**ATRIP – IP, Disability, Culture and Exceptionalism**

**Does copyright law deal with difference?**

**Introduction**

This paper explores the extent to which human rights laws relating to disability and copyright conflict or complement each other. Does copyright consider itself *lex specialis*? If one sees the human rights and disability treaties as governing only general obligations, and copyright the specific, , does copyright override what human rights and disability would otherwise dictate? Focusing on two case studies: one of creation (the disabled dancer and her dance); and one of use (people with visual impairments and access to books), this paper will look to developments in policy, international instruments, European and some domestic (UK) law to explore the relationship between these areas of law.

**Problems**

Both creators and users of copyright works have an interest in the human rights and disability instruments and activism, and the agenda which results. Consider a choreographer and dancer with disability, who is recognised as a leader in the field of dance, or blind or partially sighted person wishing to access and enjoy the latest books in the bestseller list. How does copyright treat the disabled creator and the disabled user: the disabled dancer and her dance, and the blind reader and the books she would like to read? Is there any element of ‘oppression, discrimination, inequality and poverty’ – the key inequities that disability rights seek to eradicate[[1]](#footnote-1) - in the application of copyright when faced with these types of impairment?[[2]](#footnote-2) Does copyright law recognise difference? More fundamentally, how do the copyright and the human rights disability agendas intersect? What is the reality when the disabled dancer seeks equality with her non disabled counterpart; and the blind reader seeks access to books?

To address these questions two case studies will be used: the first is that of authorship and ownership of dance made by a disabled dancer – specifically that of Caroline Bowditch[[3]](#footnote-3) and the dance Love Games choreographed by Joan Clevillé which was first performed in Scotland in 2011 by Naomi Watts and then by Caroline at the Pathways to Profession Scottish Dance Theatre event in Dundee in January 2012 and in terms of which the underlying question was whether an able-bodied dancer could cover for a non-disabled dancer. A recording of the performance can be viewed on YouTube which shows clips from the 2011 and 2012 performances side by side[[4]](#footnote-4) in both cases with the same male dancer.[[5]](#footnote-5) The second, case study will be used to explore access to books by the blind particular regard to the recent finalisation in 2013 under the auspices of WIPO of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty). This contains copyright exceptions and limitations for the print disabled..

A fundamental preliminary point is in respect of the different models of disability that have developed over the years. These have a strong bearing on the way in which we can think about how copyright responds to difference. While there are a number of different models, two influential ones are the medical model and the social model. Broadly put, the medical model sees disability as a consequence of impairment and something to be ‘cured’ by an appropriate professional. By contrast the social model sees disability as a product of the failure of society to accommodate the needs of people with impairments.[[6]](#footnote-6) The medical model held sway for many years, but was challenged in the mid 1970s by the disabled community who offered the social model. Different aspects of different laws reflect these different approaches while some seek to reconcile them.[[7]](#footnote-7) A second preliminary point concerns the existing debate among scholars concerning IP and human rights.[[8]](#footnote-8) This is something that is increasingly recognised: for example, the United Nations Sub-Commission for the Promotion and Protection of Human Rights in 2000 and 2001 issued resolutions stating that the manner in which countries had chosen to implement their international obligations under the TRIPS agreement was inconsistent with international human rights obligations;[[9]](#footnote-9) and the English Court of Appeal in *Ashdown,[[10]](#footnote-10)* the European Court of Human Rights in *Ashby Donald,[[11]](#footnote-11)* and the US Court in *Time v Geis*[[12]](#footnote-12) reveal acceptance that in some (rare) cases, rights to freedom of expression can prevail over copyright.[[13]](#footnote-13) This paper does not aim to contribute directly to this discourse, but rather to discuss the impact this potential conflict can have in the scenarios discussed, the implications for exceptionalism and the clashes between IP, human rights and disability.[[14]](#footnote-14)

**If one starts with human rights…**

As indicated in the introduction, this paper proceeds from the assumption that human rights is a *lex generalis* and therefore the appropriate starting point. Legal and political theory, which can be traced back across many centuries and in respect of which debate continues, reveals strong support for the existence of human rights. [[15]](#footnote-15) The present set of human rights instruments stem from the aftermath of World War II, and a determination that obligations would be imposed on states to ensure that atrocities against humankind should not happen again.[[16]](#footnote-16) Has this resulted in rights which are relevant to enjoyment of and participation in culture? This is worthy of consideration given contemporary arguments that there has been an expansion of human rights and an application of them to situations which were not envisaged, as can be seen in particular from discussions in the UK regarding the place of the Human Rights Act 1998.[[17]](#footnote-17) Yet it is clear from the international instruments that culture and related rights were considered worthy of attention in the post war activity.

Article 15(1)(a) of the International Covenant on Economic Social and Cultural Rights (“ICESCR”) (1966)[[18]](#footnote-18) sets out the right of everyone to take part in cultural life.[[19]](#footnote-19) Article 15(2) refers to steps being taken as necessary to develop and diffuse culture. In terms of how this might apply to books and dance, it is interesting to note that the UN’s Committee on Economic Social and Cultural Rights’ General Comment on persons with disabilities of 1994[[20]](#footnote-20) identifies that there has been discrimination in respect of cultural life,[[21]](#footnote-21) articulates the right to full participation and appeals for the elimination of communication barriers to the greatest extent possible. The General Comment refers to the need for talking books, adapted theatre, and to education of the general public of the fact that persons with disabilities have as much right as other persons to make use of cultural venues.[[22]](#footnote-22) Likewise, the UN’s Committee on Economic Social and Cultural Rights’ General Comment from 2009[[23]](#footnote-23) recognises that culture evolves.[[24]](#footnote-24) For present purposes, it could thus cover reading by the visually impaired in an online format, or to dancing by people with disabilities,[[25]](#footnote-25) Further, the General Comment states that culture includes non-verbal communication (such as dance),[[26]](#footnote-26) and for people who want to observe and share in dance by people with disabilities or to read books in whatever format, it provides for “the encouragement and promotion of … participation, to the extent possible, in recreation, leisure and sporting activities”;[[27]](#footnote-27) and refers to accessibility of culture without discrimination particularly in respect of disability.[[28]](#footnote-28)

From the disability perspective, article 2 ICESCR guarantees that rights will be exercised without discrimination in respect of, “…. other status” as to cultural rights. This provision was also considered in a General Comment in 2009[[29]](#footnote-29) which makes clear that disability is a relevant “other status”.[[30]](#footnote-30) It also refers to the possibility or obligation on states to adopt special measures to address discrimination provided these are reasonable, objective and proportionate and might exceptionally be permanent, including reasonable impairment for sensory impairments.[[31]](#footnote-31) This could be relevant to permanent requirements regarding, say, the sharing of books and their information in different formats over the internet, or on new handheld devices.

If the ICESCR right in respect of culture fits directly with the rights of persons with disabilities to dance and to share in dance and in books, the International Covenant on Civil and Political Rights (“ICCPR”) (1966)[[32]](#footnote-32) has a less direct but highly relevant right. This is freedom of expression and information, in Article 19 (2), with the right expressed, inter alia, to be subject to respect for the rights of others. This right was considered by the Human Rights Committee in its General Comment from 2011.[[33]](#footnote-33) This stresses the importance of cultural and artistic expression,[[34]](#footnote-34) of expression in non-verbal form and over the internet[[35]](#footnote-35) and also of the need for proportionate implementation.[[36]](#footnote-36) This makes no specific reference, however, to disabilities.

Yet there has been significant action in respect of persons with disabilities elsewhere. The General Comment on persons with disabilities discussed above was written against the backdrop of the Standard Rules on Equalization of Opportunities for Persons with Disabilities.[[37]](#footnote-37) These Rules led in 2006 to[[38]](#footnote-38) the Convention on the Rights of Persons with Disabilities (CRPD)[[39]](#footnote-39) which springs from the disability movement and has at its core the social model of disability.

