

MOVING TOWARDS A MORE INCLUSIVE COPYRIGHT REGIME FOR THE VISUALLY IMPAIRED

This article launches first into its discussion on the importance of taking into account users such as visually impaired persons (“VIPs”) in copyright laws, and also the factors that have made it all the more pertinent to resolve this issue at the international and domestic levels. It then discusses the stance taken to copyright exceptions for VIPs under international conventions and treaties, and evaluates the proposals recently put forth at the international level for compliance with obligations imposed under existing main international intellectual property instruments. Thereafter, this article proceeds with an overview of Singapore’s position and attempts to delineate the current copyright exceptions available to benefit VIPs in Singapore. It identifies the reasons for the failure of VIPs and their intermediaries in utilising existing copyright exceptions in the Singapore landscape. This article concludes by proposing that a multi-pronged approach, at a legislative as well as at a practical level, is required to improve the position of VIPs and their intermediaries under copyright laws.

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I. Introduction

1 Copyright systems allow certain exceptions and limitations to the rights of the copyright owners, that is, cases in which works claiming protection under copyright law can be used without the permission of the right-holders. Specific user groups have been identified to be the beneficiaries of such exceptions and limitations. The flexibility granted under the international regime allows national legislators to define the scope of exceptions which is necessary in light of the differing circumstances in each country. However, this flexibility is also responsible for the ambiguity of national copyright exceptions and limitations granted to the specified beneficiaries, and in many instances, such copyright exceptions and limitations can be ineffectual in respect of the purposes for which they were incorporated into copyright laws in the very first place! The backdrop of rapid technological advances and the global widespread use of the internet have pushed this question of redefining the “rights” of these specific beneficiaries against the monopoly held by right-holders into the forefront. Not surprisingly, the

issue of copyright exceptions and limitations is being considered in the agenda of the World Intellectual Property Organization (“WIPO”) Standing Committee on Copyright and Related Rights (“SCCR”) and in recent years, the SCCR’s debate has been focused mainly on three groups of beneficiaries, namely, educational institutions, libraries and archives, and disabled persons.¹ On 1 November 2010, the WIPO stakeholders’ platform set up to address the concerns and needs of copyright owners and VIPs approved the launch of a project to facilitate the access of the visually impaired to published works.² This project is the trusted intermediary global accessible resources project (“TIGAR”), under which publishers agree to collaborate to make their titles more easily available to trusted intermediaries (“TIs”), who will in turn create accessible formats for sharing amongst themselves and with specialised libraries catering to the visually impaired.³ A proposal on an international instrument on exceptions and limitations for VIPs had also been tabled for consideration at the SCCR’s 22nd session in June 2011 by a coalition of developed and developing countries, including Australia and the US.⁴

2 This article is particularly concerned with the exceptions granted to VIPs. Approximately 285 million of VIPs worldwide can stand to benefit from a copyright regime which takes into account their interests.⁵ In Singapore, based on the Annual Report of the Singapore Association of the Visually Handicapped (“SAVH”) for the financial years 2010 to 2011, there was an increase in the number of SAVH’s registered clients, from 2,284 clients for the financial years of 2001 to 2002, to 3,235 clients as of 31 March 2011.⁶ Registered clients of SAVH have to be certified by an ophthalmologist as blind or as having

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1 WIPO, *Limitations and Exceptions* <<http://www.wipo.int/copyright/en/limitations/index.html>> (accessed 19 October 2011).

2 WIPO, *Stakeholders’ Platform Launches Project to Facilitate Access by VIPs to Published Works* <http://www.wipo.int/pressroom/en/articles/2010/article_0043.html> (accessed 19 October 2011).

3 WIPO, *Stakeholders’ Platform Launches Project to Facilitate Access by VIPs to Published Works* <http://www.wipo.int/pressroom/en/articles/2010/article_0043.html> (accessed 19 October 2011).

4 WIPO, *Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities* <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=170640> (accessed 19 October 2011).

5 World Health Organization, *Visual Impairment and Blindness, Fact Sheet October 2011* <<http://www.who.int/mediacentre/factsheets/fs282/en/>> (accessed 19 October 2011).

6 SAVH, *Annual Report 2010/2011* at p 14 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

low vision.⁷ The Annual Report indicates that 34.8% of SAVH's clients are from the age group of 71 years and above. The largest percentage of SAVH's clients belongs to this age group, as compared to other age groups. Furthermore, 61.8% of SAVH's clients are aged 51 and above.⁸ These figures, read together, suggest a possible co-relation between old age and low vision in Singapore. With reference to a report prepared in 2007 by the Ministerial Committee on Ageing, it has been estimated that the number of Singaporean residents aged 65 years or older will multiply threefold by 2030, and that one out of every 5 residents will be aged 65 years or older at that time, up from one out of 12 residents in 2007.⁹ In fact, Singapore has been projected to be the fourth oldest country in the world by the very same report.¹⁰ As the number of elderly grows dramatically in the near future, the corollary is that there may be an increase in the number of VIPs in Singapore. This situation is likely to find its parallels in other developed countries, even though the majority of VIPs are currently resident in developing countries. Therefore, efforts to accommodate the interests of VIPs within copyright systems will have to be undertaken on a global scale to counter what appears to be an emerging international crisis. As accessibility is known to be a key enabler for people to have more opportunities to participate socially, culturally and economically, providing VIPs with adequate access to information is a step towards their better integration into society.

3 Part II of this article will first highlight the factors which make it all the more pertinent to take into account VIPs as users in future copyright reforms. Part III of this article will outline the stance taken in respect of exceptions for VIPs under international conventions and treaties, and moves on to evaluate the proposals put forth at WIPO, including the most recent one endorsed by Australia, the European Union ("EU") and its member states and the US, amongst others, for compliance with existing international copyright instruments. Part IV gives an overview and examines the existing exceptions available to VIPs and their intermediaries within Singapore's legal framework. Part V seeks to identify the reasons which explain the failures of exceptions in delivering maximum benefits to VIPs in the Singapore landscape. The practical experience of the SAVH, one of the two institutions assisting

7 SAVH, Who We Serve <<http://www.savh.org.sg/about.php#serve>> (accessed 19 October 2011).

8 SAVH, *Annual Report 2010/2011* at p 13 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

9 Ministry of Community Development, Youth and Sports, Ministerial Committee for Ageing: Report for 2007 dated 5 January 2008 at para 1 <<http://app1.mcys.gov.sg/Portals/0/Summary/pressroom/03-2008.pdf>> (accessed 19 October 2011).

10 Ministry of Community Development, Youth and Sports, Ministerial Committee for Ageing: Report for 2007 dated 5 January 2008 at para 1 <<http://app1.mcys.gov.sg/Portals/0/Summary/pressroom/03-2008.pdf>> (accessed 19 October 2011).

VIPs in Singapore, is considered.¹¹ It is to be noted that SAVH is the main organisation for VIPs in Singapore, by virtue of the size of its registered clientele. It should further be noted that this article will hence only partake in a minimal discussion of the other institution assisting VIPs, being the Singapore School for the Visually Handicapped, now known as the Lighthouse School (“School”).¹² Also, while the availability of audio and braille versions of copyright material is considered in Part V’s discussion, that of large-print versions will not be similarly discussed for the following reasons. Firstly, what can qualify as a large-print book for use by a VIP is unclear as there is a wide range to this definition.¹³ Moreover, a partially-sighted VIP who can read a large-print book can alternatively read a commercially available book in normal print with the help of a magnifier.¹⁴ Finally, Part VI concludes by stating that a hybrid of legislative and practical solutions is likely to be required to improve the access of VIPs to copyright works.

II. Factors which aggravate the problem of inadequate access by VIPs to copyright works

A. *Overriding contracts*

4 Without additional specific statutory provisions, generally speaking, it is possible for a potential user of a copyright work to be asked to agree to a binding contractual term with the right-holder which would deny the same user the opportunity to undertake what is

11 See s 7(1) of the Singapore Copyright Act (Cap 63, 2006 Rev Ed) for the definition of “institutions assisting handicapped readers”. See also reg 4 of the Copyright Regulations (Cap 63, Rg 4, 2009 Rev Ed) for the listing of the SAVH and the Singapore School for the Visually Handicapped as such institutions.

12 When the School was contacted on 11 April 2012, the School had only 27 students with visual impairment, and also enrolled students with other disabilities. The School has an estimated 716 storybooks, 83 audio storybooks and 282 braille storybooks, meant mainly for its enrolled students. As an educational institution, the School also has the benefit of ss 52 and 52A of the Copyright Act (Cap 63, 2006 Rev Ed) and the general fair dealing defence for the purposes of research and study. This is outside the purview of this article but can be considered for subsequent discussions.

13 Some large-print books have larger than normal fonts, but may not be made specifically for use by a VIP.

14 Based on SAVH’s response dated 2 February 2010 to enquiries made via e-mail. A magnifier is a commonly purchased assistive device which is relatively affordable in comparison with other devices. At the time of enquiry, both SAVH and the School could not furnish the numbers of large-print books in their collections. The National Library Board, in its response dated 13 February 2012 to enquiries made via its Reference Point service, estimated a total of 2,000 titles (10,000 books) with fonts larger than the normal font in its collection.

already permitted by an exception.¹⁵ It has become common in the digital age, with the use of digital rights management (“DRM”),¹⁶ to allow users to access works available online only if they agree to comply with specified contractual terms. This can affect VIPs and their intermediaries who rely on assistive technological devices to convert electronic copies into accessible formats, and who will want to enjoy the exceptions without having contractual terms imposed upon them. It is noted that with the exception of countries such as Germany, the UK and Portugal, the relationship between overriding contracts and exceptions in a majority of countries remains unclear, as it has not been expressly addressed in their copyright legislation.¹⁷ In Germany, contracts are void if they have the effect of overriding exceptions; by contrast, in the UK, right-holders are allowed to contract their way out of exceptions.¹⁸ Although this is presently the case in the UK, the view of the UK government that restrictions removed by copyright exceptions should not be re-imposed by contractual terms¹⁹ suggests that UK copyright legislation, taking into account the need to balance the rights of users against that of right-holders, will soon take a different turn.²⁰ The danger to exceptions posed by overriding contracts gains special significance when one considers the prevalence of non-negotiable mass-market licences in the digital environment today. In the US, legislation

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- 15 Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at para 2.11 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).
 - 16 DRM refers to the *entire* panoply of tools used to control access to and use of digital content. See Charles R McManis, “Mass-Market Licensing and Digital-Rights Management: Privatizing Access to Culture and Information in the New Digital Age?” (2009) 1 Tech Inn & Com L Rev 1 at p 24.
 - 17 Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at para 2.11 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).
 - 18 Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at para 2.11 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).
 - 19 HM Government, “The Government’s Response to the Hargreaves Review of Intellectual Property and Growth” at p 8 <<http://www.ipo.gov.uk/ipresponse-full.pdf>> (accessed 11 April 2012). See also Ian Hargreaves, “Digital Opportunity – A Review of Intellectual Property and Growth” (May 2011) at p 51 <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>> (accessed 11 April 2012).
 - 20 The UK government intends to explore expanding copyright exceptions to the maximum degree that is possible without undermining incentives to creators, and to ensure that copyright does not over-regulate activities with social benefits. One of the guiding principles of this approach is that it should be made impossible to restrict the use of an exception by way of a contract. See HM Government, “Consultation on Copyright” at paras 7.10–7.16 <<http://www.ipo.gov.uk/consult-2011-copyright.pdf>> (accessed 12 April 2012). See also Andrew Gowers, “Gowers Review of Intellectual Property” at para E.9 <<http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp>> (accessed 12 April 2012), which calls for a more flexible intellectual property rights system so that consumers can use material in ways that do not damage right-holders’ interests.

such as the Uniform Computer Information Transactions Act has affirmed the validity of such licences,²¹ and US courts have upheld mass-market “shrink-wrap” licences. In one case, the particular US court went so far as to state that the overriding contract stands strong despite no copy-right having existed in the first place.²² Such an extreme decision is visibly bad news for VIPs and their intermediaries, as they can be denied access even to works which fall outside the boundaries of copyright protection. The overall thrust has been said to “cut down any exception which could be said to depend on the previous inability in practice to collect a fee for it”.²³ Demonstrably, rapid technological advances have resulted in more significant inroads being made into the interests of VIPs under copyright laws. This is because the problems posed by overriding contracts are magnified as traditional hardcopy copyright works are now also readily available in an online electronic database. As such, more opportunities are created for binding contracts to be imposed by right-holders on end users such as VIPs, even where the purported uses are permitted by existing exceptions.

