

Reply Comments of the

THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

in Response to the Notice of the U.S. Copyright Office and the U.S. Patent and Trademark Office on October 13, 2009 Requesting Comments On The Topic Of Facilitating Access To Copyrighted Works For The Blind Or Persons With Other Disabilities

December 4, 2009

The Software & Information Industry Association (“SIIA”) respectfully submits these reply comments in response to the Federal Register Notice of the U.S. Copyright Office and U.S. Patent and Trademark Office published on October 13, 2009 requesting comments on the topic of “Facilitating Access To Copyrighted Works For The Blind Or Persons With Other Disabilities.” These comments are intended to supplement, and not supersede, the two sets of comments previously submitted by SIIA on this topic.¹

SIIA urges the U.S. Government to oppose consideration of the proposed World Blind Union (WBU) draft Treaty at the upcoming meeting of the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO). While SIIA believes that it is important to recognize and address the needs of persons who are blind or visually impaired in accessing copyrighted software and digital content, we do not believe that a treaty that attempts to address these concerns through copyright exceptions is an effective or appropriate approach. SIIA endorses WIPO’s efforts being undertaken through its Stakeholders’ Platform and other similar efforts where copyright owners work directly with organizations representing the blind and visually impaired to improve access for the blind and visually impaired community to copyrighted products and services in a format that suits their needs.

Many of the comments submitted last month, including SIIA’s, agreed that the three-part test found in Article 9 of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”), the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and the WIPO Internet Treaties provides the necessary flexibility to address these accessibility issues.² Many of the comments also lavish praise on provisions in U.S. law (such as the

¹ The prior comments submitted by SIIA on this topic describe the various and numerous ways in which the software and digital content industries are working with the blind and visually impaired community to make their copyrighted works more accessible. Instead of repeating these descriptions here we simply refer back to our prior comments.

² See Comments of Jane C. Ginsburg and June M. Besek of the Kernochian Center for Law, Media and the Arts at Columbia University School of Law, p. 1 (concluding that “Our analysis indicates that, while such a treaty (or parts of it) may be permissible, it is not necessary. Berne-TRIPs member States may currently, under their domestic law, implement all of the proposed treaty’s measures which are compatible with the Berne-TRIPs framework for national

copyright law's section 121 exception) that enable access to copyrighted works for the blind and visually impaired.³ Significantly, these provisions were all enacted without the need for an international treaty. They were enacted in compliance with the three-step test. Other countries can do the same without the need to go through the complex and lengthy process of attempting to draft and ratify a new copyright treaty.

Those who submitted comments, as well as the U.S. Copyright Office and the Obama Administration, agree that copyright protection is only one consideration affecting the ability of the blind and visually impaired from getting access to certain products and services and that there are many other factors distinct from copyright protection that have a substantial and direct effect on whether goods and services are made available in a way that is accessible to the blind and visually impaired. These other factors include most significantly disabilities laws, economic factors, factors relating to technical standards and formats, and the new technologies and new business models. A copyright treaty would not address these other factors and would, therefore, be of questionable utility.

Despite the recognized shortcomings with the treaty approach, several comments endorse the draft WBU Treaty submitted to the SCCR by Brazil, Ecuador and Paraguay ("Draft Treaty"). These comments tend to ignore, gloss over or downplay the various inconsistencies between the Draft Treaty and U.S. law and the three-step test.

For example, in **Article 3** the Draft Treaty broadly and incorrectly declares that "the provisions of this Treaty are consistent with obligations set out under" the Berne Convention, the TRIPS Agreement, the WIPO Internet Treaties, and several other treaties. Merely stating that this Draft Treaty is consistent with copyright provisions in existing international treaties does not make it so. In reality, there are several provisions in the Draft Treaty that are clearly inconsistent with the provisions in the other listed treaties – the most significant of these being the inconsistencies between Article 4 of the Draft Treaty and the three-step test found in Article 9 of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WIPO Copyright Treaty, and Article 16 of the WIPO Performances and Phonograms Treaty.

exceptions and limitations."); Comments of Library Copyright Alliance et. al., p. 14 (stating that "[t]he existence of section 121 of the U.S. Copyright Act seems to be evidence that a national exception for the blind and visually impaired involving the reproduction right meets the conditions of the Berne 3-step test."); Comments of Fritz Attaway of the Motion Picture Association of America, p. 4 (stating that "[n]o evidence was offered that the flexibilities in the Berne Convention for the Protection of Literary and Artistic Works and other international copyright instruments are insufficient to permit member states to provide effective measures to facilitate access for the visually impaired geared to the particular needs of their citizens.")

