

**BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**IN THE MATTER OF
THE FACILITATING ACCESS TO COPYRIGHTED WORKS
FOR THE BLIND OR OTHER PERSONS WITH DISABILITIES**

Docket No. E9-24539

**COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE, THE
ELECTRONIC FRONTIER FOUNDATION AND THE CHIEF OFFICERS OF
STATE LIBRARY AGENCIES**

Pursuant to the Notice of Inquiry (NOI) published by the Copyright Office in the *Federal Register* on October 13, 2009, the Library Copyright Alliance (LCA), the Electronic Frontier Foundation (EFF), and the Chief Officers of State Library Agencies (COSLA) submit the following comments on the topic of facilitating access to copyrighted works for the blind or other persons with disabilities. The Library Copyright Alliance consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries.

The American Library Association (ALA) is a nonprofit professional organization of more than 65,000 librarians, library trustees and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries (ACRL), the largest division of ALA, is a professional association of academic and research library and information professionals to serve the information needs of the higher education community and to improve learning, teaching and research.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve. Collectively, the ALA, ACRL and ARL represent over 139,000 libraries in the United States employing approximately 350,000 librarians and other personnel.

The Electronic Frontier Foundation is a non-profit organization with 13,000 members worldwide, dedicated to the protection of online freedom of expression, civil liberties, digital consumer rights, privacy, and innovation, through advocacy for balanced intellectual property law and information policy.

The Chief Officers of State Library Agencies is an independent organization of the chief officers of state and territorial agencies designated as the state library administrative agency and responsible for statewide library development.

LCA, EFF and COSLA thank the Copyright Office for conducting this request for public comments to better understand and facilitate access to protected works for the blind or persons with other disabilities. We believe that the blind or persons with other disabilities should be afforded the same access to copyrighted materials as sighted persons. Accordingly, LCA believes that the United States should work for the adoption of a treaty at the World Intellectual Property Organization (WIPO) that facilitates such access. LCA also believes that legal solutions must be combined practical solutions to improve and expand access for the blind and persons with other disabilities.

A. Summary of the Proposed WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons.

Limitations and exceptions to exclusive rights in the treaty proposal. The limitations and exceptions in the treaty proposal would make it permissible to do the following, without the authorization of the copyright owner, on a nonprofit basis, under certain conditions designed to protect the interests of copyright holders:

- Make an accessible format of a work (Article 4(a))
- Supply the accessible format or copies of that format to a visually impaired person by any means, including by non-commercial lending or by electronic communication by wire or wireless means (Article 4(a))
- Undertake any intermediate steps to achieve these objectives (Article 4(a)). It would allow the user to copy the work exclusively for personal use under certain conditions (Article 4(b)).

It would also allow for-profit entities to avail themselves of the exception, and commercial rental of copies would be possible, if:

- the activity is undertaken on a for-profit basis, but only for uses that are also permitted under exceptions and limitations without remuneration to the copyright holder (Article 4(c)(1))
- the activity is undertaken on a non-profit basis to extend access to works to the visually impaired on an equal basis with others (Article 4(c)(2))
- the work or a copy of the work is not reasonably available in an accessible format; and notice is given to the copyright owner and adequate remuneration is available (Article 4(c)(3)).

Cross-border provisions of the treaty proposal. The treaty proposal permits the export to another country of any version of the work or copies of the work that any person or

organization in one country is entitled to possess or make under the treaty proposal, and the import of that version of a work or copies of the work under the provisions of the treaty proposal in the other country (Article 8).

Other requirements in the treaty proposal. The treaty proposal requires that:

- The accessible copy must include mention of the source and the name of the author as it appears on the work of copyright of the work (Article 5)
- Contracting parties must allow for circumvention of technological measures when necessary so as to render the work accessible (Article 6)
- Any contractual provisions contrary to the exception shall be null and void (Article 7).

B. Response to Copyright Office's Questions.

1. How would the treaty proposal interact with United States law under Title 17 or otherwise?

U.S. law is generally consistent with much of the treaty proposal. The more minor apparent inconsistencies can be addressed by modest changes to the draft treaty or reliance on the fair use doctrine, 17 U.S.C. § 107. However, the compulsory license in Article 4(c) of the treaty proposal for the making of accessible formats on a for-profit basis has no analogue in U.S. law, and would probably require amendment to the Copyright Act.