B. *Emergence of technological protection measures and anti-circumvention regulations*

5 As is the case with contracts, technological progress has also led to the ubiquitous use of technological measures by right-holders in order to control access to and use of digital content. The extra layer of protection via technological protection measures (“TPMs”) available to right-holders, coupled with the ineffective protection of exceptions, further upsets the balance of interests between right-holders and end users, to the disadvantage of user groups such as VIPs. In general, users are not allowed to circumvent TPMs even if these TPMs do not respect exceptions, and right-holders are not bound to design TPMs that respect exceptions. The European Copyright Directive 2001/29 (“EUCD”)²⁴ sought to resolve this relationship between exceptions and TPMs by coming up with a mandatory list of exceptions with which TPMs have to comply. Art 6(4) of the EUCD provides that member states shall take “appropriate measures”, in the absence of “voluntary measures” undertaken by right-holders, to grant beneficiaries access to exceptions. Despite the noble intentions to assist beneficiaries with obtaining access to copyright works, it is observed that right-holders typically ignore the need for such measures altogether due to the lack of specifications on

21 Christina J Angelopoulos, “Modern Intellectual Property Legislation: Warm for Reform” (2008) 19(2) Ent L Rev 35 at 38.

22 *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir, 1996).

23 See W Cornish, *Intellectual Property – Omnipresent, Distracting, Irrelevant?* (Oxford University Press, 2004) at p 62.

24 Marcella Favale, “Fine-Tuning Copyright Law to Strike a Balance between the Rights of Owners and Users” (2008) 33(5) Ent L Rev 687 at 688.

the conduct required from them.²⁵ This complacency of right-holders is further amplified where there is no remedy against them in their failure to introduce voluntary measures, which is the case in more than one-third of the EU states. Even if remedies are available for users, the high costs of seeking judgments from courts or arbiters²⁶ will put users off, hence obliterating any minute incentive right-holders have to introduce voluntary measures to allow beneficiaries to avail themselves of exceptions. Moreover, where right-holders are obliged to implement TPMs that automatically respect exceptions, as is the case in Estonia and Lithuania,²⁷ there will be several limitations to this seemingly alluring proposition. This is because it is rare,²⁸ if not impossible, for a DRM system, which includes TPMs as a subset, to be designed to respect all exceptions on a technical level, as the complexity of the law defies any clear technical definition that could be used in the real world DRM system.²⁹ The emergence of TPMs in the digital age, and the problems posed by anti-circumvention regulations which do not make allowance for exceptions from either a legal or a practical perspective, pose a further hurdle to VIPs in their quest for access to information.

C. *The movement of accessible copies across borders*

6 The World Health Organization has estimated that 90% of the world's VIPs live in developing countries.³⁰ Developed countries, however, have in place a more sophisticated range of exceptions for VIPs and their intermediaries than in developing countries. This disparity may result from the view of developing countries of the implementation of exceptions in their domestic copyright legislation, as compared to the rights of right-holders, as *optional*, which may in turn be due to the lack of resource on the part of users, including the VIPs, in lobbying for their

25 Marcella Favale, "Fine-Tuning Copyright Law to Strike a Balance between the Rights of Owners and Users" (2008) 33(5) Ent L Rev 687 at 695.

26 On the other hand, it was suggested that turning to copyright tribunals can be less expensive than turning to courts and arbiters since the users may not require legal assistance, however, copyright tribunals can be slow in responding, see Marcella Favale, "Fine-Tuning Copyright Law to Strike a Balance between the Rights of Owners and Users" (2008) 33(5) Ent L Rev 687 at 696.

27 Marcella Favale, "Fine-Tuning Copyright Law to Strike a Balance between the Rights of Owners and Users" (2008) 33(5) Ent L Rev 687 at 707.

28 This has been somewhat achieved in the US under the Audio Home Recording Act 1992. See Stefan Bechtold, "Digital Rights Management in the United States and Europe" (2004) 52 *American Journal of Comparative Law* 323 at 370.

29 Stefan Bechtold, "Digital Rights Management in the United States and Europe" (2004) 52 *American Journal of Comparative Law* 323 at 369.

30 World Health Organization, Visual Impairment and Blindness, Fact Sheet October 2011 <<http://www.who.int/mediacentre/factsheets/fs282/en/>> (accessed 19 October 2011).

rights, as compared to the better resourced right-holders.³¹ Henceforth, users, including VIPs, generally exert lower levels of influence on domestic copyright legislation in developing countries. To further compound this problem, most developing countries also lack the technological infrastructure to facilitate VIPs' access to information. As a result, the majority of VIPs in developing countries will not be able to obtain accessible copies of copyright works ordinarily. Only if accessible copies manufactured in developed countries with the legal and technological capabilities are transferred across borders to developing countries, can the majority of VIPs resident in developing countries truly benefit. Unfortunately, the principle of territoriality which applies to copyright legislation stands in the way of this cross-border movement of accessible copies. In general, intellectual property rights and exceptions granted in a country are only recognised within the territory of the country.³² From another angle, this situation is alleviated by the fact there is currently no international multilateral instrument expressly prohibiting parallel imports of copyright works, which therefore make parallel importations possible. Indeed, Art 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 ("TRIPS Agreement") leaves the doctrine of the exhaustion of intellectual property rights to each country's interpretation. Countries are therefore free to amend their copyright legislation to facilitate parallel importation where the end users are VIPs. Nevertheless and oftentimes, due to the oversight or lack of clarity in domestic copyright legislation in this area, when activities such as the manufacture, exportation, importation and distribution of accessible copies are undertaken across jurisdictions, there will likely be a need to consider the laws of both jurisdictions. The complexities of interpreting the copyright laws of two jurisdictions and the dearth of case law in this aspect create many uncertainties in determining which activities are lawful and which are not.³³ These complexities and uncertainties further disincentivises VIPs and their intermediaries from procuring accessible copies manufactured under exceptions overseas. In light of the above, it is crucial for international and domestic copyright reforms to be effected to clarify what constitutes permitted acts by VIPs and their intermediaries, in order to lend a helping hand to VIPs worldwide, before their interests as end users get eroded any further.

31 Judith Sullivan, "Study on Copyright Limitations and Exceptions for the Visually Impaired" WIPO (20 February 2007) at para 6.5.4 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

32 Judith Sullivan, "Study on Copyright Limitations and Exceptions for the Visually Impaired" WIPO (20 February 2007) at para 3.1.6 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

33 See Judith Sullivan, "Study on Copyright Limitations and Exceptions for the Visually Impaired" WIPO (20 February 2007) at para 3.1 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

III. Approach towards copyright exceptions for VIPs and their intermediaries in the international arena

7 For a long time, there was no provision in international intellectual property treaties and conventions which specifically provided for exceptions which benefitted VIPs, or disabled people more generally.³⁴ Based on the interpretation in a study conducted on exceptions for VIPs, there is a possibility of exceptions to rights for the benefit of VIPs under main international copyright instruments such as the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), the TRIPS Agreement and the WIPO Copyright Treaty (“WCT”), for the restricted acts of reproduction, distribution, broadcasting by wireless means, other modes of communication to the public by electronic transmission and public performance.³⁵ However, the possibility of exceptions for VIPs was less clear for the restricted act of adaptation.³⁶ It is difficult to determine what exactly is permitted under these international instruments and if so permitted, the conditions that such exceptions have to comply with. Broadly speaking, as the exceptions to the abovementioned rights are not expressly prohibited under the main intellectual property conventions, in principle, exceptions for the benefit of VIPs are *possible* with respect to such rights. Henceforth, subject to conditions, it appears that countries can take into account the needs of VIPs when drafting their copyright legislation.

8 Furthermore, the scope of copyright protection can be constrained by other types of laws which emulate the role of exceptions by ensuring the balance between property and society. Such laws include human rights laws³⁷ which can support the cause for exceptions benefiting VIPs. Therefore, to have a complete picture of the international copyright legal framework, it is also necessary to discuss the international instruments that do not purport to deal specifically with intellectual property rights. It had been argued that international

34 See Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at para 1.1 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

35 For a more detailed analysis of the possibility of exceptions granted to VIPs in relation to restricted acts under existing international conventions and treaties, see Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at ch 1 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

36 Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at ch 1 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

37 Uma Suthersanen, “Some Initial Thoughts on Copyright, Human Rights and Market Freedom” in *Emerging Issues in Intellectual Property, Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith* (Guido Westkamp ed) (Edward Elgar, 2007) at p 52.

copyright law should be interpreted to emphasise that copyright is a fundamental human right and should co-exist with other fundamental freedoms such as the right to access and share scientific and cultural benefits.³⁸ The Universal Declaration on Human Rights (“UDHR”) proclaimed by the General Assembly of the United Nations (“UN”) lends support to this co-existence. Whilst Art 27(1) of the UDHR articulates the right of every person to participate, enjoy and share in the cultural life of the community, the arts and the benefits of scientific advancements, Art 27(2) prescribes rights for “moral and material interests resulting from any scientific, literary or artistic production”. Under Art 19 of the UDHR, the right to freedom of opinion and expression also expressly includes the right to receive information and ideas through *any* media and regardless of frontiers. Similarly, Arts 7 and 8 of the TRIPS Agreement read together expressly recognises, as the core objectives and principles behind the protection of intellectual property, the transfer of technology to the *mutual* advantage of producers and users in a manner conducive to social and economic welfare, and the balance of rights against other societal interests, including public interest. This demonstrates that copyright is recognised as being part of the human rights regime under the UDHR. The same can be said *vice versa* about human rights being recognised as part of the intellectual property rules regime under the TRIPS Agreement. As the UDHR is not legally binding, the International Covenant on Economic, Social and Cultural Rights (“Covenant”) which entered into force on 3 January 1976 is seen to formalise some of the principles stated in the UDHR.³⁹ It is further noted that r 5(b) of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (“Standard Rules”) adopted by the UN Assembly in 1993 addresses this point on the accessibility of disabled persons to the physical environment, information and communication, and also calls for states to develop strategies to make information accessible to VIPs by the use of braille, large print and other appropriate technologies to provide access to written information. Although the Standard Rules are not legally binding, they represent a strong political and moral commitment on states to equalise opportunities available for disabled persons.⁴⁰ Another relevant international instrument is the Convention on the Rights of Persons with Disabilities (“CRPD”) and its Optional Protocol, which entered into force on 3 May 2008. One of its guiding principles is to recognise the importance of accessibility for the disabled and to enable

38 Uma Suthersanen, “Some Initial Thoughts on Copyright, Human Rights and Market Freedom” in *Emerging Issues in Intellectual Property, Trade, Technology and Market Freedom: Essays in Honour of Herchel Smith* (Guido Westkamp ed) (Edward Elgar, 2007) at p 53.

