ Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503, 507 (2007) (summarizing the negotiations conducted at the 1967 Stockholm Conference).

²⁴ *Id.* at 507–08.

²⁵ Berne Convention, *supra* note 16, app., art. 1 (providing certain copyright concessions to accommodate developing countries). *See also* *Module 2: The International Framework*, BERKMAN CTR. FOR INTERNET & SOC’Y & ELECTRONIC INFO. FOR LIBRARIES, http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#Berne_Convention (describing the 1971 revision, “which permits developing countries to grant non-exclusive and non-transferable compulsory licenses to translate works for the purpose of teaching, scholarship or research, and to reproduce works for use in connection with systematic instructional activities”). *But see* Story, *supra* note 18, at 768–69 (“The one addition made to Berne during that era which purported to improve the situation of poor countries—incorporation of the Paris Appendix—has certainly not done so. And there is nothing in the current international economic environment that suggests that radical reforms to Berne would be any more likely today than in the 1960s.”).

²⁶ *See* Yu, *supra* note 22, at 480–82 (noting that the developing country proposals at the Stockholm Conference were largely defeated by developed countries, but some token compromises were made in recognition of the needs of developing countries).

2.2. *Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Further Resistance to IP Flexibility*

Some have characterized the World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"),²⁷ which addresses the convergence of IP and trade,²⁸ as an attempt to safeguard against developing countries that are advocating for a more flexible international IP law framework.²⁹ Consequently, any country wishing to join the WTO must comply with TRIPS.³⁰ To maintain strong intellectual property rights, TRIPS incorporated the Berne Convention's existing copyright protections.³¹ Furthermore, it has been interpreted to allow countries to negotiate bilateral agreements mandating stronger IP protection than TRIPS's already firm requirements (TRIPS-plus).³² Developed countries have exploited TRIPS-plus to pressure developing countries into adopting heightened IP protection, even where developing countries' interests might otherwise be best served under more flexible IP regimes.³³

²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.N.T.S. 299 [hereinafter TRIPS].

²⁸ Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 3, 11 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 2d ed. 2008).

²⁹ *Id.* at 7 (discussing the conditions under which the TRIPS Agreement was developed).

³⁰ Kapczynski, *supra* note 2, at 25; Peter Magic, *International Technology Transfer & Intellectual Property Rights* 2 (Nov. 30, 2003) (unpublished manuscript), available at http://www.cs.utexas.edu/~fussell/courses/econtech/public-final-papers/Peter_Magic_International_IP_Rights.pdf.

³¹ RICKETSON & GINSBURG, *supra* note 20, at 353-55.

³² See Xavier Seuba, *Human Rights and Intellectual Property Rights*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT*, *supra* note 28, at 387, 414 (defining and discussing "TRIPS-plus"); see also Beatrice Lindstrom, Note, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL. 917, 918-19 (2010) (describing TRIPS-plus provisions that "exceed the standards agreed to at the WTO").

³³ See, e.g., Pedro Paranaguá, *Strategies to Implement the Development Agenda: A Brazilian Perspective*, in *IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA* 140 (Jeremy de Beer ed., 2009) (describing the United States' use of coercive diplomatic pressure to induce developing countries to agree to TRIPS-plus agreements). The United States has similarly utilized bilateral negotiations to pressure developing countries to adopt the optional WIPO Copyright Treaty. The treaty imposes additional protections

Moreover, perceived attempts at increased TRIPS flexibility have been met with resistance. For instance, Article 8(1) of the TRIPS Agreement was originally proposed to allow IP law to better account for the demands of health-related concerns—“to protect public health and nutrition” and “to promote the public interest in sectors of vital importance to their socio-economic and technological development.”³⁴

Nonetheless, developed countries successfully insisted on appending a disclaimer to the proposal, requiring that “such measure be consistent with the provisions of [the remainder of TRIPS].”³⁵ Many commentators viewed this disclaimer as an attempt to undermine, or even swallow, Article 8(1)’s public interest goals.³⁶ Therefore, as with the 1967 Stockholm Conference, negotiation over TRIPS Article 8(1) helps underscore Western hesitation to make concessions to developing countries in the realm of intellectual property rights. Furthermore, TRIPS has mostly maintained the status quo of strong IP protection in the international copyright law system.³⁷

2.3. *World Intellectual Property Organization: Navigating Tension Between U.N. Developmental Objectives and Upholding Intellectual Property Rights*

Initially an independent governmental organization controlled primarily by “fifty-one mostly industrialized country governments,” WIPO is the leading international body governing

beyond the Berne Convention, including implementation of criminal sanctions under certain circumstances. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804, 824 (2008) (remarking that the United States has induced developing countries to agree to bilateral treaties that require the developing countries to adopt the WIPO Copyright Treaty’s heightened copyright protections).

³⁴ TRIPS, *supra* note 27, art. 8(1). This “public interest provision” was placed into TRIPS at the urging of developing countries. See Yusuf, *supra* note 28, at 13-14 (describing “the public interest principle” of TRIPS).

³⁵ Yusuf, *supra* note 28, at 14.

³⁶ See *id.* (discussing the potential confusion and ambiguity caused by the seemingly contradictory language in Article 8(1)). Arguably though, the Doha Declaration later eliminated confusion by unambiguously reaffirming TRIPS’s accommodation of public health needs). *Id.* at 14-15

³⁷ However, the Doha Declaration at least offered a slight recognition of enhanced IP balance in areas such as access to medicine. *Id.*

IP.³⁸ Under the belief that moving to the United Nations (“U.N.”) would promote “the protection of intellectual property throughout the world,” WIPO incorporated into the United Nations.³⁹ As a division of the United Nations, WIPO—a traditionally Western-controlled governmental organization—is now explicitly required to account for the developmental needs of developing countries.⁴⁰

Despite this edict, WIPO has often continued to urge stricter IP standards,⁴¹ and has taken steps to ensure that its “mission [is] adhered to unwaveringly.”⁴² Indeed, WIPO has often stood firmly behind rhetoric insisting that promoting strong IP protection would best spur development in developing countries.⁴³ Certain scholars believe that WIPO’s IP protection-oriented approach to development operates as pretext to prevent developing countries from undermining WIPO’s tradition of strong IP protection.⁴⁴

³⁸ MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* 125 (1998).

³⁹ Convention Establishing the World Intellectual Property Organization art. 3(i), July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3. See also RYAN, *supra* note 38, at 127. Commentators have speculated, however, that WIPO joined the United Nations solely to strengthen intellectual property protection, even if to the detriment of developing countries’ development. See Neil Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, in *THE DEVELOPMENT AGENDA*, *supra* note 19, at 1, 3 n.5; Yu, *supra* note 22, at 476 (articulating that developing countries have different needs in the realm of intellectual property).

⁴⁰ RYAN, *supra* note 38, at 133–34 (outlining steps taken by WIPO to address the intellectual property needs of developing countries after its incorporation into the United Nations). The United Nations even expressly imposed this obligation upon WIPO as a condition to joining it. Article 1 of the agreement incorporating WIPO into the U.N. stated that WIPO must “promot[e] intellectual activity and facilitat[e] the transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development.” Agreement between the United Nations and the World Intellectual Property Organization, art. 1, Dec. 17, 1974, WIPO Publication No. 111 (1975), available at http://www.wipo.int/export/sites/www/treaties/en/agreement/pdf/un_wip_agreement.pdf.

⁴¹ See Seuba, *supra* note 32, at 416.

⁴² RYAN, *supra* note 38, at 128.

⁴³ See Ruth L. Okediji, *History Lessons for the WIPO Development Agenda*, in *THE DEVELOPMENT AGENDA*, *supra* note 19, at 137, 145–47 (noting that even if WIPO possessed genuine concerns for developing countries, its focus upon establishing strong intellectual property rights in order to address these concerns has been ineffective).

⁴⁴ See Netanel, *supra* note 39, at 2 (“WIPO’s leadership refused to recognize any contradiction between . . . spurring development versus its traditional core objective of extending greater” intellectual property protection across the world).

Therefore, WIPO's U.N.-imposed developmental goals prove difficult to reconcile with its objective of maintaining strong intellectual property rights. Therefore, if effectively implemented, the WIPO Development Agenda stands to provide more backbone to the developmental obligations that WIPO must commit to as an arm of the U.N.

3. IP REFORM MOVEMENTS

3.1. Rise of IP Reform Movements

Commentators have recently questioned whether strong IP enforcement aids development in developing countries.⁴⁵ For instance, empirical evidence does not definitively prove that strong IP enforcement stimulates foreign direct investment in developing countries.⁴⁶ Moreover, IP law often appears to concentrate technology and innovation within developed countries.⁴⁷ Furthermore, even the WTO has inched towards acknowledging a newly balanced system of IP via the Doha Declaration which provides that WTO members can "use fully the provisions of the TRIPS Agreement, which provide *flexibility* for" increased access to medicine—a position that the WHO has since endorsed.⁴⁸ In the

⁴⁵ See, e.g., Alan Story, who argues:

In becoming signatories to Berne, countries of the South, which are primarily copyright users, have not only become further oppressed by the copyright power and control, financial and otherwise, exercised by right countries in the *present circumstance*; such relationships and the agreement of poor countries to protect and enforce copyright in, for example, educational works of every description, until, at a minimum, fifty years after their authors die, has—and will have—truly monumental effects on *those countries' economic futures for decades*, as well as their future use of materials.

Story, *supra* note 18, at 773.

⁴⁶ See, e.g., Henrique Choer Moraes & Otávio Brandelli, *The Development Agenda at WIPO: Context and Origins*, in *THE DEVELOPMENT AGENDA*, *supra* note 19, at 33, 39–40 (quoting the World Bank's 2005 Global Economic Prospects report questioning the correlation between intellectual property protection and foreign direct investment).

