

Reply Comments of Judit Rius Sanjuan

Knowledge Ecology International

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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)

I would like to submit this reply to the comments submitted by professors Jane C. Ginsburg and June M. Besek from Columbia University School of Law on November 13, 2009.

1 Introduction

The main thesis of the Ginsburg/Besek comments is that international binding norm setting on exceptions and limitations to benefit the blind and other persons with reading disabilities, although permissible and coherent with United States international obligations¹, is not necessary. Their recommendation is that a solution to the cross-border movement of protected works could be achieved with appropriate national laws and that WIPO's role should be to provide guidance with a Model Law.

They further argue that even if Member States succeed in agreeing on the details of a supra-national obligation to provide exceptions and limitations in favor of the visually impaired, past experiences (e.g. The Appendix to the Berne Convention) are not encouraging that good results will be achieved.

Summary: Critique of the Ginsberg/Besek submission

- Ginsburg/Besek do not deny the need for a solution - this is an important point. They agree that we have a problem that should be addressed.
- However what they want is a second best option - for reasons that are not consistent with the empirical evidence, minimize the efficacy of a coordinated global solution, and marginalize the interests of legitimate constituents in the global marketplace for knowledge goods.
- Copyright is not a law for owners, but for users as well. It is not an end in itself but the means to an end. There can and should be no discriminatory treatment between the twin interests of protecting incentives and preserving access to copyrighted works.
- The key argument is about the modality for addressing this: national laws have

¹ For excellent explanations of why the treaty proposal is coherent with the United States international obligations, see: Comments of Professor Daniel Gervais (Vanderbilt University Law School) and Comments of the Library Copyright Alliance, the Electronic Frontier Foundation and the Chief Officers of State Library Agencies. All available here: <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/index.html>

historically failed at accomplishing the copyright balance especially with respect to addressing coordination and market failure problems associated with cross-border movements of knowledge goods. This is why minimum levels of protection are addressed in international treaties, and why, access needs for the blind also should be addressed in a treaty.

- The failure of other international access mechanisms (e.g. the Appendix to the Berne Convention) to which Ginsburg/Besek point is not a failure of the international approach, but an example of how a treaty for disabilities should NOT be done. The Appendix to the Berne Convention introduced sufficiently high transaction costs that it created a disincentive for use.
- The international treaty approach that is being sought for the benefit of the disabilities community is precisely the kind of problem that requires a coordinated international approach. There is:
 - 1) a discrete and identifiable community;
 - 2) inadequate market-based incentives to spur significant attention to providing sustainable and robust levels of access to meet the needs of this community;
 - 3) the treaty is consistent with US and international law regarding the purpose and objectives of copyright law. Insisting on the use of "model laws" which failed to secure protection of rights for rights-holders would be to relegate the interests of users and the principles of access to a secondary status in the scheme of international copyright law;
 - 4) this treaty ENABLES countries to meet their international obligations--unless encouraging access and use is no longer a principle of copyright law;
 - 5) having an international treaty does not preclude the use of national laws and it does not prevent the copyright owners from developing business models that meet the existing needs. Indeed, at a minimum, a treaty could provide a set of default rules against which owners can develop models of access to meet this important practical, economic and morally significant need.

Elaboration

Ginsburg/Besek are among the few opposing the treaty that mention its goal: to enable the cross-border import, export and distribution of copyrighted works in accessible formats without the permission of the rights holders.

Allowing legal importing and exporting of accessible works is an essential step for expanding the number of works available to persons who are blind or have other disabilities. Another important step is to increase the production of works in accessible formats.

When the World Blind Union first petitioned the World Intellectual Property Organization in

October 2008² for the treaty, the rationale was made clear:

“The WBU seeks to greatly expand access to works through a global platform for distributing accessible works. This requires creating a harmonized global minimum standard for copyright limitations and exceptions for blind, visually impaired and reading disabled persons that allows exports and imports of works in accessible formats to qualified persons. It is anticipated that this will both facilitate greater access to works under copyright limitations and exceptions, and also motivate publishers to publish works in accessible formats.”

Although Ginsburg/Besek acknowledge that international norm setting on exceptions and limitations to allow for the cross-border of accessible copyrighted works could be permissible and coherent with United States international obligations, they wrongly conclude that it is not necessary and that a solution can be achieved through domestic law.

