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Re: Copyright Office 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. 52,507 (2009)

This Comment, offered by Jane C. Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University School of Law, and June M. Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia University School of Law, responds to the Copyright Office Notice of Inquiry (NOI) cited above, regarding the objectives and text of a draft treaty prepared under the auspices of the World Blind Union and proposed formally at the May 2009 session of the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights.

Our comments are directed to NOI Question 2: How would the treaty proposal interact with the international obligations of the United States? and Question 3: What benefits or concerns would the treaty proposal create? Specifically, we address issues implicit in these two questions: Is a treaty proposing mandatory copyright exceptions for the benefit of the visually impaired permissible under the Berne-TRIPs framework? If so, is such a treaty necessary, or might its objectives be better achieved by other means?

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 exceptions and limitations. Moreover, for the reasons explained below, we believe that WIPO can more effectively achieve the important goals of the proposed treaty by drafting a WIPO Model Law devising appropriate exceptions or otherwise providing guidance toward formulating such exceptions.

Discussion

A. Permissibility under Berne-TRIPs of a mandatory exceptions treaty

The exceptions mandated in the proposed treaty must be compatible with the framework for exceptions and limitations set out at Berne art. 9(2) and TRIPs art. 13. That framework, referred to as the "three-step test," provides that any member States may provide for exceptions and limitations in 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. If the exceptions mandated by a new treaty were incompatible with the three-step test, then Berne art. 20 (incorporated in TRIPs via art 9(1)) would prohibit member States from enacting the treaty. Article 20 bars Berne member States from agreeing to provide a level of protection that is lower than that assured by the Convention's substantive minimum protections.

On the other hand, if the proposed exceptions are consistent with the minimum protections provided in Berne, then member States may implement them as a matter of domestic law, and there is no need for an international treaty. In sum, either the proposed treaty is *ultra vires* or it is unnecessary.

National exceptions permitting the reproduction, conversion to certain formats accessible to the visually impaired, and their communication to the public may well be consonant with the norms of the "three-step test." Whether that is the case for the exceptions proposed in the draft treaty is not clear. We do not propose to analyze the current text for its conformity with Berne-TRIPs, beyond noting that "Accessible format," as defined in draft treaty art. 16, includes "audio recordings" and, apparently, "listening for pleasure." The latter wording may merely reflect an unfortunate formulation rather than a proposal to make audiobooks available to the visually impaired for free or subject to compulsory licensing. If the phrasing did so intend, however, the draft may run afoul of the requirement that the proposed exception or limitation not conflict with a normal exploitation of the copyrighted work (step 2 of the three-step test). Nonetheless, we assume that it should be possible to devise Berne-compatible exceptions or limitations which would allow the creation and communication of appropriately accessible formats.

B. Is a treaty necessary?

Some of the previous submissions to the Copyright Office and to WIPO suggest that a treaty is required (1) because national exceptions do not enable cross-border communication of copies or transmissions of protected works, and (2) because, even if its goals could be implemented through domestic laws, a treaty will supply impetus otherwise lacking in some countries to devise such laws. Both of these assertions are problematic.

1. Importation of copies produced abroad

With respect to importation, in fact, member States may, consistent with Berne-TRIPs, provide for the importation of copies of works in appropriate accessible formats. The Berne-TRIPs framework accommodates not only the production within a member State of accessible formats, but also the importation by one member State of accessible formats produced in another. As a result, an importation clause such as that proposed in art. 8 of the draft treaty may well be Berne-TRIPs-compatible, and for that very reason the clause could be adopted into national law under the current regime without the necessity for (and attendant disadvantages of) a new multilateral instrument.

The Berne Convention addresses importation rights in art. 16, which provides:

- (1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
- (2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.
- (3) The seizure shall take place in accordance with the legislation of each country.

Because art. 16 covers only “infringing” copies, member States have no obligation to make liable to seizure copies which would not have been unlawful had they been made in the country of importation. Moreover, art. 16 does not require making liable to seizure imported copies lawfully made pursuant to an exception or a compulsory license in the country of production. See Sam Ricketson & Jane Ginsburg, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND*, para. 11.46 (Oxford 2006).

The TRIPs Agreement does not impose a higher level of protection in this regard. Importation controls under TRIPs arts. 44, 50 and 51 seem primarily to concern the lawfulness of the copy in the country of importation. Unlawful manufacture in the country of production is relevant to the classification of the copy as “pirated,” but the copy must nonetheless *also* be unlawfully made under the law of the country of importation, at least with respect to any TRIPs requirements that local customs officials block the importation. See Ricketson & Ginsburg, *supra*, paras. 11.77-11.80.

Thus, a Berne/TRIPs member State that adopts a treaty-compatible exception or limitation for copies accessible to the visually impaired may also import the master copy from which to make and communicate further copies consistent with its exception or limitation. As a result, a special treaty would not violate Berne art. 20, but would be unnecessary because the requisite limitations could be introduced into domestic law.

2. Incentive to adopt domestic exceptions

Although an unnecessary treaty might still be a worthwhile rhetorical contribution to the “development agenda,” there is considerable risk that it might end up harming the very interests it purports to advance. Currently, copyright exceptions and limitations are the primary means through which member States implement their national cultural policies under the fairly flexible Berne-TRIPs standards. If the task of devising exceptions devolves on the international agreement-making bodies, the result could both constrain member States and prove substantively undesirable. This is because any exception to which the WIPO member States ultimately agree would almost certainly be heavily negotiated and accordingly highly specific and carefully circumscribed in its particular applications. As a result, it could prove both unwieldy and inadaptably to inevitable changes in technological or economic conditions. But member States may no longer be free to devise their own more flexible exceptions if an international treaty occupies the field. Notably, in countries in which treaty obligations are self-executing (a

category that may include many civil law developing countries), there may be no local variation on the international norm.

The history of the Appendix to the Paris Act of the Berne Convention tends to bear out this dreary forecast. The Appendix was intended to allow developing countries to reproduce and translate works under a lower-cost licensing system. The provisions are exceedingly complicated, as one might expect from the lengthy negotiations in Stockholm in 1967 and Paris in 1971. More importantly, few developing countries have made the declaration of intent necessary to avail themselves of the Appendix's provisions, and it is not clear whether any of these member States have actually implemented the authorized licensing scheme. See generally Ricketson & Ginsburg, *supra*, Chapter 14. Unfortunately, "[i]t is hard to point to any obvious benefits that have flowed directly to developing countries from adoption of the Appendix." *Id.*, para. 14.106.

Thus, even if member States succeeded in agreeing on the details of a supranational obligation to provide exceptions and limitations in favor of the visually impaired, past experience does not leave us optimistic that the result will in fact serve its intended beneficiaries. We do not mean to suggest, however, that WIPO cannot play an important role in ensuring the implementation of fair and reasonable exceptions for the blind and visually impaired in countries around the world. Over the past two decades WIPO has been instrumental in helping developing countries to formulate their laws. If WIPO were to provide leadership and guidance through the development of a WIPO Model Law devising appropriate exceptions, we believe it would far more effectively advance the goals of the proposed treaty.

Respectfully submitted,

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