

UNITED STATES COPYRIGHT OFFICE

**Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to
Copyrighted Works for the Blind or Persons With Other Disabilities**

COMMENTS of MOTION PICTURE ASSOCIATION OF AMERICA

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April 21, 2009

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Motion Picture Association of America, Inc. (MPAA)¹ submits these comments in response to the Notice of Inquiry ("Notice") published in the Federal Register on March 26, 2009, at page 13268.

The objective of the United States Copyright Office ("Copyright Office) and the United States Patent and Trademark Office ("USPTO") in this proceeding is "to learn more about the experiences of the blind or persons with other disabilities" with respect to their ability to access and share copyrighted works.² MPAA would like to provide in these comments relevant information on the efforts of the motion picture industry to facilitate access to movies by the blind and to express its views as to why broad exemptions or limitations on copyright, and in particular, binding international instruments in this area, would not constitute appropriate or effective solutions to the challenges faced by the blind in securing wider access to motion pictures.

At the outset, we wish to point out that MPAA member companies have a continuing commitment to addressing the

¹ MPAA members include Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc.

² Notice, at 13269. It is our understanding that the scope of the Notice is confined to persons with visual disabilities, and so we have confined our comments accordingly.

special needs of persons with disabilities and have been actively involved for many years in providing voluntary solutions for the blind, such as producing audio descriptions on first run films and DVDs.³ Additionally, the Studios have worked with organizations like WGBH to bring audio described movies to the big screen and the Society of Motion Picture and Television Engineers to develop digital technical standards for narrative description. In 2008, MPAA member companies provided audio descriptions for a significant number of first run releases.⁴

MPAA member companies believe that it is important to address the needs of the blind and persons with other disabilities. Despite what is being and has already been accomplished in this area, the MPAA member companies are supportive of further study to investigate ways in which to improve access to mainstream content for the blind. Much of what has been accomplished has been done through cooperative efforts of content producers, distributors, exhibitors and members of the affected communities. MPAA and its member companies have been at the forefront of these efforts in the motion picture industry and welcome additional information and discussion that will further improve access to motion pictures by the blind.

The existence of copyright protections is not a barrier to progress in this area. Indeed, in the experience of MPAA member companies, barriers to access are not due to any lack of willingness on their parts to license or facilitate measures (such as audio descriptions) to broaden access to their works. There are many factors unrelated to copyright protection that determine whether a film is distributed in a manner that affords access for blind people, and MPAA would caution against focusing on copyright law to the exclusion of a broader

³ Audio Description International, an initiative of the Audio Description Project of the American Council for the Blind at www.adinternational.org.

⁴ The number of motion pictures released with audio descriptions every year varies among MPAA Member companies. Audio Description International, an initiative of the Audio Description Project of the American Council for the Blind reports that 71 first run films were released with audio descriptions in 2008.

understanding of the practical realities involved. They include a number of serious challenges involved in providing access to motion pictures by the blind and persons with other disabilities, such as the need for increased funding for entities catering to distributing products accessible to the blind, limitations in technology and the need for coordination among stakeholders. In addition, it is also important that solutions do not adversely interfere with the experiencing of a movie by the non-disabled, or adversely affect the creative image of the film as envisioned by the filmmaker. MPAA is not aware of any impediments created by the existence of copyright protections that, in and of themselves, prevent access to motion pictures by the blind.

As many are well aware, the motion picture industry faces a monumental task to prevent pervasive infringements in the digital environment, and we are highly skeptical of any proposal to introduce copyright exceptions and limitations, given the increased difficulty that would be imposed on right holders in their efforts against infringement. As a general proposition, any solutions considered to address the needs of the disabled should not have the impact of discouraging creation, dissemination and protection of copyright works, as this would not serve the public interest, including the interests of those whom the proposed solution is intended to benefit.

In the Notice, the Copyright Office and USPTO list several measures that may be explored to address the needs of the disabled, many of which in various ways are now being employed:

- Developing standardized accessibility formats and other technical norms;
- Establishing trusted intermediaries to coordinate resources, eliminate unnecessary duplication of accessible works, and ensure best practices;
- Providing technical assistance, coordination, and educational outreach;

- Promoting market-based solutions achieved through private sector copyright licenses or other agreements.⁵

While we do not comment or take positions on any of these proposals, MPAA and its member companies generally support voluntary approaches and, indeed, have participated in many such activities and will continue to do so.

