MITCHELL SILBERBERG & KNUPP LLP
A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

MS&K

Steven J. Metalitz
Partner
(202) 355-7902 Phone
(202) 355-7892 Fax
met@msk.com

November 13, 2009

Ms. Maria Pallante, Associate Register,
Policy and International Affairs
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559

RE: Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities, 74 Fed. Reg. 52507 (Oct. 13, 2009)

Dear Ms. Pallante:

This submission is made on behalf of the following copyright industry organizations (hereafter referred to as the "signatory organizations"):

Association of American Publishers (AAP)

Independent Film and Television Alliance (IFTA)

Motion Picture Association of America (MPAA)

National Music Publishers' Association (NMPA)

Recording Industry Association of America (RIAA)

The signatory organizations appreciate this opportunity to submit these comments in response to the above-referenced Federal Register notice (NOI).

While the NOI addresses a number of issues, its main focus is the draft treaty prepared under the auspices of the World Blind Union, and submitted to the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO), by Brazil, Ecuador and Paraguay.[1] Because the signatory organizations have been deeply involved for many years (including through the International Intellectual Property Alliance) in

[1] *See* Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU), submitted at the World Intellectual Property Organization Standing Committee on Copyright and Related Rights (SCCR), 18th Session, May 25–29, 2009 (available at http://www.wipo.int/meetings/en/docldetails.jsp?doclid=122732).

the drafting, consideration, ratification, implementation and interpretation of treaties related to copyright protection, we are pleased to have the chance to offer our perspectives on this draft treaty. (These comments will focus on the international copyright law aspects of the proposed treaty, and thus will not directly address the first question posed in the NOI, which deals with the impact of the proposed treaty on U.S. law.)

The signatory organizations urge the U.S. Government to oppose consideration of this draft treaty by the SCCR, and to encourage other WIPO Member States to do so as well. We strongly endorse and support reasonable efforts to increase the practical and functional access of blind and visually impaired persons to works protected by copyright. But among the strategies least likely to advance the goal of increased access by the blind and visually impaired is the path down which the draft treaty points: to begin to dismantle the existing global treaty structure of copyright law, through the adoption of an international instrument at odds with existing, long-standing and well-settled norms.

The digital revolution which is now sweeping the world offers exciting opportunities for expanding access for the blind and visually impaired, as well as serious challenges about how to do so. Taking advantage of these opportunities, while addressing the accompanying challenges, demands the concerted efforts of the blind community, civil society, the technology sector, and copyright owners. National governments, both individually and collectively, have critical roles to play as well, and WIPO is surely the right forum for some of these collaborative efforts. No one, least of all the blind and visually impaired, would be well served if WIPO's resources were instead squandered on a divisive and ultimately unproductive exercise in imposing new global norms, fundamentally inconsistent with those that have marked the development of copyright law for more than a century.

The draft treaty appears to proceed from two premises which have potentially radical implications. Neither premise is sound, and taken together they challenge fundamental aspects of the existing global framework of copyright treaties.

The first premise is that the current copyright treaty system does not accommodate, and indeed is incompatible with, the practices, policies and developments that are required to improve substantially the access of blind and visually impaired persons to copyrighted works. Reality does not validate this assumption. As the U.S. government correctly observed in its most recent intervention at WIPO on this topic, "the scope of copyright protection is *one factor among many* that affects the availability of content in accessible forms." (emphasis added).[2] As the USG statement points out, a number of "complex issues of law, technology, business, and human and financial resources" bear directly upon the accessibility question. There is much that can and should be done to address these issues, without the need for any change to the global structure of copyright law as reflected in the numerous treaties administered by WIPO, as well as

[2] *See* Statement on Improving Accessibility to Copyrighted Works for Blind and Visually Impaired Persons, as Delivered by the United States of America before the World Intellectual Property Organization Standing Committee on Copyright and Related Rights (SCCR), 18th Session, May 26, 2009 (available at http://www.copyright.gov/docs/sccr/statement/us–intervention.pdf).

other important treaties such as the WTO TRIPS Agreement. Indeed, as the NOI points out, WIPO is already doing much to address these issues, notably through the WIPO Stakeholders' Platform, an initiative that the signatory organizations strongly support.

