

## Reply-comments of Dr. Manon Ress, Knowledge Ecology International

December 4, 2009

### **Re: Facilitating Access to Copyrighted Works for Visually Impaired Persons and Draft Treaty Proposal**

**Federal Register** / Vol. 74, No. 196 / October 13, 2009 / Notices **52507**

These comments address arguments made in opposition to an international treaty to facilitate access and sharing of accessible formats of works for blind people and people with reading disabilities, including the comments submitted by:

Jule Sigall for Microsoft, Steven J. Metalitz for 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), Keith Kupferschmid for the Software & Information Industry Association (SIIA), Jane C. Ginsburg and June M. Besek, for Columbia University; the Content Control groups: Advanced Access Content Protection, Licensing Administrator, LLC, Content Management License Administrator, LLC, Digital Transmission License Administrator, LLC, DVD Copy Control Association 4C Entity, LLC, and National Public Radio: Joyce Slocum, Michael Riksen, Michael Starling, Julie M. Kearney, Gregory A. Lewis, and Fritz Attaway for MPAA

### **Introduction**

Among the main arguments used to oppose negotiations on a possible WIPO treaty for persons who are blind, visually impaired or have other disabilities, are:

1. such a treaty could “dismantle” the entire copyright system;
2. a treaty is not needed, it is not necessary, blind people and persons with other reading disabilities have sufficient access to works under the existing system;
3. voluntary licensing by publishers is the solution;
4. a treaty would not help since there are so many other issues that are not linked to copyright;
5. a treaty will expand piracy of copyrighted works and undermine incentives for creation of works; and
6. a treaty is premature and counterproductive.

There are also contradictory arguments offered by opponents of the treaty such as defining the treaty as a “giant step” and creating a “slippery slope” but also as a slow, complicated process that would have no positive effect.

I would like to briefly address these arguments:

## **1. A treaty to facilitate access could “dismantle” the entire copyright system**

According to Fritz Attaway for the Motion Picture Association of America (MPAA), “the proposed Treaty would reverse the basic policy established during 125 years of norm setting.”

And according to Steven J. Metalitz for the Association of American Publishers (AAP), “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, longstanding and well-settled norms.”

### ***Reply:***

The proposed treaty would make the U.S. legal traditions under the Chafee amendment for non-profit use a global norm, while facilitating the cross-border use of works created under the Chafee amendment, a practice now discouraged by the copyright office. The treaty would also provide for the possibility of a limited exception for commercial entities.

When a new global instrument is proposed for discussion, the point is to change the global copyright norms. Improving limitations and exceptions for people with reading disabilities is better described as progress than “reversal.”

There is no evidence that the Chafee amendment has had any negative impact on the commercial copyright sector, which unfortunately has largely abandoned the market for persons with disabilities.

The Chafee amendment did not “dismantle” the U.S. publishing industries. It did vastly expand access to works in the United States, by eliminating the need for permissions to create accessible formats of works, on the condition that those versions were distributed only to persons with disabilities, under measures that protect publishers from unauthorized use by others. However, it is also fair to say that the Chafee amendment did not in itself achieve anything close to parity for persons with disabilities. Access for persons with disabilities remains far below what is available to persons without disabilities. For this reason, the treaty proposes to overcome barriers to importing and exporting accessible formats of works, and to provide for the possibility of an optional but more limited exception for commercial entities to provide accessible formats for persons with disabilities.

There is simply no evidence that an exception to facilitate access for people who are blind or have other disabilities has presented financial problems for the publishing industry, anywhere in the world.

Ironically, it is far easier to “pirate” works distributed by the publishers themselves than from the many U.S. organizations that use the Chafee amendment. For example, while Bookshare.Org and RFB&D distribute electronic books protected by encryption, most large publishers distribute audio works without encryption.

The U.S. experience with the Chafee amendment and similar national exceptions provide evidence that expanded rights for persons with disabilities has not led to the piracy of works.

The proposed exception for commercial entities is both optional (subject to a reservation) and quite limited. For example, the commercial exception would only apply in cases where the publishers themselves did not make available works in formats that were accessible, and where there was both notice to publishers and adequate remuneration for such use, as well as measures to prevent access by persons without disabilities. This would hardly qualify as something that would “dismantle” the copyright system. On the contrary, it is an incentive for copyright owners to begin to serve the market for millions of persons with disabilities.

## **2. A treaty is not needed, it is not necessary, blind people and persons with other reading disabilities have sufficient access to works under the existing system**

According to Steven Metalitz “The existing legal framework is 1) flexible enough 2) proven to be working. 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. 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.”