³ See Comments of Laura Ruby and Jule Sigall of Microsoft, p. 3 (stating "Indeed, the Chaffee amendment (17 U.S.C 121) has generally been considered a positive development in making books more widely available); Comments of the American Council of the Blind and the American Federation of the Blind, p. 2, 4 (commending the President for signing the United Nations Convention on the Rights of Persons with Disabilities and stating that "[t]he Chafee amendment of the copyright act has been a significant improvement for people who are blind in accessing printed information."); Comments of Manon Ress of KEI et al., p.2 (stating that "the U.S. has done well with designing policies that positively affect members of the disabled communities and is held by many as a model...")

Article 4(a) would allow an organization to copy and distribute works in accessible formats without the permission of the copyright owner if “the activity is undertaken on a non-profit basis.” Significantly, this exception applies without regard for whether: (1) the work has been published, or (2) the work is being made available by the copyright owner or an authorized third party in a format that is accessible to the visually impaired. The failure to include these limitations (and others) violates the three-step test that requires exceptions to “not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.” For instance, Article 4 would allow the making and distribution of copies of an unpublished article, a confidential database of personal information, or a software program that is protected as a trade secret. Disturbingly, it would also allow a nonprofit organization to make and distribute copies in accessible formats in competition with a copyright owner who is already making such accessible copies available. This would no doubt be a considerable disincentive to any copyright owner to make accessible copies themselves.

Compliance with the three-step-test would require that the work at issue be published and unavailable in accessible form. It would also likely require, among other things, that those making and distributing such accessible copies be limited to certain groups that meet appropriate standards to qualify as trusted third parties, that they take steps, including but not limited to the use of technological protections to prevent unauthorized distribution to or access by those who fall outside the class of authorized recipients, and that they include a copyright notice identifying the copyright owner and the date of the original publication so as to prevent these works from being inadvertently classified as orphaned works or from someone inadvertently believing that the work is not protected by copyright.⁴

Article 4 is also problematic due to its inconsistencies with U.S. law (specifically, the Chaffee Amendment, 17 U.S.C. 121). Unlike the section 121 exception, Article 4: (1) exempts all categories of copyrighted works as opposed to being limited to a previously published nondramatic work, (2) fails to limit the parties who are authorized to reproduce and distribute works under the exception to “authorized entities”⁵; and (3) permits the supply of the accessible format “by *any* means” as opposed to being limited to “specialized formats.”

Article 4(b) and (c) are also very troubling. Both these provisions allow works to be copied and distributed under Article 4(a) but do not include any of the limitations that might apply to authorized or trusted entities under Article 4(a). Conditions (c)(1) and (3) allow the Article 4(c) exception to apply even when it is undertaken on a for-profit basis. It is SIIA’s view that entities should not be able to profit from their making or distribution of accessible copies for the blind and visually impaired. Moreover, Article 4(c) – which allows for-profit entities to avail themselves of the exception – is conditioned on the applicability of *only* one of three very amorphous and broad requirements. For instance, in requirement 4(c)(1) it is unclear what type

⁴ Article 5 requires that the author be identified, but there is no requirement that the copyright owner be identified or that a copyright notice be placed on the work.

⁵ 17 U.S.C. §121(d)(1) “authorized entity” is defined to mean “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.”

of provisions fall within the range of “*normal* exceptions and limitations.”⁶ Similarly, requirement 4(c)(3) applies when a work is “not reasonably available in an identical or largely *equivalent format* enabling access for the visually impaired” even though a copy may be readily available in a different format that provides *equivalent access*. The fact that these requirements are so vague is of considerable concern. That concern is heightened exponentially by the fact that only one of the three requirements must be met rather than all three. It is difficult to fathom how such a simple and nebulous standard for for-profit activities could possibly meet the requirements of the three-step test.

The problems with Article 4(c)(3) are further compounded by **Article 4(d)(2)** which defines a work as being “reasonably available” for purposes of Article 4(c) if it is “affordable.” The Draft Treaty does not explain how affordability is to be measured. But more importantly this provision would set a dangerous precedent by setting levels of copyright protection that are based on the ability of a user to pay for the copyrighted work.