⁴⁷ See EMANUEL HASSAN ET AL., RAND CORP., *INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES: A REVIEW OF THE LITERATURE 19-20* (2010), available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR804.pdf (noting that a better balancing of intellectual property rights actually helped stimulate innovation in certain developed countries).

⁴⁸ World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 4, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (emphasis added). The WHO has

wake of such concerns, movements have arisen calling for intellectual property laws to better accommodate certain societal concerns.⁴⁹

3.2. Access to Knowledge Movement (A2K)

A2K, which eludes a strict definition,⁵⁰ is a loose collection of movements calling for enhanced balance and flexibility in IP law.⁵¹ At an extreme, certain A2K proponents wish to reorder IP law so that IP protection is the exception to an otherwise rather

expressed support for the Doha Declaration. Indeed, it encourages member states "to encourage trade agreements to take into account the flexibilities contained in [TRIPS] and recognized by the [Doha Declaration]." Moraes & Brandelli, *supra* note 46, at 44. Furthermore, a WHO Expert Commission adopted a similar stance on the need to exercise balance in intellectual property laws. *Id.*

⁴⁹ See Kapczynski, *supra* note 33, at 825 (noting that "[o]ver the last ten to fifteen years . . . numerous groups have emerged to contest the recent expansion of intellectual property"). Kapczynski identifies several distinct movements that have gained prominence, including (1) opposition to seed patents in India, (2) opposition to Western proposals to strengthen copyright protection of databases, (3) movements to increase access to HIV/AIDS medication in developing countries by providing accommodations in patent law, and (4) the use of affordable open-source software. *Id.* at 825-29. The HIV/AIDS access to medicine movement provides a useful snapshot of these IP reform movements and relies upon principles somewhat analogous to VIPs. The movement attributed the unaffordability of HIV/AIDS medicine in developing countries to patent laws, which granted patent holders exclusive rights over the medicine. *Id.* at 828-29. Ultimately, the movement's efforts yielded a dramatic ninety-nine percent reduction in the price of generic HIV/AIDS medication. *Id.*

⁵⁰ Lea Shaver, *Defining and Measuring Access to Knowledge: Towards an A2K Index* 4 (Yale Law Sch. Legal Scholarship Repository, Faculty Scholarship Series Paper 22, 2007), available at http://digitalcommons.law.yale.edu/fss_papers/22 (noting that "there is currently no one authoritative explanation of what [A2K] encompasses"). Another scholar has characterized the phenomenon as follows: "[S]ome groups have begun to seek to affiliate and make common cause under the rubric of [A2K] As they formulate these demands and work together, those involved are also seeking to develop a shared identity and a common critique of the existing intellectual property system." Kapczynski, *supra* note 33, at 806. Lea Shaver has attempted to characterize A2K by developing a model which is based upon metrics corresponding to its defining characteristics. See Shaver, *supra*, (establishing the following metrics: "[1] education for information literacy, [2] access to the global knowledge commons, [3] access to knowledge goods, [4] an enabling legal framework, and [5] effective innovation systems").

⁵¹ Krikorian, *supra* note 3, at 70-71 (noting A2K's rather wide-ranging objectives and its loose composition of several diverse movements which still nonetheless seek a "common cause"). Indeed, the movement has been described as "a heterogeneous collective inheriting its intentionality in the progression from the singular to the common in which the concept of access becomes itself a dispositive of the organization of singularities." *Id.* at 73.

uninhibited exchange of knowledge.⁵² More moderately, the movement pushes to render IP law more balanced in order to better facilitate a more open and efficient transfer of knowledge and information.⁵³

In 2005, the Consumer Project on Technology (“CPTech”)⁵⁴ even proposed an A2K treaty before WIPO; however, the treaty was not adopted.⁵⁵ Directly applicable to VIPs, the treaty proposed that “[t]he dissemination of works in formats that enable access by disabled persons shall be permitted to any country that duly authorizes the non-voluntary use of such works.”⁵⁶ This direct reference to disabled persons underscores A2K’s compatibility with a VIP treaty. Thus, A2K’s emphasis on a richer exchange of

⁵² See William New, *Experts Debate Access to Knowledge*, INTELL. PROP. WATCH (Feb. 15, 2005, 10:24 PM), http://www.ip-watch.org/weblog/2005/02/15/experts-debate-access-to-knowledge/?res=1280_ff&print=0 (remarking that many A2K proponents believe that “restrictions on access ought to be the exception, not the other way around”); see generally Henning Grosse Ruse-Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection*, 1 TRADE L. & DEV. 56 (2009) (arguing that IP protection should be governed by “maximum standards” or ceilings in order to balance users’ rights against those of IP rights holders).

⁵³ See, e.g., Ahmed Abdel Latif, *The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing-Country Delegate*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY, *supra* note 2, at 99, 102 (describing a 2002 report of the UK Commission on Intellectual Property Rights, which “underlined the need to achieve a more balanced international intellectual property system that would not be based on a ‘one size fits all’ approach . . .”). Since definitions of A2K are somewhat broad and varied, this Comment does not necessarily endorse A2K at its most extreme, e.g., demanding a complete reordering of IP law. However, this Comment does offer support to A2K insofar that normatively speaking, a proper IP law framework should attempt to strike a proper balance between stimulating creative works and preserving authors’ moral rights with allowing society an opportunity to access creative works for a net overall societal gain.

⁵⁴ CPTech (now Knowledge Ecology International) is an organization that compiled a large collection of information pertaining to, and in support of, the A2K movement. *Access to Knowledge: Overview*, CONSUMER PROJECT ON TECH., <http://www.cptech.org/a2k/> (last visited Mar. 25, 2012).

⁵⁵ Draft Treaty on Access to Knowledge, CONSUMER PROJECT ON TECH. (May 9, 2005) [hereinafter Draft A2K Treaty], available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf. See also Latif, *supra* note 53, 117 (noting that when the A2K treaty was proposed, “the A2K movement was fully formed and had come forward with a major norm-setting proposal.”).

⁵⁶ Draft A2K Treaty, *supra* note 55, art. 3-3(c). Further lending credence to a VIP treaty, the A2K treaty called for members to recognize the “right to access knowledge through a diversity of formats to meet the individual’s specific needs.” *Id.* art. 3-3(a)(1).

knowledge—as is further exemplified by the A2K treaty proposal—provides a highly compatible normative underpinning to VIPs' movement to increase the availability of accessible written works via copyright reform.

3.3. WIPO Development Agenda

The WIPO Development Agenda seeks for WIPO to better accommodate developmental concerns in its IP policies.⁵⁷ A South American proposal at WIPO initiated talks towards a Development Agenda.⁵⁸ The proposal underscored WIPO's developmental obligations as a U.N. body, and it called for WIPO to implement a more nuanced approach to IP that better accounted for developing countries' developmental needs, rather than rigidly continuing to promulgate heightened IP protection.⁵⁹

After rounds of negotiation, WIPO formally adopted the WIPO Development Agenda in 2007, enacting forty-five provisions⁶⁰ grouped within six distinct clusters.⁶¹ The Development Agenda stands to be a significant stride towards acknowledging developmental concerns at WIPO: “[F]or the first time in WIPO's history [the Development Agenda] place[d] the need for balance, flexibility and a robust public domain on par with promoting IP protection in all WIPO matters affecting developing countries.”⁶² Formally acknowledging developing countries' developmental

⁵⁷ See generally *Decision of the 2007 General Assembly*, WORLD INTELL. PROP. ORG., http://www.wipo.int/ip-development/en/agenda/wo_ga/wo_ga_34_summary.html (last visited Apr. 9, 2012) (providing a general background chronicling the Development Agenda's adoption).

⁵⁸ WIPO, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, Gen. Assembly, 31st (15th Extraordinary) sess, Sept. 27–Oct. 5, 2004, WIPO Doc. WO/GA/31/11 (Aug. 27, 2004), available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf.

⁵⁹ *Id.* at Annex, at 2–3 [§§ III–V].

⁶⁰ *Decision of the 2007 General Assembly*, *supra* note 57.

⁶¹ See *The 45 Adopted Recommendations Under the WIPO Development Agenda*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited Apr. 9, 2012) [hereinafter *Development Agenda Recommendations*] (noting that the forty-five selected recommendations were chosen from over one-hundred proposals). These clusters are: (A) “Technical Assistance and Capacity Building”; (B) “Norm-setting, flexibilities, public policy and public domain”; (C) “Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge”; (D) “Assessment, Evaluation and Impact Studies”; (E) “Institutional Matters including Mandate and Governance”; and (F) “Other issues.” *Id.*

⁶² Netanel, *supra* note 39, at 2.

concerns pertaining to IP law certainly marks an important step forward from WIPO's somewhat rigid roots. However, the Development Agenda will prove toothless absent meaningful implementation through efforts to actually account for developing countries' needs. Due to the disproportionate concentration of VIPs in developing countries, adoption of a VIP treaty stands to pose a meaningful step towards this implementation.

4. PROPOSED TREATIES FOR VISUALLY IMPAIRED PERSONS

4.1. *VIP-Related Concerns and the Shift Towards a VIP Treaty Addressing Copyright Barriers*

Forming within the background of the above-mentioned IP reform movements, a narrower complementary movement has demanded that VIPs obtain substantially more access to written works in accessible formats.⁶³ Stemming from this complementary movement, a 2006 WIPO submission subsequently declared that "neither the market nor technology appears to be supporting a basis for facilitating the access to information by visually impaired people in a way that is consistent with the general standards for the full social and economic integration of people with disabilities."⁶⁴ Consequently, the submission asserted, copyright law provided an inadequate legal framework for sufficiently facilitating VIPs' access to accessible written works.⁶⁵

⁶³ Indeed, at the onset of the new millennium, VIP advocates began mobilizing support for IP reform. See generally David Mann, *WIPO – Advancing Access to Information for Print Disabled People*, Meeting Paper of 67th IFLA Council and General Conference (Aug. 2001), available at http://keionline.org/sites/default/files/david_manon_wipo.pdf (examining WIPO's role related to VIP's reading rights and copyright). By 2004, the World Blind Union (WBU) formally declared that it would "strive for the creation of international agreements which would allow the unhindered transfer of accessible material created in one country to blind . . . people in another country." *Policy Position Agreed by the World Blind Union (WBU), the Daisy Consortium and IFLA Libraries for the Blind Section (LBS)* (World Blind Union et al., 2004), available at <http://www.worldblindunion.org/en/our-work/position-statements/Documents/wbu%20ifla%20lbs%20and%20daisy%20joint%20Policy%20Position.doc>.

