

Comments of James Love, Knowledge Ecology International, to the Copyright Office and the USPTO regarding the WIPO draft proposal to facilitate access to copyrighted works for persons, who are blind or have other reading disabilities, in response to the Federal Register Notice of October 13, 2009.

Filed November 13, 2009

- 1. How would the treaty proposal interact with United States law under Title 17 or otherwise? The Copyright Office and the USPTO seek to learn interested parties' views on how the treaty proposal compares to U.S. law under Title 17, or any other statutory or regulatory provisions that might be affected. How consistent is the treaty proposal with current U.S. law? If the treaty proposal is adopted, would any changes to U.S. law be required in order to implement its provisions? Please reference with as much specificity as possible any U.S. statutes, regulations, or other provisions that should be considered in a review of the treaty proposal's implications on U.S. law.*

Dr. Manon Ress, Cynthia Waddell, Scott Lissner, Jo Anne Simon and Dr. Cynthia Stuen have addressed this issue in considerable detail in their comments. I add the following comments:

The basic proposal by the WBU for a treaty is to (1) create a mandatory noncommercial exception that is quite similar to domestic U.S. exception, (2) to require a more limited commercial exception that would be limited to cases where works are “not reasonably available in an identical or largely equivalent format,” and the commercial entity provides notice and remuneration to right owners.

It is arguably already the case that imports and exports are allowed under the U.S. law, although the legal uncertainty has apparently deterred people from importing or exporting works created under exceptions. The commercial exception would be optional, in the sense that member states could opt-out.

The provisions regarding circumvention of technical protection measures would make permanent a provision that is now available only through a DMCA rule-making procedure that creates uncertainty for those who create the accessible works.

The provision on contracts in Article 7 is needed, particularly in a world with a proliferation of unreasonable electronic contracts on information goods.

The WBU proposal constructively extends its provisions to non-copyrighted elements of databases, and provides very minor guidance regarding access to orphaned works.

As others have indicated, in agreeing to the UN Convention on the Rights of Persons with Disabilities, the U.S. has an affirmative obligation to address the right to read along the lines set out by the treaty proposal.

- 2. How would the treaty proposal interact with the international obligations of the United States? Please comment on whether, and how, the treaty proposal would affect the existing multilateral and bilateral agreements of the United States. Please reference with as much specificity as*

*possible the provisions of any treaties, conventions, agreements or other instruments that should be considered, as well as any conclusions or analyses that might be instructive.*

The WBU proposal is consistent with the WTO TRIPS Agreement, particularly in light of the flexibilities of Articles 1, 6, 7, 8, 40 and 44.2 of the TRIPS. The relations to other agreement is set out in Article 3 of the WBU proposal.

3. *What benefits or concerns would the treaty proposal create? Please comment generally on the objectives of the treaty proposal, and how such objectives could facilitate access for the blind and visually impaired. Is the treaty proposal likely to meet its objectives? Would there be any legal or practical impediments to implementing the treaty proposal in the United States? What issues should the United States consider with respect to application of the treaty proposal in foreign countries?*

The benefits of the treaty would be those that flow from having a global legal framework that provides sufficient harmonization of minimum exceptions and clarity of the legality of importing and exporting works created under such exceptions. This would include but not be limited to:

- a) the elimination of much needless duplication of efforts in the creation of accessible works,
- b) vastly expanded access to foreign works, including those in languages other than English,
- c) creation of a global market for accessible works, leading to more efficient economies of scale.

4. *Other possible courses of action that would facilitate access by “blind, visually impaired, and other reading disabled persons.” Please comment on any additional, possible methods of improving accessibility about which the Copyright Office and the USPTO should be aware, including possible roles for WIPO, the U.S. government, and the commercial and noncommercial private sectors.*

The Administration should take a larger role in protecting persons who are blind or have other reading disabilities from the attacks on the use of text-to-speech technologies in ebook readers.

The Administration should take a larger role in making sure that new ebook readers have menus and navigation systems that are more accessible.

The Administration should support the development of a new protocol at the WTO on the supply of public goods, and use this protocol to secure agreement among countries to share the costs the digitalization of accessible works.

The United States delegation does not argue that the current U.S. laws providing exceptions to copyright for purposes of making accessible formats of works are unnecessary or that they should be repealed. Indeed, the U.S. delegation is quite proud of our statutory exception. Thus, it would come as a surprise if anyone would seriously entertain the notion that a treaty instrument can be replaced by voluntary actions alone.

Some new global norm or norms are clearly needed to facilitate the cross-border sharing of works created under copyright exceptions for persons who are blind or have other disabilities. This has been obvious since at least 1985.

It is appalling that many copyright owner groups are organizing against a treaty that will improve the lives of so many persons who are blind or have other disabilities. If the Obama Administration does not support this treaty effort, it may fail. If the treaty fails due to opposition or lack of support from the U.S., millions of persons who already struggle to read will have lost a historic opportunity to improve their situation. Every single person in the Administration who can influence this decision should think long and hard about what is at stake. We need leadership by the U.S. government to support this initiative, in the most positive and constructive way possible.