*‘It takes to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with disabilities as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.’*[[40]](#footnote-40)

The CRPD imposes explicit obligations on states to ensure that persons with disabilities have the opportunity to ‘develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society’ and states that intellectual property should not be an obstacle to this.[[41]](#footnote-41)

So, persons with disabilities seeking to dance, to read books, and to view the output of dancers with disabilities, do have rights. These are, consistent with the international human rights framework, rights against states, rather than, say, private dance companies who may decide not to employ dancers with disabilities, theatres who may choose not to book disabled dance companies**,** or early stage providers of tablet eReader products which did not include software to assist the blind in accessing the text.[[42]](#footnote-42) So what might a dancer in the UK concerned about state withdrawal of funding from a disabled dance company actually do?[[43]](#footnote-43), This is highly problematic. The means of ensuring that states respect these rights, and to ensure for present purposes that there is opportunity to dance and to read books with appropriate steps taken to enable this to be done by people with disabilities, operates through a system of monitoring and reporting rather than any more tangible form of enforcement. For the ICCPR, the Human Rights Committee has a monitoring role[[44]](#footnote-44) as does the Committee on Economic Social and Cultural Rights in respect of the ICESCR.[[45]](#footnote-45) So a concerned individual or group could hope that this issue would be identified and addressed by a Committee – but with little opportunity for ensuring that this happens, or that it would engage with their own situation.[[46]](#footnote-46) There are opportunities under both international treaties, through optional protocols, for individuals or groups to complain about state conduct.[[47]](#footnote-47) Yet the UK is not a member of either protocol.[[48]](#footnote-48) It is also interesting to note that there has been very limited activity in respect of cultural and discrimination rights at international level.[[49]](#footnote-49)

Little is likely to come, therefore, from the general cultural and expressive rights.. In terms of more specific rights, the CRPD has an optional protocol enabling complaints to its Committee;[[50]](#footnote-50) and this time the UK is a signatory.[[51]](#footnote-51) Yet in terms of ultimate outcomes, this will once again lead only to identification of an issue, monitoring, encouragement of action and support. If the UK considers that it has insufficient funds to dedicate to, say, dancers with disabilities, further action is unlikely.[[52]](#footnote-52)

In summary, this discussion has identified rights which are relevant to participation, sharing and supporting dance and to access to books for disabled people.[[53]](#footnote-53) There are legal limits on these rights, with the references in freedom of expression to the rights of others, and the reminder of the power of intellectual property in the cultural life provision of the CRPD[[54]](#footnote-54) which has echoes of the balancing acts discussed in the cases and resolutions referred to above. And there are also practical limits on enforcing these human rights. This should provide a useful comparator with the position in respect of copyright, which is considered in the next section of the paper.[[55]](#footnote-55) This brief overview and discussion of priorities suggests, however, that there may be significant differences in how one approaches books and dance from the perspective of copyright and its international legal obligations than from that in respect of human rights and disabilities, the *lex generalis*. This, and then the implications for conflict and complementarity, will now be considered.

**Starting with copyright…**

How does copyright law deal with disability and difference? How does it reflect the rights of the disabled dancer to access and use their talents for the benefit of themselves and their communities, and of the blind to read books? And is this a fitting outcome?

***The copyright/disability interface***

Copyright rules[[56]](#footnote-56) mostly recognise and build rights around works and performances developed by the able-bodied and perceived by the senses, especially the eyes and ears. Indeed, copyright has its origins in text – the protection of the book and booksellers.[[57]](#footnote-57) Until recently, mention of disability has been largely conspicuous by its absence in international treaties dealing with copyright: there is nothing for instance in the Berne Convention,[[58]](#footnote-58) the WCT, or TRIPS. European Directives make no mention of disability – with the exception of the Infosoc Directive[[59]](#footnote-59) which provides in the recitals:

*(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.*

This is reflected in the Articles of the InfoSoc Directive as permission to provide an exception or limitation in national law for:

*uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability [[60]](#footnote-60)*

The influence of both the social and medical models of disability on the policy thinking underpinning this measure is evident in the references to *obstacles* to the use of works, and that persons *suffer* from disability (emphasis added).

In some domestic laws, some concessions have been given for people with disabilities – but the scope as between different jurisdictions differs.[[61]](#footnote-61) For instance as a result of joint lobbying in the UK by the publishing industry, the Royal National Institute of Blind People (RNIB), and the National Library for the Blind (NLB), an exception to copyright was introduced in the Copyright (Visually Impaired Persons) Act 2002 (CVIPA 2002),[[62]](#footnote-62) which amends the Copyright Designs and Patents Act 1988 (CDPA), to the effect that accessible copies of a literary, dramatic, musical, or artistic work may be made by or for visually impaired persons without the consent of the copyright owner.[[63]](#footnote-63) More recently in 2013, in domestic UK law the Government signaled an intention to broaden the exceptions for the disabled in terms of type of work, scope and beneficiaries.[[64]](#footnote-64) At the time of writing the consultation on the wording of the implementing regulations had just closed. If implemented in their present form the regulations would allow for making accessible copies of all types of work for people with all types of disability (mental as well as physical) so long as the person had lawful possession or use of that work and it was not available on reasonable commercial terms.[[65]](#footnote-65)

The pinnacle in this framework at present is the Marrakesh Treaty, which concerns the access of visually impaired people to books. The negotiation period leading up to the signing of the Treaty was challenging, as a range of different interests needed to be accommodated. The tensions that arose will be explored below, as will the text of the Treaty relevant to this discussion..

So on the copyright side, some policy makers and legislators have shown themselves anxious at some levels to build a framework that would enable the disabled user to gain access to copyright protected works for a range of reasons. The impact of this on the disabled dancer and her creation will be considered, and then that in respect of books and the blind.

**The case of the disabled dancer: authorship and ownership of the dance.**

The question for this section is how copyright law treats the disabled dancer and her dance, with a particular focus on authorship and ownership of the copyright in the dance. Does the approach of copyright accord with the disability agenda which has been discussed? Or does it follow its own path? If discrimination and inequality are to be avoided, then, on matters of authorship and ownership, the disabled dancer needs to be treated not only the same as others, but any barriers to inclusion should be broken down. As there is nothing explicit in copyright law about disability and dance, what is the reality of the position of the disabled dancer as compared with her non-disabled colleagues in matters of authorship and ownership?[[66]](#footnote-66)

***Copyright subsistence – the new regime***

The author is the central figure in the copyright regime. It is around her that the framework is built. The Berne Convention accords copyright protection, ownership[[67]](#footnote-67) and moral rights[[68]](#footnote-68) to a qualifying author[[69]](#footnote-69) for literary and artistic works including choreographic works[[70]](#footnote-70) for a fixed period of time.[[71]](#footnote-71) These rules are reflected to a greater or lesser extent in European Directives and national law.[[72]](#footnote-72)

There have been recent developments in the case law of the Court of Justice dealing with the criteria for the subsistence of copyright – which in turn have impact on laws in member states. Through a series of cases, the Court of Justice has stressed that the European scheme of protection for copyright,[[73]](#footnote-73) based on obligations to be found in the international regime, provides that works are to be protected where the subject matter is original in the sense of being the author’s intellectual creation.[[74]](#footnote-74) What the work is called, whether a literary, dramatic or musical work, is irrelevant. The standard of originality for all types of work is one of intellectual creation [[75]](#footnote-75)

To reach this level the author should:

express her creative ability in an original manner by making free and creative choices[[76]](#footnote-76)

stamp her ‘personal touch’ on the work.[[77]](#footnote-77)

Where choices are dictated by technical considerations, rules or constraints which leave no room for creative freedom, then these criteria are not met.[[78]](#footnote-78)

What does this mean for dance? While there are debates among dance professionals as to what constitutes a dance, many of these focus on a personal view of the quality of the work. Those in the dance community are not always in agreement. Nijinsky said of work by Duncan *‘...her performance is spontaneous and is not based on any school of dancing and so cannot be taught... It is not art’.*[[79]](#footnote-79) Others talk of the difficulty in identifying the work in postmodern dance: *‘One major aspect of postmodernism in dance is the nature of the works created: its structure and form challenge the traditional and consequently it is difficult to fix its identity as the works are prone to have many identities: each instantiation is a ‘token’ of the work*.’[[80]](#footnote-80) Despite these reservations, from the perspective of the law it would seem that there would not be a difficulty in showing the necessary intellectual creation for these to qualify as original works for the purposes of copyright.

There could perhaps be challenges for some dances in relation to the ‘dictated by technical considerations’ proviso. Some works which have historically been protected may no longer receive copyright status because they are limited by their technical function. An example from music is the skill, labour and effort exerted in updating musical scores to recreate the music of a baroque composer: the input may be considered to be dictated by technical requirements and may therefore not now be capable of protection by copyright.[[81]](#footnote-81) By analogy, would the recreation of an historic dance to conform to an original production now earn its own copyright protection? Arguably not if its re-creation was dictated by the technical requirements of the original choreographer. The question of how much of the dance should be considered personal to the dancer as opposed to fixed on the body by a more contemporary choreographer, or by an interpretation of the choreographers’ intent, will be considered below.