39 For instance, Art 15 of the Covenant is based on Art 27 of the UDHR.

40 UN Enable, The Standard Rules on the Equalization of Opportunities for Persons with Disabilities <<http://www.un.org/esa/socdev/enable/dissre00.htm>> (accessed 30 October 2011).

disabled persons to enjoy all human rights.⁴¹ Article 9(2) calls for member states to promote access for disabled persons to new information and technologies, as well as to promote the development and distribution of accessible information technologies at an early stage, so that these technologies become accessible at minimum cost subsequently.⁴² Art 21 also calls for member states to ensure that information accessible to the general public is provided to persons with disabilities in accessible formats and appropriate technologies without additional cost, so as to ensure that such persons can exercise their rights to the freedom to receive information on an equal basis with others, through suitable modes of communication.⁴³ Last but not least, Art 30(3) calls for member states to take steps to ensure that domestic intellectual property laws do not constitute an unreasonable or discriminatory barrier to access by the disabled to cultural materials, and is significant in that it delivers in the clearest way to date a requirement for a balance between the rights of copyright owners and the access needs of the disabled, including VIPs, when drafting copyright legislation. Notably, Art 30(3), which is long overdue in the area of international intellectual property law, calls for steps to be taken *in accordance with international law* but does not purport to create new exceptions for VIPs. By virtue of Art 30(3), taking into account the needs of VIPs is no longer optional, it is *essential*, when attempting to strike a balance between VIPs and right-holders.⁴⁴

9 At this stage, this article will explore in more detail, how international obligations owed under existing multilateral intellectual property instruments can have an impact on national laws in the latter's creation of more exceptions or the expansion of existing exceptions to benefit VIPs. For this article's purposes, the main international copyright instruments to consider are the Berne Convention and the TRIPS Agreement, unless otherwise provided. This is because the WCT is not intended to extend or reduce the applicability of permissible exceptions under the Berne Convention. Instead, all the WCT does is to allow member states to extend appropriately the same exceptions in their domestic laws which are permitted under the Berne Convention into the digital environment, and to devise new exceptions suited for the digital environment.⁴⁵ It is noted that the combined effect of the Berne

41 See para v of the Preamble of the Convention on the Rights of Persons with Disabilities.

42 See Arts 9(2g) and 9(2h) of the Convention on the Rights of Persons with Disabilities.

43 See Art 21(a) of the Convention on the Rights of Persons with Disabilities.

44 Judith Sullivan, "Study on Copyright Limitations and Exceptions for the Visually Impaired" WIPO (20 February 2007) at para 6.4.2 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

45 See the Agreed Statement concerning Art 10 of the WIPO Copyright Treaty.

Convention and the TRIPS Agreement⁴⁶ is that any exception granted by a country who is a party to both the Berne Convention and the TRIPS Agreement is required to be consistent with the exceptions provided in the Berne Convention, in order not to derogate from the Berne Convention. This position is also unequivocally stated under Art 2(2) of the TRIPS Agreement.⁴⁷

A. *The three-step test*

10 The three-step test in international copyright law restricts the ability of states to introduce and implement exceptions. Under its well-known terms, exceptions are only permitted:

- (a) in certain special cases;
- (b) where they do not conflict with a normal exploitation of the work; and
- (c) do not unreasonably prejudice the legitimate interests of the author⁴⁸ (or right holder).⁴⁹

11 If one takes the broad view of the World Trade Organization (“WTO”) Panel decision in the Fairness in Music Licensing case,⁵⁰ Art 13 of the TRIPS Agreement will be the standard employed to determine the appropriateness of exceptions to exclusive rights under both the Berne Convention and the TRIPS Agreement. It follows that exceptions are permitted so long as they meet the three-step test under Art 13 of the TRIPS Agreement. The same WTO Panel decision has been regarded as endorsing the restrictive interpretation of the three-step test, for the following reasons. Firstly, the three steps are cumulative requirements, such that failure to surmount any step will violate the test. Secondly, “certain special cases” under the first prong of the test permits only exceptions that are clearly defined and narrow in scope. Thirdly, exceptions will “conflict with a normal exploitation of the work” so long as the uses compete with any potential, not just actual, commercial gain that right-holders can normally extract from their works.⁵¹ The second

46 See Art 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

47 See also Sam Ricketson, “WIPO Study on Limitations and Exceptions of Copyright and Related Materials in the Digital Environment” (5 April 2003) WIPO at p 48 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf> (accessed 27 October 2011).

48 See Art 9(2) of the Berne Convention and Art 10(2) of the WIPO Copyright Treaty.

49 See Art 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

50 WTO Panel, *Report on Fairness in Music Licensing* (15 June 2000) WT/DS/160/R.

51 Nic Garnett, “Automated Rights Management Systems and Copyright Limitations and Exceptions” (27 April 2006) WIPO <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf> (accessed 31 October 2011).

reason is not likely to pose a problem as exceptions benefiting only VIPs and their intermediaries can be said to be sufficiently narrow in scope. However, the first and third reasons are potentially problematic to VIPs and their intermediaries. For instance, an increased risk of piracy in the digital environment and the corresponding potential loss of income have been considered to impair the normal exploitation of a work and as such, these relevant activities will fall outside the scope of a permissible exception.⁵² It follows that the creation of exceptions to benefit VIPs and their intermediaries may be curtailed, due to the ease of violation of the second step of the test. The proliferation of electronic copies, though known to facilitate the making of accessible copies for VIPs, can arguably be a mode of exploitation that can result in potential revenue loss. The focus on *potential*, not just *actual* loss is such that the second step can assume undesirable “show-stopping” status⁵³ if it is interpreted too stringently. As the prohibition operates upon *any* conflict with the “normal exploitation of a work”, this will preclude almost every intervention into a right-holder’s market.⁵⁴ In that case, it may be difficult to justify the creation of new exceptions or the expansion of current exceptions for VIPs and their intermediaries. However, it should be noted that, though the Panel considers, in its test for “normal exploitation”, likely and plausible future forms of exploitation which could acquire “considerable economic or practical importance”⁵⁵ in addition to current forms, the Panel did cautiously characterise this “test” as *only* “one way of measuring” the normalcy of exploitation.⁵⁶ Arguably, the Panel did not intend for the second step to have “show-stopping” status, as it has emphasised that not every commercial use of a copyright work will conflict with a normal exploitation. Competition with the ways right-holders *normally extract economic value* from their copyright works and the consequence of deprivation of right-holders to *significant* commercial gains are required before the second step can preclude a specific exception.⁵⁷ The Panel in this decision held that the home-style exception did not conflict with normal exploitation because it was of “little economic or practical importance”, as it covered only dramatic musical works and benefited

52 Mulholland Drive, French Supreme Court, 28 February 2006 (2006) 37 IIC 760.

53 Jonathan Griffiths, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions” (2009) 4 *Intellectual Property Quarterly* 428 at 441.

54 Jonathan Griffiths, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions” (2009) 4 *Intellectual Property Quarterly* 428 at 441.

55 WTO Panel, *Report on Fairness in Music Licensing* (15 June 2000) WT/DS/160/R.

56 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 7.

57 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 7.

only a meager percentage of establishments.⁵⁸ Therefore, the Panel decision, if considered in its entirety, will not exclude exceptions benefiting VIPs if such exceptions are seen as being available to a very small percentage of users and as not excluding right-holders from any significant source of income.

12 Alternatively, a more liberal interpretation of the test⁵⁹ will not allow the second step to predominate the entire test but will instead pave the way for the third step to take a more significant role in securing the balance between right-holders and VIPs. The potential loss of a market does not automatically preclude the application of an exception as the three steps are not strictly cumulative, and the statutory licence is employed as a device to effect a compromise between the competing interests.⁶⁰ If “unreasonable prejudice is caused” to the copyright owner, remuneration may be able to counterbalance and render this level of prejudice reasonable.⁶¹ With a liberal interpretation of the test, the uses of VIPs and their intermediaries are more likely to fall within permissible exceptions.

13 It was, however, argued that the three-step test, whether interpreted restrictively or liberally, currently has no settled meaning and is fundamentally unsuited to provide an analytical framework for resolving disputes concerning the scope of exceptions.⁶² The first step of the three-step test is relatively straightforward. However, the second and third steps of the test in respect of “normal exploitation” and “reasonableness” of prejudice caused are subject to interpretative uncertainties for the following reasons. Ricketson has argued that there is no conflict with “normal exploitation” where there is no realistic possibility that the right-holder will be able to enforce his rights, either by obtaining a fee through free negotiation or by directly refusing permission.⁶³ Ricketson has also commented that what constitutes

58 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 7.

59 See *ProLitteris v Aargauer Zeitung AG* (2008) 39 IIC 990.

60 Jonathan Griffiths, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions” (2009) 4 *Intellectual Property Quarterly* 428 at 440.

61 See Comment submitted by Daniel Gervais, Vanderbilt University Law School, in response to the Copyright Office Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities, at p 7 <<http://www.copyright.gov/docs/sccr/comments/2009/comments-2/daniel-gervais-vanderbilt-university-law-school.pdf>> (accessed 31 October 2011).

62 Jonathan Griffiths, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions” (2009) 4 *Intellectual Property Quarterly* 428 at 430.

63 Sam Ricketson, “International Conventions and Treaties” in *The Boundaries of Copyright: Its Proper Limitations and Exceptions* (Libby Baulch, Michael Green & Mary Wyburn eds) (Australian Copyright Council, 1999) at pp 10–11.