⁶⁴ WIPO, *Automated Rights Management Systems and Copyright Limitations and Exceptions*, at 33, Standing Comm. Copyright & Related Rights, 14th sess, May 1-5, 2006, WIPO Doc. SCCR/14/5 (Apr. 27, 2006) (prepared by Nic Garnett), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf.

⁶⁵ See *id.* (stating that "given that there are no specific provisions in international law dealing with the needs of visually impaired people," the current

Early discussion of a treaty addressing this defect possessed clear traces of the WIPO Development Agenda and A2K. It recognized the need to “mov[e] towards agreement on exceptions and limitations for public interest purposes.”⁶⁶ Moreover, there was a call for “access to the most vulnerable or socially prioritized sectors.”⁶⁷ Discussion also demanded a “new reality” of a more balanced IP legal framework.⁶⁸

Emerging from this discussion, four VIP treaties were initially tabled before WIPO between 2009 and 2010: (1) a joint proposal of three Latin American countries and the World Blind Union (“Latin American VIP Treaty”);⁶⁹ (2) an African Group proposal (“African VIP Treaty”);⁷⁰ (3) a European Union proposal (“EU VIP Treaty”);⁷¹

copyright system does not provide a proper economic framework for dissemination of accessible written works).

⁶⁶ See WIPO, *Proposal by Chile on the Analysis of Exceptions and Limitations*, Annex, at 1, Standing Comm. Copyright & Related Rights, 13th sess, Nov. 21–23, 2005, WIPO Doc. SCCR/13/5 (Nov. 22, 2005) (emphasis added), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf.

⁶⁷ *Id.*

⁶⁸ See *id.* at 2 [§ 2, para. 2] (“To maintain this balance between rightsholders and users, between authors and other rightsholders, and also among the rightsholders themselves, the intellectual property system makes use of the principles of exceptions and limitations.”).

⁶⁹ WIPO, *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)*, 18th sess, May 25–29, 2009, WIPO Doc. SCCR/18/5 (May 25, 2009) [hereinafter Latin American VIP Treaty], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf. The Latin American proposal was the first proposal to be tabled before WIPO (during the Eighteenth Session of the WIPO Standing Committee on Copyright and Related Rights (“SCCR”) meeting) and served largely as the baseline proposal from which subsequent treaties and negotiations stemmed from. The initial proposals of Africa, the European Union, and the United States were all proposed later during WIPO SCCR’s Twentieth Session in 2010.

⁷⁰ WIPO, *Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, Proposal by the African Group*, Standing Comm. Copyright & Related Rights, 20th sess, June 21–24, 2010, WIPO Doc. SCCR/20/11 (June 15, 2010), [hereinafter Africa VIP Treaty], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_11.pdf.

⁷¹ 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*, Standing Comm. Copyright & Related Rights, 20th sess, June 21–24, 2010, WIPO Doc. SCCR/20/12 (June 17, 2010) [hereinafter EU VIP Treaty], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf.

and (4) a United States proposal (“U.S. VIP Treaty”).⁷² The two developing countries’ proposals were binding,⁷³ while the developed countries’ proposals were non-binding.⁷⁴ In many respects, the four initial proposals aptly personify the disconnect between developing and developed countries’ approaches to IP balancing. The developing countries’ proposals pushed for broader reforms while the developed countries’ proposals sought narrower reforms to avoid any scope of interpretation beyond VIPs. In 2011, a compromise proposal was tabled at WIPO by most of the countries who submitted earlier proposals (with the exception of the African Group), and was joined by several new additional countries.⁷⁵ Ultimately, all the proposals—even the

⁷² WIPO, *Draft Consensus Instrument, Proposal by the Delegation of the United States of America*, Standing Comm. Copyright & Related Rights, 20th sess, June 21–24, 2010, WIPO Doc. SCCR/20/10 (June 10, 2010) [hereinafter U.S. VIP Treaty], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_10.pdf.

⁷³ See Latin American VIP Treaty, *supra* note 69, Annex, at 3 [pmb.] (providing that the parties “[h]ave agreed as follows” to the subsequent treaty provisions); African VIP Treaty, *supra* note 70, at 3 [pmb.] (stating that signatories “[h]ereby agree on the following.”).

⁷⁴ See EU VIP Treaty, *supra* note 71, at 4 [Joint Recommendation, para. 4] (characterizing the treaty as a “recommendation” and stressing that it “[r]ecommend[s] that each Member State . . . bring[] its legislation into accord with this Recommendation”); U.S. VIP Treaty, *supra* note 72, at 2 [pmb., para. 8] (describing the treaty as a “consensus instrument” and merely “[r]ecommend[ing] that each Member state adopt and implement the provisions” of the treaty).

⁷⁵ See WIPO, *Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities, Proposal by Argentina, Australia, Brazil, Chile, Colombia, Ecuador, the European Union and its Member States, Mexico, Norway, Paraguay, the Russian Federation, the United States of America, and Uruguay*, Standing Comm. Copyright & Related Rights 22d sess, June 15–24, 2011, WIPO Doc. SCCR/22/15 Rev. 1 (June 22, 2011) [hereinafter 2011 Combined VIP Treaty Proposal], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_15_rev.pdf. Additional documents have since circulated at the WIPO SCCR proposing further revisions. To the author’s best knowledge, the proposal cited above is the most recent formal compromise proposal tabled before WIPO at the time of this Comment’s writing. For the additional working documents and revisions subsequent to the formal proposal, see WIPO, *Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities*, Standing Comm. Copyright & Related Rights, 22d sess, June 15–24, 2011, WIPO Doc. SCCR/22/16 Prov. (June 23, 2011), available at <http://www.ip-watch.org/weblog/wp-content/uploads/2011/06/SCCR-22-16-Prov.-June-2011.pdf>; WIPO, *Working Document on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities*, Standing Comm. Copyright & Related Rights, 23d sess, Nov. 21–25, Nov. 28, Nov. 29, & Dec. 2, 2011, WIPO Doc. SCCR/23/7 Prov. (Dec. 1, 2011), available at http://keionline.org/sites/default/files/Working_

developing countries' more restrained proposals—evoke traces of policies reminiscent of A2K and the WIPO Development Agenda.

4.2. Initial Developing Country Proposals

4.2.1. Latin American VIP Treaty: Setting an Initial Negotiation Baseline

The Latin American VIP Treaty⁷⁶ requires satisfaction of the following elements to render a copyrighted work into an accessible format for importation or exportation between WIPO signatories:⁷⁷ (1) the initial copy of the work must be obtained lawfully; (2) the work may only be rendered into “an accessible format”; (3) the accessible written work may only be “supplied exclusively” to VIPs; and (4) the accessible written work may only be undertaken “on a non-profit basis.”⁷⁸ Perhaps recognizing its potential incompatibility with copyright systems grounded in moral rights, the treaty attempts to provide for their acknowledgment.⁷⁹

document_VIP_Final_Prov[1].doc. Undoubtedly, unless treaty talks stall, additional proposals may arise after this Comment's publication.

⁷⁶ Note that despite referring to the proposal broadly as the “Latin American VIP Treaty,” the only countries named on the proposal were Brazil, Ecuador, and Paraguay. Admittedly, a small selection of only three countries is not necessarily representative of every country in the entire geographic region. Therefore, despite the broad language throughout this Comment, this Comment should not be construed to purport that the proposal is representative of *all* Latin American countries.

⁷⁷ See Latin American VIP Treaty, *supra* note 69, Annex, art. 8.

⁷⁸ See *id.*, Annex, art. 4(a)(1)–(4). An optional exception to the fourth element provides that countries may allow for-profit entities to distribute written works under the following conditions: (1) the activity “fall[s] within the normal exceptions and limitations to exclusive rights,” (2) the activity is only undertaken on “a non-profit basis, only to extend access to works to [VIPs] on an equal basis with others,” and (3) accessible copies of the work are not “reasonably available” and the entity provides notice and adequate compensation to the lawful copyright holder. *Id.*, Annex, art. 4 (c)(1)–(3). However, the treaty allows a country to waive the third element of the for-profit exception. *Id.*, Annex, art. 19 (“Any Contracting Parties may declare that it [sic] declines to implement Article 4(c)(3) of the Treaty.”).

⁷⁹ See *id.*, Annex, art. 5(a) (“Where a work . . . is supplied to a [VIP under the treaty], mention shall be made of the source, and of the name of the author as it appears on the work or copy of the work that the person or organization acting under Article 4 has lawful access to.”). The Latin American proposal further stresses: “Use as permitted by Article 4 shall be without prejudice to the exercise of moral rights.” *Id.*, Annex, art. 5(b). Furthermore, under the for-profit exception of the proposal, “reasonable efforts should be made to provide notice to the owner of a work protected by copyright.” Also under the for-profit exception, authors

Besides the Latin American VIP Treaty's basic elements, it promulgates a rather inclusive definition of VIPs: "persons with any . . . disability who, due to that disability, need an accessible format . . . in order to access a copyright work to substantially the same degree as a person without a disability."⁸⁰ Somewhat controversially, this broad language may seemingly extend the scope of the treaty beyond VIPs. Also, somewhat contentiously, the treaty stipulates that its provisions automatically comply with existing international copyright law.⁸¹

While the Latin American VIP treaty targets copyright issues afflicting VIPs, broader statements in the treaty stand to effectuate the goals of A2K and the WIPO Development Agenda. Most obviously, the treaty directly emphasizes that negotiation of a VIP Treaty stands to enhance implementation of the WIPO Development Agenda.⁸² It further pronounces that the treaty must be "development-oriented" and should account for developmental disparities.⁸³ Moreover, the preamble champions quintessential A2K objectives: "to provide *full and equal access to information and communication* for the visually impaired."⁸⁴ Consistent with IP reform movements, the treaty also invokes a broad desire to institute more flexible and accommodating copyright laws to address societal concerns:

The Purpose of this Treaty is to provide the necessary minimum flexibilities in copyright laws that are needed to ensure full and equal access to information and communication for persons who are visually impaired or

must receive reasonable compensation. *Id.*, Annex, art. 11. However, in developing countries, "remuneration should also take into consideration the need to ensure that works are accessible and available at prices that are affordable." *Id.*

⁸⁰ *Id.*, Annex, art. 15(b).