In reaching their conclusion, Ginsburg/Besek have failed to acknowledge or cite an extensive body of evidence regarding the failures of the current system or the benefits of a treaty.

The positions taken by Ginsburg/Besek in this proceeding against new global norm setting are also in stark contrast to the positions taken by Professor Ginsburg in many other occasions, where she has supported new global treaties and agreements, including a proposed treaty co-authored by Professor Ginsburg for the cross border enforcement of intellectual property rights.

2 Evidence Not Cited By Ginsburg/Besek Regarding the Need for Global Norms for Copyright Limitations and Exceptions for Persons with Disabilities

Among the evidence **not cited** by Ginsburg/Besek are these primary reports from WIPO on the barriers to access works protected by copyright:

- Report by the UNESCO/WIPO Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright. UNESCO/WIPO/WGH/I/3. Paris, October 1982.
- Noel, W. Problems Experienced by the Handicapped in Obtaining Access to Protected Works. Published as Annex II to an Executive Committee for the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention report of the agenda item "Copyright Problems Raised by the Access by Handicapped Persons to Protected Works." 1985.
- Garnett, N. WIPO Study on Automated Rights Management Systems and Copyright Limitations and Exceptions. WIPO SCCR 14/5. April 2006.
- Sullivan, J. WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired. WIPO SCCR 15/7. February 2007.

2 WBU Letter to Frances Gurry, WIPO DG. Available here: http://www.keionline.org/misc-docs/tvi/wbu_coverletter_gurry.pdf

Ginsburg/Besek also do not cite any of the 33 submissions to the Copyright Office and the USPTO from the April 28, 2009 request for comments, or the 3 reply comments filed on May 12, 2009, or any of the submissions and comments presented at the May 18, 2009 meeting at the Library of Congress, on this topic.

Ginsburg/Besek do not cite any of the World Blind Union interventions at the WIPO SCCR from 2002 to 2009.

Ginsburg/Besek do not cite the report of the August 2008 WBU/KEI expert group meeting on reading disabilities, which explains the rationale for the WBU proposal.

Evidence in the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired

The February 2007 WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired by Judith Sullivan (SCCR/15/7)³ described the paucity of access for persons who are disabled, and the role of imports and exports of accessible works in addressing these problems. The purpose of the Sullivan report was to collect and share information on national practices in the area of copyright limitations and exceptions for the visually impaired and identify possible problems and recommendations.

The WIPO Sullivan Study reported that less than 50% of WIPO Member States, and most of the developing countries, do not provide for national exceptions that benefit the visually impaired. The study specifically pointed to the special problem of exports and imports of works in formats accessible to the visually impaired to other countries. Furthermore, the WIPO report acknowledged that in order to evaluate the legality of a cross-border movement of a legal copy, the conditions of both the importing and the exporting national laws have to be analyzed and complied with.

In its analysis of the cross-border issue, the WIPO study explained that:

“Organizations making accessible copies for visually impaired people under an exception in one country often wish to share those copies with similar organizations in other countries so that transcription work in one country does not need to be repeated in another country, and the limited resources available for assisting visually impaired people in all countries are used more efficiently.”

And acknowledged that:

“One of the difficulties in deciding whether accessible copies made under an exception in one country may be exported to another country is the lack of clarity about what types of distribution of accessible copies are within the scope of many of the specific exceptions to copyright for the benefit of visually impaired people. However, other aspects of the scope of the exceptions are also likely to be relevant, such as who may act under the exception, how to determine whether or not the requirements about the end beneficiary of the exception are met, whether requirements that a work must have been published are

3 The WIPO Sullivan Study is available here: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696

met, whether or not only copies made under the exception may be distributed in the country and whether the same type of accessible copies in both importing and exporting countries are permitted. In a number of countries, the interaction with more general provisions relating to import and/or export of copies that have been made without the authorization of the right holder also seems to be relevant. . . .

“These case studies show that at one end of the spectrum problems are as much due to lack of understanding about the needs of visually impaired people as lack of exceptions to copyright or other provision that can lead to more accessible copies being made available. At the other end of the spectrum, that is in countries with fairly comprehensive provision regarding the making of accessible copies under exceptions to copyright, there may still be problems where it is desired to move accessible copies between countries . . .