***Dance: Fixation***

Although there is no requirement of fixation in the international framework for copyright to subsist,[[82]](#footnote-82) the law in the UK does require that the work be fixed in some material form:[[83]](#footnote-83) copyright only arises on fixation. What form fixation takes is left open and needs only to be ‘in writing or otherwise’.[[84]](#footnote-84) Traditionally fixation has been thought of as being in writing, reflecting the historical text-based roots of copyright law. For dance, one of the notation systems such as Laban or Benesh might be deployed, both of which have relatively modern origins, having been invented in the mid 20th century. More modern examples of dance fixation might include film and video, computer animation, motion capture and holography.[[85]](#footnote-85) But for dance, meeting the requirement of fixation is perhaps too easily assumed. These methods might fix the work but may not capture the essence of the dance. Choreographers voice different opinions as to what amounts to fixation as well as challenging the requirement itself. As to the dance, some view its fugitive nature as presenting particular problems for capture; others point to the technicalities of the art form occupying both space and time as being too challenging for fixation.[[86]](#footnote-86) Yet others assert that the dance is fixed or ‘set’ in the ‘memories and bodies of the dancers’ where the bodies are considered material objects.[[87]](#footnote-87) For others the idea of any form of record is an anathema: the dance is meant only to be ephemeral – to exist at the time of performance where fixation ossifies the work.[[88]](#footnote-88)

With the current state of the law, in the UK the expectations and practices of those who would see fixation on the body are unlikely to be met. A court refused to accept that Adam Ant’s make-up was the subject of copyright protection because it was painted on his face and not fixed to a surface, saying that a painting is an object and not an idea.[[89]](#footnote-89) The court wanted to separate the idea in the work from the expression of the idea, as copyright protects only expression and not ideas.[[90]](#footnote-90) For performative works it would seem that the idea and expression may fuse into one – as in the fixation of the dance on the bodies and in the memories of the dancers.

***So who has authored the dance?***

What of the dance performance by Caroline Bowditch discussed above: does it meet the requirements for copyright protection? And if so, who has authored the dance? The requirement of fixation is clearly met. Whatever may be thought of fixation, these dances, or at least the parts that are available on YouTube, have been fixed in a form that is sufficient to meet this prerequisite. What also seems unarguable is that intellectual creation has been expressed in the work in an original manner through making free and creative choices. The key question is w*ho* has expressed this creative ability and stamped their personal touch on the work? There is a clear assumption in the dance community that the choreographer is the author of the dance and first owner of the copyright in the work. This comes through clearly from interviews with choreographers,[[91]](#footnote-91) in the literature both by[[92]](#footnote-92) and about choreographers.[[93]](#footnote-93) The one case in the UK jurisdictions to have considered the question, *Massine v de Basil*,[[94]](#footnote-94) was decided under the 1911 Act which in turn included a reference to ‘choreographic work’[[95]](#footnote-95) as did the 1956 Act.[[96]](#footnote-96) By contrast the CDPA says nothing about choreography or choreographic work. Is it therefore the choreographer who would be recognised as the author under the CDPA? Or Caroline, the dancer? Or both?

By analogy it is useful to look at the subsistence of copyright in music. A distinction exists between composition and arrangement. Copyright can subsist in an original musical composition[[97]](#footnote-97) and a separate copyright can exist in an arrangement of the composition so long as the correct type of originality has been expended.[[98]](#footnote-98) Why can the dancer not be considered as an arranger of the choreography?[[99]](#footnote-99) The dance may be ‘placed on the body’ by the choreographer, but is there not room in interpretation and arrangement on and through the body for authorial intent sufficient for copyright? This is particularly so if we look at Caroline’s virtuoso interpretation of the dance, interpreting the choreographic intent, but visibly different from that performed by Naomi, the other female dancer. It seems unarguable that Caroline’s personal touch is stamped on her arrangement of Love Games. It is only Caroline who knows how her body operates. It is only Caroline who could produce the dance in the form that she has. In terms of who then is the author of the dance, it seems perfectly plausible that there are two: one in the composition (the choreographer) and one in the arrangement (the dancer). If on the other hand the two contributions are considered indistinguishable, the dance could be considered a work of joint authorship.[[100]](#footnote-100)

Some have said that this is not a plausible argument:[[101]](#footnote-101) copyright focuses on the work, and not on the personal attributes of the author who makes that work; others argue that it is an interpretation of a work and thus in the nature of performance, and thus more apt to be protected by performers’ rights than by copyright.[[102]](#footnote-102) The points raise tricky questions that lie at the interface between the authorial input necessary to be considered an author for the purposes of copyright, and when the input instead interprets a work and is in the nature of performance. There is no case law on dance, and only limited case law considering the authorial requirements in respect of dramatic works. *Brighton v Jones*[[103]](#footnote-103) considered whether a director and playwright were the joint authors of a play. One argument was in respect of the contributions made during the course of rehearsals. The court noted that one contributor, Ms Jones, the defendant, had contributed the plot of the play in advance of rehearsals. Ms Brighton, the claimant, had contributed ideas to the dialogue, with the decisions on whether these were taken up were for Ms Jones. The ideas were found by the court to be ‘contributions to the interpretation and theatrical presentation of the dramatic work’[[104]](#footnote-104) rather than to contributions to the work itself.[[105]](#footnote-105) There was therefore no joint authorship. In *Coffey v Warner* [[106]](#footnote-106)concerning a musical work, voice expression, pitch contour and syncopation were found to be elements in the ‘interpretation or performance characteristics by the performer’ which was not ‘the legitimate subject of copyright protection in the case of a musical work, rather than [..] composition, which is.’[[107]](#footnote-107)

A number of observations can be made. *Brighton v Jones* was not concerned with the input into the work by the performers, but rather by those in charge of realising the performance. Further, it is quite accepted that where a performer interprets the work of another, such as where a chamber orchestra interprets a score, then performers’ rights are the appropriate mechanism to protect their interests. But there is a real difference between that type of performance, and a performance where the performer brings her own intellectual creation to the work of interpretation: it is her skill as a dancer through having developed her techniques through which she interprets and delivers the arrangement of the dance, that makes Caroline’s contribution suitable for protection by copyright. While *Coffey v Warner* seems to rule out certain elements of musical performance as suitable for copyright protection, finding analogies within dance seems problematic. Might a battement développé be considered equivalent to voice expression? Or an elevé equivalent to syncopation? It seems difficult to equate these. Further, in *Coffey* the elements were found to be not ‘the legitimate subject of copyright protection in the case of a musical work’. With the new case law from the Court of Justice mentioned above in respect of intellectual creation, it seems that the concept of work may not be relevant. If so, then this may lead the way for hitherto unprotected elements to be considered as suitable for protection by copyright. One more question arises: suppose Caroline gives an *ex tempore* performance which is then recorded. Does this mean that no copyright would exist in the dance at all?[[108]](#footnote-108) Or copyright would exist in the dance but there would be no author? Does a dance really have to exist in the mind of a choreographer or fixed in some other form by another party before it can be protected by copyright? It seems implausible; but that seems the logical outcome if Caroline is to be denied copyright protection in her creativity in her arrangement of the dance on her body.

So where does this take us when thinking about the disability agenda, the disabled dancer and her dance and copyright? Does copyright consider itself exceptional in this regard? The argument suggests not. Copyright with its focus on the work rather than the author, is blind to difference. Copyright supports the creative effort expended by those with impairments in the same way as those who are able bodied,; indeed, copyright may be *more* sympathetic to the work produced by the disabled dancer because of its very particular expression and because of the virtuoso nature of the arrangement. As is argued by Anes, in responding to the claim that the trained, and nondisabled dancer’s body is the ideal of aesthetic beauty: *‘it is exactly the disability and its marks of symptom – its signs of pathology – that produces a new and radical aesthetic. An able-bodied virtuoso cannot produce this aesthetic and the site of resistance to interpellation that is found in this kind of performance’*.[[109]](#footnote-109) By recognising the disabled dancer as an author, she would become a co-owner of the copyright in the work. This would confer equality with co-owners and status within the dance community and beyond.

So it would seem that for the disabled dance artist in her capacity as creator, the human rights, disability and copyright converge, showing support for the artist and her creation. Can the same be said for disability and human rights in relation to books, where the concern is for the user rather than the author?

**Books and the blind**

It has been noted above that where disability is included in the copyright framework at European and domestic level its focus is on accessibility for the disabled user. Historically, this has been done through relying on the medical model of disability, but more recently emphasis has been on the social model. However, the reality for disabled people seems not to have lived up to the aspirations within the legislation. It has long been argued that there is a ‘book famine’, despite the legislation.[[110]](#footnote-110) There have been and continue to be notable numbers of private initiatives seeking to make works available, including through audio books[[111]](#footnote-111) text-to-voice software, and newer technologies which convert words, images and graphics into words and oral descriptions to which a blind person may listen.[[112]](#footnote-112) Yet high hurdles remain.