⁸¹ See *id.*, Annex, art. 3 ("Contracting Parties agree that the provisions of this Treaty are consistent with obligations set out under those of the following treaties and conventions to which they are a party . . .").

⁸² Latin American VIP Treaty, *supra* note 69, Annex, at 1 [¶ 3] ("[T]he establishment of formal negotiations on limitations and exceptions would contribute to the broader aims of the Development Agenda, particularly the ones related to norm-setting . . .").

⁸³ *Id.*, Annex, art. 2(e) ("Implementation of the Treaty shall be development-oriented and transparent, taking into account the priorities and the special needs of developing countries, as well as the different levels of development of Contracting Parties.") (citing the WIPO Development Agenda).

⁸⁴ *Id.* (emphasis added).

otherwise disabled in terms of reading copyrighted works, focusing in particular on measures that are needed to publish and distribute works in formats that are accessible for persons who are blind, have low vision, or have other disabilities in reading text, in order to support their full and effective participation in society on an equal basis with others, and to ensure the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.⁸⁵

Therefore, through such statements, the Latin American VIP Treaty offers a valuable foundational starting point for enhancing A2K and the WIPO Development Agenda upon which the ensuing treaties would build.

4.2.2. *African VIP Treaty: Pushing the Boundaries of IP Reform More Directly Beyond Visually Impaired Persons*

Perhaps unsurprisingly, the African group proposed the most expansive VIP Treaty. The treaty's title itself telegraphs its broad scope well beyond VIPs: "Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers."⁸⁶ While the elements for an exception under the African treaty are roughly analogous to the Latin American proposal,⁸⁷ the African proposal sets forth the most expansive definition of VIPs.⁸⁸ Indeed, read at its broadest, the definition may conceivably extend to those possessing the "disability" of illiteracy. Likewise, the treaty is the only one to *overtly* propose copyright exceptions beyond VIPs.⁸⁹ Moreover, the treaty authorizes circumvention of "technical protection measures"

⁸⁵ *Id.*, Annex, art. 3.

⁸⁶ African VIP Treaty, *supra* note 70.

⁸⁷ See *id.* art. 5 (detailing the VIP copyright exception's elements under the African VIP treaty).

⁸⁸ See *id.* art. 21 (stating that the treaty extends to VIPs and "persons with any other disability who, due to that disability, need an accessible format of a type that could be made . . . in order to access a copyright work to substantially the same degree as a person without a disability").

⁸⁹ The exceptions include: (1) private use and research, (2) educational and research institutions, (3) libraries and archives, (4) computer programs, (5) certain instances of visual and sound performances, and (6) quotation. *Id.* arts. 6-10.

by those covered under the copyright exception⁹⁰ and expressly prohibits contracting around its provisions.⁹¹ It also adopts the Latin American Treaty's provision stipulating that the VIP treaty automatically comports with international copyright agreements.⁹² Lastly, the treaty broadly permits countries to take any additional measures "necessary to achieve greater equality of access to knowledge and communications."⁹³

As with the Latin American proposal, the African VIP treaty provides strong support to IP reform movements. Consistent with the WIPO Development Agenda, the African treaty asserts a firm stance on stimulating development.⁹⁴ It highlights "the importance of *guaranteeing* that developing countries enjoy and continue to enjoy access to flexibilities and exceptions without any legal or technical hindrances."⁹⁵ Moreover, the proposal invokes quite broad principles of human rights and equality.⁹⁶ More remarkably, the African group's proposal is the only one to explicitly endorse

⁹⁰ *Id.* art. 13 (declaring that the beneficiaries of the treaty should "have the means to enjoy the exception where technical protection measures have been applied to the work").

⁹¹ *Id.* art. 13 ("[A]ny contractual provisions which provide exemptions from the application of the limitations and exceptions listed in Article 2 shall be null and void.").

⁹² *Id.* art. 4.

⁹³ *Id.* art. 23(3).

⁹⁴ *See id.* pmbl. (asserting that the proposed treaty is "[p]rompted by a desire to contribute to implementation of the relevant recommendations of the [WIPO] Development Agenda")

⁹⁵ *Id.* (emphasis added).

⁹⁶ The preamble declares:

Recalling the principles of non-discrimination, equal opportunity and access, proclaimed in the United Nations Convention on the Rights of Persons with Disabilities;

Noting that the International Covenant on Civil and Political Rights guarantees the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice;

Considering that equal access to education, culture, information and communication is a fundamental right that comes under public policy;

Recognizing the important role played by the authorities in guaranteeing equal opportunity for all in terms of access to education, culture and information.

Id.

broadening the “scope of copyright exceptions and limitations.”⁹⁷ Presumably, such broadening would facilitate greater social equality amongst not just VIPs, but many other groups as well.⁹⁸ Thus, the African VIP Treaty clearly offers the broadest approach, one that champions broad access and developmental objectives that expressly extend beyond the specific needs of VIPs.

4.3. Initial Developed Country Proposals

4.3.1. Initial European Union VIP Treaty: Providing a More Restrained Approach

Somewhat predictably, the EU’s 2010 proposal offers a more restrained VIP treaty than those proposed by the developing countries. Indeed, the treaty never expressly endorses utilizing IP law flexibilities to better accommodate developing countries.⁹⁹ Instead, the treaty narrows its focus explicitly to VIPs.¹⁰⁰ Furthermore, the treaty explicitly mandates that the copyright exception “may only be applied in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.”¹⁰¹ Additionally, the EU proposes a narrower definition of VIPs than the developing countries’ broader definitions.¹⁰² In recognition of Europe’s moral rights tradition, the treaty authorizes countries to mandate compensation to copyright holders for *all* distribution of accessible written works.¹⁰³

⁹⁷ *Id.*

⁹⁸ *Id.* (seeking a broadening of copyright limitations and exceptions not just for “disabled persons,” but also for “libraries, archives, education and research”).

⁹⁹ *See generally id.*

¹⁰⁰ The preface of the EU VIP Treaty perhaps most starkly demonstrates this dynamic. It repeatedly makes reference solely to making concessions to VIPs, but eschews any broader language that would be likely to be construed beyond VIPs. *Compare id.*, Preface (making no reference to greater developmental needs), *with* Latin American VIP Treaty, *supra* note 69, Annex, art. 2(e) (stating that the treaty “shall be development-oriented” per the WIPO Development Agenda).

¹⁰¹ *Id.* This language mirrors the language of the Berne three-step test. *See supra* note 19 and accompanying text (discussing and articulating the Berne three-step test).

¹⁰² *See* EU VIP Treaty, *supra* note 71, art. 1(ii) (defining VIPs as those with seeing disabilities, dyslexia or those physically unable to manipulate traditional printed works).

¹⁰³ *See id.* art. 2 (“Member states may ensure that the rights holders receive an adequate remuneration for the use of their works covered by the exception.”).

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The EU proposal also attaches an additional hurdle that is wholly absent in the developing countries' proposals¹⁰⁴—dissemination of accessible written works may only occur through a “trusted intermediary.”¹⁰⁵ A trusted intermediary is “an approved institution whose activities must have the consent of both[] persons with a print disability and rights holders such as publishers” who facilitate cross-border transfer of accessible written works “in a controlled manner.”¹⁰⁶ The trusted intermediary requirement may prejudice those developing countries that lack sufficient resources to establish viable trusted intermediaries. Moreover, because trusted intermediaries must be approved by rights holders under the 2010 EU proposal, some rights holders may put up significant fights in approving them.

Also notably, the EU proposal prohibits the copyright exception where “there are sufficient and adequate market solutions for persons with a print disability.”¹⁰⁷ Additionally, the treaty refuses to stipulate to per se compliance with existing copyright treaties as the developing countries propose.¹⁰⁸

While the EU treaty provides a more restrained approach, it still embraces at least minimal traces of A2K and the WIPO Development Agenda. For example, it acknowledges “the importance of accessibility to the achievement of equal opportunities in all spheres of society.”¹⁰⁹ Moreover, it further encourages “the *balance* of the international system of intellectual

The Latin American VIP treaty only requires compensation to copyright holders when an entity distributes accessible written works on a for-profit basis. *See supra* note 78 and accompanying text.

¹⁰⁴ This requirement is also present in the U.S. proposal. *See* U.S. VIP Treaty, *supra* note 72, art. 1(3).

¹⁰⁵ *See* EU VIP Treaty, *supra* note 71, art. 4 (stating that cross-border transfer of “physical works in accessible formats” must be done through “a trusted intermediary”).

¹⁰⁶ *Id.* art. 1(iv). The EU VIP Treaty requires that trusted intermediaries must: (1) operate on a non-profit basis, (2) register those with print disabilities “they serve,” (3) provide “specialized services relating to training, education or adaptive reading . . . needs of [VIPs],” (3) “maintain policies and procedures to establish the bona fide nature of persons with print disabilities that they serve,” and (4) “maintain policies and procedures to ensure full and complete compliance with copyright and data protection law.” *Id.*

¹⁰⁷ *Id.* art. 2. The proposal provides no definition, however, of what constitutes a sufficient market solution.