“Export and import of accessible copies from and to organizations, such as libraries for the blind working in different countries, is likely to be more complicated. The actual transfer between the organizations may not be an act of distribution, but it may be caught by provisions applying to exports and/or imports. Moreover, passing an accessible copy to another organization may fall outside the scope of an exception and distribution to visually impaired people by the receiving organization of any copies it receives from abroad may not fall within the scope of the exception in the receiving country.”

As it relates to export to individuals, the WIPO study explained that:

“It is quite rare for there to be any specific provision in copyright law regarding the act of exporting such a legal copy . . . and so it seems rather unlikely that exports from these countries will be legal.”... “On the other hand, for exceptions that do clearly permit some form of distribution, it is much more likely that distribution by a permitted means of an accessible copy to a visually impaired person in another country is possible without infringing copyright in the exporting country. Although it is difficult to be certain, there are, therefore, quite a large number of countries where the export of an accessible copy made by an organization in the source country to a visually impaired person in another country may be permitted by a distribution method that is within the scope of the exception. Examples of such countries are Australia, Belize, China, Denmark, Estonia, Fiji, Germany, Iceland, Latvia, Malaysia, Nigeria, Portugal, Singapore and the United Kingdom.”

As it relates to export to national organizations, the WIPO study explained that:

“No country has been found which makes specific provision for export of accessible copies to other organizations in other countries that are able to supply them to visually impaired people in those other countries”... “Consequently there seems to be considerable doubt regarding what, if any, activity of this nature is permitted under exceptions.”

As it relates to import by individuals, the WIPO study explained that:

“A number of countries make some provision regarding the legality of importing copies of a work into the country. In some cases there is a right to prevent imports, or sue for

infringement of copyright where importation occurs, not only of copies that have been made illegally, but also copies that that have been made under exceptions in other countries because the import of copies that have been produced without the right holder's permission is prohibited."

"A large number of other countries do seem to include some provision in their national laws which could impose some restrictions on importation of accessible copies, but delivered in such a way that personal imports of an accessible copy made legally in another country would be permissible in at least some situations. Countries in this category include ... the United States of America."

As it relates to import by organizations, the WIPO study explained that:

"Importation of accessible copies by organizations entitled to act under specific exceptions for the benefit of visually impaired people in the destination country is much less clearly legal in most of the cases where some import restrictions have been identified... imports by organizations seem even less likely to be possible than imports by individuals in those countries where import restrictions seem to prevent even personal imports."

"In the USA, imports of Braille copies and a very small number of copies for non-commercial loan may be possible."

"Exactly what can be imported by organizations therefore seems to be very complicated and a clear answer to this question does not seem to exist in the majority of countries studied. It is, of course, in addition necessary to assess the effect of any restrictions in law on export from the source country as well as import into the destination country in order to decide whether or not any particular movement between countries of accessible copies is permitted."

And on the important issue of export/import of intermediate copies, the WIPO study acknowledged:

"Very few national laws recognize the usefulness of intermediate copies, and possible exchange of intermediate copies between organizations entitled to make accessible copies under specific exceptions to copyright for the benefit of visually impaired people. None seem to contemplate an exchange of intermediate copies between organizations in different countries... it might be even more unlikely that intermediate copies can be exported or imported where, as is the case in the vast majority of countries, specific exceptions do not even make any specific provision regarding the making and use of intermediate copies within a country."

To sum up, the most recent and relevant WIPO study on the matter concluded that less than 50% of WIPO Member States have a national exception (mostly developed countries) and that even when exceptions do exist, both the laws of the importing and the exporting country have to be taken in consideration and the acts of importation and exportation are usually not clearly regulated. According to the WIPO study, the legality of the cross-border movement of accessible

works produced under current national laws is therefore very uncertain. Dan Pescod from the RNIB/UK explains it very well. The WIPO study “demonstrated that there was a legal patchwork of exceptions for visually impaired people worldwide, and that transferring a book made accessible thanks to a copyright exception in country “A” to country “B” was a legal “grey area”⁴.”

Evidence from organizations serving the blind and other people with reading disabilities

We would also like to highlight evidence repeatedly presented by the World Blind Union, Bookshare, Tiflolibros, the National Federation for the Blind, the American Foundation for the Blind or the American Council for the Blind to name only a few organizations serving the needs of the blind and visually impaired and that are presenting a realistic picture of the situation for their constituency. They all make it clear that domestic solutions are not enough. Even though the technology is ready for more access and the global library they are dreaming about, these kinds of projects are currently impossible because of an archaic legal framework.