Article 7 is also extremely problematic. Article 7 of the treaty states that “Any contractual provisions contrary to the exception provided in Article 4 shall be null and void.” In support of Article 7, the joint comments filed by the Library Copyright Alliance, the Electronic Frontier Foundation, and the Chief Officers of State Library Agencies (“LCA Comments”) take the unsupported position that U.S. law prohibits contracts from abridging uses that may be permitted under the Copyright Act. They state that the “weight of [U.S.] authority supports the position that such restrictions, particularly in shrink-wrap or browse-wrap licenses, are not enforceable” and claim that the Intellectual Property Clause of the Constitution, or, in the alternative, section 301 of the Copyright Act, routinely invalidate such agreements. That position (as its own comment demonstrates, *see id.* at 9 n.3) is quite simply incorrect.

The Intellectual Property clause has no independent preemptive force whatsoever. Like the other powers granted to Congress in article I, section 3, the exercise of legislative power rests entirely within its discretion. “[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.” *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). The clause does not require Congress to do anything. If, however, Congress elects to enact a copyright statute, that statute may protect the writings of authors for a limited time, and that statute may supplant state law if Congress so intends.

The Intellectual Property clause, in and of itself, does not limit state action—only an act of Congress can.⁷ Through the 1976 Act, Congress has created a vibrant market for creative works

⁶ For instance, unlike existing uses of the term “normal” in the Berne Convention, which can be determined through consideration of actual and potential market practices and the parties activities, it is unclear what standards (e.g., international or domestic) would be used to determine whether an exception or limitation qualified as “normal.”

⁷ In the absence of federal regulation, the states remain free to act in this sphere, and the IP clause does not constrain their action. For example, under U.S. law, the protection of a sound recording by a state for an unlimited time has already been held to be completely consistent with the Copyright Clause. *Goldstein v. California*, 412 U.S. 546 (1973). In that case, the Supreme Court expressly rejected the argument that the IP Clause reserved all power over copyrighted materials to the federal government and that the states could take no action inconsistent with the dictates of the IP clause. *See id.* at 557-60.

in which the copyright law creates a base-line of rights and responsibilities, but leaves it to market actors to fine-tune how the works created by those rights are used. Contracts fill the gap between the grants that the Act gives and the needs of consumers, producing valuable societal gains. The certainty of those contracts encourages investment in the creation and distribution of software and other information products. The enforceability of these contracts, to list just one example, permits a variety of software and information sources to be sold at heavily discounted rates to educational and nonprofit customers, on the condition that the copyrighted goods not be repurposed for commercial use. The further dissemination of these works is exactly the kind of activity that statutes enacted under the Intellectual Property clause were designed to achieve.

The sole issue in contract preemption cases is simply whether Congress intended section 301 to preempt state-law contracts, including shrink-wrap or click-wrap agreements. U.S. courts have simply not found that intent, and routinely enforce their terms. The LCA Comments misleadingly presents key cases that upheld such restrictions as judicial outliers—a characterization at odds with reality. Courts routinely enforce restrictions on reverse engineering, *e.g.*, *Dunn & Bradstreet Software Servs. v. Grace Consulting, Inc.*, 307 F.3d 197, 216 (3d Cir. 2002); *Frontline Test Equipment, Inc. v. Greenleaf Software, Inc.*, 10 F.Supp.2d 583 (W.D. Va. 1998), as well as restrictions on the use and re-use of factual information. *e.g.*, *Pro CD*, 86 F.3d 1447 (7th Cir. 1996), *Register.com v. Verio, Inc.*, 356 F.3d 393 (2nd Cir. 2004).

The sources that the LCA Comments cite for the contrary position cannot bear the weight they seek to place on them. For example, the section that the LCA Comments cite from the Nimmer treatise evinces nothing more than the author's disagreement with the state of the law. See M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.01[B][1][a][iii] 1-19-20 & 1-27 (expressing general disapproval of judicial ratification of shrinkwrap contracts that vary the terms of the copyright act, and noting that courts are moving in a direction of which the author disapproves).

Similarly, *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988), which the LCA Comments references on page 11 of its comments, set aside a statute of general application that regulated restrictions on reverse engineering otherwise permitted by copyright law because of its effects on the rights of the owners of copies, not the copyright owners' licensees. *Kabehie v. Zoland*, 102 Cal. App. 4th 513 (Cal. App. 2d Dist. 2002), the case which the LCA Comments quote at some length, only preempted those provisions that prevented *user* conduct prohibited by the Copyright Act, on the theory that the contract lacks consideration in such a circumstance. *See id.* at 528-29. That case offers no support for the proposition that a contract which prohibited the signers from waiving the ability to engage in certain uses that they would otherwise have permission to make, such as those that fair use might permit, may not be enforced.