Amongst the measures listed in the Notice, there is one which gives us great concern. We believe that the final measure listed in the Notice -- developing binding or non-binding international instruments, including a treaty that would establish minimum requirements for [copyright] limitations and exceptions for blind, visually impaired and other reading-disabled persons⁶ -- would, in addition to providing no real benefit for the blind, damage the international regime for copyright protection and enforcement, to the detriment of rightholders, consumers and the blind community alike.

We believe that efforts aimed at establishing international copyright instruments, whether binding or non-binding, even if successful, will not contribute to the goal of improving meaningful access to copyrighted works by the blind, and would divert attention from other efforts that offer much more meaningful progress toward that objective.

Existing international copyright instruments, most notably the Berne Convention, establish minimum levels of protection with broad possibilities for exemptions and limitations so long as they are confined to certain special cases which do not conflict with the normal exploitation of works and do not unreasonably prejudice the legitimate interests of rights holders -- the so-called "three step test." This leaves signatory nations maximum flexibility to provide meaningful exceptions and limitations based upon their particular legal

⁵ Notice, at page 13269.

⁶ Id.

structure, culture and societal needs. International harmonization of exceptions and limitations will reduce existing flexibilities and force nations to meet the special needs of their citizens with one-size-fits-all solutions without regard to their effectiveness in particular situations. International norm-setting of exceptions and limitations would therefore be counterproductive, unnecessary and diversionary. See attached "Copyright Exceptions and Limitations" presented to the WIPO Standing Committee on Copyright and Related Rights, 17th Session, by 26 international organizations representing owners and creators of copyrighted works.

Efforts to impose such harmonization pose considerable risks to the present international intellectual property rights structure, and would thus pose a further barrier to innovation and economic development goals.⁷

We are also concerned that proposals for international norm-setting in this area are being furthered by a broader agenda that seeks to erode copyright protections in the name of innovation and increased access. Despite the laudable objectives of any effort that seeks to improve access for people with disabilities, we are concerned that some proposals for copyright limitations and exceptions are not primarily concerned with such objectives, but are underwritten by opponents of the internationally recognized minimums of copyright protection, by those who seek to further their own

⁷ See, for instance, "Copyright Industries in the U.S. Economy: The 2006 Report," International Intellectual Property Alliance, "Making the Intangible Tangible, The Economic Contribution of Australia's Copyright Industries," Prepared for the Australian Copyright Council by PricewaterhouseCoopers, 2008, and "Whither Bollywood? IP rights, innovation, and economic growth in India's film industries," Bertrand Moullier, February 2007

agendas in that regard.

CONCLUSION

MPAA urges the Copyright Office and USPTO to recognize that improving access to copyrighted works by the blind will not be served by creating exceptions and limitations to the rights of the owners of those works. MPAA supports the goal of improving access to copyright works as a worthy objective but believes that the appropriate solution should be explored for the stated problem. Copyright protection is not an impediment to access to motion pictures by the blind. And the proposed solution, weakening copyright, will not only divert much needed resources and attention from focusing on real solutions, but would lessen the incentives to create the very works to which the blind and disabled, and the public at large, seek access. We object in particular to proposals to create international instruments in this area, as unwarranted and counterproductive.

MPAA looks forward to the proposals elicited in response to this Inquiry, and commends the Copyright Office and USPTO for responding to calls for further inquiry into this important issue.

ALPSP

Association of Learned
and Professional
Society Publishers

APNET

African Publishers
Network

APPA

Asia-Pacific Publishers
Association

BIEM

Bureau International
des Sociétés Gérant les
Droits d'Enregistrement
et de Reproduction
Mécanique

CISAC

International
Confederation of
Authors and Composers
Societies

ENPA

European Newspaper
Publishers' Association

EPC

European Publishers
Council

EuroCopia

European Federation of
Joint Management
Societies of Producers
for Private Audiovisual
Copying

EWC

European
Writers' Council

FEP

Federation of European
Publishers

FERA

Federation of European
Film Directors

FIA

International Federation
of Actors

FIAD

International Federation
of Film Distributors
Associations

COPYRIGHT EXCEPTIONS AND LIMITATIONS

JOINT POSITION

WIPO STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, 17TH SESSION

Every nation can transform the creativity and knowledge of its people into a motor for social, cultural and economic development. The national legislative framework is a critical determinant of whether creative industries can develop. Within this framework, copyright plays a vital role as it is the most important asset for creative industries. Its value and potential for delivering development are determined by the way legal rights function in practice.