“normal exploitation” of a work can and will change with technological developments.⁶⁴ Control of particular uses which once attract disproportionately high transaction costs may, with technological advances, attract more reasonable costs instead through the mechanism of effective licensing.⁶⁵ In such instances, the same uses previously exempted will now be said to conflict with normal exploitation. Furthermore, there is a circular logic underlying the second step, as a right-holder will only *normally* exploit a work only where he is certain of his legal rights.⁶⁶ Exempted uses will fall outside the scope of normal exploitation, and it follows that an expansion of an exemption will shrink the “normal market”.⁶⁷ The Panel’s decision which mentions assessing any potential forms of exploitation for conflict with normal exploitation, in terms of subsequent acquisition of tangible practical importance, is arguably more of a directive for anticipating what the empirical situation will be, rather than a description of what the relevant right-holder’s markets *should* cover.⁶⁸ It is, therefore, submitted that what constitutes “normal exploitation” is not static but is rather always changing, in tandem with legal, technological and business realities. Last but not least, in respect of the third step, the Panel acknowledged that some level of prejudice to the right-holder’s interests is permissible, but where there is prejudice of an “unreasonable” level such that there is, or will be, an unreasonable loss of income to the right-holder, the conciliatory role of the third step comes in, as compensation can bring the prejudice back to tolerable or “reasonable” levels. Such compensation can come in the form of a compulsory licence.⁶⁹ It is to be noted that a compulsory licence does not necessarily follow or result in a permissible exception. For instance, exceptions that cause little prejudice will not need this compromise measure in the form of a compulsory licence. Furthermore, in a free market where licensing can be readily negotiated, price fixing via compulsory licences, without any adequate non-economic justification, will arguably violate the second step of the test, as excepting such uses will conflict with normal

64 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 13.

65 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 13.

66 Paul Goldstein, *International Copyright: Principles, Law and Practice* (Oxford University Press, 2001) at para 5.5.

67 Paul Goldstein, *International Copyright: Principles, Law and Practice* (Oxford University Press, 2001) at para 5.5.

68 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 14.

69 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 14.

exploitation. Henceforth, the above purported uses will not cross the threshold of the three-step test.⁷⁰ This view is consistent with the Panel's restrictive interpretation of the three-step test, that is, all the steps in the test are cumulative and will require to be satisfied. In respect of the third step, in addition, it has been suggested that a balancing act is required between the countervailing legitimacy of end users, as against the "legitimate interests" of right-holders. Where the right-holders' interests greatly outweigh that of end users, the exception should be prohibited; where the interests of both sides are somewhat balanced, a compulsory licence may be imposed so that the exception can cross the threshold of the third step; and where the end users' interests outweigh that of the right-holders, there is no need for compensation to be awarded to right-holders and an outright exemption should be given.⁷¹ Clearly, attempts at balancing conflicting interests can be infamously imprecise and whether prejudice is of a "reasonable" level may be ultimately appreciated only with reference to other values.⁷² In light of the aforesaid, it is submitted that one should acknowledge that application of the three-step test as clarified by the Panel is plagued with internal contradictions and may likely give rise to unpredictable outcomes. Caution should be exercised against rigidly applying the restrictive interpretation endorsed by the Panel. To conclude on this point, one could choose to adopt the Panel's criteria as a general baseline or a guiding post, but should still attempt to incorporate some amount of flexibility⁷³ in interpreting the test as the Panel decision is not an authoritative precedent.⁷⁴ In support of this proposition is the fact that Panel decisions are not intended to be binding on any parties other than those in the particular dispute, although adopted Panel reports create

70 Jane C Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (January 2001) *Revue Internationale du Droit d'Auteur* 1 at 15.

71 Jane C Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (January 2001) *Revue Internationale du Droit d'Auteur* 1 at 15.

72 Jane C Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions" (January 2001) *Revue Internationale du Droit d'Auteur* 1 at 16.

73 See Max-Planck Institute of Intellectual Property, "Competition and Tax Law – A Balanced Interpretation of the 'Three-Step Test' in Copyright Law" at <http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf> (accessed 16 April 2012), which supports a balanced and more flexible interpretation of the three-step test, in a manner which respects the legitimate interests of third parties.

74 WTO, "WTO Analytical Index – Guide to WTO Law and Practice" at p 65 <http://books.google.com.au/books?id=nDkO4YubaxwC&pg=PA65&lpg=PA65&dq=wto+panel+reports+binding+or+just+legitimate+expectation&source=bl&ots=I5bvZ1Kj5o&sig=wdjrmDGYLGzAxB07UZA6cBs0GvA&hl=en&ei=5iyFTKHafCO3cO-I5dAL&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCsQ6AEwAw#v=onepage&q&f=false> (accessed 31 October 2011).

legitimate expectations between WTO members and are considered in subsequent Panel decisions.⁷⁵

B. *De minimis exceptions doctrine*

14 On the other hand, if one rejects the broader view described earlier, and instead takes a stricter view of the relationship between the Berne Convention and the TRIPS Agreement, the three-step test arguably applies only to new rights introduced under the TRIPS Agreement, and to the rights of reproduction, quotation and news reporting under the Berne Convention.⁷⁶ Other than the aforesaid, other rights can only be departed from if exceptions are based on existing exceptions applicable under the Berne Convention.⁷⁷ Whilst exceptions created to broadcasting and recording rights must not be prejudicial to the rights of the authors to receive equitable remuneration,⁷⁸ exceptions to translation, public performance, recitation, and adaptation rights⁷⁹ under the Berne Convention are said to have to adhere to the *de minimis* exceptions doctrine, that is, such exceptions to these rights have to be of *de minimis* character. An earlier WIPO study has indicated that it is “possible to imagine exceptions that are far from *de minimis* but that still meet the requirements of the three-step test”.⁸⁰ Therefore, with respect particularly to translation and adaptation rights, when it comes to the *translation into braille* formats and *adaptation into other accessible formats*, respectively, a higher threshold than the three-step test is possibly the relevant standard to be adopted in determining the appropriateness of exceptions. Taking this restrictive view of the relationship between the Berne Convention and the TRIPS Agreement creates further impediments to potential users who are VIPs and intermediaries. It is unlikely that VIPs and their intermediaries can qualify for the *de minimis* defence against infringement, in view of the fact that the intention of such uses by VIPs and their intermediaries is to allow VIPs to access the copyright materials on an equal basis as members of the public with no visual impairment. Therefore, such uses are not considered trivial and will not be excused by this form of

75 See n 74 above.

76 Arts 9(2), 10 and 10bis of the Berne Convention. See Sam Ricketson, “International Conventions and Treaties” in *The Boundaries of Copyright, its Proper Limitations and Exceptions* (Libby Baulch, Michael Green & Mary Wyburn eds) (Australian Copyright Council, 1999) at pp 10–11.

77 Coree Thompson, “Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere” (2006) 23 *Arizona Journal of International & Comparative Law* 787 at 787.

78 Arts 11bis(2) and 13(1) of the Berne Convention.

79 Arts 8, 11, 11ter, 12 and 14 of the Berne Convention.

80 Jane C Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (January 2001) *Revue Internationale du Droit d’Auteur* 1 at 13.

defence. Arguably, proponents who hold this stricter view but yet wish to see inroads into these *almost* impenetrable rights of translation and adaptation can argue that translation of a literary work is a species of adaptation,⁸¹ and further that adaptation which occurs when manufacturing accessible copies for VIPs is a species of reproduction.⁸² Going by this argument, the exceptions permissible are subject to the lower threshold imposed by the three-step test, instead of the *de minimis* doctrine. However, it should be noted that, ultimately, there is no clarity as to whether this view is accepted.

C. *Recent proposals and their compliance with main multilateral intellectual property instruments*

15 Recently, in June 2011, at the 22nd session of the WIPO SCCR, a proposal on an international instrument on limitations and exceptions for persons with print disabilities (“Proposal”) was presented by a group of countries including, amongst others, developing nations such as Argentina, Brazil and Mexico, as well as developed nations such as Australia and the US.⁸³ In the Preamble of the Proposal, the principles of equal access and non-discrimination proclaimed in the CRPD are reiterated. The Proposal recognises that many states implement exceptions in their copyright legislation to benefit VIPs, yet there is on the ground a continuing shortage of works in accessible formats. It also acknowledges that the territorial nature of copyright legislation creates uncertainty in the legality of acts undertaken across borders. This uncertainty can undermine the development and use of technologies and services which can potentially improve the lives of VIPs,⁸⁴ possibly by alleviating the accessibility problems faced by them. The Proposal aims to provide a minimum standard for international copyright laws in order to ensure equal access to information, as well as to keep accessible works affordable, for all VIPs. Henceforth, the Proposal can, like its predecessor, the draft treaty titled “WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons” (“WBU Draft Treaty”) put forth by the World Blind Union in May 2009,⁸⁵ be described as imposing a “ceiling” due to its introduction

81 See, for example, the definition of “adaptation” in the Singapore Copyright Act (Cap 63, 2006 Rev Ed).

82 See Judith Sullivan, “Study on Copyright Limitations and Exceptions for the Visually Impaired” WIPO (20 February 2007) at para 1.2.2 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

83 WIPO, *Proposal on an international instrument on limitations and exceptions for persons with print disabilities* <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=170957> (accessed 2 November 2011).

84 See the Preamble of the Proposal.

85 WIPO, *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union* <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf> (accessed 9 November 2011).

of minimum quasi rights. The introduced exemptions introduce a mandatory maximum standard of copyright protection,⁸⁶ by obligating exemptions from protected copyright material and hence limiting the scope of copyright protection. While Art G of the Proposal leaves it to member states to address the relationship between contract law and exceptions for VIPs, Art F of the Proposal attempts to deal with the tension between TPMs and exceptions for VIPs by calling on member states to ensure that VIPs have the *means* to enjoy the exception under Art C of the Proposal where TPMs have been applied to a copyright work. The same Art F goes on further to state affirmatively that member states should take *suitable measures* to ensure that VIPs, being the intended beneficiaries of the exception under Art C, have the means of benefiting from the exception when TPMs have been applied. This call on member states to take appropriate measures is qualified by the following criteria in the same Art F: primarily, that right-holders have failed to take voluntary measures; and secondarily, such measures sought to be implemented by member states must only be to the extent that a copy of the relevant copyright work in an accessible format is not available via intermediaries assisting VIPs, or commercially at a reasonable price. It is submitted that this Art F appears to contradict Art 11 of the WCT, which stipulates that member states should provide legal protection against the circumvention of TPMs used by authors to protect their exclusive rights or to restrict access to their copyright works. In reconciling Art F with Art 11 of the WCT, the saving grace may be the last words of Art 11 “or permitted by law”. If a contracting state to the WCT subsequently becomes a party to the Proposal as well, arguably, its implementation of Art F of the Proposal into its national laws can be said to permit by law, for the benefit of VIPs, the circumvention of TPMs restricting the access of VIPs or their intermediaries to the relevant copyright works. The utility of the Articles in the Proposal is inevitably premised on the actual exception set out under Art C of the Proposal, the scope of which allows intermediaries of VIPs, without obtaining the consent of the right-holder, to supply the accessible format copies of a copyright work made by themselves or obtained from other intermediaries⁸⁷ to VIPs, provided that specified conditions set out under Art C(2A) are met. The conditions such as lawful access to the work from which accessible format copies are made, the non-introduction of changes other than those necessary to make the work accessible to VIPs, the exclusive supply of such accessible format copies for use only by VIPs and the non-profit basis of the supply and manufacture of accessible format copies, are imposed

86 Henning Grosse Ruse-Khan, “Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection” (2009) 1 *Trade, Law and Development* 2 at 10.