Article 4(a)

Article 4(a) of the treaty proposal requires Contracting Parties to permit an entity to supply works in accessible formats without the permission of the rights holder if the activity is undertaken on a non-profit basis. Article 4(a) is similar to the Chafee amendment, 17 U.S.C. § 121, which provides an exception for the reproduction and

distribution of works in “specialized formats” for the use of the blind and other persons with disabilities. Article 4(a) is broader than section 121 in several technical respects:

- Article 4(a) applies to all kinds of works, while section 121 applies only to non-dramatic literary works.
- Article 4(a) provides an exception to any non-profit entity,¹ while section 121 exempts only "authorized entities," which are defined as a nonprofit organization or government agency with the primary mission of providing specialized services to the training, education, or adaptive reading or information access needs of blind or other persons with disabilities. *See* 17 U.S.C. §121(d)(1).
- Article 4(a) permits the supply of the accessible format “by any means, including by ... electronic communication by wire or wireless means....” In contrast, section 121 permits only distribution of the accessible format.
- Article 15 of the treaty proposal 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....” Section 121’s definition of “blind and others with disabilities” is narrower in that it by reference requires certification by a competent authority that a person is blind or has a visual disability that with correction prevents the reading of standard printed material. (121

¹ Article 4(a) by its terms refers to any entity undertaking the permitted activity on a non-profit basis, but Article 4(c)(2) appears to address the situation of the permitted activity being undertaken by a for profit entity on a non-profit basis.

U.S.C. § 121(d)(2) refers to 2 U.S.C. § 135a, which in turn references 36 CFR 701.6(b)(1).)

- The term “accessible format” in Article 16 of the treaty proposal appears slightly broader than the term “specialized formats” in section 121(d)(4). For example, accessible format includes large print, but specialized format includes large print only with respect to “print instructional materials” under the Individuals with Disabilities Education Act.

These small differences between Article 4(a) and section 121 can be addressed by minor amendments to Article 4(a) and the related definitions in Article 15 and 16. Alternatively, the fair use privilege in 17 U.S.C. § 107 could be relied upon to “fill the gap” between Article 4(a) and section 121. The first fair use factor, the purpose and character of the use, would weigh in favor of the entity providing the work in accessible formats in all Article 4(a) cases because by definition such cases involve activities undertaken on a non-profit basis. Likewise, the fourth fair use factor, the effect of the use on the potential market for or value of the work, would tend to favor the entity providing works in accessible formats. Typically, the entity would provide accessible copies only if the rights holder or its licensees did not provide accessible copies. Thus, the rights holder would suffer no injury to a market it had exploited. Moreover, courts have held that harm to unexploited transformative markets should receive no weight in the fourth factor analysis. *See Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614-15 (2d Cir. 2006). Accordingly, the United States could reasonably assert that section 121 combined with section 107 complies with the requirements of Article 4(a) of the draft treaty.

Article 4(b)

Article 4(b) of the treaty proposal requires contracting parties to permit a visually impaired person to make a copy of a work in an accessible format for his or her personal use. The fair use doctrine permits making personal copies of this sort. *See Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

Article 4(c)

Article 4(c) of the treaty proposal requires Contracting Parties to establish a compulsory license for an entity to make works accessible on a for-profit basis.² Several other provisions of the treaty proposal relate just to the 4(c) compulsory license, including Articles 9, 11, and 12. Article 4(c) has no analogue in the Copyright Act. Accordingly, if Article 4(c) were included in the treaty and the United States joined the treaty without reservation, Congress would have to amend the Copyright Act in order to implement Article 4(c).

Article 6

Article 6 of the treaty proposal requires Contracting Parties to ensure that entities operating under the Article 4 exceptions have the means of circumventing technological protection measures in order to make works accessible. Additionally, the entities must have the right to engage in necessary acts of circumvention.