¹⁰⁸ On the contrary, the treaty emphasizes “[t]aking into account the Berne Convention and World Copyright Treaty.” *Id.*, Preface.

property.”¹¹⁰ Admittedly, such language provides more superficial and indirect endorsement of the IP reform movements. Indeed, it certainly does not outright endorse the WIPO Development Agenda. However, the aforementioned statements do at least guardedly acknowledge principles that underlie A2K and the Development Agenda. Therefore, inasmuch as the treaty engenders such principles, even the EU’s restrained approach stands to advance the IP reform movements at least to a certain degree.

4.3.2. *Initial United States VIP Treaty: An Additional Restrained Approach*

The 2010 U.S. VIP Treaty proposes a similarly restrained approach. For example, the United States proposes the narrowest definitions for both VIPs¹¹¹ and permissible accessible formats.¹¹² The Treaty also requires distribution of most accessible written works via trusted intermediaries.¹¹³ Additionally, the U.S. VIP Treaty declines to incorporate any express stipulation of the

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (emphasis added). However, such balance must still remain within the confines of the Berne Convention. *Id.*

¹¹¹ The treaty defines VIPs as: (1) the visually impaired and (2) individuals incapable of physically manipulating traditional print materials. *Compare* U.S. VIP Treaty, *supra* note 72, art. 1 (defining VIPs as those who are blind, those who possess a visual impairment that restricts ability “to read printed works to substantially the same degree as a person without an impairment,” or those with a physical disability that prevents manipulation and use of traditional print materials), *with* EU VIP Treaty, *supra* note 71, art. 1 (allowing, in addition to the conditions covered in the U.S. definition, those who are dyslexic).

¹¹² The treaty allows for conversion distribution of protected works that are converted into Braille, audio, or digital text formats for VIPs. U.S. VIP Treaty, *supra* note 72, art. 1.

¹¹³ *Id.* arts. 2(A), 3(B) (allowing for import and export of “special format” works only through trusted intermediaries). The U.S. VIP Treaty restricts “special format” works to “Braille, audio, or digital text which is exclusively for use by persons with print disabilities.” The treaty defines trusted intermediaries as follows: “[A] government agency or non-profit entity . . . that has as a primary mission to assist [VIPs] by providing them with services relating to education, training, adaptive reading, or information access.” *Id.* art. 1. The treaty further requires that trusted intermediaries be approved both by VIPs and by copyright holders. *Id.* However, the treaty does *not* require distribution of Braille works via trusted intermediaries. *Id.* arts. 2(A), 3(B) (allowing importation and exportation of any “physical Braille format copy of a published work” without requiring a trusted intermediary).

treaty's compliance with international copyright law.¹¹⁴ To the contrary, it largely stresses maintaining the Berne Convention's framework.¹¹⁵ Moreover, it also lacks overt language in support of the WIPO Development Agenda.¹¹⁶

Nonetheless, as with the EU VIP Treaty, the U.S. proposal still conjures subtle traces of A2K and developmental principles. It acknowledges "the public interest in maintaining a *balance* between the interests of authors and users, particularly the needs of those persons with print disabilities or impairment of their vision"¹¹⁷ Furthermore, it recognizes "the role of the copyright system in facilitating access to information and full engagement by persons who are blind or print disabled in civil, educational, political, economic, social and cultural spheres"¹¹⁸ Such emphasis on IP balance is certainly embraced within both the WIPO Development Agenda and A2K. Similarly, recognition of copyright "facilitating access to information" directly comports with A2K. Nonetheless, the United States couches these statements within the narrow scope of VIPs only. Even with this limitation, however, evocation of such language stands to enhance the IP reform movements.

4.4. 2011 VIP Proposal: Consolidated Proposal of Latin America, the United States, the European Union, and other Delegations

By mid-2011, VIP treaty negotiations progressed,¹¹⁹ leading to a new treaty proposal that seeks to strike a compromise between the

¹¹⁴ See generally U.S. VIP Treaty, *supra* note 72 (containing no provision agreeing to per se compliance with international IP treaties). In fact, it is the only proposal to explicitly invoke the Berne three-step test by name. *Id.* at 2 [pmb., para. 7] ("Emphasizing the importance, vitality and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention and in Article 10 of the WIPO Copyright Treaty."). As previously noted, however, the EU's 2010 proposal nonetheless does invoke language that is essentially identical to the three-step test. See discussion *supra* note 101. The developing country proposals, on the other hand, lack such invocation of the three-step test.

¹¹⁵ See U.S. VIP Treaty, *supra* note 72, at 2 [pmb., para. 2] (stating that the treaty will take "into account the provisions of the Berne Convention").

¹¹⁶ See generally U.S. VIP Treaty, *supra* note 72.

¹¹⁷ *Id.* at 2 [pmb., para. 4] (emphasis added).

¹¹⁸ *Id.* [pmb., para. 5].

¹¹⁹ See Catherine Saez, *Common Text Emerges on Copyright Exceptions for the Blind*, INTELL. PROP. WATCH (June 17, 2011, 5:29 PM), <http://www.ipwatch.org/weblog/2011/06/17/common-text-emerges-on-copyright-exceptions-for-the-blind/> (noting that, according to a U.S. SCCR delegate, the 2011 negotiations

prior proposals.¹²⁰ The basic recommended elements for a copyright exception under the 2011 proposal do not diverge dramatically from those articulated in the first Latin American proposal. Indeed, the treaty *suggests* that authorized entities must (1) initially have “lawful access” to the copyrighted work, (2) convert the work to an accessible format which “does not introduce changes other than those needed to make the work accessible to the beneficiary person,” (3) supply the accessible works exclusively to VIPs, and (4) generally undertake the distribution on a non-profit basis.¹²¹ A closer reading of the proposal, however, indicates that these elements are merely illustrative recommendations rather than mandatory. Indeed, the 2011 treaty offers a great deal of leeway by essentially offering countries the following three broad choices: (1) provide for any VIP exception to the rights for reproduction, distribution, and making available to the public as defined in Article 8 of the WIPO Copyright Treaty;¹²² (2) adopt the abovementioned illustrative four-part test;¹²³ or (3) provide any other VIP exception which would comply with the Berne three-step test.¹²⁴

reflected a “‘careful compromise between’ several countries and is based on ‘good-faith discussions’”).

¹²⁰ The treaty was proposed by Argentina, Australia, Brazil, Chile, Colombia, Ecuador, the European Union, Mexico, Norway, Paraguay, Russia, the United States, and Uruguay. See 2011 Combined VIP Treaty, *supra* note 75, at 1. The African Group, however, did not join the proposal. Rather, it proposed a far broader treaty similar to that of its prior proposal. See generally WIPO, *Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives, Proposal by the African Group*, Standing Comm. Copyright & Related Rights, 22d sess, June 15–24, 2011, WIPO Doc. SCCR/22/12 (June 3, 2011), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf.

¹²¹ 2011 Combined VIP Treaty Proposal, *supra* note 75, art. C(2)(A).

¹²² *Id.* art. C(1). Article 8 of the WIPO Copyright Treaty provides that

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available of their works in such a way that members of the public may access these works from a place at a time individually chosen by them.

WIPO Copyright Treaty, art. 8, *adopted* Dec. 20, 1996, 36 I.L.M. 65.

¹²³ 2011 Combined VIP Treaty Proposal, *supra* note 75, art. C(2)(A).

¹²⁴ *Id.* art. C(3) (“A member state/Contracting Party may fulfill Article C (1) by providing any other exception or limitation in its national copyright law that is limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”). While not overtly referring to the three-step test by name, this

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Besides the general elements outlined above, many of the more restrained features pushed for by the developed countries appear to have prevailed in the latest VIP treaty incarnation. For example, the 2011 proposal is framed as non-binding rather than binding,¹²⁵ and it sets forth a rather narrow definition of VIPs.¹²⁶ Moreover, it retains reference to the developed countries' use of trusted intermediaries (now referred to as "authorized entities").¹²⁷ Additionally, the 2011 proposal explicitly refuses to bar contracting around the treaty as the developing countries originally sought in their initial proposals,¹²⁸ and the proposal allows countries to limit VIP exceptions "to published works which, in the applicable special format, cannot be otherwise obtained within a reasonable time and at a reasonable price."¹²⁹ Lastly, the 2011 proposal allows countries to require remuneration for accessible works distributed under the treaty.¹³⁰

exception essentially employs the exact language of the three-step test. For an articulation of the three-step test, see *supra* note 19 and accompanying text.

¹²⁵ The 2011 proposal states that a "Member State/Contracting Party should/shall provide in their national copyright law for an exception or limitation [for VIPs]." *Id.* art. C (emphasis added).

¹²⁶ Compare 2011 Combined VIP Treaty Proposal, *supra* note 75, art. B (restricting qualifying VIPs to the blind, those who cannot use corrective lenses to read, and those physically unable to manipulate traditional print formats), with VIP definitions discussed *supra* Sections 4.2–4.3 (providing more expansive definitions in the developing country proposals and the EU proposal).

¹²⁷ See 2011 Combined VIP Treaty Proposal, *supra* note 75, arts. A, C(2)(A) (suggesting that dissemination of written works in accessible formats be distributed through authorized entities). The 2011 proposal defines authorized entities as "a governmental agency, a non-profit entity or non-profit organization that has one of its primary missions to assist persons with print disabilities by providing them with services relating to education, training adaptive reading, or information access." *Id.* art. A. However, the authorized entity requirement is somewhat softened from the trusted intermediary requirement of the prior developed country proposals because it does not require "the prior permission of . . . rightholders or beneficiary persons." *Id.*

¹²⁸ See *id.* art. G ("[N]othing herein shall prevent Member States/Contracting Parties from addressing the relationship of contract law and statutory exceptions and limitations for beneficiary persons.").