For example, in the United States, where a national exception does exist and the question of whether import and exports of works produced under exception is arguable. However, as matter of fact organizations serving blind people and people with other reading disabilities are not sharing with other countries and not accessing works produced in other countries because there is no legal certainty to protect them and their donors from potential litigation.

One organization working for the blind in the US that was consulted for this reply, reports that some years ago they wanted to test the possibility of cross-border sharing of works produced under national exception with the U.S. and Canadian Copyright Offices. They were given negative answers on both sides of the border and suggested that bilateral changes in copyright laws in both countries could be a way forward. These bilateral changes never happened. The same organization also report that last year, in a case concerning Freely Associated States like the Federated States of Micronesia and Palau, that are actually covered by the U.S. Department of Education as part of the compact between the U.S. and former colonial possessions, the US Copyright Office issued a letter saying that it was not legal to export accessible works to these countries under the U.S. domestic copyright exemption.”⁵

John Kelly and Brad Thomas of Recording for the Blind & Dyslexic (RFB&D) explain that:

"The legal impediments to transnational access are the result of different copyright laws in different countries. Navigating the multiple rights that publishers may have to works distributed in other countries can also make obtaining copyright permission without a broader exemption a significant barrier."

The WIPO Sullivan Study complemented this difficulty in these terms:

“Recording for the Blind and Dyslexic is the nation’s premier educational library hosting the world’s most significant collection of recorded textbooks. RFB&D has been

4 Pescod, Dan, “The 'Right to Read' – Why a WIPO Treaty for Print Disabled People?,” *KEStudies* Vol 3 (2009). Available here: <http://www.kestudies.org/ojs/index.php/kes/article/view/43>

5 Reported by Jim Fruchterman from Bookshare.

advised that the copyright exception applies only to distribution in the US as the exception cannot have an extraterritorial effect. Distribution in other countries outside the US would be governed by the legislation of the individual country, not by US legislation. Although some countries may allow import, RFB&D is not authorized under existing US copyright law to export titles to those countries.

Organisations in a number of countries have reported concerns about the lack of availability of digital books from RFB&D given its very comprehensive collection compared to those in their own countries. Obtaining material from RFB&D which already has accessible copies of requested material in a suitable format would avoid duplication of effort and expenditure of scarce resources. Once such organisation is the National Council for the Blind of Ireland (NCBI).”

And outside the United States, this is also a problem. The Sullivan WIPO Study reports the following about the CNIB Library in Canada:

“Users of the accessible formats created as a result of activity under the exception to copyright in Canada must fall within the scope of the definition of perceptual disability in the Canadian Copyright Act. This will also be the case where the accessible material has been placed in the CNIB Digital Library. individuals and patrons of libraries in other countries are denied access to the CNIB Digital Library because there is no way to ensure that a person has a legal right to use the alternative format work in his or her country.

A number of other countries do, of course, also have exceptions to copyright that permit the making of accessible copies for disabled people and in some cases the exceptions may even have a similar scope to that in Canada. However, with the varying scope of national exceptions, extending access to its Digital Library to patrons of trusted partner libraries in other countries remains difficult for the CNIB Library.”

In a survey conducted for a previous submission to a US Notice of Inquiry, INCI (Instituto Nacional de Ciegos) of Colombia confirmed that CNIB Canada rejected the possibility of creating a mechanism to share the digital libraries of both institutions because of limits on the import/export of works in accessible formats under current Canadian national law⁶.

The WIPO Study also mentions Netherlands having problems with the cross-border movement of accessible works:

“... increasing numbers of Dutch students with a print disability are requesting access to material in English which already exists in a suitable format in libraries abroad. In the past Dedicon has often been able to obtain accessible copies in an analogue form, such as talking books recorded on cassettes, from other countries through inter-library loans. However, the change to digital accessible copies, such as copies in the DAISY format, has led to more uncertainty and caution about the legality of this sort of activity. In the absence of international regulations or comprehensive agreements with publishers, some libraries fear that publishers might bring claims for infringement of copyright where

6 Survey on Accessible Books in Spanish-Speaking Countries. Judit Rius Sanjuan, Knowledge Ecology International (April 28, 2009). Available here: <http://www.copyright.gov/docs/sccr/comments/2009/>

accessible copies are loaned across borders. The result is that often the only way that Dedicon is able to supply the needs of students with a print impairment in the Netherlands is to make the accessible copies itself even when the copies already exist in a suitable format in other countries. The effect of this is that Dedicon spends time and uses its scarce resources to repeat work converting material to an accessible format when that work has already been undertaken in another country....”.