For the last 30 odd years attempts have been made to break down these hurdles at international level to provide a mechanism which would result in meaningful ways in which the blind could access books. When the disability agenda reached the international copyright policy-making stage in the early 1980s, both visual and auditory impairments were considered. However in 1981, a Working Group created by WIPO and UNESCO to look at access by the visually and auditory impaired to protected works[[113]](#footnote-113) accepted the findings of a report which argued that captioning (which involves capturing and condensing text and making it available in written form) involves an ‘adaptation’ of the work which does not fall under the Berne Convention’s ‘minor reservations’ doctrine. As a result the Working Group abandoned their remit of addressing auditory impairment.[[114]](#footnote-114) At the related 1982 Intergovernmental Committee meeting, it was noted that there was support for finding ways to facilitate making works accessible to the blind, but that there was a concern for the legitimate interests of authors (as opposed to right-holders more broadly). Delegates were in favour of reproduction into Braille, but were not in favour of reproduction into large print or sound recording or broadcasting. Braille, it was reasoned, would be accessible only to the blind, while reproduction by other means would be difficult to limit to the blind, so there “would be much danger that [the author’s] interests might be prejudiced”.[[115]](#footnote-115) In a report in 1985, ‘Copyright Problems Raised by the Access by Handicapped Persons to Protected Works’,[[116]](#footnote-116) two key issues were identified as being barriers to access. These were (a) the lack of an exception or limitation in domestic laws that would allow reproduction of the works to make them accessible; and (b) the absence of a mechanism whereby accessible works once made could be distributed across borders. These two problems it was argued could be solved by an international treaty. [[117]](#footnote-117)

Notwithstanding this,, and while the disability agenda gained momentum in other fora,[[118]](#footnote-118) there was little obvious activity within the copyright sector. The next major, but general (in the sense that it is not a culture specific treaty but rather deals with a range of human rights and equality issues of people with disabilities, including culture) milestone was the negotiation of the CRPD in 2006, which was discussed above. No doubt as a result at least in part of the obligations undertaken in this Convention, further activity ensued in the copyright space. The European Commission established a stakeholder forum to examine issues of access by the blind to cultural works,[[119]](#footnote-119) and the World Blind Union (WBU) succeeded in placing the issue of a specific treaty containing exceptions and limitations for the blind on WIPO’s agenda,[[120]](#footnote-120) which eventually resulted in the Marrakesh Treaty in 2013. Full details of the views of people with disabilities of the brouhaha these negotiations are not clear. Yet it is clear is that there was fierce lobbying over large principles and over small words. Some of the issues that arose included whether the proposal should take the form of a Treaty or a recommendation;[[121]](#footnote-121) what types of disabilities should be included;[[122]](#footnote-122) what rights should be included;[[123]](#footnote-123) the class(es) of beneficiaries, the works to be included and the extent of rights in relation to those works, the extent of relaxations to be provided for developing countries, and, tellingly, the relationship to the Berne three step test.[[124]](#footnote-124) Finally, in July 2013 agreement was reached. Some note that because of the publicity surrounding the negotiations this was the only possible outcome because:*‘members will feel pressure to do whatever it takes to conclude a treaty because whoever stands in the way of this effort for blind people “will be branded as a villain.”[[125]](#footnote-125)* The World Blind Union has welcomed the final Treaty and sees it as a promising base for future action.[[126]](#footnote-126)

The Treaty itself is more obviously embedded in the social model of disability and in human rights rhetoric than any of the previous measures. This is evident from the preamble:

The link between disability and human rights is emphasised:

*Recalling the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities[[127]](#endnote-1)[[128]](#footnote-127)*

The preamble also notes that the Treaty is rooted in the social model of disability:

*Aware of the barriers of persons with visual impairments or with other print disabilities to access published works in achieving equal opportunities in society, and the need to both expand the number of works in accessible formats and to improve the circulation of such works[[129]](#endnote-2)*

In terms of content, the Treaty requires States to introduce limitations or exceptions to facilitate the reproduction, dissemination and making available[[130]](#footnote-128) of literary and artistic works[[131]](#footnote-129) in accessible formats to beneficiaries defined as people who are blind, have a visual impairment which cannot be improved or who are unable to hold or manipulate a book to read it.[[132]](#footnote-130) The Treaty also allows for cross border exchange of works in accessible format via a system of authorised entities[[133]](#footnote-131) thus eliminating costly duplication in effort, and holding out the possibility of access by those in developing areas countries to accessible format collections from elsewhere. By September 2013 there were 53 signatories to the Treaty, which comes into force three months after 20 eligible parties have deposited their instruments of ratification or accession.[[134]](#footnote-132) At the time of writing (September 2013) no instruments of ratification or accession had been deposited. and the World Blind Union has stated that it sees this as its next sphere of activity.[[135]](#footnote-133) To move on from international achievement, much depends on the next stage - domestic implementation of the provisions, in which the World Blind Union is also active.[[136]](#footnote-134) Given the newness of the Treaty, and the rather ponderous processes needed for ratifying the treaty and then implementing Treaty provisions into domestic law where not self-executing, it is likely to take some time before we witness changes that have the potential to make practical differences. One would hope, however, that the time period is not excessive.

So where does this take us when thinking about the disability agenda, and its impact on the disabled user of books and copyright? Unlike the position in respect of dance, the protracted nature of negotiations relating to the Marrakesh Treaty suggest that copyright does consider itself exceptional. . The Marrakesh Treaty does suggest a balance between copyright, human rights and disability concerns:

*Recognizing the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities[[137]](#footnote-135)*

*Emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits.* [[138]](#footnote-136)

These recitals indicate that in respect of one group of people with certain specified disabilities, the three fields can once again complement each other. The nature of the negotiations suggests, however, that it was something of a ‘shotgun’ wedding. It is only when there are national laws and they start to be used by the beneficiaries and those who help them to access books, that the real and tangible impact of these words will be known. That will be the point at which we will have a deeper understanding of the relationships between disability, human rights and copyright, and of the extent to which they support and complement each other, or are in conflict.

**Conclusion**

So what then is the conclusion about the intersections between the disability, human rights and copyright? Where the focus is on the creator and her creation, then the systems can seem well aligned. Copyright is blind to difference in the individual and treatment of the able-bodied and the disabled is equal. Yet is this blindness, or perhaps wilful ignorance, sufficient? Should there be more open and robust discussions between the fields to enable the reality of disabled dance to form part of the copyright framework, rather than relying on creative legal arguments to bring it within its scope? In respect of users, and books while the Marrakesh Treaty, rightfully, has been hailed as an historic success, the real test will be as to how it is implemented into domestic laws and then how it is used in practice. Only then will we know whether disability as underpinned by a human rights agenda and instruments is actually powerful enough to displace the control conferred by copyright and the sway that the copyright lobby holds over policy makers.

This is only the start of the exploration into the disability, human rights and copyright ecosystem. Our focus has been on two particular case studies: one of creation and one of use. There are many other intersections that need to be explored. While we chose to look at issues of ownership and authorship in relation to Caroline Bowditch’s performance in Love Games, the intention of the choreographer of that piece was to explore whether a disabled dancer could ‘cover’ a non-disabled dancer. While feedback we understand was generally positive, anecdotal evidence suggests that there were some who did not agree. The right of the disabled artist to take part in cultural performance is a pressing issue. While there are notable inclusive companies such as Candoco in respect of dance and Graeae in respect of theatre, is there any disabled performer in say the Royal Ballet? Or in Ballet Rambert**?** And of interest to this collection, what role might copyright play in contributing to exclusion? In respect of the position of users, what of other forms of disabilities and other works which are not covered by the Marrakesh Treaty? And what of the role of copyright in excluding disabled people from our cultural heritage, such as producing touchable copies of works of art?

This paper has identified clear differences in priority and substance between disability, human rights and copyright. In some policy discussions and in some court cases, they have moved closer together and, using the arguments made here, they could move closer still. There remains, however, a significant power imbalance. Human rights and disabilities treaties make clear the rights to be accorded to people with disabilities, but enforcement systems are limited. A significant body of law which relates to culture makes very limited reference to the position of people with disabilities. This field of law, copyright, has robust enforcement procedures and has well organised and well funded lobbyists to protect its interests. Copyright appears to consider itself a *lex specialis;* and that the (largely) legitimate arguments which can be made in favour of it, enable it to disregard in many cases the interests of others - notwithstanding that these interests are recognised by rights in international treaties. This seems not to have been, at least until auditory impairment was excluded from WIPO, the result of a deliberate decision. More concerningly it came from being inward looking and disregarding those who do not seem sufficiently relevant to warrant attention, be that through exceptions to copyright or conferring copyright’s protection. Marrakesh is a triumph – but it is not the end: it is a fine beginning.