The signatory Non-Governmental Organisations - each an international representative for creators, performers or creative industries in its field - base their consideration on the following general principles:

1. Existing flexibilities are not only adequate but preferable. There is no need for new international binding norms restricting the freedom to develop locally adapted exceptions and limitations.
2. At national level, all legislative options should be built on a flexible and fair foundation that is based on the notion of lawful access for users respecting the rights of creators and other rightsholders.
3. The signatories can provide many examples of good national models and practices, drafted within the present international norms.

FIAPF

International Federation
of Film Producers
Associations

FIM

International Federation
of Musicians

ICMP

International
Confederation of Music
Publishers

IFJ

International Federation
of Journalists

IFPI

International Federation
of the Phonographic
Industry

IFRRO

International Federation
of Reproduction Rights
Organisations

IFTA

Independent Film &
Television Alliance

IFSP

International Federation
of Scholarly Publishers

IMPALA

Independent Music
Companies Association

IPA

International Publishers
Association

IVF

International Video
Federation

STM

International Association
of Scientific, Technical
and Medical Publishers

WAN

World Association of
Newspapers

Existing International Binding Norms on Exceptions and Limitations

Exceptions and limitations in copyright legislation are a fundamental part of the copyright system, defining the scope of rights. Striking a balance between the rights of copyright holders and interests of users of works has been at the heart of WIPO's work over decades. The present international IPR framework, consisting of exclusive rights combined with a set of exceptions and limitations governed by the three-step-test, is based on a delicate equilibrium which has benefited creators and users alike, and should continue to be. Optimal flexibility requires general international principles which leave specific implementation for Member States.

The three-step test, as set out in the major international intellectual property treaties, is a common international standard and a long-established high-level principle. According to Article 9.2 of the Berne Convention, Article 10 WCT, Article 16 WPPT and Article 13 of the TRIPS Agreement, the three-step test provides a safety net for all exceptions and limitations, allowing flexibilities as long as the common criteria are respected.

More detailed internationally binding norms on a set of minimum exceptions and limitations would not serve their supposed purpose: ensuring improved access in an ever-changing media landscape. Turning flexibilities into mandatory international norms would be de facto counter-productive. Instead of new binding norm-setting activities at the international level the focus should be at national level. Application of the three-step test by national legislatures and courts has shown time and again that its inherent flexibility allows for appropriate national solutions. This flexibility is vital to equilibrium at national level.

Equilibrium at National Level

How current international norms serve the interest of a country is a vital question at national level. To achieve a stable equilibrium, a holistic and long-term approach is needed. A sustainable approach must ensure lawful access to knowledge-based material and promote

local film, music, writing and publishing activities and cultural diversity.

We all aspire to give everyone the greatest possible access to the best possible content, both local and international. This is one of the overall goals of the copyright system. However, to provide free access through mandatory exceptions would sacrifice long-term sustainability for perceived short-term gain. Local industries that directly support the growth of the information society rely on the copyright system.

Educational publishing is the motor of the publishing sector. For instance in South Africa it represents 74 % of the publishing market¹. In most countries, the publishing sector comprises mostly small-and-medium sized enterprises. A solid legal, economic and cultural environment is needed to boost their development. With appropriate enhancement a real change can be achieved, as the success story from Cameroon² shows: from 2000 to 2006 the share of local textbooks rose from 11 % to 50 %, with the support of the World Bank.

In the newspaper sector, the World Association of Newspapers is particularly active in Africa in Newspaper in Education development projects which include training of teachers, workshops, involvement of local publishers and distribution of newspapers in schools³. Research shows that media literacy and Newspaper in Education (NIE) programs influence positively student motivation, academic skills and classroom communications. The newspaper keeps students informed and helps mould them into responsible and socially aware citizens.

Films and television programmes are important to wealth creation and cultural diversity throughout the world. The current

¹ South African Book Development Council, Factors influencing the cost of books in South Africa, Department: Arts and Culture, Republic of South Africa, June 2007

² Intervention of Freddy Ngandu, representative of IPA, Cameroon, at the First Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, April 2005

³ <http://www.wan-press.org/nie/africa.php>

growth of audiovisual industries in Eastern and Western African countries, such as Kenya's "Riverwood" and Nigeria's "Nollywood", could be greatly enhanced through the effective application of copyright law to stimulate creativity and investment in the production infrastructure.

The share of local music repertoire is significant in many countries. In Mexico, for example, local repertoire is approximately 70 % of the market. In Argentina, the local repertoire also accounts for the largest segment of the market; about 45 % in 2007, compared to 16 % Spanish and 35 % of English and other repertoires. These repertoires need a properly functioning IP system in order to maintain and increase their potential.