The reality in the world that Ginsberg/Besek seem to ignore is that leaving the solution to national laws, with no international harmonization, has proven not to work or to be inefficient. When the law is silent or unclear on the legality of cross-border movement of accessible books, in practice this means that there is no sharing of resources between trusted intermediaries in different countries. The main goal of the treaty proposal is to clarify the legality and expressly authorize the acts of importing and exporting accessible versions of works now created under national copyright limitations and exceptions.

Evidence in the US consultation process

In the October 13, 2009 Federal Register Notice where the current Notice of Inquiry and Request for Comments was published, the US government also recognize that there are problems with the current legal regime:

“To date, the U.S. consultations have demonstrated that although there are willing buyers and sellers of accessible works, concerns over rights clearances, downstream infringement, and high costs prevent the marketplace of accessible works from growing to its full potential. Additionally, the United States has learned that improved implementation of existing legal and regulatory provisions may be needed in order to maximize the accessibility of works to the blind and other persons with disabilities...”

Evidence in the report to the Executive Committee of the International Union for the Protection of Literature and Artistic Works (Berne Union) and the Intergovernmental Committee of the Universal Copyright Convention

Ginsburg/Besek comments also omit the the recommendations contained in the 1985 report “Problems Experienced by the Handicapped in Obtaining Access to Protected Works, taking into account, in particular, the Different Categories of Handicapped Persons,” by Wanda Noel⁷.

In its conclusions and recommendations to the Executive committee Executive Committee of the International Union for the Protection of Literature and Artistic Works (Berne Union) and the Intergovernmental Committee of the Universal Copyright Convention, professor Noel mentioned that:

“The problem of access to and use of intellectual works by the handicapped consists of two elements. The first deals with the production of special media materials and services.

7 The report is included as Annex II of the report on “Copyright Problems Raised by the Access by Handicapped Persons to Protected Works”. Available in the WIPO website:
http://www.wipo.int/mdocsarchives/B_EC_XXIV_85/B_EC_XXIV_10%20_IGC%201971_VI_11_E.pdf

This is a matter of primarily domestic concern which can be addressed by means of an exception or a compulsory access provision in domestic copyright law. Model provisions have already been developed and debated under the auspices of WIPO and UNESCO. The second problem concerns the distribution of special media materials and services. The example used determined that free international circulation of special media materials is prohibited because of importation provisions contained in the copyright laws of most countries. One remedy would be to remove those importation provisions by introducing exhaustion. This would permit free circulation of special media materials and services among those countries with exhaustion. Another solution to the dual problem of production and distribution is the suggestion to formulate an entirely new international instrument which would permit production of special media materials and services in member states, and the distribution of those materials and services among member states without restriction..... This solution is recommended on the grounds that it would solve both the production and distribution problems by providing a legal mechanism for sharing materials and services for the handicapped around the world”.

Publishers Stakeholder Platform proposal

Another issue that is not considered in the Ginsburg/Besek comments is the fact that even some publishers and right holders are recognizing that national solutions are too costly and burdensome for organizations serving the blind and they are currently starting to consider global solutions, like their proposal for a stakeholder platform to coordinate multi-country partnerships with voluntary licensing strategies for cross-border access to accessible works, what the World Blind Union and the Daisy Consortium consider a twin approach to the treaty proposal⁸.

3 Double Standard: Binding international norm setting should only benefit rights holders?

The authors present an inconsistent approach to international norm setting. Their comments seem to argue that consumers, in this case consumers with reading disabilities, should remain satisfied with domestic solutions and that the only role for WIPO should be to provide guidance through model laws and similar soft mechanisms.

However, the authors have in other circumstances strongly advocated for binding international norm setting and harmonization of law at WIPO. One has to note that this happened only when harmonization benefits right holders.

