

Submission 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**

November 13, 2009
(Billing Code 1410-30-S)

The Software & Information Industry Association (“SIIA”) respectfully submits these 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,” and more specifically on a proposed treaty relating to copyright exceptions for the blind and visually impaired that was drafted by the World Blind Union (WBU) and submitted to the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO) by Brazil, Ecuador and Paraguay (“Draft Treaty”). For the reasons delineated below, SIIA strongly urges that the U.S. Government oppose consideration of the Draft Treaty at the upcoming meeting of the SCCR.

SIIA is the leading trade association of the software and digital information (S&I) industries, with members ranging from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies¹ are leading providers of various content publications, including books, newspapers, magazines, and newsletters; software publishing, graphics, and photo editing tools; online legal information and legal research tools; and many other products and services in the digital content industry.

The innovative companies that make up SIIA’s membership rely upon copyright and other intellectual property protections to protect their proprietary products and services and to serve the marketplace, including the blind and visually impaired. SIIA and its member publishers have long recognized the challenges faced by the blind and visually impaired in accessing copyrighted

¹ A list of the more than 500 SIIA member companies may be found at:
<http://www.siiia.net/membership/memberlist.asp>

software and digital content, and, as summarized in SIIA's earlier comments² and testimony³ on these issues, have a long history of working with organizations that represent the interests of the blind and visually impaired community toward the goal of improving access to their works.

SIIA believes that it is important to recognize and address the needs of the blind and visually impaired in accessing copyrighted software and digital content. SIIA members continue to take steps to meet this goal, as well as being at the forefront of providing the usable tools and services that enable all citizens to participate fully in our information-based society. Many SIIA-member publishers work directly with the blind and visually impaired and organizations representing them to ensure that the entire community can use their products and services in a format that suits their needs.

The bilateral approach of mutual cooperation working within the marketplace is the best way to develop the technological solutions to the specific issues related to facilitating access to copyrighted works for the blind and visually impaired. With each passing day, via the Internet and other digital technologies, the blind and visually impaired are being provided with more options, more alternatives and more opportunities. Businesses, educational institutions and other stakeholders are working in partnership with groups representing the blind and visually impaired to provide a wide range of copyrighted products and services to this previously mostly unreached audience.

It would be premature and counter-productive to prescribe in treaty form the very technologies and market that is facilitating, for the first time in human history, the very accessibility long sought by blind and visually impaired individuals. There is a real danger that these cooperative efforts could be adversely affected if WIPO or any government were to step in and attempt to create and implement copyright-specific mandates or exceptions that bind the hands of the stakeholders, especially those being proposed in the draft Treaty.

Although copyright protection is a consideration affecting the ability of the blind and visually impaired from getting access to certain products and services, it is not the sole or primary factor. As evidenced by the testimony at the hearing⁴ held on this issue earlier this year by the U.S. Copyright Office and U.S. Patent and Trademark Office and the U.S. Government delegation's own statement to WIPO at the eighteenth session of the SCCR⁵, there are many considerations distinct from copyright protection that have a more substantial and direct effect on whether goods and services are made available in a way that is accessible to the blind and visually

² See <http://www.copyright.gov/docs/sccr/comments/2009/kupferschmid.pdf>

³ See <http://www.copyright.gov/docs/sccr/transcripts/sccr5-18-09.pdf>

⁴ See <http://www.copyright.gov/docs/sccr/transcripts/index.html>.

⁵ See <http://www.copyright.gov/docs/sccr/statement/us-intervention.pdf>. (“[T]he United States has confirmed that there are multiple, inter-related challenges when it comes to providing access to copyrighted works for the blind or other persons with disabilities. A mix of highly-complex factors intersect. These factors include the application of copyright law and disabilities laws, but also include economic factors, factors relating to technical standards and formats, factors related to coordination and best practices, and the promise of new technologies and new business models.”)

impaired. Focusing exclusively on copyright protection as a barrier to progress in this area is a mistake. And directing that focus on an international treaty is particularly unwise.

With technology and business models evolving so rapidly, it would be unwise to attempt to craft a new and potentially complicated international framework merely to address concerns that are likely to be addressed more rapidly and effectively by the marketplace than they could be by such a Treaty. The WIPO treaty-making process is inherently ill-equipped to effectively address many of issues that are certain to be raised. These processes are slow and unwieldy. Whatever Treaty WIPO were to adopt today will not be able to keep pace with the rapid changes in technology – virtually assuring that any standard it codifies is outdated the moment it's printed on the page.

WIPO and its member states understood this dilemma when it enacted the so-called three-part test found in article 9 of the Berne Convention and re-affirmed and extended in the Agreement on Trade Related Aspects of Intellectual Property (TRIPs) and the WIPO Internet Treaties. This test provides the necessary flexibility to address these accessibility issues. Perhaps most disturbing about this proposed treaty-making effort is that there has been no showing that the three-part test is in any way inadequate to address the current access problems for the blind and visually impaired.⁶ Why re-invent the wheel, when we have a perfectly good wheel to use that is adequate to the task at hand.

Unfortunately, the proposed treaty goes well beyond just re-inventing the wheel. The Treaty would break new ground at WIPO by mandating one or more specific exceptions and limitations to copyright protection. WIPO copyright treaties (whether Berne or the Internet treaties) have always set forth minimum standards for copyright protection that each member state must satisfy while, at the same time “allowing” member states to enact exceptions and limitations applicable to those standards. Significantly, these exceptions and limitations are permissible. They are not required. Member states are free to provide greater copyright protections than set forth in the Berne Convention by exceeding the minimum standards established by Berne and/or by not choosing to implement an exception or limitation permitted by Berne.⁷ The WBU draft Treaty proposed by Brazil, Ecuador and Paraguay would, for the first time, change this long-standing principle by mandating each member state to enact exceptions for the blind and visually impaired. We urge the U.S. Government to oppose the treaty on this basis, as well as the others mentioned herein.

Although we oppose consideration of a WIPO Treaty on this important topic, our comments should not be construed as opposing any WIPO involvement. We support the use of WIPO

⁶ Article 3 of the WBU draft treaty provides that “the provisions of this Treaty are consistent with obligations set out under” several other copyright treaties, such as the Berne Convention, TRIPs and the WIPO Internet Treaties. This provision raises additional questions about the efficacy of and need for the Treaty. If the exceptions in the Treaty must be interpreted in a manner that is consistent with Article 9 of the Berne Convention then each individual member state could simply choose to enact exceptions provided for under the Treaty into their national laws without need for a new Treaty.

⁷ See Article 19 of the Berne Convention (“The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”)

resources to consider how best to address these issues under Article 9 of the Berne Convention by, for instance, conducting case studies, research and discussions amongst the stakeholders. Accordingly, we are supportive of WIPO's efforts being undertaken through its Stakeholders' Platform.⁸ It would not benefit the copyright or blind and visually impaired communities to divert WIPO's limited resources from these efforts in order to engage in a treaty-making exercise that would be conflict-ridden, time consuming, and lengthy and (at the end of the process) is unlikely to improve greatly (or at all) the existing situation.

In closing, we want to reiterate and stress our willingness to voluntarily work with groups representing the blind and visually impaired to improve access to software and digital content products and services. The history of the software and digital content industries has shown that the answer to most technology-based problems lies principally in the stakeholders and the marketplace developing technical and business solutions. The software and digital content industry has worked with the blind community to reach consensus on ways to address numerous accessibility problems in the past. We expect the same with any other outstanding concerns.

⁸ See http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_4.doc.