Furthermore, even to the extent that adjustments in national copyright laws, and greater harmonization of those laws, is thought necessary in order to channel the course of the digital revolution in the direction of improved accessibility for the blind and visually impaired, the long-standing global treaty framework provides ample room for such changes. The three-step test for exceptions and limitations to copyright protection, first adopted in the Berne Convention with respect to the reproduction right, and since adapted and extended to other rights in the TRIPS Agreement and the WIPO Internet treaties, is fully capable of accommodating these adjustments.[3] More precisely, there has been no demonstration that this authorization for the recognition of exceptions and limitations is too limited or too rigid to advance this goal. Of course, WIPO has a number of important roles to play here as well, such as sponsoring discussions, research and case studies on how the three-step test can properly be employed to increase accessibility for the blind and visually impaired, and encouraging harmonization of national laws around "best practices" where appropriate. Instead, the draft treaty takes the opposite approach, requiring signatories to enact extremely broad exceptions to copyright protection (such as those set forth in Article 4(a) of the proposal), which cannot possibly be considered consistent with the three-step test.

We acknowledge that the draft treaty recites (in Article 3(a)) that everything in it is consistent with the obligations of states under the Berne Convention, as well as the other copyright and neighboring rights treaties administered by WIPO. But the recitation rings false. To require a contracting party to adopt a sweeping exception, such as that outlined in Article 4(a), that would certainly fail to pass muster as even a permissible exception under Article 9(2) of the Berne Convention, Article 13 of TRIPS, Article 10 of the WIPO Copyright Treaty (WCT), or Article 16 of the WIPO Performances and Phonograms Treaty (WPPT), is to create an irreconcilable conflict.

This brings us to the second unsound premise of the draft treaty: that even if an exception along the lines of Article 4(a) were consistent with the three-step test, this would not be enough to address the problem. Instead, the draft treaty goes one giant step farther, by mandating the adoption of such an exception in national laws. By requiring the recognition of a specific, detailed exception to copyright protection, the draft treaty would break the mold of every previous treaty instrument that forms part of the long-standing global framework of copyright norms.

The uniform approach within this global framework has been to set minimum standards of copyright protection, subject to certain exceptions or limitations which are permissible, but

[3] The most general formulation of the three-step test is found in Article 13 of the WTO TRIPS Agreement: "Members shall confine limitations or exceptions to exclusive rights to [1] certain special cases which [2] do not conflict with a normal exploitation of the work and [3] do not unreasonably prejudice the legitimate interests of the right holder." (Numbering added) See also Berne Convention, Article 9(2); WIPO Copyright Treaty, Article 10; WIPO Performances and Phonograms Treaty, Article 16.

not mandatory. As a corollary, none of the existing treaties bars national legislation that provides stronger protection than the global minimum standard, or that declines to recognize a permissible limitation or exception. See, e.g., Berne Convention, Art. 19. The draft treaty would turn this long-standing principle on its head, demanding that signatories limit copyright protection to an extent not even permissible under the existing treaties, and inviting them (in Article 2(d)) to go even further, to include "more extensive protections for the visually impaired and reading disabled." Thus, further exceptions would apparently be permitted, so long as these are consistent with the draft treaty itself, but clearly without regard to whether they would be consistent with Berne, WCT or WPPT.

To appreciate the significance of this sharp departure from the long-standing practice of making copyright exceptions and limitations permissive, not mandatory, it is worth recalling some of the policy considerations that underlie the established practice. Prime among these is flexibility: a permissive approach more readily allows a country to implement exceptions gradually and to make the necessary adjustments to respond to unforeseen market or technological developments. A mandatory exception could be more difficult to tailor to changing circumstances. This argument is particularly strong in the case of access for the blind or visually impaired, where most participants in the discussion within WIPO agree that the ultimate goal should be a market-based solution where persons with disabilities can purchase commercial copyrighted works that are fully accessible when introduced into the market. A rigid mandate — especially one that comprehensively trumps all contractual arrangements to the contrary, see Article 7 — is peculiarly ill-suited to advancing this goal. Indeed, it seems doubtful that such a mandate would do anything to increase the incentives for publishers to invest in the production or dissemination of accessible material. The greater flexibility provided by the time-tested approach of defining the scope of permissible exceptions better serves the long-term interests both of copyright owners and of the blind or visually impaired.