For the MPAA: “No evidence was offered that the flexibilities in the Berne Convention for the Protection of Literary and Artistic Works and other international copyright instruments are insufficient to permit member states to provide effective measures to facilitate access for the visually impaired geared to the particular needs of their citizens. “

And for Keith Kupferschmid (SIIA) “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.” But his optimism is tempered by the prospect of a discussion on a treaty: “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. Why re-invent the wheel, when we have a perfectly good wheel to use that is adequate to the task at hand.”

### ***Reply:***

The perfectly “good wheel” is a system that results in very little access to works for blind people and people who have other reading disabilities.

Evidence of this lack of access has been documented in countless reports and studies, including for example, the following:

- A 1985 Report of the Executive Committee for the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention by Ms Wanda Noel, on the topic of Problems Experienced by the Handicapped in Obtaining Access to Protected Works, as Annex II to a WIPO and UNESCO report of the agenda item "Copyright Problems Raised by the Access by Handicapped Persons to Protected Works."<sup>1</sup>

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<sup>1</sup> <http://keionline.org/node/644>

- A May 2006 WIPO Study by Nic Garnett (WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions," WIPO Standing Committee on Copyright and Related Rights) offered these comments:

Only a very small percentage of commercially published books and periodicals are made available by publishers in formats accessible by visually impaired readers. There is in some countries a commercial market for a limited range of "accessible" material, but large print books and unabridged audio books almost always cost more than the "standard" version. Most accessible material is today still created by specialist agencies operating on charitable funds or social subventions. This means in practice that only a small proportion of the material published currently becomes available in accessible formats. In the United Kingdom, for example, it is estimated that only around 5% of published titles ever become available in accessible formats, and it is rare indeed for the accessible version to come out until months or years after the original."

[...] at present, neither the market nor technology appears to be supporting a basis for facilitating the access to information by visually impaired people in a way that is consistent with the general standards for the full social and economic integration of people with disabilities<sup>2</sup>."

The evidence is also obvious for others and I would like to point to articles by stakeholders such as "Copyright protection as access barrier for people who read differently: the case for an international approach" by Johan Roos (South African Library for the Blind, South Africa), "Copyright: How can barriers to access be removed? An action plan for the removal of some copyright barriers that prevent equitable access to information by people with print disabilities" by Stephen King (Royal National Institute of the Blind, UK) and David Mann (RNIB UK: International copyright development for WBU supported by IFLA LBS and DAISY Consortium)<sup>3</sup>. As these experts and many others report and document, the "wheel" needs to be fixed.

### **3. Voluntary licensing by publishers is the solution**

While they rarely admit that there is even a problem, the opponents of the treaty praise the results of voluntary actions by publishers:

Jule Sigall: "Microsoft has taken voluntary steps for nearly twenty years to provide books in accessible formats." and later in the comments "The experience from other sectors like the

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<sup>2</sup> [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=59952](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952)

<sup>3</sup> <http://archive.ifla.org/IV/ifla70/prog04.htm#129>

software industry also highlights the concept that the best solutions to these problems are ones that rely primarily on the voluntary cooperation and collaboration of all interested parties, not specific mandates from the law."

In NPR's comments: "Alternative approaches, such as the WIPO Stakeholders' Platform, may strike a better balance between the competing objectives of protecting copyrighted works and facilitating access through exceptions and limitations."

Keith Kupferschmid for the Software & Information Industry Association (SIIA): "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."

### **Reply**

Allow me to quote experts and stakeholders addressing the effectiveness or rather the failure of voluntary licensing in providing access for reading disabled persons to works in accessible formats. Since the 1980s, many have reported the failure and inadequacy of negotiations to obtain the permission from publishers and copyright owners, in producing accessible works for reading disabled communities. The negotiations (if they happen) are slow, costly, and incomplete. This is not a mystery.

In a September 2006 "Study on Copyright Limitations and Exceptions for the Visually Impaired," presented to the WIPO Standing Committee on Copyright and Related Rights (SCCR/15/7)," Judith Sullivan said:

"Licensing to permit activity for the benefit of visually impaired people is likely to be helpful both to cover what happens within a country and, as discussed above, how accessible copies might move between countries. This is likely to be the case even where legislative provision provides for much useful activity. In the case studies, a number explore what is happening in countries that have reasonably good provision of copyright exceptions, but where licensing arrangements are still permitting other useful activities. The problem with licensing is, of course, that it is not always easy to find or engage with the right copyright owners and more useful blanket or collective licensing agreements are not always possible."