¹²⁹ *Id.* art. C(4). However, the treaty does provide some level of accommodation to developing countries by providing different definitions of "reasonable price" depending upon whether a country is developed or developing. See *id.* art. A (stating that determination of the reasonable price in developing countries should "tak[e] into account the humanitarian needs of persons with print disabilities").

¹³⁰ *Id.* art. C(5).

Despite these somewhat more restrained features, the 2011 proposal does, nonetheless, evoke rather firm endorsements of A2K and the WIPO Development Agenda. For instance, the treaty highlights that the majority of VIPs live in lower income countries.¹³¹ Hence, in this vein, it explicitly acknowledges the need to effectuate the WIPO Development Agenda.¹³² Similarly, with respect to A2K, the treaty strongly acknowledges the need for copyright law to balance between rights holders and the greater public interest.¹³³ Indeed, while reaffirming copyright's roles in incentivizing creation, the treaty further stresses the need to balance incentives with meaningful participation in cultural and scientific advancement.¹³⁴ Thus, notwithstanding disagreement from the African Group,¹³⁵ the 2011 proposal ultimately appears to be a step forward towards meaningful reconciliation between the interests of developed and developing countries, a reconciliation

¹³¹ *Id.* pmb., para. 6 (“[T]he majority of visually impaired persons/persons with a print disability live in countries of low or moderate incomes.”).

¹³² *Id.* (declaring that the treaty was “[p]rompted by a desire to contribute to the implementation of the relevant recommendations of the Development Agenda of the World Intellectual Property Organization”). As previously discussed, prior developed country proposals never explicitly endorsed assisting implementation of the WIPO Development Agenda. See *supra* note 116 and accompanying text.

¹³³ See 2011 Combined VIP Treaty Proposal, *supra* note 75, pmb., para. 13 (recognizing existence of a “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of visually impaired persons/persons with a print disability”). Note that, somewhat akin to prior developed country proposals, the latter half of the statement hones in strictly on VIPs, perhaps in a move to prevent the treaty from extending beyond VIPs. However, the first half of the clause still appears to endorse a broader balancing of the public interest generally. This dynamic appears to aptly demonstrate the nature of the 2011 proposal as a compromise between prior developed and developing country proposals.

¹³⁴ *Id.* pmb., para. 3 (acknowledging the need for copyright law to incentivize creation but similarly stressing that it should “enhanc[e] opportunities for everyone to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”).

¹³⁵ As noted above, the African Group has yet to endorse the latest proposal. See *supra* note 120 and accompanying text. Reportedly, the African Group's concerns included that the 2011 proposal “did not reflect the positions of all member states” and that any VIP Agreement must be a binding treaty rather than a non-binding instrument. See Catherine Saez, *WIPO Members Advance Draft Texts on Copyright Exceptions, AV Protection*, INTELL. PROP. WATCH (June 23, 2011, 9:39 PM), <http://www.ip-watch.org/weblog/2011/06/23/wipo-members-advance-draft-texts-on-copyright-exceptions-av-protection>.

that, in its current form, firmly endorses the tenets embraced by A2K and the WIPO Development Agenda.

5. OPPOSITION TO A VIP TREATY

Certain actors have objected to adopting a VIP treaty.¹³⁶ Predictably, a large contingent of the criticism derives from influential interest groups representing copyright holders that would be weary of undermining any existing IP protection.¹³⁷ Interestingly though, some criticism derives from rights holders who do not even possess a direct stake in written works.¹³⁸ Most likely, the underlying—and perhaps unspoken—motive driving these rights holders' opposition is a concern that permitting *any* erosion of copyright's exclusion rights will catalyze further exceptions in other areas, and therefore threaten to undermine existing exclusion rights in other realms pertinent to their own respective industries.¹³⁹ Ultimately, much of the criticism lodged against a VIP treaty largely brushes aside whether existing copyright law embodies a properly balanced IP system. Therefore, with this consideration in mind, the ensuing material responds to some of the critics' arguments.

¹³⁶ It should be noted at the outset of this Section that many of the criticisms sampled in the ensuing text directly responded to the initial Latin American treaty proposal, which was initially the only proposal tabled before WIPO. Nonetheless, many of the critiques lodged against the Latin American proposal might very likely be lodged against almost any VIP treaty.

¹³⁷ Some of the leading critics include the Association of American Publishers; Independent Film and Television Alliance; Motion Picture Association of America; National Music Publishers' Association; and Recording Industry Association of America. See Comment from Steven J. Metalitz, Partner, Mitchell Silberberg & Knupp LLP on behalf of copyright industry organizations, to Maria Pallante, Assoc. Register, Policy & Int'l Affairs, U.S. Copyright Office, regarding Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities, 74 Fed. Reg. 52507, at 5 (Nov. 13, 2009) [hereinafter AAP et al., Comment], available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/steven-j-metalitz-aap-ifta-mpaa-nmpa-riaa.pdf> (raising the concern that the treaty "departs sharply from well-grounded precedents against mandating exceptions to copyright protection").

¹³⁸ Notable examples include the film lobby and music industry lobby. See *supra* note 137 and accompanying text.

¹³⁹ Indeed, some rights holders have explicitly argued that a VIP treaty will create a dangerous slippery slope. See *infra* Section 5.1. Others, however, have more subtly relied upon other arguments to oppose a VIP treaty, even where they likely have an unspoken interest in preventing any trend towards softening of copyright protections generally.

5.1. *Perception that a VIP Treaty Will Produce a Slippery Slope of Continual Undermining of IP Rights*

Certain critics contend that a VIP treaty will open a Pandora's Box of limitless additional copyright exceptions beyond VIPs. A contingent of leading copyright-holding lobbying groups consisting of book publishers, film companies, and the music industry has expressed this reservation:

[T]here is a serious risk that the likely impact of the draft treaty will not be confined to the four corners of the [VIP Treaty], widely spaced though they be. Viewed in context, the draft appears to many as the not-so-thin edge of a wedge to be driven into the long-standing structure of global copyright norms. It advocates a U-turn in the approach to global copyright norms that would almost certainly not be restricted to the issue of access for the visually impaired, or even for the disabled community generally. Adoption of this proposal would be used to justify a radical approach—mandating in national law exceptions and limitations that reach far beyond what would be even permissible under global norms today—in many other fields of copyright law.¹⁴⁰

Consequently, the group argues, a VIP treaty will create far more than “a small rip in the encompassing fabric of global copyright law.”¹⁴¹

This critique overstates and sensationalizes the degree of disorder that a VIP treaty will exert on IP law. Moreover, it assumes that the existing IP framework already provides an optimal balance of IP rights. However, A2K and the WIPO Development Agenda question this fundamental assumption.¹⁴² Assuming copyright law should operate to enrich the public by incentivizing development of creative works for public consumption,¹⁴³ the dearth of accessible written works

¹⁴⁰ AAP et al., Comment, *supra* note 137, at 5.

¹⁴¹ *Id.*

¹⁴² See Vera Franz, *Back to Balance: Limitations and Exceptions to Copyright, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY*, *supra* note 2, at 517, 518 (noting that the rights of “users” have recently been overlooked in the balancing of intellectual property protection).

¹⁴³ See Kapczynski, *supra* note 2, at 27 (noting that the commonly held goal of providing exclusion rights via intellectual property law is to “generate markets in

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demonstrates that VIPs cannot reap the benefit of public consumption under existing copyright law. Therefore, arguing that a VIP treaty is inconsistent with copyright's objectives proves illusory because VIPs do not even have an opportunity to access most written works as a properly aligned copyright framework should facilitate.

Admittedly, critics are likely correct that a VIP treaty could mark a shift in copyright law. However, a certain degree of realignment is to be *welcomed* rather than shunned where realignment establishes a more optimal balance of copyright:

There are times in history when human and technological evolution require new approaches for balancing the scales of copyright protections and limitations. The Berne Appendix and the other specific exceptions were introduced for this purpose. It is once again time to focus on a just balance. WIPO and the international copyright system it administers thrive on the idea of creativity and innovation that enable people and societies to evolve and achieve. This is a time when reshaping the mold should be seen as essential to the integrity of nations and well-being of their citizens in all parts of the world.¹⁴⁴

A2K recognizes that such a shift in copyright law serves to enrich the existing framework.¹⁴⁵ Moreover, embracing such a shift through a VIP treaty—whose beneficiaries reside overwhelmingly in developing countries—would help signal WIPO's genuine commitment to meaningfully implementing the Development

information, solving the free-rider problem and aligning individual incentives with social good"). Certainly, some countries' copyright laws are primarily based upon moral rights rather than incentive-based justifications. It is perhaps less straightforward to justify a VIP treaty using utilitarian arguments for copyright systems based upon moral rights. Nonetheless, should society receive a net benefit in information and cultural exchange, it may be beneficial to sacrifice a minimal erosion of moral rights within this particular exception. Additionally, the minimal erosion of moral rights might be softened somewhat by recognition of authorial rights and other safeguards.

¹⁴⁴ Reply Comments of the Library Copyright Alliance, The Electronic Frontier Foundation, the Internet Archive, and the Chief Officers of State Library Agencies in the Matter of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities 18 (Dec. 4, 2009) [hereinafter Library Copyright Alliance et al., Reply Comment], available at <http://www.copyright.gov/docs/sccr/comments/2009/reply-2/23-gwen-hynze-and-janice-pilch.pdf>.

¹⁴⁵ See *supra* Section 3.2 and accompanying text.