87 See Art A of the Proposal for the definition of “authorised entities”, which are, in essence, intermediaries assisting VIPs.

before the exception can be availed of. Under the same Article, a VIP or someone acting on the VIP's behalf may also make an accessible format copy of a copyright work for the VIP's personal use, so long as the VIP in question has lawful access to the original work. These conditions appear to be imposed so that there is minimal intervention into the right-holder's market. Last but not least, Art D of the Proposal may be a welcome remedy to the problems faced by the majority of VIPs in developing countries without the legal or technological infrastructure to make or supply accessible format copies to VIPs. The effect of Art D is such that accessible format copies of a work made under an exception in one member state may be distributed, without the consent of the right-holder, by intermediaries to other intermediaries⁸⁸ or VIPs⁸⁹ in another member state, so long as that other member state would have permitted the intermediaries or VIPs to make or import the accessible format copies in the first place.⁹⁰ The principle of territoriality discussed earlier which stands in the way of this cross-border exchange is hence circumvented by way of Art D. As is the case in Art C, conditions are also imposed before the exception under Art D can be availed of, so that there is minimum encroachment into the right-holder's market.⁹¹ In summary, the Proposal addresses the stumbling blocks hampering the access of VIPs to copyright works: under Art C, by calling for member states to incorporate exceptions for reproduction and distribution of accessible format copies;⁹² under Arts D and E, by allowing for the cross-border exchange of accessible format copies between the intermediaries assisting VIPs or "authorised entities" of member states, and also between intermediaries assisting VIPs of member states with VIPs of other member states; and under Art F, by calling for member states to ensure that VIPs have the means to benefit from the exception under Art C when TPMs have been applied to a copyright work.

16 Unlike the WBU Draft Treaty which was the proposal preceding it, the Proposal does not have a conflict clause, which establishes the superiority of its provisions over those of other international instruments in the event of a conflict, by expressing the agreement of member states that the provisions of the WBU Draft Treaty are consistent with its obligations under a number of international instruments, including the Berne Convention, the TRIPS Agreement, the WCT and even the CRPD. In place of the conflict clause, the Proposal instead emphasises the importance and flexibility of the three-step test in international instruments such as the Berne Convention and the TRIPS Agreement, and in fact expressly provides, under Arts C and D of the Proposal,

88 See Art D(2A) of the Proposal.

89 See Art D(2B) of the Proposal.

90 See also Art E of the Proposal.

91 See Arts D(2A) and D(2B) of the Proposal.

92 See Art A of the Proposal for the definition of "accessible format copy".

that this three-step test is to be the standard applied to exceptions introduced into the domestic copyright legislation of member states by virtue of these Articles. This appears to be consistent with the broad view discussed above, that the three-step test set out in the Berne Convention and the TRIPS Agreement is the relevant standard to be employed against exceptions to exclusive rights. In light of the emphasis on flexibility, it is to be noted that the call is for a less restrictive criteria to apply where necessary, so as to take into account the interests of VIPs against those of right-holders.

17 It is submitted that the Proposal amalgamates the different considerations under many earlier proposals, such as the WBU Draft Treaty, the proposal submitted by the African Group in June 2010 (“African Draft Treaty”),⁹³ as well as the earlier joint recommendations put forth by the EU⁹⁴ and the US⁹⁵ (“Draft Recommendations”). For instance, instead of incorporating a conflict clause similar to that in the WBU Draft Treaty, the Proposal seems to have taken the same position as that in the Draft Recommendations, which instead reiterate the relevance of the three-step test as the standard to be employed,⁹⁶ albeit having its emphasis on incorporating *flexibility* in the test. Furthermore, the key points of the Draft Recommendations relate to the movement of accessible format copies and the role of TIs. TIs are entities trusted by right-holders and VIPs and are the intended conduits to facilitate the interactions between right-holders and VIPs, and hence the transmission of accessible format copies of works to VIPs, in a controlled manner.⁹⁷ The concept and role of TIs incorporated in the Draft Recommendations has been subsumed under its equivalent concept in the Proposal, that of “authorised entities”. As the provisions in the Draft Recommendations are less substantive than that in the WBU Draft Treaty and the African Draft Treaty, it is not surprising that the substance of the Proposal has been adapted from the WBU Draft Treaty. It is further noted that the

93 WIPO, *Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers: Proposal by the African Group* <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_13_prov.doc> (accessed 13 November 2011). See also the updated African Draft Treaty at <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=169397> (accessed 13 November 2011).

94 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* <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.doc> (accessed 13 November 2011).

95 WIPO, *Draft Consensus Instrument: Proposal by the Delegation of the United States of America* <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=133815> (accessed 13 November 2011).

96 See Art 2 of the EU Draft Recommendations and the Preamble of the US Draft Recommendations.

97 See the Draft Recommendations and the definition of an “authorised entity” in Art A of the Proposal.

African Draft Treaty contains to a great extent, similar provisions to the WBU Draft Treaty, but attempts to take on a more holistic approach by encompassing within its purview, the access needs of other user groups other than the disabled, such as educational and research institutions, libraries and archives. As the exceptions for other user groups are grouped together with that for the disabled, including VIPs, under the African Draft Treaty, this means that any standard for exceptions will apply unevenly in the contexts of different user groups. As a result, the WBU Draft Treaty is more relevant for the purpose of this discourse than the African Draft Treaty.

18 The Proposal consolidates the best approaches forward in respect of creating exceptions under copyright legislation to benefit VIPs, and is endorsed by the member states which earlier presented the WBU Draft Treaty and the Draft Recommendations. The Proposal can hence be taken more seriously than the earlier proposals and is the fruit of consensus of member states such as Brazil, Ecuador, Paraguay, the EU member states and the US, amongst others. However, it also appears that two minds have been reached over the appropriate form of instrument that should be adopted, in view of the fact that the Proposal does not clearly state whether it is to take the form of a joint recommendation or a treaty.⁹⁸ It is submitted here that the appropriate instrument to adopt is a treaty, instead of a recommendation, as the latter has no binding force, and may result in more ambiguity of implementation at the national level. Adopting an instrument in the form of a treaty at the WIPO level will be a more effective solution to address the access needs of VIPs to copyright material, as it will reflect the commitment of the WIPO and its member states towards finding a solution to benefit VIPs under their copyright regimes. A treaty if adopted can also serve as a guiding post highlighting the future direction of copyright laws for other WIPO member states which have no intention of ratifying or even signing the treaty, and also serves as a framework to which member states can look when coming up with national law exceptions on accessible format copies. It is submitted that opponents of the adoption of a treaty should be less concerned of the adoption of the Proposal as a treaty. This is because the Proposal does not dictate, but instead gives national legislators the flexibility to decide on finer points in the domestic copyright legislation, such as the relationship between overriding contracts and exceptions benefiting VIPs,⁹⁹ and also if exceptions under Art C are subject to remuneration.¹⁰⁰ It is submitted that on the whole, the language in the Proposal is permissive, rather than restrictive. However, unlike the WBU Draft Treaty which grants flexibility to member states in allowing them to

98 See the Preamble of the Proposal.

99 Art G of the Proposal.

100 Art C(5) of the Proposal.

freely determine how they wish to incorporate its provisions into their national laws, and further allows, but does not oblige member states to introduce more extensive exceptions benefiting VIPs, so long as the provisions are not contravened, the Proposal instead calls upfront for member states to limit the scope of the exceptions, with reference to the three-step test under the Berne Convention and to the availability and affordability of accessible format copies.¹⁰¹ This is consistent with our earlier discussion on the applicability of the three-step test as the relevant threshold test for copyright exceptions.

19 Last but not least, that the TIGAR project was launched by WIPO on 1 November 2010, with the goal of enabling publishers to make their titles more easily available to intermediaries assisting VIPs, or TIs,¹⁰² is worth a mention. The TIGAR project seeks to work towards an integration of the interests of right-holder organisations representing authors or publishers with that of VIPs, by enabling right-holders to produce accessible versions of copyright works themselves, by enabling TIs to benefit from the electronic master files publishers use for the final print run of their copyright works, and by facilitating the exchange of electronic master files between TIs, all in order to increase significantly the number of accessible versions of copyright works available to VIPs worldwide.¹⁰³ If the accessible versions of certain titles are not available, TIs can convert the electronic master files supplied by right-holders to accessible format copies, and then share these copies amongst themselves and with specialised libraries.¹⁰⁴ The criteria to participate as a TI in the TIGAR project include, amongst other criteria, that it must operate on a not-for-profit basis, that it has as a primary mission to provide specialised services related to education, training or information access for VIPs, and that it has the resources and technical capabilities either on its own or through a third party to share the requisite information with other TIs.¹⁰⁵ Furthermore, each TI has to ensure that it can only share its files with TIs that belong to the network of qualified TIs and which meet the criteria stipulated.¹⁰⁶ It is widely recognised the success of the TIGAR project is contingent upon close collaboration between WIPO, voluntarily participating right-holder

101 Arts C(3), C(4), D(2) and D(3) of the Proposal.

102 WIPO, *Stakeholders' Platform Launches Project to Facilitate Access by VIPs to Published Works* <http://www.wipo.int/pressroom/en/articles/2010/article_0043.html> (accessed 18 November 2011).

103 WIPO, The TIGAR project plan <http://www.visionip.org/export/sites/visionip/tigar/en/project_plan/pdf/project_plan_nov3_version.pdf> (accessed 11 April 2012).

104 WIPO, The TIGAR project plan <http://www.visionip.org/export/sites/visionip/tigar/en/project_plan/pdf/project_plan_nov3_version.pdf> (accessed 11 April 2012).

105 WIPO, Trusted Intermediary Participation Criteria <<http://www.visionip.org/tigar/en/criteria.html>> (accessed 11 April 2012).

106 WIPO, Trusted Intermediary Participation Criteria <<http://www.visionip.org/tigar/en/criteria.html>> (accessed 11 April 2012).

organisations and TIs.¹⁰⁷ It is to be noted that the TIGAR project is taken to be a complement, but not as a substitute to establishing a multilateral legal framework in the area of copyright exceptions to benefit VIPs.¹⁰⁸ As right-holder organisations have to agree to participate in the TIGAR project, there is no question of copyright infringement, or that of the collaboration being non-compliant with international intellectual property instruments.

IV. An overview of Singapore's position – What is available to VIPs

20 Singapore's Copyright Act¹⁰⁹ ("SCA") has provisions permitting certain acts which do not constitute copyright infringements. These provisions are intended to strike a fair balance between the interests of right-holders against societal needs to permit access to copyright works for particular purposes.¹¹⁰

A. Exception for institutions assisting VIPs

21 Section 54 of the SCA exempts from infringement of copyright, the making of sound recordings, braille, large-print or photographic versions of published literary or dramatic works, by or on behalf of bodies administering institutions assisting handicapped readers, provided that the alternative versions are for the purposes of research, study or instruction on *any* matter by a handicapped reader.¹¹¹ While the permitted purposes are arguably wide, that it falls short of the generous definition of "educational purposes"¹¹² for which the making of copies of copyright works are exempted under s 52 of the SCA, is a point to be noted. With this in view, it will definitely be useful if the specified purposes under s 54 are amended to clarify that making an alternative version for inclusion within the collection of a library, by or on behalf of such an institution assisting handicapped readers, is permitted. It is further noted that where accessible format copies which can be accessed

107 WIPO, Trusted Intermediary Participation Criteria <<http://www.visionip.org/tigar/en/criteria.html>> (accessed 11 April 2012).