1. Oliver, M ‘The Individual and Social Models of Disability’ Paper presented at Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians July 1990 <disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> last accessed 14 October 2013 *‘the real issues in disability which are about oppression, discrimination, inequality and poverty’*. [↑](#footnote-ref-1)
2. Here, a preliminary point should be made. The disability conventions speak of utilising creative potential for personal and community benefit; to access to cultural material and activities in accessible forms; and to access to places where cultural performances and services are offered. This comment is concerned with the first two – but not with physical access. See United Nations Convention on the Rights of Persons with Disabilities art. 30; and General comment Committee on Economic, Social and Cultural Rights Forty-third session 2–20 November 2009 General comment No. 21 [↑](#footnote-ref-2)
3. Caroline Bowditch’s profile on the Dance4 website <dance4.co.uk/profile/associate-artist/caroline-bowditch> last accessed 14 October 2013 [↑](#footnote-ref-3)
4. “Casting Exploration by Scottish Dance Theatre” <youtube.com/watch?v=6YEtEyr6N4g> last accessed 14 October 2013 [↑](#footnote-ref-4)
5. This part of the paper will build on discussions carried out from the dance, copyright, human rights and ethics perspective, in S Whatley et al ‘Validation and Virtuosity: Perspectives on Difference and Authorship/Control in Dance’ submitted to and accepted by The Dance Research Journal (US) to be published in 2014. This paper formed part of “InVisible Difference: Dance, Disability, Law” a project funded by the AHRC on which the authors are Co-Investigators. See project website <http://www.invisibledifference.org.uk>. [↑](#footnote-ref-5)
6. UPIAS, *Fundamental principles of Disability* (London Union of the Physically Impaired, 1976) at 14. See also Sheila McLean and Laura Williamson *Impairment and Disability: law and ethics at the beginning and end of life* (2007 Routledge Cavendish ); Alastair Campbell *The body in Bioethics*, (2009 Routledge Cavendish) [↑](#footnote-ref-6)
7. Sheila Mclean and Laura Williamson *Impairment and Disability: law and ethics at the beginning and end of life* (2007 Routledge Cavendish) [↑](#footnote-ref-7)
8. Peter K Yu ‘Intellectual property and human rights in the non-multilateral era’ 64 Fla. L. Rev. July 2012 no 4 1045; Laurence Helfer “The New Innovation Frontier? Intellectual Property and the European Court of Human Rights” 49 Harv. Int’l. L. J. 1(2008); Wojciech Sadurski “Allegro without Vivaldi: trademark protection, freedom of speech, and constitutional balancing” E.C.L. Review 2012 8(3) 456-492. See also Christophe Geiger *Research Handbook on Human Rights and Intellectual Property* (forthcoming, Edward Elgar) [↑](#footnote-ref-8)
9. UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2000/7 <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>> last accessed 21 October 2013; and United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. Economic, Social and Cultural Rights, Intellectual property rights and human rights. Report of the Secretary-General. E/CN.4/Sub.2/2001/12 14 June 2001 <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.12.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2001.12.En?Opendocument)> last accessed 21 October 2013 [↑](#footnote-ref-9)
10. *Ashdown* *v Telegraph Ltd* [2001] EWCA Civ 1142 [[2002] Ch. 149](https://uk.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&DB=4697&SerialNum=2001569852&FindType=g&AP=&fn=_top&rs=WLUK8.06&mt=WestlawUK&vr=2.0&sv=Split&sp=ukatedu-000) [↑](#footnote-ref-10)
11. In French *Ashby Donald v France* (2013) http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115979 and comment Copyright vs Freedom of Expression (22 January 2013) at <<http://echrblog.blogspot.co.uk/2013/01/copyright-vs-freedom-of-expression.html>> last accessed 21 October 2013 [↑](#footnote-ref-11)
12. *Time Inc v Geis* 293 F. Supp 130 [↑](#footnote-ref-12)
13. Although frequently this will be not so, see *Harper* *& Row v Nation Enterprises* 471 U.S. 539, HRH *Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) [2006] E.C.D.R. 20 – and also of course that in some cases where human rights argument might appear to be evident for example the use of a photograph of drugs in a campaign warning against them, are not pursued *Hoffman v Drug Abuse Resistance Education (UK) Ltd* [2012] EWPCC 2. [↑](#footnote-ref-13)
14. This paper will not explore questions of the extent to which IP is a human right, including in respect of being a form of property, or is a form of delivery of human rights – in respect of which see Article 15(1)(c) ICESCR, article 17(2) UDHR, Office of the High Commissioner for Human Rights Committee on Economic Social and Cultural Rights“The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author” General Comment No. 17 (2005) <[http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.17.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.GC.17.En?OpenDocument)> last accessed 21 October 2013; *Anheuser-Busch Inc v Portugal* (73049/01) [2007] E.T.M.R. 24 (2007) 45 E.H.R.R. 36, *Smith Kline & French Laboratories Ltd v Netherlands (Admissibility)* (12633/87) October 4, 1990 Eur Comm HR 70, *Levi Strauss & Co v Tesco Stores Ltd* [2002] EWHC 1625 (Ch) [2002] 3 C.M.L.R. 11 [2003] R.P.C. 18, Audrey Chapman “Approaching intellectual property as a human right: obligations related to Article 15(1)(c)” Copyright Bulletin, vol XXXV No. 3, July-September 2001 UNESCO Publishing, Paris, France, Jonathan Griffiths “Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law” 2013 ELR 65 [↑](#footnote-ref-14)
15. See e.g. Declaration of the Rights of Man and the Citizen, (1789), John Locke, *Two Treatises of Government* (work first published 1690, The Legal Classics Library 1994), Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (work first published 1789 The Hafner Library of Classics Hafner Publishing Co 1963,); for ongoing arguments, see eg John Rawls, *A Theory of Justice* (Clarendon Press 1972) (see 225 regarding freedom of expression of interest here), Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) (see 277 regarding freedom of expression), Michael Ignatieff (ed.), *Human Rights as Politics and Idolatry* (Princetown University Press 2001), Wiktor Osiatynski, *Human Rights and their limits* (CUP 2009) and Andrew Fagan, *Human Rights: Confronting Myths and Misunderstandings* (Edward Elgar 2011) [↑](#footnote-ref-15)
16. See e.g. J Symonides (ed.), *Human Rights: Concepts and Standards* (Dartmouth Publishing Co Ltd and UNESCO 2000); Yvonne Donders and V Volodin, *Human Rights and Educational, Social and Cultural Developments and Challenges* (UNESCO Publishing and Ashgate 2007); Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (The Federation Press 1997) [↑](#footnote-ref-16)
17. UK Commission on a Bill of Rights <<http://www.justice.gov.uk/about/cbr>> last accessed 21 October 2013 which did not come to any clear decision; the suggestion that there should be a replacement of the regime was resisted strongly by the Scottish Human Rights Commission <<http://scottishhumanrights.com/news/latestnews/article/billofrightsnov11news>> last accessed 21 October 2013 Yet dance and the arts were absence from the lengthy Scottish Human Rights Commission *Getting it Right? Human Right in Scotland* (Edinburgh: SHRC, 2012). [↑](#footnote-ref-17)
18. Regarding states who have ratified the international human rights treaties, see Office of the United Nations High Commissioner for Human Rights ‘Status of Ratifications of the Principal Human Rights Treaties as of 14 July 2006’, available at <http://www2.ohchr.org/english/bodies/docs/status.pdf> last accessed 21 October 2013 [↑](#footnote-ref-18)
19. See discussion in R Stavenhagen, ‘Cultural Rights: A Social Science Perspective’ and A Eide, ‘Cultural Rights as Individual Human Rights’ in A Eide, C Krause, A Rosas *Economic, Social and Cultural Rights* (Martinus Nijoff, 2001) and L Shaver, ‘The Right to Science and Culture’ 10 Wis. L. Rev. 212. Neither of these pieces addresses disability. [↑](#footnote-ref-19)
20. Office for the High Commissioner for Human Rights Persons with Disabilities General Comment 5 <<http://www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>> last accessed 21 October 2013 [↑](#footnote-ref-20)
21. Office for the High Commissioner for Human Rights Persons with Disabilities General Comment 5, Para 15 <<http://www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>> last accessed 21 October 2013 [↑](#footnote-ref-21)
22. <<http://www.unhchr.ch/tbs/doc.nsf/0/4b0c449a9ab4ff72c12563ed0054f17d>> last accessed 21 October 2013 General Comment 5, Paras 37, 38 [↑](#footnote-ref-22)
23. “Right of everyone to take part in Cultural Life” (General Comment 21) E/C.12/GC/21 accessible via http://tbinternet.ohchr.org/\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 last accessed 22 October 2013 [↑](#footnote-ref-23)
24. General Comment 21, Para 11 [↑](#footnote-ref-24)
25. Which might have been (or still be) considered unusual by some. A review by Michael Scott appeared in *Vancouver Sun*, May 20, 1999. Scott commented with a specific reference to Candoco company member David Toole; “There is a horrific, Satyricon quality to CandoCo that heaves up in the chest – nausea at the moral rudderlessness of a world where we would pay money to watch a man whose body terminates at his ribcage, moving about the stage on his hands” [↑](#footnote-ref-25)
26. General Comment 21, see note 23 Para 13 [↑](#footnote-ref-26)
27. General Comment 21 Para 31 [↑](#footnote-ref-27)
28. General Comment 21 Paras 16(b), 30 and also makes a general reference to non-discrimination including “on …other status” para 21 [↑](#footnote-ref-28)