Agenda and upholding its developmental obligation as a U.N. body. Such a shift does not tear away the very fabric of copyright law. Rather, it merely seeks a healthier balancing of copyright law.¹⁴⁶

5.2. *Concern that Certain VIP Treaty Terms are Overly Broad*

VIP treaty critics have asserted that terms in the VIP treaties—particularly those proposed by developing countries—are “vastly overbroad.”¹⁴⁷ The Motion Picture Association of America (“MPAA”), for instance, expressed concern that the Latin American VIP Treaty would apply “to all forms of visual impairment, not just to the blind” and therefore may cover dyslexia or other disorders.¹⁴⁸ Worse, it speculated, a broad VIP definition might “allow unauthorized duplication and distribution of copyright works—even for commercial purposes—and the circumvention of technological protection measures can be invoked by any person who is self-defined as having any form of disability.”¹⁴⁹ Seemingly brushing aside the developmental prospects of a VIP treaty, the MPAA has further objected that the Latin American proposal might even cover external causes “such as poverty or lack of access to technology.”¹⁵⁰

Admittedly, the developing countries’ treaties—especially the African treaty—utilize somewhat broad terms. Indeed, the treaties

¹⁴⁶ Indeed, the Latin American Treaty Proposal specifically maintains the desire for copyright law to incentivize the creation of useful works, just within a more balanced framework that optimizes society’s ability to benefit from this stimulated creativity. See Latin American VIP Treaty, *supra* note 69, Annex (“[T]he importance of copyright protection as an incentive for literary and artistic creation, and as a means to ensure that everyone has the opportunity to participate in the cultural life of the community, to enjoy the arts and share in scientific advancement and its benefits.”). Indeed, a similar dynamic appears within statements found in the 2011 proposal. 2011 Combined VIP Treaty, *supra* note 75, pmb., para. 3 (“Emphasizing the importance of copyright protection as an incentive for literary and artistic creation and enhancing opportunities for everyone to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).

¹⁴⁷ Fritz E. Attaway, Comments of Motion Picture Association of America 4 (Nov. 13, 2009) [hereinafter MPAA Comment], available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/fritz-attaway-mpaa.pdf>.

¹⁴⁸ *Id.* at 8–9.

¹⁴⁹ *Id.* at 9. See also AAP et al., Comment, *supra* note 137, at 5 (similarly disapproving of broad language in the definition of VIPs).

¹⁵⁰ *Id.* at 10.

utilize VIP definitions that potentially may be construed beyond certain individuals one would traditionally perceive purely as “visually impaired.”

However, the MPAA’s apparent hesitation to accommodate those in poverty overlooks a VIP treaty’s ability to enhance WIPO’s commitment to the Development Agenda. Indeed, the Development Agenda calls for WIPO’s legislative assistance to be “development-oriented . . . taking into account the priorities and the special needs of developing countries”¹⁵¹ Therefore, insofar as slightly broader treaty language would encourage development by benefitting impoverished individuals residing in developing countries, the WIPO Development Agenda would appear to lend credence to such language. Moreover, even a developed country proposal – that of the EU – embraces a broader VIP definition.¹⁵² Thus, that even traditionally guarded, developed countries would provide such a broader definition provides additional support to rendering VIP definitions at least somewhat broader. Of course, it would be undesirable to forge VIP definitions so broad as to render the treaty a means for nearly *any* individual to obtain free access to copyrighted works. Therefore, whatever definition ultimately adopted optimally should strike a balance between encouraging development and access for VIPs, while not moving so far as to provide wholesale access to those who could otherwise ordinarily and conveniently disseminate written works in traditional formats.

5.3. Belief that a VIP Copyright Treaty is Inappropriate Because It Will Not Increase VIPs’ Access to Written Works

Other critics suggest that, even if copyright barriers were removed as to VIPs, VIPs’ use of accessible written works would not increase, because external deficiencies beyond copyright law provide the root cause for the scarcity of accessible written works. For example, the MPAA argued in its Comment under the heading “Copyright is Not an Impediment to access”:

¹⁵¹ *Development Agenda Recommendations*, *supra* note 61, ¶ 13.

¹⁵² In fact, the EU’s VIP definition even includes accommodation for those with dyslexia. *See* EU VIP Treaty, *supra* note 71, art. 1(ii) (defining VIPs as those with seeing disabilities, dyslexia, or those physically unable to manipulate traditional printed works).

[T]he underlying cause of the issues purported to be addressed by the Treaty typically have nothing to do with copyright. No international instrument mandating copyright limitations and exceptions will meaningfully contribute to increased access, because the assumption that existing copyright law is an impediment to access by the visually impaired or other disabled people is wholly inaccurate. *A gap in access certainly exists, but not one that an international legal instrument could hope to fill* The focusing of attention and resources on an international instrument, at the expense of practical measures that would have a real world impact, stands to harm the interests of the visually impaired and other disabled people.¹⁵³

Similar arguments have been invoked by other lobbies, such as those of the software¹⁵⁴ and book publishing¹⁵⁵ industries.

Undoubtedly, copyright law does not provide the sole impediment to VIPs' access to written materials. Conversion costs, infrastructure issues, and a multitude of other potential factors

¹⁵³ MPAA Comment, *supra* note 147, at 3 (first emphasis added).

¹⁵⁴ The Software and Information Industry Association remarked,

Although copyright protection is a consideration affecting the ability of the blind and visually impaired from getting access to certain products and services, it is not the sole or primary factor. . . . [T]here are many considerations distinct from copyright protection that have a more substantial and direct effect on whether goods and services are made . . . accessible to the blind and visually impaired. Focusing exclusively on copyright protection as a barrier to progress in this area is a mistake. And directing that focus on an international treaty is particularly unwise.

Comments of Software & Info. Indus. Ass'n in Response to the Notice of the U.S. Copyright Office and the U.S. Patent and Trademark Office on October 13, 2009 Requesting Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons with Other Disabilities 2-3 (Nov. 13, 2009) [hereinafter SIIA Comment]. In this vein, the SIIA declared that the treaty would be "unlikely to improve greatly (or at all) the existing situation." *Id.* at 4.

¹⁵⁵ See *Visually Impaired Persons (VIPs)*, INT'L PUBLISHERS ASS'N, <http://www.internationalpublishers.org/index.php/-industry-policy/visually-impaired-persons> (last visited Apr. 11, 2011) ("Copyright exceptions, through their legal nature, do not address the key obstacles to access. The biggest obstacle to wider accessibility are [sic] the costs for re-formatting works in VIP charities. A reduction of these costs can only be reached through cooperation of rightsholders. A copyright exception is therefore not a suitable tool to achieve the shared objective.") Interestingly, the book publishing lobby calls merely for dependence upon "cooperation between publisher organisations and organisations representing VIPs," an approach that thus far has failed to provide VIPs meaningful access to accessible written works. *Id.*

likely contribute to the overall lack of availability.¹⁵⁶ However, even the software industry qualifies its abovementioned critique on this point with an admission that copyright at least *contributes* to VIPs' lack of access.¹⁵⁷ Furthermore, a study submitted before WIPO suggests that removing copyright barriers may at least mitigate VIP's access issues.¹⁵⁸ Therefore, just because other factors exacerbate VIPs' lack of access to accessible written works, it does not follow that a VIP treaty cannot play a meaningful role in mitigating the problem. Indeed, a treaty at WIPO could play an integral role in a multifaceted approach to providing VIPs wider access to accessible written works:

[C]opyright is not the only problem Any solution to the problem of accessibility must include changes in international copyright laws (legal solutions) as well as cooperation and collaboration of all interested parties (market solutions), and also continued development toward better applications and communications technology to enable accessibility (technological solutions). The matter is too large, too critical, and too complex, for just one solution. The treaty proposal leaves room for all solutions.¹⁵⁹

Hence, even though copyright law does not necessarily act as the *sole* barrier to VIPs' ability to access accessible written works, a copyright exception stands to provide a valuable starting point to a multipronged approach. An analogue to this issue can be drawn from the Access to Medicine Movement. There, advocates argued

¹⁵⁶ For example, the American Foundation for the Blind estimates that a large volume Braille printer costs up to \$80,000. *Braille Technology*, AM. FOUND. FOR BLIND, <http://www.afb.org/Section.asp?SectionID=4&TopicID=31&DocumentID=1282>. Thus, even if nonprofits could freely convert written works into accessible formats, it may be quite costly to do so regardless of copyright barriers. Moreover, there is not necessarily a sufficient market demand for publishers to produce most written works in accessible formats on the free market.

¹⁵⁷ SIAA Comment, *supra* note 154, at 2 (conceding that "copyright protection is a consideration affecting the ability of the blind and visually impaired from getting access to certain products and services").

¹⁵⁸ WIPO *Study on Copyright Limitations and Exceptions for the Visually Impaired*, *supra* note 7, at 133 ("Exceptions to copyright are never likely to deliver full accessibility to all publications of the written word for visually impaired people, but they may nevertheless be justified until much more material is published in accessible forms.").

¹⁵⁹ Library Copyright Alliance et al., Reply Comment, *supra* note 144, at 13.

that patent law restrictions prevented developing countries from obtaining AIDS medication.¹⁶⁰ While a blanket treaty analogous to a VIP treaty was never formed,¹⁶¹ a multipronged approach that included realignment of approaches to patent law led to greater access to AIDS medication in developing countries.¹⁶² While the instant VIP treaty does not provide an exact equivalent to Access to Medicine, similarly realigning copyright laws regarding VIPs in concert with other efforts may engender positive movement towards improving VIPs' access to accessible works. Hence, even if a VIP treaty does not provide the *sole* solution to VIPs' access problems, it stands to provide a *meaningful* step in the right direction worth pursuing.

5.4. Assertion that a VIP Treaty Will Disincentivize Creation of Creative Works

Some treaty opponents have argued that a VIP treaty will undermine rights holders' incentive to create and will therefore result in fewer written works. Without offering analogous empirical evidence, the MPAA has asserted this very argument: "[T]o the extent that the proposed Treaty would mandate gaping fissures in the current level of copyright productions with potentially devastating impact to create new works, society as a whole would be left with fewer works to access."¹⁶³ In less pointed terms, Microsoft has expressed similar reservations: "The reticence of authors' and publishers' [sic] to license this activity is caused in

¹⁶⁰ See Susan K. Sell, *A Comparison of A2K Movements: From Medicines to Farmers*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY*, *supra* note 2, at 391, 394-97 (describing the Access to Medicine Movement, which targeted reducing high pharmaceutical prices in developing countries by calling for patent law flexibilities); see also Kapczynski, *supra* note 2, at 37-39 (describing the Access to Medicine campaign's attempt to reduce AIDS medication prices in developing countries, which were artificially high due to pharmaceutical companies' patent protections).