The almost invariable preference in treaty language for permissive rather than mandatory treatment of copyright exceptions also accurately reflects the incremental character of the development of most global copyright norms. Treaties generally build upon, or at least draw from, examples in national legislation, whose practical impact in a particular country can be observed and evaluated. Even where treaty obligations include relatively innovative mandates, there are generally some national law examples that prefigure them. Here, by contrast, the exception that would be mandated by the draft treaty has no real precedent in national law. Such a detailed mandate, drawn up without the benefit of practical experience in national legislation , is more likely to prove unrealistic or inflexible, and to need revision or recasting in a short period of time. Prudence counsels against including in an international instrument a mandatory directive to sail into these uncharted waters.

Finally, the permissive approach to exceptions in general – and the well-established three-step test in particular – has proven successful in bridging the gap between civil and common law legal systems. Consistent implementation of mandatory treaty provisions in the two types of legal systems, as well as in particular national variations upon them, has often been more problematic. The same could be expected in this case.

In sum, adoption of this draft treaty would be incompatible with the long-standing global treaty framework that has successfully provided copyright law norms for many decades, both because it deprecates the flexibility already recognized in those norms, and because it departs sharply from well-grounded precedents against mandating exceptions to copyright protection, Even so, it might be argued, such an incompatibility, in light of its laudable objective, ought to be tolerated as simply a minor inconsistency, a small rip in the encompassing fabric of global copyright law. Unfortunately, this argument cannot bear scrutiny.

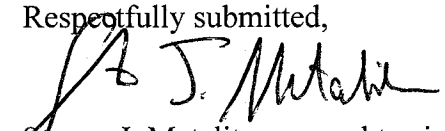
Even by its own terms, the impact of the treaty proposal would extend far beyond facilitating the access of blind and visually impaired people to the subset of works for which their particular condition presents an obstacle. See, for example, Article 2(a) (signatories obligated to act on behalf of persons who have "other disabilities in accessing copyrighted works," wholly apart from those who are "visually impaired"); Article 12 (authorizing commercial use of orphaned works without regard to impact on access by the visually impaired); Article 15(b) (signatories obliged to apply treaty to persons with "any other disability" to which an accessible format could be applied); Article 16 (treaty covers "any work of a type in which copyright could subsist," with no limitation to works protected under national law, nor to works of a type to which visually impaired persons currently enjoy less than full access).

Furthermore, there is serious risk that the likely impact of the draft treaty will not be confined to the four corners of the document, widely spaced though they be. Viewed in context, the draft treaty appears to many as the not-so-thin edge of a wedge to be driven into the long-standing structure of global copyright norms. It advocates a U-turn in the approach to global copyright norms that would almost certainly not be restricted to the issue of access for the visually impaired, or even for the disabled community generally. Adoption of this proposal would be used to justify its radical approach — mandating in national law exceptions and limitations that reach far beyond what would be even permissible under global norms today — in many other fields of copyright law.

The signatory organizations urge the U.S. government to take a clear stand against the draft treaty, and instead to advocate for more constructive and collaborative WIPO initiatives to address the real problem of improving access of the blind and visually impaired to copyrighted works. We look forward to working with you, and with representatives of the disabilities community, civil society organizations, and other governments, toward this critical goal.

Thank you for your consideration of the views of the signatory organizations.

Respectfully submitted,



Steven J. Metalitz, counsel to signatory organizations
Mitchell Silberberg & Knupp LLP
1818 N Street, NW, 8th Floor
Washington, DC 20036 USA
Tel: (+1) 202-355-7902; Fax: (+1) 202-355-7899
E-mail: met@msk.com