108 WIPO, Trusted Intermediary Participation Criteria <<http://www.visionip.org/tigar/en/criteria.html>> (accessed 11 April 2012).

109 Cap 63, 2006 Rev Ed.

110 Such as education, research, criticism and review, dissemination of news, archiving and preservation of works. See Ng-Loy Wee Loon, "Exceptions and Limitations" in *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 2009) at para 11.01.

111 Sections 54(1) and 54(2) of the Copyright Act (Cap 63, 2006 Rev Ed). As the exempted purposes under ss 54(1) and 54(2) include that of the handicapped reader instructing himself on *any* matter, it can arguably, subject to the other conditions under s 54, exempt the making of an alternative format copy for recreational use by a handicapped reader.

112 Section 7(1A) of the Copyright Act (Cap 63, 2006 Rev Ed).

by handicapped readers are already published, the exceptions only apply if the person who makes the relevant format is satisfied upon reasonable investigation that no new copy or recording of such format can be obtained at an ordinary commercial price within a reasonable amount of time.¹¹³ VIPs fall within the definition of a “handicapped reader” under the SCA,¹¹⁴ and are the ultimate beneficiaries of the s 54 exception. Records of the particulars of such copying will also have to be made and kept,¹¹⁵ where alternative versions are made under this exception. A noteworthy point is that s 54 avails itself as a statutory licence, under which the copyright owner, within a prescribed period, is entitled to “equitable remuneration” upon his or her request.¹¹⁶ If the copyright owner and the copying body cannot agree on the quantum of remuneration, the Singapore Copyright Tribunal shall make an order, on an application from either party, to determine the amount which it considers to be equitable remuneration.¹¹⁷ Based on a recent order issued by the Singapore Copyright Tribunal, the factors it may consider in its determination will include: the market rate of the licence; the notional bargain rate of the licence; comparable bargains; and judicial estimation, having regard to previous negotiation between the parties, comparisons with rates set by other licensors and in other jurisdictions, the interests of users, the general public interest and the capacity of the copying body to pay.¹¹⁸ While the Singapore Copyright Tribunal will take into account the non-profit status of an institution assisting VIPs in its ascertainment of what amounts to equitable remuneration, it will be useful if there is a clearer articulation on whether the equitable remuneration determined to be payable by non-profit institutions serving less privileged users such as VIPs, is nominal. This will then lend some assurance to institutions assisting VIPs which wish to take advantage of s 54.

113 Sections 54(3), 54(4), 54(5) and 54(6) of the Copyright Act (Cap 63, 2006 Rev Ed).

114 See section 7(1) of the Copyright Act (Cap 63, 2006 Rev Ed). A “handicapped reader” means:

- (a) a blind person;
- (b) a person suffering severe impairment of his sight;
- (c) a person unable to hold or manipulate books or to focus or move his eyes; or
- (d) a person suffering from a perceptual handicap.

115 Sections 54(7), 54(8) and 54(9) of the Copyright Act (Cap 63, 2006 Rev Ed).

116 Section 54(10) of the Copyright Act (Cap 63, 2006 Rev Ed). See also reg 8(4) of the Copyright Regulations (Cap 63, Rg 4, 2009 Rev Ed) for the prescribed period of four years.

117 Section 158(3) of the Copyright Act (Cap 63, 2006 Rev Ed).

118 Intellectual Property of Singapore, Order of the Copyright Tribunal dated 19 October 2011 at paras 36–37 <http://www.ipos.gov.sg/NR/rdonlyres/EAD66D8B-524D-4023-8009-0E2E556B43D4/20111/CT1of2010_groundsofdecision_final1.pdf> (accessed 18 April 2012).

22 It is submitted that s 54 of the SCA can be interpreted to be compliant with the three-step test. An exception *only* for the institutions assisting VIPs, albeit for arguably wide purposes by individual VIPs, being in its entirety sufficiently narrow in scope, will pass the first step of the test. The second step of the test is incorporated into s 54, which potentially prohibits enjoyment of the exception when there is an established market in which accessible formats are commercially available to VIPs.¹¹⁹ Fortunately for VIPs, the strictest interpretation of the second step is not adopted. The word “can” in the phrase “*can* be obtained within a reasonable time” [emphasis added] in the relevant subsections of s 54 arguably suggests that only actual, not potential, economic loss caused to the copyright owner will infringe the second step. The same phrase is reflective of the Singapore legislative attempt to secure an appropriate balance between the interests of VIPs and right-holders, as consideration is given to the convenience of attaining the already published accessible formats. Last but not least, compliance with the third step is ensured by virtue of the compensation mechanism under the statutory licence built into s 54(10). Singapore’s transposition of the three-step test into the s 54 exception appears to be fairly liberal, to the benefit of VIPs and their intermediaries.

B. General fair dealing defence for individual VIPs

23 The exception discussed earlier applies to institutions assisting VIPs. For completeness, this article moves on to consider the exceptions available to individual VIPs. Some activities undertaken by VIPs in relation to copyright works may fall within the scope of other general exceptions available to users other than VIPs. The most likely types of exceptions that could help individual VIPs are those provided under the fair dealing defences, which can exempt the use of works for the purposes of research and study.¹²⁰ This article will not be discussing fair dealing defences in general, and will instead only touch on the general fair dealing defence available to individual VIPs.

24 The fair dealing defences in the SCA, as of 1 January 2005, are no longer limited to the specific purposes of research, private study, criticism, review or reporting current events.¹²¹ Pursuant to the Copyright (Amendment) Act 2004, s 35 is for “*any purpose* other a purpose referred to in section 36¹²² or 37”,¹²³ and “*shall include* research

119 Where a new record or copy can be obtained within a reasonable time at an ordinary commercial price, s 7(1A) of the Copyright Act (Cap 63, 2006 Rev Ed).

120 Section 35(1A) of the Copyright Act (Cap 63, 2006 Rev Ed).

121 Ng-Loy Wee Loon, “Exceptions and Limitations” in *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 2009) at para 11.3.16.

122 Fair dealing for criticism or review.

123 Fair dealing for the purpose of reporting current events.

or study” [emphasis added].¹²⁴ This change is of significance as the fair dealing defence is no longer restricted to any specified purpose. The current s 35 hence can be said to provide a *general* fair dealing defence.¹²⁵

25 Conceivably, private copying of a work for “format shifting”¹²⁶ may fall within the general fair dealing defence.¹²⁷ It has been argued that a person who owns a non-infringing copy should be allowed to convert that copy to a format for his or her own personal use and convenience. The case law on “fair use”, the US parallel of the fair dealing defence,¹²⁸ further supports interpreting private and non-commercial copying as fair use falling beyond copyright regulation.¹²⁹ Format shifting could be an important activity for VIPs who may need to convert a purchased copy in normal format to a more accessible format. It is submitted that, in respect of the activity of format shifting for personal use, individual VIPs may choose to rely on the general fair dealing defence, as such uses, being private and noncommercial uses, have a good chance of satisfying the criteria evaluated for the fair dealing defence to come into play.¹³⁰

26 It is tempting to argue that institutions assisting VIPs in Singapore, in their quest for alternative formats, can look to this general fair dealing defence, in addition to the statutory exception granted to such institutions under s 54. However, it was argued that “absent its express preservation s 35 cannot colonise what is already covered by another provision”. Where s 35 is intended to supplement another provision, in this instance s 54, this should be provided for unequivocally.¹³¹ To get around this argument and to reconcile these two provisions of the SCA, it is submitted that though the end beneficiaries of the s 54 exception are ultimately individual VIPs, s 54 applies mainly to the institutions assisting VIPs. It follows that an individual VIP can instead rely on the s 35 exception.

124 Section 35(1A) of the Copyright Act (Cap 63, 2006 Rev Ed).

125 Ng-Loy Wee Loon, “Exceptions and Limitations” in *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 2009) at para 11.3.20.

126 Format shifting is the practice of copying material from one format to another.

127 Ng-Loy Wee Loon, “Exceptions and Limitations” in *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 2009) at para 11.3.23.

128 The difference is semantic as in the US, fair dealing has a different meaning and is instead a duty of full disclosure imposed on corporate officers, parties to contracts and fiduciaries.

129 See *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 (1984). See also *Recording Indus Ass’n Am v Diamond Multimedia Sys Inc* 180 F 3d 1072, 1079 (9th Cir, 1999). See also Pamela Samuelson, “Unbundling Fair Uses” at pp 44–48 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323834> (accessed 17 April 2012).

130 See s 35(2) for the non-exhaustive list of factors considered in determining whether a use is covered under the fair dealing defence.

131 Ng-Loy Wee Loon, “Exceptions and Limitations” in *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 2009) at para 11.3.26.

C. *Interplay with DRM*

27 As DRM technologies, of which TPMs are a subset, are neutral and do not discriminate between a circumvention in the pursuit of legitimate uses and circumvention in flagrant breach of copyright law, it is not surprising that the VIP community is concerned that DRM technologies will thwart legitimate uses of copyright works.¹³²

28 In Singapore, anti-circumvention regulations target both the act of circumvention as well as the use of circumvention devices.¹³³ Notably, the protection against circumvention of TPMs conferred under the SCA¹³⁴ is subject to statutory exceptions.¹³⁵ In respect of the circumvention of TPMs by an institution assisting VIPs for the purpose of determining whether to acquire a copy of the copyright work, the right-holder is not granted the protection of any anti-circumvention legislation.¹³⁶ Denying TPMs the legal protection of anti-circumvention regulations in certain instances arguably could imply a “right to circumvent” in these instances, even though such right is not expressly provided. The protection of TPMs has been expressed not to affect any limitation on copyright works or any defence against infringement.¹³⁷ Notably, s 261D of the SCA provides that the act of circumvention is not prohibited if the act falls within s 261D’s specified exceptions.¹³⁸ Despite allowing exceptions to prevail over anti-circumvention regulations in the earlier mentioned instances, it is noted that there is no mechanism or conduct from right-holders specified as requisite under the SCA, so as to allow beneficiaries to avail themselves of existing exceptions in despite of the TPMs used by right-holders. The lack of incentive of right-holders to make their copyright works available to beneficiaries is exacerbated by the practical difficulties faced by the VIP-community. VIPs and their intermediaries, as is the case commonly with resource challenged user groups, may not have the know-how to circumvent TPMs to use or access works despite being permitted to do so, and will depend largely on the availability of tools and services that enable circumvention.¹³⁹ All of the above reasons, together with the broad

132 Geidy Lung, “Copyright Exceptions for the Visually Impaired – International Perspective” (17 August 2004) WIPO at para 21 <<http://archive.ifla.org/IV/ifla70/papers/177e-Lung.pdf>> (accessed 27 November 2009).

133 Section 261C of the Copyright Act (Cap 63, 2006 Rev Ed).

134 For the acts prohibited, see s 261C(1) of the Copyright Act (Cap 63, 2006 Rev Ed).

135 For such exceptions, see ss 261D and 261E of the Copyright Act (Cap 63, 2006 Rev Ed).

136 Section 261D(1)(a) of the Copyright Act (Cap 63, 2006 Rev Ed).

137 See ss 261B(3)(c) and 261B(3)(d) of the Copyright Act (Cap 63, 2006 Rev Ed).

138 See particularly, in relation to institutions assisting VIPs, s 261D(1)(a) of the Copyright Act (Cap 63, 2006 Rev Ed).