¹⁶¹ Despite the lack of a comprehensive treaty on Access to Medicine, TRIPS was nonetheless amended to allow easier access to generic medications in certain cases. See Sell, *supra* note 160, at 396-97 (detailing the TRIPS amendments pertaining to generic medications).

¹⁶² See *id.*; see also Kapczynski, *supra* note 33, at 828 (noting that "perhaps the most significant measure of the success of the campaign has been the drastic fall in the price" of relevant medicine).

¹⁶³ MPAA Comment, *supra* note 147, at 3.

part by fears that it may . . . undermine the economic incentive for the creation and distribution of books."¹⁶⁴

The notion that a VIP treaty will stifle incentives seems far less likely than critics suggest. As a starting point, varying copyright exceptions for visually impaired persons already exist in at least fifty-seven countries, and no reports appear to have surfaced claiming a disincentive effect on works in such countries.¹⁶⁵

Indeed, continued existence of a viable market for written works in traditional text-based formats should maintain adequate incentive for creators to continue creating. While critics may believe that free dissemination of accessible written works will cut into the market for traditional text formats, works in accessible formats cannot fully duplicate the value and intrinsic pleasure that a typical reader derives from traditional print.¹⁶⁶ Consequently,

¹⁶⁴ Comment by Laura Ruby, Director, Accessibility Policy & Standards, Microsoft Corp. and Jule Sigall, Senior Copyright Counsel, Microsoft Corp., to Maria Pallante, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office, regarding Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities 4 (Nov. 13, 2009) [hereinafter Microsoft Comment], available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/jule-sigall-microsoft-corporation.pdf>.

¹⁶⁵ WIPO *Study on Copyright Limitations and Exceptions for the Visually Impaired*, supra note 7, § 2.1 (providing data on VIP copyright exceptions in fifty-seven countries).

¹⁶⁶ See, e.g., Tim Challies, *5 Reasons Books are Better than E-Books*, CHALLIES.COM (Aug. 17, 2010), <http://www.challies.com/articles/5-reasons-books-are-better-than-e-books> (“[A] book is unique – there is nothing else quite like it. An e-book reduces a book to just its words, it strips out any sort of tactile experience. . . . It makes a book a whole lot less than it ought to be.”); Anne Mangen, *Hypertext Fiction Reading: Haptics and Immersion*, 31 J. RES. READING 404, 406–07 (2008) (noting that digital text formats, for instance, do not as readily induce readers to fully immerse themselves in literature and obtain enjoyment from the imagination that occurs in traditional print formats); *Listening Isn't Reading – Why Braille is Still Necessary*, OPEN SALON, BIBLIO FILES BLOG, http://open.salon.com/blog/the_biblio_files/2010/02/02/listening_isnt_reading_-_why_braille_is_still_necessary (Feb 2, 2010, 11:05 PM) (“It’s undoubtedly a different experience to read a book with just ink and paper (or pixels and screen) between you and the author than it is to listen to someone’s vocalization of the sentences.”). This argument does not suppose per se that alternative forms of text-based works such as e-books do not present viable markets. Conversion to other formats such as Braille, however, may result in certain losses of authorial expression much like a translated work would. Other formats, such as audiobooks, force particular inflections, govern pace, and other modifications which may be less preferable than a reader’s own internal narrative voice and therefore may decrease the pleasure readers derive from traditional reading. See, e.g., *Why Are Books Always Better Than the Movie Versions?*, WISEGEEK, <http://www.wisegeek.com/why-are-books-always-better->

even if it were possible for non-VIPs to improperly use accessible written works made under the treaty, most non-VIPs would still likely opt to purchase a written work in a format inaccessible to VIPs.

Even more convincingly, rights holders already derive scant profit from accessible written works.¹⁶⁷ Indeed, if a vital market existed for accessible written works, their scarcity would not likely be so pronounced. Therefore, because rights holders largely draw their profits from non-accessible works, providing VIPs free access to works in formats that publishers are not drawing profits from anyways could not substantially reduce incentives to create. However, even if assuming *arguendo* that incentives were modestly reduced, a slight reduction in incentives might be welcome if it would be offset by a more significant gain in access to information.¹⁶⁸ Here, the disincentive effect on creation appears slight at best, while VIPs stand to access significantly more written works and then subsequently enrich societal discourse.

6. CONCLUSION

VIP Treaty negotiations mark the culmination of movements calling for reexamination of IP policies that have traced somewhat parallel paths. As discussions flesh out and move towards a potential final agreement, A2K, the WIPO Development Agenda, and VIP movements stand to enhance each other.¹⁶⁹ Due to VIPs' concentration in developing countries, a VIP treaty stands as at least a symbolic step towards WIPO's real commitment to development under the Development Agenda. Additionally, given

than-the-movie-versions.htm (last visited Nov. 1, 2011) (noting that when reading, "you're creating your own movie in a sense and decide the most important parts: how the characters speak, what they look like and what their surroundings are like").

¹⁶⁷ See COPY/SOUTH RESEARCH GRP., *supra* note 5, at 133 ("[C]onversion of [written works] into accessible formats does not entail any loss of revenues for copyright owners.").

¹⁶⁸ See Ruse-Khan, *supra* note 52, at 80 (noting that an optimal copyright system "does not only entail incentivizing the development and production of new knowledge capital *via* IP exclusivity, but also safeguards for access, use and dissemination of the existing building blocks of knowledge").

¹⁶⁹ In fact, quite naturally, the WIPO Development Agenda already contains significant traces of A2K. See Latif, *supra* note 53, at 115 ("Although the WIPO Development Agenda initiative was not only about A2K, A2K-related issues were clearly an important component of the proposals and ideas that the initiative was seeking to advance.").

A2K's emphasis on heightened IP balancing, providing copyright accommodations to VIPs recognizes such balancing. Likewise, A2K and the WIPO Development Agenda arm VIPs with useful normative tools for pressing forward a copyright framework that can improve their access to accessible written works. Thus, while a VIP treaty may appear to benefit only VIPs, it would move more meaningfully towards legitimizing IP movements concerned with balance in intellectual property protection.¹⁷⁰

VIPs provide a particularly suitable demographic to push forward A2K and the WIPO Development Agenda. Indeed, defending a legal system which contributes to blocking VIPs from accessing written works in accessible formats proves difficult. Hence, even staunch treaty opponents often still "strongly endorse" providing VIPs improved access to accessible written works.¹⁷¹ Therefore, because VIPs afford a rather uncontroversial starting point, a VIP treaty offers an excellent launching pad to bolster attention to A2K and the WIPO Development Agenda in other contexts. Developed countries' increasing acknowledgement of such principles throughout treaty negotiations¹⁷²—even if less direct—may signal that such a shift has already been at least preliminarily initiated.

Ultimately, language from the Latin American proposal may perhaps best capture the symbiotic relationship between a VIP treaty, A2K and the WIPO Development Agenda—"the

¹⁷⁰ Indeed, similar observations have been made regarding the Doha Declaration on TRIPS. *See id.* at 101–02 (noting that for developing countries, the Doha Declaration was a "balanced and powerful message [that] had a wider significance beyond the WTO, because it signaled the importance of implementing intellectual property protection in a manner that is supportive of public-policy objectives"). Likewise, scholars have similarly viewed the World Summit on the Information Society's ("WSIS") Geneva Declaration's acknowledgement of A2K principles as providing a significant step forward. *See id.* at 107 ("[T]he WSIS appeared as a landmark development for the emerging A2K movement, because the movement succeeded, for the first time in including A2K concerns in a major policy document that was endorsed by heads of state and governments."). Successful agreement upon a VIP treaty serves to provide yet another significant development in acknowledgment of A2K's principles, as well as meaningful implementation of the WIPO Development Agenda.

¹⁷¹ AAP et al., Comment, *supra* note 137, at 2.

¹⁷² *See, e.g.*, EU VIP Treaty, *supra* note 71, Preface, para. 1 ("[R]ecognizing the importance of accessibility to the achievement of equal opportunities in all spheres of society . . ."); *see* U.S. VIP Treaty, *supra* note 72, at 2 [pmbl., para. 4] ("[R]ecognizing the public interest in maintaining a balance between the interests of authors and users . . .").

importance of copyright protection as an incentive for literary and artistic creation, and as a means to ensure that everyone has the opportunity to participate in the cultural life of the community, to enjoy the arts and share in scientific advancement and its benefits.”¹⁷³ Importantly, it emphasizes that a VIP treaty would not endorse a complete erosion of copyright’s traditional incentive structures, and does not seek to completely strip rights holders of their full bundle of exclusion rights. To the contrary, a VIP treaty would strive to best provide all members of society an *opportunity* to access the fruits of copyright’s incentives framework. Nevertheless, past trends have proved that developed countries often successfully blunt attempts at rebalancing IP law.¹⁷⁴ VIPs, however, have offered IP movements a difficult-to-refute cause, and the latest 2011 VIP treaty proposal shows progress towards meaningful compromise between developing and developed interests. Should effective compromise continue to progress forward, successful passage of a VIP treaty will provide a meaningful step towards recognition of striking a more ideal balance in IP as championed by A2K and the WIPO Development Agenda.

¹⁷³ Latin American VIP Treaty, *supra* note 69, Annex.

¹⁷⁴ See *supra* Section 2 (providing examples of developing countries calling for international copyright law reforms and developed countries’ resistance to such reforms).