According to the report of the July 24-25, 2008 World Blind Union (WBU) and Knowledge Ecology International (KEI) Experts Meeting on a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled Persons:

"Under copyright law, authors, or the publishers who acquired rights from authors, normally have the exclusive right to permit the publishing of works. Sometimes these rights are divided among right owners by geography, or by the format, edition or

a time period for publication. According to the meeting participants, it is often quite difficult or impossible to obtain permissions from copyright owners to publish works in accessible formats.”

This issue was also addressed in April 2009, in comments to the United States Copyright Office and the United States Patent and Trademark Office “Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons With Other Disabilities.”<sup>4</sup>

According to George Kerscher, Secretary General of the DAISY Consortium:

“An international copyright exception, similar to that proposed by the WBU is essential now and will probably be needed for many years to come. It is unlikely that mainstream publishers will ever cater to the very special needs of some disability groups. Tactile graphics and braille are examples of where libraries will continue to need an exception to provide materials in support of the mainstream version of the book purchased.”

According to James R. Fruchterman, the CEO of Benetech:

“Private Sector Initiatives. We believe that these have been largely unsuccessful in delivering substantial numbers of accessible books. Disability access is often linked with potentially promoting piracy, and technology vendors and publishers have regularly locked people with print disabilities out of the electronic book market. Our paper, the Soundproof Book, talks about the background of this problem. In contrast, with supportive laws in place internationally, successful nonprofit models, such as Bookshare in the US or RNIB in the UK, could be utilized to deliver books to fill the market gap.”

According to Marc Maurer, President, National Federation of the Blind:

“Unfortunately, our efforts to date to bring this about through cooperation with publishers and other text rights holders have not been successful. In discussions, rights holders have expressed concerns about the “leakage” of material made available to the blind into the general market, where the material might compete with other products. More to the point, rights holders do not regard the blind (and other people with print disabilities) as potentially significant markets, and are therefore unwilling to re-imagine their general distribution practices and business models to promote accessibility. Many

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<sup>4</sup> Federal Register on March 26, 2009 (Volume 74, Number 57, pages 13268-70).

publishers do make limited voluntary donations of recorded books (as distinct from e-books) to special services such as RFB&D). Welcome as these contributions are, they are no substitute for efforts to promote accessibility as a general proposition.”

According to Judit Rius Sanjuan, Attorney, Knowledge Ecology International:

“Independent of the existence of a national copyright exception for reading disabled persons, the survey shows that accessible books produced under voluntary licenses provided by the copyright holders are nearly non-existent among the countries surveyed.” (In this *Survey on Accessible Books in Spanish-Speaking Countries*, responses represent data from seven countries: Argentina, Chile, Colombia, Mexico, Nicaragua, Spain and Uruguay.)

#### **4. A treaty would not help since there are so many other issues that are not linked to copyright**

For Jule Sigal: “[...]copyright law exceptions for people who are blind are not the only issue that affects how accessible books can be made more readily available....some of the other legal and non-legal issues that need to be addressed to improve the situation, such as lack of adequate funding and a need for better coordination among trusted organizations, educational institutions and publishers, to name a few”.

And for Fritz Attaway: “It is important to note that the underlying cause of the issues purported to be addressed by the Treaty typically have nothing to do with copyright. No international instrument mandating copyright limitations and exceptions will meaningfully contribute to increased access, because the assumption that existing copyright law is an impediment to access by the visually impaired or other disabled people is wholly inaccurate [...] Measures that will truly facilitate access include greater funding for entities that distribute products accessible to the visually impaired, technological development and greater coordination among stakeholders. The focusing of attention and resources on an international instrument, at the expense of practical measures that would have a real world impact, stands to harm the interests of the visually impaired and other disabled people.” And again Fritz Attaway: “The circumstances that impede access to copyrighted works by the visually impaired and others with disabilities are many and varied, but in most instances have nothing to do with copyright protection.”

And finally, Keith Kupferschmid “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 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.”

## **Reply**

No one asserts that the difficulties encountered by people with reading disabilities are only caused by the lack of access due to copyright barriers. But no one should assert that copyright barriers are not among the chief barriers that have to be addressed.

This is the subject of the US government Copyright Office and US Patent and Trademark inquiry and the topic under discussion at the World Intellectual Property Organization Standing Committee on Copyright and Related Rights.

In his recent article, “Copyright protection as access barrier for people who read differently: the case for an international approach” J. W. Roos, an Advocate of the High Court of South Africa and the Director of the South African Library for the Blind South Africa, explains that today people with print disabilities have a clear interest in the contemporary debates concerning copyright. He writes,

“For them, copyright protection poses an access barrier. An accommodation that would balance access needs with protection needs is therefore of great potential importance. Although people with print-disabilities have traditionally used Braille and audio materials to satisfy their reading needs, one should not, when considering access issues, confine the analysis to those media only. In a rapidly changing technological environment, accommodations are needed that will not become obsolete due to technological change that opens up new access opportunities.”<sup>5</sup>

### **5 A treaty will lead to “piracy” and result in fewer incentives for creation**

According to Jule Sigall (Microsoft), “The reticence of authors’ and publishers’ to license this activity is caused in part by fears that it may lead to infringement or otherwise undermine the economic incentive for the creation and distribution of books.”