Under the Section 1201 rulemaking process, the Librarian of Congress has granted an exemption from the prohibition in 17 U.S.C. § 1201(a)(1)(A) with regard to “[l]iterary works distributed in ebook format when all existing ebook editions of the work

² Article 4(c) also applies to activities “undertaken by a for-profit entity on a non-profit basis, only to extend access to works to the visually impaired on an equal basis with others.”

(including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into specialized format.” Renewal of an exemption along these lines in each triennial rulemaking cycle would appear to satisfy the treaty proposal’s requirement that entities have the right to engage in the acts of circumvention necessary to render the work accessible.

Less clear is whether renewal of the exemption would also ensure that entities have the means to engage in the acts of circumvention. By its terms, the exemptions granted under section 1201(a)(1)(C) apply only to the section 1201(a)(1)(A) prohibition on acts of circumvention, not on the section 1201(a)(2) prohibition on the manufacture and distribution of circumvention devices. However, a court could very well conclude that Congress intended for the exemption to apply to the manufacture and distribution of circumvention devices as well as the act of circumvention. Without circumvention devices, a person cannot engage in a permitted act of circumvention. A court could find that Congress would not have intended such an absurd result, and thus would interpret the exemption as applying to both the act of circumvention and the manufacture and distribution of circumvention devices. Given the likelihood of a court reaching this result, the United States could reasonably take the position that the existing 1201(a)(1)(C) rulemaking framework complies with the treaty proposal’s requirements concerning the availability of the means of circumvention.

Article 7

Article 7 would require Contracting Parties to invalidate contractual restrictions contrary to the Article 4 exceptions. While the enforceability of a contractual restriction

on an exception to the U.S. Copyright Act is an unsettled question under U.S. law, the weight of authority supports the position that such restrictions, particularly in shrink-wrap or browse-wrap licenses, are not enforceable.

There are two theories of preemption of state law: statutory preemption under section 301(a) of the Copyright Act, and constitutional preemption under the Intellectual Property Clause of the U.S. Constitution. Section 301(a) preempts state laws creating “rights that are equivalent to any of the exclusive rights within the general scope of copyright....” Courts have interpreted section 301(a) as not preempting a state cause of action that requires proof of “extra elements” not present in a copyright claim. Some courts have held that section 301(a) did not preempt enforcement of a contract that prohibited copying because proof of the existence of an enforceable contract by itself satisfied the extra element requirement.³

On the other hand, some scholars have rejected this analysis:

³ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Bowers v. Baystate Technologies*, 320 F.3d 1317 (Fed. Cir. 2003); *Davidson & Assoc. v. Jung*, 422 F.3d 630 (8th Cir. 2005). However, Judge Dyk in a dissenting opinion in *Bowers* argued that while section 301(a) would not preempt a restriction in an negotiated agreement between parties of equal bargaining strength, it would preempt a restriction contained in a non-negotiated shrink-wrap license. 320 F.3d at 1337 (J. Dyk, dissenting). This reasoning suggests that a restriction on section 121 contained in a shrink-wrap, click-on, or browse-wrap license would not be enforceable. Additionally, many courts have questioned whether a licensee to a shrink-wrap or browse-wrap license has sufficiently manifested assent in order to be bound to its terms. See, e.g., *Novell, Inc. v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1230 (D. Utah 1997); *Morgan Labs., Inc. v. Micro Data Base Sys., Inc.* 41 U.S.P.Q.2d 1850 (N.D. Cal. 1997); *Arizona Retail Sys., Inc. v. The Software Link, Inc.*, 831 F. Supp. 759, 764-66 (D. Ariz. 1993); *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91, 98-100 (3d Cir. 1991); *Foresight Resources Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1010 (D. Kan. 1989); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. August 10, 2000), *aff'd*, 248 F. 3d 1173 (9th Cir. 2001); *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002); *Softman Prods. Co. v. Adobe Systems, Inc.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001); and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1338-39 (D. Kan. 2000).

[A]t times a breach of contract cause of action can serve as a subterfuge to control nothing other than the reproduction, adaptation, public distribution, etc. of works within the subject matter of copyright. That situation typically unfolds when the “contract” at issue consists of a “shrinkwrap license” to which the copyright owner demands adhesion as a condition to licensing its materials. To the extent that such a contract is determined to be binding under state law, then that law may be attempting to vindicate rights indistinguishable from those accorded by the Copyright Act. Under that scenario, the subject contract cause of action should be deemed pre-empted Although the vast majority of contract claims will presumably survive scrutiny ... nonetheless pre-emption should strike down claims that, although denominated “contract,” nonetheless complain directly about the reproduction of expressive materials.