139 Stefan Bechtold, “Digital Rights Management in the United States and Europe” (2004) 52 *American Journal of Comparative Law* 323 at 372.

prohibition on circumvention devices and services under the SCA¹⁴⁰ arguably render the implied right to circumvent futile.

29 Fortunately for the VIP community, under the SCA, the Minister can, by way of an order, exclude the operation of s 261(C)(1)(a) from specified copyright works.¹⁴¹ Thus far, the Minister had by order, excluded literary works which are in electronic book formats and where TPMs have been applied to either prevent the read-aloud function or the conversion of text into specialised formats.¹⁴² It is therefore fortunate that the prohibition under s 261(C)(1)(a) has been excluded from applying to the act of circumvention of TPMs which prevent conversion of literary works in electronic formats to accessible formats.¹⁴³ This class of works utilised by VIPs is specifically excluded, to the benefit of VIPs.

V. Explaining the practical failure of exceptions in delivering benefit to VIPs in Singapore

30 As demonstrated above, Singapore's copyright law contains exceptions, and additionally confers a comfortable level of protection to such exceptions benefiting VIPs. The interpretation of the three-step test incorporated into s 54 is fairly liberal, and the prohibition against circumvention of TPMs has been excluded from applying to the class of works commonly used by VIPs and their intermediaries. Regardless, in reality, institutions assisting VIPs may not be able to exploit available exceptions fully, and hence an individual VIP may not be able to reap the full extent of benefits from these exceptions. It may be instructive at this juncture to discuss the practical experience of SAVH in Singapore, and the other factors which may impede efforts to improve the access of VIPs to a greater volume of copyright works.

A. Background of the Singapore experience – Practical realities

31 It will be useful to consider the sources from which individual VIPs obtain accessible copies of copyright works. One source is the SAVH's Library for the Blind ("SAVH Library"), which made a total of 3,292 loans of audio and braille books and periodicals to its members for the year under review.¹⁴⁴ The SAVH Library is estimated to have

140 Sections 261C(1)(b) and 261C(1)(c) of the Copyright Act (Cap 63, 2006 Rev Ed).

141 Section 261(D)(2) of the Copyright Act (Cap 63, 2006 Rev Ed).

142 Specialised format means a format that is in braille, audio or digital text, and is intended solely for use by handicapped readers, see s 3(1) of the Copyright (Excluded Works) Order 2008 (S 649/2008).

143 Section 4(c) of the Copyright (Excluded Works) Order 2008 (S 649/2008).

144 SAVH, *Annual Report 2010/2011* at p 128 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

approximately 100 to 150 braille items and 250 audio items.¹⁴⁵ The public libraries are another source from which VIPs and their intermediaries can obtain accessible works. For ease of reference in this article, the term “NLB”, when used, is intended to refer to the public libraries overseen by the National Library Board. Based on NLB’s response to an enquiry,¹⁴⁶ it is noted that NLB no longer maintains a braille collection. NLB has 21,000 audio items, which constitute only approximately 0.2% of NLB’s total book collection.¹⁴⁷ These audio items are purchased by NLB from audio-visual vendors.¹⁴⁸ It is noted that SAVH, as a non-profit organisation, is allowed to borrow a maximum of 2,000 items at any one time under NLB’s bulk borrowing scheme.¹⁴⁹

32 It appears that SAVH and NLB act as conduits for the flow of accessible works from the vendors to VIPs. Their functions in these instances bear resemblance to those of TIs, the role of which has been recognised to be instrumental to the success of the Proposal. The substantial disparity of the number of accessible works available at SAVH, as against NLB’s collection of accessible works, and also against NLB’s total book collection of approximately 8 million,¹⁵⁰ indicates that there is a massive collection of materials in normal print which are not available in accessible formats. This is despite the fact that any manufacture of alternative formats undertaken by SAVH can fall within the s 54 exception, so long as the ultimate use of any such alternative format is by a VIP for the purpose of research, study or self-instruction on any matter.¹⁵¹ That the conversion of normal print materials to audio and braille versions is labour intensive,¹⁵² the inadequate funding,¹⁵³ the rather meager manpower at SAVH,¹⁵⁴ SAVH’s very niche clientele and

145 Based on SAVH’s response dated 2 February 2010 to enquiries made via e-mail. When contacted on 2 February 2012, a contact person at SAVH mentioned that the information furnished in 2010 can be similarly relied on, as there has been little change since that date.

146 Based on NLB’s response dated 21 October 2011 to an enquiry made via its Reference Point service.

147 NLB has a total of 8,546,749 books, including talking books. See NLB, *Annual Report 2010/2011* at p 57 <<http://www.nlb.gov.sg/annualreport/fy10/index.html>> (accessed 28 November 2011).

148 NLB, *Annual Report 2010/2011* at p 57 <<http://www.nlb.gov.sg/annualreport/fy10/index.html>> (accessed 28 November 2011).

149 Under the DEAR (Drop Everything And Read) @ Community initiative by NLB.

150 NLB, *Annual Report 2010/2011* at p 57 <<http://www.nlb.gov.sg/annualreport/fy10/index.html>> (accessed 28 November 2011).

151 Subject to the conditions specified. The s 54 exception applies similarly to the School as well.

152 SAVH, *Annual Report 2010/2011* at p 28 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

153 SAVH, *Annual Report 2010/2011* at pp 7–8 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

154 SAVH, *Annual Report 2010/2011* at p 67 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

the discomfort of SAVH in navigating the difficulties of copyright legislation, are all possible reasons that may explain SAVH's small collection of accessible works and its inability to take full advantage of the s 54 exception.

B. Others – Overriding contracts and importation provisions

33 Currently, no provision in the SCA addresses this issue of overriding contracts. As such, VIPs and their intermediaries in Singapore may find, to their detriment, the exceptions ordinarily available in the traditional paper world overridden by contracts in the digital environment.

34 Another factor crucial to the success of exceptions in delivering tangible benefits to VIPs in Singapore is the permissibility of importing accessible copies under the SCA. This is because considerable resources are expended to make accessible copies for VIPs. Institutions assisting VIPs or intermediaries have always been keen to realise the economies of scale where VIPs in more than one country wish to access the same copyright work. The expenditure per accessible copy made will often be less per copy where a large number of copies are made.¹⁵⁵ There will also be an increase in the number of titles available in accessible formats if resources are more effectively channelled to avoid the duplication of effort and costs in making accessible copies in each country where they are required.¹⁵⁶ Over time, a greater volume of accessible copies can be supplied to VIPs, and at affordable prices. Generally, Singapore's legislative regime leans in favour of allowing parallel imports.¹⁵⁷ However, s 32 of the SCA provides that importation for sale or hire of articles made without the consent of the copyright owner will infringe the copyright in such works, where the importer knows or ought reasonably to know that the articles were made without the consent of the copyright owner. It is noted then that the imported copies are "infringing copies" if they are made without the consent of the copyright owner in the country of manufacture.¹⁵⁸ Further, consent is not deemed to be given in the event that the accessible copies are made under a compulsory licence.¹⁵⁹ This is disadvantageous to the VIP

155 Judith Sullivan, "Study on Copyright Limitations and Exceptions for the Visually Impaired" WIPO (20 February 2007) at para 3.1 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

156 Judith Sullivan, "Study on Copyright Limitations and Exceptions for the Visually Impaired" WIPO (20 February 2007) at para 6.6.1 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id+75696> (accessed 20 October 2011).

157 See generally, Ng-Loy Wee Loon, "Exceptions and Limitations" in *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 2009) at paras 16.37, 16.38, 16.39 and 16.40.

158 Sections 7(1) and 25(3) of the Copyright Act (Cap 63, 2006 Rev Ed).

159 Section 25(4) of the Copyright Act (Cap 63, 2006 Rev Ed).

community as institutions assisting VIPs may not be able to import accessible copies for distribution to VIPs,¹⁶⁰ as such copies are “infringing copies” even if they are made under compulsory licences for VIPs in the country of manufacture.

VI. Conclusion

A. *The Proposal*

35 The introduction of a minimum international copyright exception for incorporation into national laws¹⁶¹ has been touted as a way to strike the much needed balance between the interests of right-holders and that of users such as VIPs. An international effort to standardise exceptions will be an important first step towards affirming the importance of serving disadvantaged communities such as the VIP community¹⁶² and will provide a preliminary framework for countries, including those without such exceptions, to work towards. If the Proposal is adopted as a treaty, its provisions can lend fabric to the less substantive treaty language in the Berne Convention, in respect of the creation of exceptions. Undeniably, the Proposal holds a lot of promise, given that it has been endorsed by and represents some form of consensus between a significant number of states, many of which have submitted separate preceding proposals including the WBU Draft Treaty and the Draft Recommendations. The Proposal is an encouraging step in the right direction as it goes beyond the WBU Draft Treaty and acknowledges the role of TIs in making the exceptions work in reality. It provides the platform for countries to take affirmative action in incorporating public interest concerns in the domestic copyright systems, and to ensure that these public interests introduced more concretely at the international level are not easily bartered away in the face of the expansion of intellectual property rights.

B. *The SCA and moving towards a greater role for NLB*

36 It is observed that there is no legal requirement for the notification of blindness in Singapore, as such, the number of registered

160 As they may be liable for infringement. See s 32, particularly s 32(b), of the Copyright Act (Cap 63, 2006 Rev Ed).

161 Ruth L Okediji, “The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries” (Issue Paper No 15, UNCTAD – ICTSD Project on IPRs and Sustainable Development, March 2006) at p 23 <http://www.unctad.org/en/docs/iteipc200610_en.pdf> (accessed 22 January 2012).

162 J W Roos, “Copyright Protection as Access Barrier for People who Read Differently: the case for an international approach” (IFLA Journal 2005) at p 66 <<http://sagepub.com/cgi/content/abstract/31/1/52>> (accessed 9 September 2010).

clients at SAVH had been observed to be an underestimation, approximately by a factor of four, of the actual number of VIPs in Singapore.¹⁶³ Poor vision was recently reported to be a major problem in Singapore.¹⁶⁴ The availability of exceptions for VIPs becomes more crucial as Singapore's population ages and the number of VIPs in Singapore increases. Since every person is recognised as having the right to receive information and to participate in the community,¹⁶⁵ it is in our public interests to protect the users' rights of VIPs and their intermediaries, who constitute a growing faction in our community.