Fritz Attaway of the MPAA is more animated, saying: “to the extent that the proposed Treaty would mandate gaping fissures in the current level of copyright protections with potentially devastating impact on incentives to create new works, society as a whole would be left with fewer works to access.”

## **Reply:**

As noted above regarding the potential risk of unauthorized use, there is no evidence that organizations or institutions that publish works in accessible format for persons who are blind or have other reading disabilities have engaged or assisted in infringing activities of any sort. It is one thing to make hysterical comments about piracy; it is another thing to be taken seriously. The decades of successful implementation of national exceptions, as regards limiting access to persons who are *bona fide* beneficiaries of the exceptions, is the best

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<sup>5</sup> <http://archive.ifla.org/IV/ifla70/prog04.htm#129>

evidence that these are challenges that can be managed.

Furthermore, as has been discussed in some length in the earlier Copyright Office/USTPO consultation on this topic, many publishers of accessible formats go much further than the US law in terms of implementing measures to exclude people who would not qualify for access under the US exception.<sup>6</sup>

Regarding the possibility that the treaty would create a situation where authors and publishers would have fewer incentives, the opponents of a global exception for blind people and people who have reading disabilities should provide data on the changes that occurred when the Chafee amendment was adopted in the US. It would also be interesting to hear from authors about how more access to their works to blind people would negatively affect their creativity.

## **6. A treaty is “premature and counterproductive”**

For Keith Kupferschmid, “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.”

According to Steven J. Metalitz for the Association of American Publishers (AAP): “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.”

### ***Reply:***

The argument that a treaty should not offer anything new is being made by persons who supported new global norms for digital rights management and technological protection measures in the WIPO WCT and WPP, and who continue to support new global norms in the ACTA and in other global negotiations. Thus, the objection to newness appears to be a selective standard only applied to persons with disabilities, but not to copyright owners.

We note that the US already has an exception for persons with disabilities. According to the Sullivan WIPO report, so do at least 63 other countries.

There are two elements of the treaty that could be described as new, in terms of state practice. One is to clarify the ability to import and export works created under exceptions.

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<sup>6</sup> See Bookshare.Org's "Seven Point Digital Rights Management Plan" which includes the a number of requirements and restrictions on use, as described here: Qualified Users, Contractual Agreement. <http://www.bookshare.org/about/legalInformation>. Note that sighted people who borrow an e-book might have less “security check” than a blind student who needs a digital file!

Without this element, there is almost no reason for the treaty, since it was proposed to facilitate the more economically efficient global sharing of accessible works, which are expensive to create, and quite limited in terms of global supply.

The second area where the treaty provides for something “new” would be to extend the global exception, in a limited way, to commercial entities. As noted, the commercial exception would be optional (subject to national reservation), and also limited by conditions such as these:

“the work or copy of the work that is to be made into an accessible format is not reasonably available in an identical or largely equivalent format enabling access for the visually impaired, and the entity providing this accessible format gives notice to the owner of copyright of such use and adequate remuneration to copyright owners is available.”

There are today US businesses and for-profit organizations involved in mass digitalization of millions of books that if allowed to by law, could make accessible copies to blind people or people with other reading disabilities, including by delivering these documents digitally across borders. To exclude the commercial entities exception would, for example, prevent Google Books from providing access to works across borders, under an exception. This issue deserves considerable attention, as Google expects to invest in the digitalization of up to 30 million books in the United States alone.

In general treaties are effectively drafted when national laws alone do not fix the problem at hand. Regarding the “premature” aspect of the treaty, I would urge the US Delegation at WIPO to examine the various WIPO model laws that have been circulated as well as the reports from WIPO and UNESCO meetings on the topic in the 1980s.

In the 1985 Report of the Executive Committee for the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, Ms Wanda Noel recommends in her conclusion:

“an entirely new international instrument which would permit production of special media materials and services in member states, and with the distribution of those material and services amongst member states without restriction.”

After 25 years the proposal hardly seems premature.

If a child today is blind, how many years will it be before we improve the global copyright regime to expand access to works? Will we act before a young person becomes an adult?

For adults, the World Blind Union has a saying “books before we die!”

This treaty is not premature. It is overdue.