1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, § 1.01[B][1][a] at 1-19 and 1-22 (2001) (citations omitted).

Relying on this passage, the court in *Selby v. New Line Cinema*, 96 F. Supp. 2d 1053 (C.D. Cal. 2000), declined to enforce an implied-in-fact contract prohibiting the use of an idea without attribution. Similarly, the court in *Symantec Corp. v. McAfee Assocs., Inc.*, 1998 WL 740798 (N.D. Cal. June 9, 1998), declined to enforce a contractual restriction on reverse engineering. The court found that the mere existence of the agreement was insufficient to transform “what essentially is a copyright infringement claim” into “something more.” *Id.* at *5.

In *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), the First Circuit noted that not every extra element will establish a qualitative variance between rights under copyright and those protected by state law. Thus, if the extra elements are “illusory ... mere labels attached to the same odious business conduct,” then preemption will occur. A California court summarized the case law in this area as follows:

The cases that have decided the issue of federal copyright preemption of state breach of contract causes of action can be roughly divided into two groups: (1) a minority of the cases hold state breach of contract causes of

action are never preempted by federal copyright law; and (2) a majority of the cases hold state breach of contract actions are not preempted by federal copyright law when they seek to enforce rights that are qualitatively different from the exclusive rights of copyright. We adopt the majority view.... The promise alleged to have been breached in a breach of contract action does not always make the contract action qualitatively different from a copyright infringement action. If the promise was simply to refrain from copying the material or infringing the rights protected by copyright, then the promisor has promised nothing more than that which was already required under federal copyright law. The promise not to infringe adds nothing to a breach of contract action for copyright infringement. A breach of contract action based on this type of promise must be preempted in order to prevent parties from circumventing federal copyright law and nullifying the preemption provided for in section 301.

Kabehie et al., v. Zoland, et al., 125 Cal. Rptr. 721 (Cal.App.2nd Dist. 2002).⁴

Constitutional preemption is based on the Intellectual Property and Supremacy clauses of the U.S. Constitution. Relying a constitutional preemption, the Fifth Circuit in *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988), set aside a shrink-wrap restriction on reverse engineering otherwise permitted by copyright law. The *Vault* court cited *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), where the Supreme Court relied on the U.S. Constitution's Supremacy Clause to conclude that "[w]hen state law touches upon an area of [the copyright statutes], it is 'familiar' doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by state law." *Sears*, 376 U.S. at 229 (citations omitted). The *Vault* court held that a reverse engineering prohibition in a shrink-wrap license "conflicts with the rights of computer program owners under Section 117 and clearly 'touches upon an area' of federal copyright law." *Vault*, 847 F.2d at 270.

⁴ See also *Health Grades Inc. v. Robert Wood Johnson University Hospital, Inc.*, 2009 WL 1763327 (D. Colo., June 19, 2009); *Ritchie v. Williams*, 395 F.3d 283, 287 n.3 (6th Cir. 2005); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 457 (6th Cir. 2001); *Tavormina v. Evening Star Prods., Inc.*, 10 F.Supp.2d 729, 734 (S.D. Tex. 1998); *Am. Movie Classics Co. v. Turner Entm't Co.*, 922 F.Supp. 926, 931 (S.D.N.Y. 1996).

To be sure, some courts have rejected constitutional preemption theories in cases involving restrictions on exceptions provided by the Copyright Act.⁵ But we believe these cases were wrongly decided. The strong case law supporting statutory and constitutional preemption of contractual restrictions on copyright exceptions provides the United States with sufficient basis to take the position that U.S. law complies with Article 7.