37 Based on the research conducted, there appears to be a potential for closer collaboration between SAVH and NLB to increase the overall volume of accessible works, which remains largely unexploited at the moment. As SAVH lacks sufficient resources required for it to take full advantage of the s 54 exception, there could be a role for a resource-rich body like NLB to fill in the near future. In view of NLB's massive book collection and its 900 employees,¹⁶⁶ NLB could possibly work with SAVH to increase the overall number of accessible formats of copyright works for VIPs. Recalling the phrase "by or on behalf of" in the s 54 exception, a case can perhaps be made for NLB to act *by or on behalf* of these intermediaries to convert to alternative formats, popular titles in their collection, which are not already available in accessible formats.¹⁶⁷ Such a case is better buttressed if the SCA can be amended to clarify that the storage of an alternative version in the collection of a library at NLB or SAVH falls within permitted purposes, as discussed earlier. NLB and SAVH can then pool together their collection of accessible works and share these amongst themselves and their visually impaired members. A similar arrangement can be established with the School, which has its own audio and braille production units. Although NLB has no current

163 Kuang-Hui Lim, "Vision 2020 and Prevention of Blindness: Is it Relevant or Achievable in the Modern Era?" (2006) 35 Ann Acad Med Singapore 215 at 219 <<http://www.annals.edu.sg/pdf/35VolNo3200604/V35N3p215.pdf>> (accessed 23 January 2012).

164 For instance, in the second part of a study conducted to document the frequency and causes of low vision and major eye diseases in the Indian community in Singapore, it was found that two in five Indians are suffering from low vision or blindness in at least one eye, and low vision for about half of such sufferers cannot be corrected by glasses. See Asiaone, "Poor Vision a major problem in Singapore" (4 February 2010) <<http://www.asiaone.com/Health/News/Story/A1Story20100204-196543.html>> (accessed 23 January 2012).

165 Arts 19 and 27 of the Universal Declaration on Human Rights.

166 Based on NLB's response dated 13 February 2012 to an enquiry made via its Reference Point service.

167 See Burton Ong, "Fissures in the Façade of Fair-Dealing: Users' Rights in Works Protected by Copyright" [2004] Sing JLS 150 at 170, where the Canadian Supreme Court held that the fair dealing defence for the purpose of research and study was available to the law library even though it was making copies on behalf of the actual end-users.

capabilities to convert books into alternative formats,¹⁶⁸ the suggestion above sits well with NLB's intention to encourage life-long learning in "senior citizens",¹⁶⁹ to be inclusive in its provision of services and to serve every segment of our community.¹⁷⁰

C. *Licensing*

38 Licensing is a useful tool that can benefit both right-holders and VIPs as end users, if employed appropriately. Right-holders are more highly incentivised to engage with the producers of alternative formats, including TIs, if they are allowed to retain control over their works. The trust established between right-holder organisations and entities such as TIs are crucial in ensuring that VIPs, as end users, can reap maximum benefits from the exceptions.

39 As a first step taken under the TIGAR project, the TIGAR Fast Track Memorandum of Understanding ("TIGAR MOU") delineates the short term arrangement to facilitate early trials of cross border exchange for accessible books between TIs, and was introduced to kick-start progress in this area, whilst the Proposal is being deliberated upon. The TIGAR MOU expressly acknowledges that it sets the stage for a longer term licensing solution in the future,¹⁷¹ by building practical confidence and experience in cross border file exchange for accessible formats of books between TIs who participate in the TIGAR MOU.

40 Furthermore, it is to be noted that while the Proposal leaves it to domestic copyright legislation to determine if the exceptions it includes are subject to remuneration¹⁷² and generally is silent on for-profit uses, its predecessor, the WBU Draft Treaty, views licensing as a potential solution and compromise between right-holders and users, particularly in respect of for-profit uses.¹⁷³

41 In Singapore, right-holders are allowed to enter into licensing schemes with institutions assisting VIPs in respect of the production of alternative formats.¹⁷⁴ Currently, accessible formats of titles newly added

168 NLB's collection of audio and large-print books are purchased from vendors. Based on NLB's response dated 8 February 2010 to an enquiry made via its ASK! service.

169 NLB, Librarian Services – Adults <http://www.pl.sg/page/PIJustBrowseContentBook2/AdultsLibrarianServices&_parent=AdultsLibrarianServices&_nfls=false> (accessed 6 February 2012).

170 NLB, *Library 2010 Report* at p 13 <<http://www.nlb.gov.sg/ShowBinary/BEA%20Repository/corporate/Publications/L2010Report>> (accessed 23 January 2012).

171 See the Preamble of the TIGAR MOU.

172 See Art C(5) of the Proposal.

173 See Art 4(c)(3) of the WBU Draft Treaty.

174 Section 54(13) of the Copyright Act (Cap 63, 2006 Rev Ed).

to SAVH's Library are mostly obtained through donations¹⁷⁵ or loans from NLB,¹⁷⁶ and not through licensing arrangements with right-holders. This may be because negotiating licences with individual right-holders can be a cumbersome process for all parties. In order to streamline procedures and rates of compensation, licensing schemes will have to be entered into by right-holder organisations with entities such as NLB and SAVH, in a structured environment with defined processes, such as those which the TIGAR MOU seeks to establish in the immediate future.

D. The way forward

42 International cooperation is required to be established for VIPs worldwide to truly benefit from copyright exceptions. This will pave the way for increased access by VIPs as there will be quicker and more voluminous production of accessible copies of works in the long run. Even without the existence of a binding multilateral instrument setting out minimum exceptions for VIPs and their intermediaries, Singapore is arguably not constrained from amending its copyright legislation to facilitate parallel importation of copyright works by clarifying its importation provisions, as there are currently no practical and legal impediments against the same.¹⁷⁷ This is in light of Art 6 of the TRIPS Agreement which leaves the question of exhaustion of rights to each country's discretion, and also the problem posed to exceptions by overriding contracts. An international agreement such as the Proposal is important because of its potential to establish a network between contracting parties, including TIs, to facilitate the cross-border movement of accessible copies. Now that there have been proposals put forth at the international level, these proposals can serve as guiding posts for the structure and principles to be introduced into domestic copyright legislation in this respect. A step taken towards accommodating the needs of VIPs in copyright legislation will re-instil some balance in an international intellectual property rights regime already inclined to promote recognition and strengthen enforceability of intellectual

175 See "Libraries which reach out to people" *The Straits Times* (31 May 1989) at p 2 <<http://newspapers.nl.sg/Digitised/Article/straitstimes19890531.2.72.4.2.aspx>> (accessed 7 February 2012). See also "Americans Donate Braille Books" *The Straits Times* (5 December 2003) at p 6 <<http://newspapers.nl.sg/Digitised/Article.aspx?articleid=straitstimes20031205.2.45.11.1&sessionid=3e917ae0fcf5407985f87a1afc861424&keyword=library+and+donate+and+Braille>> (accessed 7 February 2012).

176 SAVH, *Annual Report 2010/2011* at p 14 <http://www.savh.org.sg/publications/annual_reports/2010-11.pdf> (accessed 19 October 2011).

177 Other than cl 16.7(2) of the free trade agreement between US and Singapore which limits the parallel importation of patented pharmaceutical drugs, as of 11 April 2012, there are no provisions in any other free trade agreement entered into by Singapore which curtails Singapore's right to determine its approach towards parallel importation in other areas.

property rights, bolstered further by the proliferation of TRIPS-plus standards in many free trade agreements. Inspiration can also be drawn from the Doha Declaration on TRIPS Agreement and Public Health¹⁷⁸ that provides further flexibilities and allowances for least developed countries and other countries which have inadequate or no manufacturing capabilities so as to allow them to derive real benefit from the compulsory licensing provisions for pharmaceutical products under the TRIPS Agreement. It is submitted that a similar framework can be adopted with respect to the cross-border movement of accessible copies of copyright works at an opportune juncture, that is, when an international agreement benefiting VIPs is adopted.¹⁷⁹

43 Although it is acknowledged that the SCA does take into account the rights of users such as VIPs and their intermediaries to a fair extent, the necessary infrastructure has to be in place before VIPs and their intermediaries can practically avail themselves of the exceptions available under Singapore's copyright legislation. At the end of the day, in order to deliver the maximum benefits to the VIP-community, changes must be effected both at the international and domestic level. The change in mindset such that one questions what the maximum levels of intellectual property protection are, over the conventional perception of main international instruments as setting a floor of minimum standards, has to be accompanied by practical mechanisms on the ground to be effective. It is noted that under the TIGAR MOU, the first condition, out of many, to be fulfilled, before a TI can receive an accessible format of a title from another TI, can include, either the existence of a copyright exception for which the TI can produce accessible formats for VIPs, *or* that the TI has a licence from the right-holder organisation and has otherwise secured permission from the right-holder organisation, *or*, that the right-holder organisation has chosen to enter into the TIGAR MOU.¹⁸⁰ This supports this article's argument that a multi-pronged strategy will have to be adopted for the VIP-community to truly benefit. Not only is a binding multilateral instrument such as a treaty welcomed in order to give the skeletal framework for such exceptions benefiting VIPs, the processes by which TIs and right-holder organisations collaborate have to be tried and

178 WTO, Declaration on TRIPS Agreement and Public Health <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> (accessed 16 April 2012). See also WTO, Implementation of paragraph 6 of the Doha Declaration on TRIPS Agreement and Public Health <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> (accessed 16 April 2012).

179 This will re-affirm the commitment of developed countries to transfer technology to least developed countries which may have no technological base to take advantage of exceptions for VIPs, even if an international agreement benefiting VIPs is finally adopted. See Art 66(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

180 See Art 6(a) of the TIGAR MOU.

tested beforehand. Moreover, the optimal remuneration to right-holders across each type of copyright work, so as to be adequate enough to incentivise right-holder organisations such as publishers to render the cooperation needed in trials including those under the TIGAR MOU, but not so much as to nullify the intended social purpose by making accessible formats unaffordable, requires further study beyond the scope of this article. This article concludes that the international intellectual property system has to continue to retain its credibility and relevance in this age of global challenges, by accommodating public interest concerns and taking into account the growing group of VIP-users everywhere in the world – this can be done by having TIs and right-holder organisations facilitate cross border exchange in reality, and to “walk the talk”, even before the multilateral instrument is finalised.

44 It is commendable that, as at the start of 2012, Elsevier (Singapore) Pte Ltd, being a publisher rights-holder organisation in Singapore, had already signed on to the TIGAR MOU, together with other rights-holder organisations and TIs in other countries.¹⁸¹ It is submitted that VIPs and their intermediaries will stand to gain if more publishers and potential TIs such as NLB and SAVH sign up to the TIGAR MOU at this point in time, even before the Proposal is in its final form. This also develops both NLB and SAVH’s roles as TIs,¹⁸² while they gain valuable experience in the exchange of accessible formats of copyright works. Over time, as the public presence and roles of these TIs are more established, right-holder organisations will be more inclined to initiate voluntary licensing schemes with such TIs. The combined effects of a multilateral instrument such as the Proposal, the participation of TIs in facilitating cross border exchange of accessible copies and the proliferation of market-based licensing schemes at the initiative of right-holders can pave the way for a more inclusive copyright regime for the visually impaired.

181 WIPO, List of Publishers that have signed the Fast Track MOU <<https://www3.wipo.int/confluence/pages/worddav/preview.action?fileName=Feb+1+2012+List+of+Publishers+that+have+signed+the+Fast+Track+MOU.xls&pageId=19400697>> (accessed 7 February 2012).

182 One of the functions of NLB is to establish liaison with overseas library authorities and information providers to secure maximum collaboration of all activities relevant to its functions, see s 7(1) of the National Library Board Act (Cap 197, 1996 Rev Ed).