Finally, the LCA Comments representation that the court in *Symantec Corp. v. McAfee Assoc., Inc.*, 1998 WL 740798 (N.D. Cal. June 9, 1998) declined to enforce a reverse engineering restriction is simply inaccurate. The enforceability of a reverse engineering restriction was never at issue in that case. The plaintiffs in the case had brought a state-law unfair competition claim based on the defendant's failure to abide by a reverse-engineering restriction. The court preempted the application of California's unfair competition law as applied to acts of reverse engineering, stating that activity that allegedly broke the law was no different from a copyright

claim. *See id.* at *5. The enforceability of the restriction itself was simply never before the court, and the position in the LCA Comments to the contrary is erroneous.

In sum, the LCA Comments regarding the compatibility between Article 7 of the Draft Treaty and U.S. law are wholly inaccurate. The LCA Comments cite no case holding that a contract that limits exceptions to a user's defenses under the Copyright Act is preempted by section 301 or the Constitution. To be clear, we are not suggesting that all contract claims prevail against preemption attacks in every circumstance, but – contrary to what the LCA Comments claim – they are upheld in the overwhelming majority of cases. *See, e.g., Kabehie*, 102 Cal. App. 4th at 526-28 (collecting cases).

For these reasons, Article 7 is inconsistent with U.S. law. The issues involved in determining the enforceability of licensing terms are complex and entirely distinct from the issues being addressed in this Draft Treaty. Its presence in the Draft Treaty serves to unduly complicate and compound concerns we have with this treaty-making process.

In addition to concerns with Articles 3, 4 and 7 there are also numerous problems with other provisions in the Draft Treaty. For instance:

- **Article 6** provides that signatories to the Draft Treaty must provide “beneficiaries of the exception provided by Article 4 [with] the means to enjoy the exception where technological protection measures have been applied to a work....” This provision goes well beyond what is necessary or appropriate by: (1) applying to any one who is a “beneficiary of the exception” (as opposed to just applying to the visually impaired); (2) requiring that such “beneficiaries” be provided with the *means* for circumvent technical protection measures as opposed to simply allowing acts of circumvention in limited circumstances;⁸ and (3) applying even when circumvention is not necessary to gain access to the work.⁹
- **Article 8** would require signatories to the Draft Treaty to permit the import and export of the accessible format copies that are made in compliance with Article 4. This provision is incompatible with section 121, which does not allow import or export, and for good reason. Copyright owners often place geographic restrictions in their distribution licenses to prevent or otherwise control how their works may be distributed in a particular region. For example, a publisher may have different versions of a literary work that it distributes to different parts of the world to account for different community values and cultural differences. Among other things, damages to the value of the work and the author or publishers reputation could ensue when a work intended for one region is distributed in

⁸ To show how absurd Article 6 is consider an equivalent provision that requires governments to provide all those who have a driver's license (*i.e.*, those who are allowed under the law to drive) with an automobile (*i.e.*, the *means* to make use the license).

⁹ For example, when there exist ebook editions of the work that contain access controls that do not prevent the enabling of the ebook's read-aloud function or that do not prevent the enabling of screen readers to render the text into a specialized format, as is the case under U.S. law, this exception should not apply. *See* exemption for ebooks under Section 1201 anti-circumvention rulemaking at <http://www.copyright.gov/1201/>.

another. Publishers may also intentionally not distribute their literary works in a particular country because the libel or defamation laws in a particular country (or, in the case of software, a country's product liability laws) are so broad that doing so may subject themselves to unmerited litigation in that country.¹⁰

- **Article 12** provides for the commercial use of orphan works without regard to the impact on access by the visually impaired. The orphan works issue is a complex one that cannot be simply addressed by a few lines in a treaty. It is also wholly distinct from the issues being addressed in this Draft Treaty and its inclusion in this Draft Treaty typifies why the treaty-making process represents such a flawed approach to these important issues.
- **Article 15(a)** defines a “visually impaired person” as a person who is blind or “a person who has a visual impairment which cannot be improved by use of a corrective lens to give visual function substantially equivalent to that of a person who has no visual impairment...” The failure to limit the definition of visual impairment to one that is physical could result in this provision being broadly interpreted to also include cognitive and other non-physical disabilities, such as dyslexia and attention deficit disorder. Such an interpretation would dramatically increase the scale and impact of this exception.¹¹ This provision also fails to require, as under U.S. law, that individuals must first be certified by a competent authority that he or she is blind or has a visual disability that with correction prevents the reading of standard printed material. However, whatever limitations may be contained in Article 15(a) are rendered meaningless by the breadth of **Article 15(b)**, which broadly states that “Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.” The