29. “Non-discrimination in economic, social and cultural rights” (General Comment 20) E/C.12/GC/20 accessible via http://tbinternet.ohchr.org/\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 last accessed 22 October 2013 [↑](#footnote-ref-29)
30. General Comment 20 Paras 11, 15 (regarding non exhaustive), 16, 28 (which refers back to General Comment 5). [↑](#footnote-ref-30)
31. General Comment 20, Para 9. [↑](#footnote-ref-31)
32. 999 UNTS 171 (“ICCPR”) Regarding states who have ratified the international human rights treaties, see Office of the United Nations High Commissioner for Human Rights ‘Status of Ratifications of the Principal Human Rights Treaties as of 14 July 2006’, available at <http://www2.ohchr.org/english/bodies/docs/status.pdf> last accessed 21 October 2013 [↑](#footnote-ref-32)
33. General Comment No. 34 on article 19 <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> last accessed 22 October 2013 [↑](#footnote-ref-33)
34. General Comment 34 Para 11 [↑](#footnote-ref-34)
35. General Comment 34 Para 12 [↑](#footnote-ref-35)
36. General Comment 34 Para 34 [↑](#footnote-ref-36)
37. Annexed to UNGA resolution 48/96 of 20 December 1993 [↑](#footnote-ref-37)
38. See Louise Arbour, UN High Commissioner for Human Rights, General Assembly Ad Hoc Committee 8th session, New York, 5 December 2006 [↑](#footnote-ref-38)
39. See United Nations Convention on the Rights of Persons with Disabilities <<http://www.un.org/disabilities/convention/conventionfull.shtml>> last accessed 21 October 2013 [↑](#footnote-ref-39)
40. United Nations Enable – The Convention in Brief <<http://www.un.org/disabilities/default.asp?navid=15&pid=162>> last accessed 21 October 2013 [↑](#footnote-ref-40)
41. Article 30(2) Convention on the Rights of Persons with Disabilities (2006) [↑](#footnote-ref-41)
42. See A Brown. S Harmon and C Waelde, ‘Do You See What I See? Disability, Technology, Law and the Experience of Culture’ 2012 IIC (8) 901-930 , at 909-913 [↑](#footnote-ref-42)
43. Such as when the company Blue Eyed Soul lost its public funding. <[disabilityartsonline.org.uk/Blue-Eyed-Soul-Dance-Company](http://www.disabilityartsonline.org.uk/Blue-Eyed-Soul-Dance-Company) > last accessed 21 October 2013 See discussion in Alfredsson, Gudmundur et al (2009) [*International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller*](http://www.amazon.co.uk/International-Human-Rights-Monitoring-Mechanisms/dp/9004162364/ref%3Dsr_1_1?ie=UTF8&qid=1301395589&sr=8-1) (Martinus Nijhoff, Netherlands, 2009); A.R. Chapman, “Development of Indicators for Economic, Social and Cultural Rights. The rights to Education, Participation in Cultural Life and Access to the Benefits of Science” 111 and W.A. Schabas “Study of the Rights to Enjoy the Benefits of Scientific and Technical Progress and its Applications” 273 both in Yvonne Donders Y. and Volodin, V. (2007) *Human Rights and Educational, Social and Cultural Developments and Challenges* UNESCO Publishing and Ashgate, Aldershot, Hampshire, UK and Burlington, VT, USA [↑](#footnote-ref-43)
44. Human Rights Committee <<http://www2.ohchr.org/english/bodies/hrc/>> last accessed 21 October 2013 [↑](#footnote-ref-44)
45. Committee on Social, Economic and Cultural Rights <<http://www2.ohchr.org/english/bodies/cescr/> > last accessed 21 October 2013 [↑](#footnote-ref-45)
46. See N Pillay, ‘A report by the United Nations High Commission for Human Rights. Strengthening the United Nations human rights treaty body system’ (June 2012) <<http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf>> last accessed 21 October 2013 [↑](#footnote-ref-46)
47. http://www.ohchr.org/Documents/HRBodies/CESCR/OProtocol\_en.pdf (CESCR 2008); http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx (ICCPR (1966) both last accessed 22 October 2013 [↑](#footnote-ref-47)
48. See United Nations Treaty Collection <<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>> last accessed 21 October 2013 [↑](#footnote-ref-48)
49. See R Stavenhagen, ’Cultural Rights: A Social Science Perspective’ and A Eide, ‘Cultural Rights as Individual Human Rights’ in A Eide, C Krause, A Rosas) *Economic, Social and Cultural Rights* (Martinus Nijoff, 2001), and L Vanhala *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP,2013) [↑](#footnote-ref-49)
50. Committee on the Rights of Persons with Disabilities <<http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>> last accessed 21 October 2013 [↑](#footnote-ref-50)
51. Optional Protocol to the Convention on the Rights of Persons with Disabilities, articles 4,6,7 <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx>> last accessed 21 October 2013 [↑](#footnote-ref-51)
52. See <<http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>> last accessed 21 October 2013 for link to CRPD Committee response to the Human Rights Treaty body consultation, see also note 46 [↑](#footnote-ref-52)
53. Note also that comparable rights exist in the European Convention on Human Rights (articles 10, 14), Charter of Fundamental Rights of the European Union (article 21), Treaty on the Functioning of the European Union (articles 10 and 19) and there is also in the UK the Equality Act 2010, see in particular sections 13(4), 15, 19, 21, 29. The practical impact of these instruments is considered in Brown A and Waelde C ‘Human Rights, persons with disabilities and copyright’ in Christophe Geiger *Research Handbook on Human Rights and Intellectual Property* (forthcoming, Edward Elgar) [↑](#footnote-ref-53)
54. (even though it is clearly intended there that the rights of the person with disabilities shall prevail) [↑](#footnote-ref-54)
55. Since intellectual property came under the umbrella of the WTO in 1994, if a state is concerned about another state’s action or inaction in respect of IP it can make a complaint to the WTO dispute settlement system which could lead ultimately to trade sanctions. Strong arguments have also been made that if IP owners are concerned, they are encouraging states to complain (see GC Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, Washington, USA, 2003) Scholars have argued that these complaints are made less frequently than had been feared, and outcomes have also been more balanced – see J Pauwelyn, ‘The dog that barked but didn’t bite: 15 years of intellectual property disputes’ (2010) 1 JIDS 2, 389-42 [↑](#footnote-ref-55)
56. Derived from a web of international treaties, and, for European Union member states, from Regulations and Directives Examples include: Berne Convention for the Protection of Literary and Artistic Works 1886 as revised; WIPO Copyright Treaty 1996; Copyright in the Information Society Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society; Term of Protection Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights; Rental Right Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version). [↑](#footnote-ref-56)
57. Statute of Anne 1709. [↑](#footnote-ref-57)
58. Berne Convention for the Protection of Literary and Artistic Works 1886 as revised. [↑](#footnote-ref-58)
59. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [↑](#footnote-ref-59)
60. Ibid Article 3 b) [↑](#footnote-ref-60)
61. SCCR, Study on Copyright Limitations and Exceptions for the Visually Impaired, WIPO <wipo.int/meetings/en/doc\_details.jsp?doc\_id=75696> Last accessed 22 October 2013 [↑](#footnote-ref-61)
62. In force 31 October 2003 [↑](#footnote-ref-62)
63. Subject to a host of limitations: see ss. 81-83, Copyright Designs and Patents Act 1988. [↑](#footnote-ref-63)
64. [ipo.gov.uk/techreview-disability-exceptions.pdf](http://www.ipo.gov.uk/techreview-disability-exceptions.pdf) Last accessed 22 October 2013 Consultation on the wording of the proposals closed in September 2013 [↑](#footnote-ref-64)
65. Draft s 31A [↑](#footnote-ref-65)
66. Legally, this is an underexplored area although has been the subject of some attention recently. Yeoh, F ‘The copyright implications of Beyoncé’s “borrowings,”’ Choreographic Practices 2013 Volume 4 No. 1, 95-117. Yeoh, F, ‘Choreographers’ moral right of integrity,’ Journal of Intellectual Property and Practice, 2013, Vol. 8, No. 1. 43-58. Yeoh, F ‘Choreographer’s Copyright Dilemma,’ Entertainment Law Review, 2012, Issue 7, 201-208. Yeoh F ‘The Choreographic Trust: Preserving Dance Legacies,’ Dance Chronicle, 2012, 35.2, 224-249 There is more in the US where there has been some important litigation in relation to ownership of dance around the Martha Graham estate. This contribution will concentrate on the UK. [↑](#footnote-ref-66)
67. Berne Convention Article 5 [↑](#footnote-ref-67)
68. Berne Convention Article 6 bis [↑](#footnote-ref-68)
69. Berne Convention Article 3 [↑](#footnote-ref-69)
70. Berne Convention Article 2 [↑](#footnote-ref-70)
71. Berne Convention Article 7 [↑](#footnote-ref-71)
72. In the UK the Copyright Designs and Patents Act 1988 as amended. [↑](#footnote-ref-72)
73. J Pila, “An intentional View of the Copyright Work” 71 Mod. L. Rev. (2008); C Handig, “*Infopaq International A/S v Danske Dagblades Forening* (C-5/08): is the term “work” in the CDPA 1988 in line with the European Directives?” (2010) *EIPR* 32(2), 53. [↑](#footnote-ref-73)
74. Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* ( *Infopaq*) paras 33 38. See also Case C -393/09 *Bezpečnostní softwarová asociac*e para 45 What is not protected is expression which is limited by its technical function. Case C- 406/10 *SAS Institute Inc. v World Programming Ltd* paras 38-40. Case C-145/10, *Painer v Standard VerlagsGmbH et a*l In the UK see *SAS Institute Inc.v World Programming Ltd* [2013] EWHC 69 (Ch) para 27. [↑](#footnote-ref-74)
75. ##  Case C-5/08 Infopaq International A/S v Danske Dagblades Forening, , Case C‑393/09 Bezpečnostní softwarová asociace [45]; Joined Cases C‑403/08 and C‑429/08 Football Association Premier League and Others; E Rosati ‘Originality in a work, or a work of originality: the effects of the Infopaq decision’ E.I.P.R. 2011, 33(12), 746-755. E Derclaye, ’Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law’ (2010) EIPR 32(5), 248.