Article 8

Article 8 of the treaty proposal would require Contracting Parties to permit the import or export of the accessible format copies made in compliance with Article 4. Section 121 is consistent with this requirement. 17 U.S.C. § 602 treats the unauthorized importation or exportation of copies as an infringement of the distribution right. But section 121 provides an exception to the distribution right. Accordingly, section 121 permits the importation and exportation of copies in specialized formats.⁶

2. How would the treaty proposal interact with the international obligations of the United States?

The United States is obligated by certain international treaties and agreements to provide minimum standards of protection for copyrighted works. These instruments also grant flexibility to adopt limitations and exceptions to the exclusive rights of authors and right holders under certain conditions. The existing multilateral agreements of the United States relevant for consideration are the Berne Convention for the Protection of Literary

⁵ See *Bowers v. Baystate Technologies*, 320 F.3d 1317 (Fed. Cir. 2003) and *Davidson & Assoc. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

⁶ The Supreme Court in *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135 (1998), ruled that exceptions to the distribution right also applied to the importation right. Because section 121, unlike section 109(a), is not limited only to copies “lawfully made under” Title 17, the issue pending before the Supreme Court in *Costco v. Omega* does not arise here.

and Artistic Works, Paris Act of the July 24, 1971, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁷

The treaty proposal sets out in Article 3 the understanding of Contracting Parties that the provisions of the treaty are consistent with obligations set out under the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performances Treaty. Thus, the treaty proposal as a matter of international law is consistent with these other treaties. The following analysis demonstrates that the treaty proposal is also substantively compatible with the provisions of the four instruments.

Limitations and exceptions to exclusive rights in the treaty proposal

U.S. obligations under the Berne Convention

Exclusive rights in the Berne Convention of possible relevance to the treaty proposal include:

- the right of reproduction (Article 9)
- the right of public performance and communication to the public of a performance for authors of dramatic, dramatico-musical and musical works (Article 11)
- the right for broadcasting and other wireless communications to the public, and public communication of the broadcast (Article 11^{bis})
- the right of public recitation for authors of literary works (Article 11^{ter})
- the right of adaptation, arrangement and other alteration (Article 12)

⁷ Because the Universal Copyright Convention plays a secondary role in international copyright governance for nations that are parties to the Berne Convention, it is not considered here.

- the right of cinematographic adaptation and reproduction; distribution, public performance and public communication of such a work; and adaptation of a cinematographic production (Article 14)

As is well known, the Berne Convention does not provide a limitation or exception that relates specifically to uses by the blind and visually impaired, but it provides the means for nations to adopt limitations and exceptions to the reproduction right subject to certain conditions. Article 9(2), known as the 3-step test, states: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

The U.S. was a party to the Berne Convention when the Chafee Amendment was passed. The 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. Indeed the WIPO Study by Judith Sullivan identifies 57 national laws that have limitations and exceptions for blind and visually impaired persons involving the reproduction right, and none have been challenged for violating Article 9(2).⁸ The reproduction right is also implicated in the provision that would allow the user to copy the work exclusively for personal use under certain

⁸ WIPO Standing Committee on Copyright and Related Rights, Fifteenth Session, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan (SCCR/15/7), February 20, 2007, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696.

conditions (Article 4(b)). This activity would easily fall within the U.S. fair use doctrine, which is consistent with the Berne 3-step test.

As for the adaptation right, reproducing the copyrighted work in a specialized format may or may not involve adaptation. It does not necessarily involve any alteration of content. A technical process altering the form of the work is not an adaptation of intellectual content. Given that section 121 in the U.S. has not been challenged internationally, there is no reason to believe that it would be viewed as inconsistent with Berne's adaptation right in the future. Section 121 permits reproduction and distribution of a previously published, nondramatic literary works into specialized formats, defined as "braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities." A number of national exceptions identified in the WIPO Study by Judith Sullivan allow activity that might involve adaptation, and none is known to have been challenged as being in violation of Berne.

The remaining exclusive rights relevant for the discussion involve types of communication or distribution to the public: public performance, communication, broadcasting, recitation, and distribution. Given that Section 121 of the U.S. Copyright Act, which permits distribution of published, nondramatic literary works in specialized formats for blind persons and other persons with disabilities, has been found to be compatible with the Berne Convention, there appears to be no conflict. The other national laws identified by Sullivan also involve types of communication and distribution of accessible works to the visually impaired, and have not been challenged.