¹⁰ For example, in the case of *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007) a Saudi businessman sued the U.S. author of the book “Funding Evil,” which linked the businessman and others to funding terrorism. The book was published in the U.S., and there was little question that the book would be protected by the First Amendment under U.S. law. The only connection to Great Britain was that a few dozen copies were sold by online bookstores to British residents. Nevertheless, the British court found those online sales to support jurisdiction and imposition of British law (which lacks a free speech protection equivalent to our First Amendment), ruled against the author, and imposed a large fine and injunction. See also *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (Yahoo must abide by French court's decision requiring it to block online sales of Nazi memorabilia to French citizens); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (Indian national obtained libel judgment from British court, for news story published in Indian newspapers); *Matushevitch v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995) (Maryland court refuses to enforce British judgment for libel against a journalist, based on article criticizing BBC Russian Service's recruitment as racially discriminatory); “*Suharto Says He Will Sue Time Magazine*,” N.Y. Times, June 3, 1999 at A4 (Indonesian President files civil libel lawsuit in Jakarta, based on Time magazine's article describing his movement of money to foreign bank accounts). At least one state has enacted legislation to prevent enforcement of libel judgments that do not comport with U.S. Constitutional free speech protections. See Libel Tourism Protection Act, N.Y. C.P.L.R. § 5304(b)(8) and § 302(d) (2008). But such protection does not exist in every state and, in any event, does little to protect the many U.S. publishers that have facilities and assets in other countries.

¹¹ See U.S. Census Household Economic Studies By Erika Steinmetz at <http://www.census.gov/hhes/www/disability/sipp/disab02/awd02.html> (stating that “people with limitations in cognitive functioning or a mental or emotional illness that interfered with their daily activities accounted for 6.4 percent of the population or 14.3 million people”)

number of individuals with physical and other disabilities is so large that this language would result in the exception swallowing the rule.¹²

- Lastly, the draft Treaty is riddled with overbroad, undefined and inconsistent language, which makes the applicability and breadth of many of the provisions unclear.¹³ The impact of these ambiguities would result in the Draft Treaty applying well beyond merely facilitating the access of blind and visually impaired to the class of works for which their specific disability prevents them from enjoying a work. Adding to the confusion is the Draft Treaty's reference to "protections" (Article 2(d)) and "rights" (Articles 4(c) and 9). The Draft Treaty provides for exceptions to copyright law, not protections or rights.

To reiterate, we strongly urge the U.S. Government to oppose consideration of the draft WBU Draft Treaty at the upcoming meeting of the SCCR. As noted in our two prior submission, the software and digital content industries remains committed to working with the blind and visually impaired community to make software and digital content more accessible. However, it is unproductive and unwise to divert the limited resources of WIPO, the blind and visually impaired community and the copyright community to engage in a treaty-making exercise that is conflict-ridden, time consuming, and lengthy and is virtually certain to not improve the existing situation any more than can presently be accomplished by considering exceptions in domestic law that are consistent with the three-step test. This view is reinforced when one considers the magnitude of the problems with the proposed Draft Treaty, as outlined in this submission and others.

The better approach is for the stakeholders to continue their efforts aimed at making real improvements in access for the blind and visually impaired and by focusing any legal or market-based approaches on providing incentives to copyright owners to make their works timely available in accessible formats rather than approaches that reduce incentives or seek to reduce or remove their copyright protections as a means for making these works more accessible. Time would also be better spent focusing on addressing issues related to improved funding, better coordination among the stakeholders and improved technologies.

We thank the U.S. Copyright Office and U.S. Patent and Trademark Office for soliciting and considering our views and want to stress our continued committed to working with groups representing the blind and visually impaired to improve access to software and digital content products and services.

¹² *See id.* (stating that "51.2 million people (18.1 percent of the population) had some level of disability")

¹³ Examples of such vague terminology includes "reading disabled" (Article 2(d)) and "other disabilities" (Article 2(a)), "reasonably available" (Article 4(c)); "the source" (Article 5); "beneficiaries" (Article 6); and "sufficiently restricted" (Article 9).