 [↑](#footnote-ref-75)
76. *Infopaq International A/S v Danske Dagblades Forening* (C-5/08):, [45]; Case C‑393/09 *Bezpečnostní softwarová asociace*, [50]; and Case C-145/10, *Painer v Standard VerlagsGmbH et al*, [89] and Case C-604/10 *Football Dataco v Yahoo!* [2012] 2 CMLR 24 [38] [↑](#footnote-ref-76)
77. Case C-145/10, *Painer v Standard VerlagsGmbH et al*, [92]; Case C-604/10 *Football Dataco* [38]. [↑](#footnote-ref-77)
78. Case C‑393/09 *Bezpečnostní softwarová asociace*, [48]- [49], and Cases C‑403/08 and C‑429/08 *Football Association Premier League and Others,* [98]; Case C-604/10 *Football Dataco* para 39. A number of articles have discussed the implications of these cases. These include: M van Eechoud ‘Along the road to uniformity – diverse readings of the Court of Justice Judgments on copyright work’ 3 (2012) JIPITEC 1 para 60; C Handig, ‘The “sweat of the brow” is not enough! – more than a blueprint of the European copyright term ‘work’’, 2013, EIPR 1; A Rahmatian, ‘Originality in UK copyright law: the old “skill and labour” doctrine under pressure’, 2013 !!C 3; E Rosati, ‘Towards an EU-wide copyright? (Judicial) pride and (legislative) prejudice’, 2013, IPQ 46. [↑](#footnote-ref-78)
79. D Jowitt, ‘*Time and the Dancing Image*’ (Berkeley and Los Angeles: University of California Press) 1988, p 76 [↑](#footnote-ref-79)
80. F Yeoh *Copyright Law does not adequately accommodate the art form of dance’* PhD thesis Birkbeck College 2012. [↑](#footnote-ref-80)
81. Sawkins v Hyperion Records Ltd, [2005] EWCA 565. [↑](#footnote-ref-81)
82. Berne Convention Article 2.2 leaves fixation to members of the Union [↑](#footnote-ref-82)
83. This is so the extent of the monopoly claimed may be known to others *Tate v Fulbrook* 1908 1 KB 821 at 832. [↑](#footnote-ref-83)
84. Copyright Designs and Patents Act 1988 as amended (CDPA) s 3(2). [↑](#footnote-ref-84)
85. Each of which may have separate protection in their own right. [↑](#footnote-ref-85)
86. Cook, Melanie ‘Moving to a new beat: copyright protection for choreographic works’ 1977 24 UCLA L Rev 1287; Yeoh n 83 pp 96-100 [↑](#footnote-ref-86)
87. Traylor, M. 1981. ‘Choreography, Pantomime and the Copyright Revision Act of 1976.’ New England Law Review 16: 227, 237 [↑](#footnote-ref-87)
88. See for instance Théberge, P “Technology Creative Practice and Copyright”, S Frith and L Marshall (eds) *Music and Copyright* (Edinburgh: Edinburgh University Press 2004 2nd ed) 139, 140. [↑](#footnote-ref-88)
89. *Merchandising v Harpbond* (1983) FSR 32. [↑](#footnote-ref-89)
90. *Designers Guild Ltd v Russell Williams (Textiles) L*td [2001] FSR 11, paras 24, 25 [↑](#footnote-ref-90)
91. Waelde C and Schlesinger, P ‘Music and Dance: Beyond Copyright Text?’ (2011) 8:3 SCRIPTed 257 <<http://script-ed.org/?p=83>> Last accessed 22 October 2013 [↑](#footnote-ref-91)
92. A De Mille, *And Promenade Home*, (Boston, Toronto: Little, Brown and Company, 1956), at 256. “[T]he choreographer is glued immobile as a fly in a web and must watch his own pupils and assistants, suborned to steal his ideas and livelihood. Several dancers made paying careers out of doing just this”. [↑](#footnote-ref-92)
93. See generally McFee, G 2011. *The Philosophical Aesthetics of Dance: Identity, Performance and Understanding*. Alton: Dance Books [↑](#footnote-ref-93)
94. [1936–45] MacG CC 223 [↑](#footnote-ref-94)
95. Copyright Act 1911 s 35(1) ‘ Dramatic work ’ includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character [↑](#footnote-ref-95)
96. Copyright Act 1956 s 45(1). Carrière L ‘Choreography and Copyright: some comments on choreographic works as newly defined in the Canadian Copyright Act’ 2003 available at <<http://www.robic.ca/admin/pdf/279/105-LC.pdf>> Last accessed 22 October 2013 [↑](#footnote-ref-96)
97. First recognised in *Bach v Longman,* 98 ER [1777] 1274. [↑](#footnote-ref-97)
98. *Austin v Columbia,* [1917-1923] MacG CC 398; *Robertson v Lewis,* [1976] RPC 169; *Redwood Music v Chappell & Co Ltd.,* [1982] RPC 109. Although the case law which has considered copyright in arrangements tends to leave the line between composition and arrangement rather fuzzy *Godfrey v Lees,* [1995] EMLR 307; *Beckingham v Hodgens,* [2002] EMLR 45; *Hadley v Kemp,* [1999] EMLR 589; *Fisher v Brooker*, [2009] UKHL 41. See also R Arnold, ’Reflections on “The Triumph of Music: Copyrights and Performers’ Rights in Music’ (2010) *IPQ* 153; Arnold, R ’Are Performers Authors? *Hadley v Kemp*,’ (1999) *EIPR* 21(9), 464.. [↑](#footnote-ref-98)
99. *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 109; *Fisher v Brooker* [2009] UKHL 41 [↑](#footnote-ref-99)
100. *Fisher v Brooker* [2009] UKHL 41; *Brighton v Jones* [2004] EWHC 1157 (Ch) Stuart v Barrett [1994] EMLR 449; *Hadley v Kemp,* [1999] EMLR 589 [↑](#footnote-ref-100)
101. Conversation at ATRIP Oxford 2013. [↑](#footnote-ref-101)
102. Although it seems unarguable that a work can be protected by both copyright and by performers’ rights. R Arnold, ’Reflections on “The Triumph of Music: Copyrights and Performers’ Rights in Music’ (2010) *IPQ* 153. [↑](#footnote-ref-102)
103. [2004] EWHC 1157 (Ch). [↑](#footnote-ref-103)
104. Ibid [56] [↑](#footnote-ref-104)
105. Citing *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449 [↑](#footnote-ref-105)
106. *Coffey v Warner/Chappell Music Ltd* [2005] EWHC 449. [↑](#footnote-ref-106)
107. Ibid [6]. [↑](#footnote-ref-107)
108. Copyright would subsist in the sound recording and film of the dance. Copyright Designs and Patents Act ss 5A and 5B [↑](#footnote-ref-108)
109. Anes. M ‘Performing between intention and unconscious daily gesture. How might disabled dancers offer us a new aesthetic sensibility?’ About performance No 11, 2012, 143, 143. [↑](#footnote-ref-109)
110. Annex 111 SCCR/20/5 WIPO Standing Committee on Copyright and Related Rights Twentieth Session Geneva, 21–24 June 2010, at 2 In 2004 , despite the 2002 VIP Copyright Act, no discernible increase in the number of accessible publications could be detected. [↑](#footnote-ref-110)
111. [↑](#footnote-ref-111)
112. See discussion on RNIB website ‘‘Talking Books and Daisy Players’’ <rnib.org.