Finally, in the matter of the compulsory license proposed in Article 4(c)(3), Berne contains a provision in Article 11^{bis}(2) permitting nations to implement compulsory licenses for broadcasting and other wireless communications. The possibility of a compulsory license implicating other relevant rights needed for the making and supplying of accessible works is also possible within the framework of international obligations of the U.S. within the conditions of the TRIPS, WCT and WPPT 3-step tests, discussed below.

The conditions under which activity could be undertaken on a for-profit basis for uses that are also permitted under exceptions and limitations without remuneration to the copyright holder in Article 4(c)(1) may need to be clarified in order to judge how the provision could be implemented within the conditions of the 3-step tests.

U.S. obligations under the TRIPS Agreement

The TRIPS Agreement obliges members to comply with Articles 1 through 21 of the Berne Convention and the Berne Appendix (Article 9). It obligates Member States to protect computer programs as literary works under the Berne Convention, and to protect compilation of data or other material (Article 10). Additional exclusive rights in TRIPS that members are obligated to provide nationally include:

- right of commercial rental to the public with respect to at least computer programs and cinematographic works, with an exception for cinematographic works in the case of material impairment due to the reproduction right due to widespread copying (Article 11)
- fixation of performances on a phonogram and reproduction of such fixation (Article 14)

- broadcasting by wireless means and communication to the public of live performances (Article 14)
- reproduction of phonograms (Article 14)
- fixation, reproduction of fixations, and rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts (Article 14)

Article 13 of TRIPS contains a broader version of the 3-step test, not restricted to the reproduction right: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

Exceptions for the blind and visually impaired relating to exclusive rights involving communication or distribution to the public are possible within the conditions of the TRIPS 3-step test. As Sullivan’s report indicates, they already exist in a number of TRIPS members, including the U.S. The remaining exclusive rights in TRIPS involve performances on a phonogram, phonograms, and broadcasts. It is unlikely that these categories are a major concern for the aims of the treaty proposal, but the same is true for them concerning application of the TRIPS 3-step test.

U.S. obligations under the WIPO Copyright Treaty

The WIPO Copyright Treaty (WCT) requires adherents to comply with the substantive provisions of the Berne Convention. It requires contracting parties to protect computer programs as literary works (Article 4) and to protect compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations (Article 5).

It also requires that members to provide:

- the right of distribution, stipulated as the making available to the public through sale or other transfer of ownership (Article 6)
- the right of commercial rental to the public of computer programs, cinematographic works, and works embodied in phonograms (Article 7)
- the right of communication to the public of literary and artistic works by wire or wireless means, including making them available so that they may be accessed by the public from any place or at any time (Article 8).

Article 11 concerns obligations for Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures. Article 12 obligates Contracting Parties to provide adequate and effective legal remedies against removal or alteration of electronic rights management information.

Article 10(2), the WCT version of the 3-step test, applies to any of the exclusive rights in the treaty:

Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

As with Berne and TRIPS, the making and supplying of accessible copies for the restricted community of visually impaired persons may be accomplished within limitations allowed by the WCT 3-step test, as special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The other aspect of the WCT to be considered is Article 11 concerning the obligations to provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures. As discussed above, in connection with the 2003 DMCA triennial rulemaking an exemption has twice been made for literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format. This exemption has not been challenged internationally. There no reason to believe that an anti-circumvention exception for the visually impaired would violate the WCT.

U.S. obligations under the WIPO Performances and Phonograms Treaty

The WIPO Performances and Phonograms Treaty (WPPT) obligates Contracting Parties to provide the following rights to performers:

- moral rights of paternity and integrity (Article 5)
- the broadcasting and communication to the public of unfixed performances except where performance is already a broadcast performance, and the fixation of unfixed performances (Article 6)
- the reproduction of performances fixed in phonograms (Article 7)
- the making available to the public of performances fixed in phonograms through sale or other transfer of ownership (Article 8)
- the commercial rental to the public of performances fixed in phonograms (Article 9)

- the making available to the public of performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them (Article 10).

It obligates Contracting Parties to extend to producers of phonograms rights for:

- the reproduction of phonograms (Article 11)
- the making available to the public of phonograms through sale or other transfer of ownership (Article 12)
- the commercial rental to the public of phonograms (article 13)
- the making available to the public of phonograms by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them (Article 14)

Article 18 concerns obligations for Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures. Article 19 obligates Contracting Parties to provide adequate and effective legal remedies against removal or alteration of electronic rights management information.