Toolbox of Solutions

Authors, producers, publishers and distributors have every interest to ensure lawful access on reasonable terms. Writers write, musicians perform, producers and publishers develop, finance and distribute content, each with the goal of seeking the widest possible audience, provided that their intellectual property rights are respected and allow them to seek to recover production costs and generate a return on their creative and financial investments. Accessibility is an important issue and there exist a variety of ways to offer access, ranging from selling books, CDs and DVDs to licensing a wide range of electronic delivery and digital platforms.

The needs of important user groups, such as educational establishments, libraries and archives and those of disabled persons, must be taken into account. However, exceptions and limitations are just one tool amongst many. They often provide an inflexible solution to a broad range of different circumstances. Sometimes, sector-specific solutions need to be fashioned. The law should facilitate tailor-made solutions, and in many countries it does.

Collaboration between stakeholders can bring clear advantages in ensuring accessibility in constantly evolving usage scenarios. That is one of the conclusions in the recent study, commissioned by WIPO, on copyright limitations and exceptions for

the visually impaired⁴. Trust and understanding between stakeholders can bring partners to flexible solutions that change over time. The needs of disabled persons can be met by properly analysing and addressing the obstacles they meet with the aim of ensuring their equal treatment. Many stakeholders in the audiovisual sector provide tools to make their products more accessible to people with disabilities: additional features on DVDs including video description for visually impaired viewers and subtitles for hearing impaired.

In the publishing sector, research and educational communities constitute the most significant audiences and markets for some authors and publishers. The very essence of normal exploitation is to offer publications and information services to these non-commercial communities. The interest of research and education is best served by encouraging the creation of new works, publications and information services that serve the communication within these communities.

Innovative partnerships⁵ between publishers, libraries, governments and UN organisations not only provide access, but also training on how to make use of resources voluntarily made available. We are happy to expand more on these examples and other win-win solutions in different creative industries during the course of forthcoming deliberations.

Copyright provides a legal basis for licensing both analogue and digital material. In cases where exceptions and limitations are an appropriate tool, the present framework of commonly accepted international norms (in particular the three-

⁴ Study on Copyright Limitations and Exceptions for the Visually Impaired, prepared by Judith Sullivan, February 20, 2007

⁵ HINARI (Health InterNetwork Access to Research Initiative)
<http://www.who.int/hinari>, AGORA (Access to Global Online Research Agriculture)
<http://www.aginternetwork.org>, OARE (Online Access to Research in the Environment)
<http://www.oaresciences.org>

step-test) allows for flexible and tailored solutions.

Licensing can interact with Exceptions and Limitations

Licensing agreements can offer wide usage opportunities, based on tailor-made solutions. Agreements can be concluded individually between users and rightsholders, or collectively with collective management organisations, when appropriate. In collective licensing, *Reproduction Rights Organisations* (RROs) as specialised organisations have a wealth of experience on how to serve educational and library users in different parts of the world. In this area, access by citizens is improved all the time, through a variety of pragmatic solutions which include voluntary agreements.

Licensing agreements should be available to cover all large-scale and systematic copying for education and research. Online accessibility in libraries and other cultural institutions can be achieved through licensing avoiding the risk that exceptions and limitations could conflict with the normal exploitation of the works. Exceptions and limitations can interact in useful ways with licensing agreements and there are many ways to incorporate unremunerated copying into licenses, for example by deducting copies made under an exception or adjusting the remuneration to take into account unremunerated copying.

Well-Crafted National Exceptions and Limitations

In cases where exceptions and limitations are appropriate, they need to be individually crafted and carefully defined at national level. This applies irrespective of the form: specified norms or more general fair use/fair dealing provisions. One important goal is predictability, and any national legislative initiative should be based on a long-term impact analysis. The consequences of an unbalanced solution could endanger the development of national creativity and creative industries, and threaten cultural diversity. That would be to the detriment of creators, performers, publishers, producers, users and ultimately society as a whole.

Good Examples and Practices

The signatories can provide examples of individual and collective licensing where broad access has been achieved on the basis of voluntary agreements and collaborative approaches, providing greater flexibility, predictability and ease of use than solely reliance on statutory exceptions and limitations.

We are happy to give information on appropriate national models and practices in both analogue and digital environments. We look forward to participating constructively in the forthcoming dialogue in the Standing Committee on Copyright and Related Rights.