uk/livingwithsightloss/readingwriting/Talkingbooksanddaisyplayers/Pages/talking\_books\_

daisy.aspx> last accessed 22 October 2012. For links to some sources, see <http://talkingbookstore.net/> and <[www.amazon.co.uk/Audio-CDs-Books/b?ie=UTF8&node=267859](http://www.amazon.co.uk/Audio-CDs-Books/b?ie=UTF8&node=267859)> last accessed 22 October 2013. In tandem with the proposals discussed below, extensive informal efforts have been made at international level to develop licensing schemes to facilitate access to works. WIPO established the TIGAR project. See <<http://www.visionip.org/tigar/en/faq.html>> Last accessed 22 October 2013 [↑](#footnote-ref-112)
113. The Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, met in Paris on 25-27 October 1982, and its report, Report d 1V, was published in 1985 in conjunction with that of the ensuing Intergovernmental Committee: see Executive Committee of the International Intergovernmental Committee of the Union for the Protection of Literary and Universal Copyright Convention on Artistic Works (Berne Union), Twenty-Fourth Session Sixth Ordinary Session of the (9th Extraordinary) Committee of the 1971 Convention PARIS (17-25 June 1985) B/EC/XXIV/10 IGC/VI/11, Paris, 12 March 1985. [↑](#footnote-ref-113)
114. The Working Group agreed with the submission that the making of captions involves the right of adaptation. Thus, it opined that it would be incompatible with both international copyright treaties and the national legislation of many countries to provide for any kind of exceptions or non-voluntary licensing in respect of such use: see Berne Union, ibid, at 354. For more on minor reservations for religious ceremonies, military bands and the educational needs of children and adults, and its revisions in 1948 and 1967, see Standing Committee on Copyright and Related Rights, Nineteenth Session Geneva, 14-18 December 2009, Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and research Activities in Latin America and the Caribbean, SCCR/19/4, 30 September 2009, at para 1.1.1. [↑](#footnote-ref-114)
115. Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) Paris (17-25 June 1985) B/EC/XXIV/10, para. 12, and p. 3 of ANNEX I. [↑](#footnote-ref-115)
116. Ms Wanda Noel, IGC(1971)/VI/11 - B/EC/XXIV/10 ANNEX II - PAGE 25-26. Kei online [↑](#footnote-ref-116)
117. See WIPO, *Supplementary Information on Studies on Limitations and Exceptions for Educational Activities* (document SCCR/20/3), WIPO, *Second Analytical Document on Limitations and Exceptions* (document SCCR/20/4), WIPO, *Examples of Practices and Other Measures at National Level for the Benefit of Persons with Print Disabilities* (document SCCR/20/5), WIPO, *Third Interim Report on the Stakeholders Platform* (document SCCR/20/6), and WIPO, *Report on the Questionnaire on Limitations and Exceptions* (document SCCR/20/7). See also J. Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired* (Geneva: WIPO, 2007), which demonstrated that there is a legal patchwork of exceptions for visually impaired people worldwide, and that transferring a book to country B which has been made accessible under a copyright exception in country A remains a legal “grey area.” For the US which has just embraced international exhaustion for works lawfully made under the US Copyright Act the emphasis may change. See *Kirtsaeng v. John Wiley & Sons, Inc*., 568 U. S.(2013) [↑](#footnote-ref-117)
118. See Brown A and Waelde C ‘Human Rights, persons with disabilities and copyright’ in Christophe Geiger *Research Handbook on Human Rights and Intellectual Property* (forthcoming, Edward Elgar) [↑](#footnote-ref-118)
119. See European Commission, Communication: Copyright in the Knowledge Economy, Brussels, 19.10.2009 COM(2009) 532 final. In this Communication, the Commission notes that, despite the UN Convention on the Rights of Persons with Disabilities, only 5% of books were available in formats accessible to the blind, accepts that the exceptions and limitations in Member State legislation are piecemeal and not conducive to cross-border trade, and agrees that technical protection measures may cause problems for changing formats. However, it is not clear whether this stakeholder forum has yet been constituted, as there appears to be no publicly available information. [↑](#footnote-ref-119)
120. The WBU managed to persuade Brazil, Ecuador, and Paraguay to table a proposal for a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons at WIPO’s 2009, which proposal was debated at the WIPO Standing Committee in 2010: see Standing Committee on Copyright and Related Rights, Eighteenth Session, Geneva, 25-29 May 2009, Proposal by Brazil, Ecuador and Paraguay Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union, SCCR/18/5, 25 May 2009. [↑](#footnote-ref-120)
121. The US was the last country holding out against a Treaty agreed that it should take the form of a Treaty. http://www.ip-watch.org/2013/09/20/negotiators-stakeholders-tell-tale-of-wipo-marrakesh-treaty-negotiation-look-to-implementation/ [↑](#footnote-ref-121)
122. For example, the African delegation and the WBU sought to include those unable to turn pages, those unable to move their eyes (and so requiring reformatting as opposed to re-writing), and those suffering from physical, mental, sensory, or cognitive incapacity. Standing Committee on Copyright and Related Rights, Twentieth Session Geneva, 21-24 June 2010, Draft Report Prepared by the Secretariat, SCCR/20/13 PROV, 6 August 2010. [↑](#footnote-ref-122)
123. The African delegation also wanted to extend the treaty to any work in which copyright subsists, whereas the US proposed that it should be limited to works that had been published, and the EU to those which had been published in print. [↑](#footnote-ref-123)
124. See Document SCCR/23/7. [↑](#footnote-ref-124)
125. William New “Mixed Reaction Among Participants in WIPO Talks on Treaty for the Blind” (Intellectual Property Watch, 22 April 2013) <<http://www.ip-watch.org/2013/04/22/mixed-reactions-among-participants-in-wipo-talks-on-treaty-for-the-blind/>> last accessed 22 October 2013 [↑](#footnote-ref-125)
126. See D Pescod, ‘What the Marrakech Treaty means for Blind People’ WIPO Magazine (August 2013) <<http://www.wipo.int/wipo_magazine/en/2013/04/article_0002.html>> Last accessed 22 October 2013 and statement of World Blind Union to WIPO General Assemblies 26 September 2013 [↑](#footnote-ref-126)
127. [↑](#endnote-ref-1)
128. Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. Preamble, First para. [↑](#footnote-ref-127)
129. [↑](#endnote-ref-2)
130. Marrakesh Treaty Preamble, first para [↑](#footnote-ref-128)
131. Marrakesh Treaty Preamble, fourth para [↑](#footnote-ref-129)
132. Marrakesh Treaty, Article 3 [↑](#footnote-ref-130)
133. Marrakesh Treaty, Article 5 [↑](#footnote-ref-131)
134. Marrakesh Treaty, Article 18 [↑](#footnote-ref-132)
135. See note 126 [↑](#footnote-ref-133)
136. ibid [↑](#footnote-ref-134)
137. Marrakesh Treaty Preamble, ninth para, [↑](#footnote-ref-135)
138. Marrakesh Treaty Preamble, third para [↑](#footnote-ref-136)