The WPPT in Article 16(2) also contains a 3-step test that is applicable to all the WPPT exclusive rights: “Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases that do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.”

The Agreed Statements of the WCT (Concerning Article 10) and the WPPT (Concerning Article 16) adopted by the Diplomatic Conference on December 20, 1996 clarify that the treaties permit nations to extend into the digital environment limitations and exceptions which have been considered acceptable under the Berne Convention.

As with the Berne, TRIPS, and the WCT, the making and supplying of accessible copies for blind and visually impaired persons may easily fall within the possibilities for limitations and exceptions under the WPPT 3-step test.

WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired

It is important to add that the *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan, offers considerable detail on the compatibility of limitations and exceptions for the visually impaired with provisions in the relevant international instruments. Her conclusions may be summarized as follows:

Exclusive rights that could be implicated in limitations and exceptions for the visually impaired in the four instruments include reproduction; adaptation; distribution, including rental and lending; broadcasting by wireless means; other communication to the public by electronic transmission; and public performance. Sullivan's analysis concludes that for most of these categories, limitations and exceptions for the benefit of the visually impaired would be possible under the terms of the four instruments. There was a lack of clarity include the adaptation right with respect to the Berne Convention, TRIPS, and WCT. In the matter of distribution, including rental and lending, Sullivan suggests that non-commercial lending is likely to be more acceptable with respect to TRIPS, WCT, and WPPT.

Cross-border provisions of the treaty proposal

The provisions for import and export of accessible copies of works do not raise questions concerning international obligations of the U.S. While some clarification might be needed concerning application of national laws in the context of the general principles of territoriality, reciprocity and national treatment which govern international copyright, the treaty proposal is not inconsistent with U.S. obligations.⁹

Other requirements in the treaty proposal

Other relevant provisions in the treaty proposal include eligibility requirements for the entity undertaking the activity, end beneficiaries (disabilities covered), scope of works in the treaty proposal, the type of accessible formats allowed, and an optional provision on orphaned works. These provisions do not appear to present challenges to the international obligations of the U.S.

Bilateral agreements

The provisions of the treaty proposal are compatible with bilateral agreements to which the U.S. is a party, including the Free Trade Agreements. These agreements all contain language similar to the Berne 3-step test. For example, the Korea-U.S. agreement provides that

Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with the normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.¹⁰

⁹ Sullivan, *WIPO Study*, 57-8.

¹⁰ Korea-U.S. Free Trade Agreement, fn. 11.

As a general matter, bilateral agreements present no concerns with respect to U.S. international obligations, only opportunities for better provisions for the visually impaired. Any copyright-related bilateral agreement signed with another nation should require the other nation to adhere to the treaty for the blind and visually impaired in order to facilitate cross-border transactions, in the interest of improving the accessibility of copyrighted works for the benefit of visually impaired persons.

The treaty proposal is consistent with bilateral free trade agreements (FTAs) negotiated by the U.S. Bilateral FTAs should, in particular, require compliance with the provisions of the treaty for the blind and visually impaired. The provisions of the treaty should be included in FTAs, so that they take effect in the national law of the bilateral partner. This will provide a secondary mechanism, outside the multilateral framework, for the rights of the visually impaired to be realized internationally.

3. What benefits or concerns would the treaty proposal create?

Visually impaired people around the world suffer from profound social, economic, and educational inequities, in part due to lack of access to knowledge. Fewer than half of the member nations of WIPO have exceptions specifically for the visually impaired in their national copyright laws,¹¹ indicating a wide gap in the divide between those countries that offer some access to information for the visually impaired and those countries that offer nothing at all. The treaty proposal's purpose is leveling the playing field so that all persons with reading disabilities can fully enjoy human rights and fundamental freedoms.

¹¹ Sullivan, *WIPO Study*, p. 28.

The key benefit of the treaty proposal is facilitating the cross-border sharing of accessible content. It is estimated that only 5% of published works are available to the reading impaired in the United States. The situation is particularly dire in developing countries, where 90% of the world's reading disabled reside.

If WIPO seeks to address the inequities that exist between developed and developing countries as suggested by the Development Agenda, a top priority of WIPO, access to knowledge in order to fully participate in society is required. The treaty proposal can help to address part of this gap by expanding access to works for the blind around the world.

The treaty proposal would expand access to works in three ways. The audience for accessible copies would expand to include all of the reading impaired, such as those persons who have physical disabilities that prevent them from using a book. The treaty proposal would apply to all categories of works, expanding the range of creative works available. Lastly, the treaty proposal would expand the types of accessible copies beyond “specialized formats.” These expansions are required if the visually impaired are to enjoy the same levels of access as sighted persons.

The visually impaired require access to works in the modes and means of communication that meets their particular needs. Braille is still an essential format for learning for younger people to acquire information literacy, but it is less suitable for people who lose their sight later in life. Digitally accessible copies are particularly important because these formats can be used to create all types of other accessible works— improving efficiency, reducing redundancy and lowering the costs of providing accessible copies.

Moreover, the treaty proposal recognizes that we live in a world where reading is increasingly technology dependent. In developing countries, information will more likely be delivered via digital technologies and networks. According to the International Telecommunication Union there are over 4 billion mobile cellular subscriptions worldwide, translating into a penetration rate of 61 per cent. “The spread of mobile cellular services and technologies has made great strides towards connecting the previously unconnected, with growth most significant in developing regions, where, by the end of 2007, mobile cellular penetration had reached close to 40 per cent. By the end of 2007, 64 per cent of the world’s mobile subscriptions were from developing countries. Five years earlier, in 2002, they represented only 44 per cent.”¹²

If the treaty proposal were endorsed by WIPO member nations, WIPO would gain great credibility by following through on its commitment to balance intellectual property law to address the rights of users of information as well as the interests of rights holders. Such support action would align with the actions of the United Nations to pursue legislative measures necessary to implement the Convention on the Rights of Persons with Disabilities, recently signed by the United States. Lastly, the treaty proposal includes the option for commercial entities that provide accessible copies the assurance that they will be compensated through a compulsory license scheme, perhaps encouraging newcomers into the market and encouraging rights holders to sell accessible copies.

¹² International Telecommunication Union report, "Measuring the Information Society: The ICT Development Index," 2009. p. 3. [http://www.itu.int/ITU-D/ict/publications/idi/2009/material/IDI2009_w5.pdf], accessed November 5, 2009

4. Other possible courses of action that would facilitate access by “blind, visually impaired, and other reading disabled persons.”

There are several courses of action that could be pursued to help improve access for the reading impaired in the United States and internationally. The creation of an authoritative database of all of the accessible copies available could speed delivery of content to the reading impaired while reducing duplication of effort. Increasing the number of libraries that could supply accessible copies to the reading impaired is desirable, as is increasing the funding for libraries to meet this new service challenge. Alternatively, libraries could be points of access with a trusted intermediary like Bookshare or Recording for the Blind and Dyslexic to serve as the gatekeepers between rights holders and users. Interlibrary loan could be expanded to include international sharing of accessible copies, again with the necessary financial backing. Rights holders, libraries and accessible technology companies could collaborate to create an effective, yet secure sharing model. Publishers could be encouraged to create accessible copies at the point of production, greatly reducing the costs for creating accessible copies.¹³ The United States could establish a bilateral or multilateral agreement among nations to share accessible resources. Other English-speaking countries could benefit from U.S. publishers devising secure methods to share U.S. content. If the definition of reading impaired is expanded to include the developmentally challenged, rights holders may be more willing to develop a market of accessible copies with a larger group of potential buyers. Finally, agreement to use the DAISY standard would ensure that the reading impaired would have full functionality of content. Technical efficiency, involving a

¹³ Publishers also could be encouraged to permit ebook providers such as Amazon to turn on the read aloud function with respect to their books.

move away from multiple standards, should drive the effort to provide full functionality in accessible formats.¹⁴

¹⁴ We also note that approval of the proposed settlement of the litigation concerning the Google Library Project could significantly expand the access of the visually disabled to millions of out-of-print books.