In a 2000 paper⁹, Professor Ginsburg explained the benefits of international harmonization of rights in these very powerful terms:

“In The Federalist No. 43, James Madison, justifying the new U.S. Constitution's patent-

8 For more information: George Kerscher, Secretary General, DAISY Consortium. Copyright Exception and Trusted Intermediaries: Two Concepts that work together. (Draft: May 27, 2009). Available at the WIPO Stakeholder Platform project website: http://www.visionip.org/stakeholders/en/intermediaries_copyright.html

9 Ginsburg, Jane C., International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?, 47 J. Copyright Soc'y U.S.A. 265 (2000)

copyright clause, declared, “The States cannot separately make effectual provision” for the protection of the exclusive rights of authors. Territorial regimes limited by state borders could not ensure effective protection for works whose distribution inevitably (and designedly) crossed state lines. For that reason, Congress required the authority to “secur[e] for limited Times to Authors the exclusive Right to their ... Writings,” lest the interstate movement of works of authorship deprive authors of effective coverage.

Today, in an era of instantaneous transnational communication of copyrighted works, the same concerns that faced the Framers of the Constitution of the United States in 1789 have surfaced in the international context. There is reason to doubt that the nation states that comprise the Berne Union, the World Trade Organization, and beyond can “separately make effectual provision” for the protection of authors' rights.

From the outset of the movement for international copyright protection, two distinct principles have vied for primacy. On the one hand, the non discrimination principle of national treatment preserves the integrity of domestic legislation, but ensures that foreign authors will be assimilated to local authors. On the other hand, supranational norms guarantee international uniformity and predictability, and thus enhance the international dissemination of works of authorship. A compromise approach institutes national treatment, but avoids local underprotection by imposing minimum substantive standards that member countries must adopt. The development of the Berne Convention illustrates all three of these approaches.

International uniformity of substantive norms favors the international dissemination of works of authorship. If the goal is to foster the world-widest possible audience for authors in the digital age, then one might conclude that national copyright norms are vestiges of the soon-to-be by-gone analog world. But not all copyright exploitations occur over digital networks, and, more importantly, national laws remain relevant, even for the Internet”

In 2001, Professor Ginsburg (with Professor Rochelle C. Dreyfuss) proposed to create a regime for international enforcement of intellectual property law judgments under the auspices of WIPO or the WTO and even drafted language for a possible treaty.¹⁰

Professor Ginsburg has also written about the benefits of binding international harmonization of copyright. For example, referring to the 1996 WIPO Copyright Treaty, prof. Ginsburg argued that:

“The treaty rationalized and synthesized protection by establishing full coverage of the communication right for all protected works of authorship”¹¹

And as it related to copyright and the digital environment, Prof. Ginsburg has acknowledged

10 For more information on the Ginsburg/Dreyfuss treaty proposal, including a draft treaty, visit the website of the Chicago-Kent College of Law's Symposium on international IP law where it was discussed: <http://www.kentlaw.edu/depts/ipp/intl-courts/>

11 Ginsburg, Jane C., "The (New?) Right of Making Available to the Public". *Columbia Public Law & Legal Theory Working Papers*. Paper 0478 (2004). Available at: http://lsr.nellco.org/columbia_pllt/0478

that:

“Traditionally copyright protection has been territorial. That is, national law will apply to acts of infringement committed in a particular country, regardless of the national origin of the work infringed. The principal multilateral copyright conventions aim to promote international exchange of works of authorship by mandating the nondiscrimination rule of "national treatment." While promoting the permeability of national boundaries by copyrighted works, this rule also preserves national sovereignty by confining any country's copyright regime to local borders. But the concept of territoriality becomes elusive when the alleged infringements are accomplished by means of digital communications originating offshore. Traditional international copyright rules seem to presume that international infringements will occur sequentially and slowly; but digital networks make possible multinational infringements that are simultaneous and pervasive. As a result, it may be time to rethink this basic rule of international copyright¹².”

We are left wondering why professors Ginsburg/Besek consider that consumers and users of knowledge, and especially people who are blind and have reading disabilities, do not deserve the legal certainty and low transaction costs that international binding norm setting activities have for years benefited right holder and publishers.

4 Conclusion

While the current international intellectual property framework may permit countries to design national laws in a way that would allow the import or export copyrighted works in accessible formats, this is often not done. The majority of national laws do not explicitly authorize the cross-border movement of copies made under national exceptions, and even if they did, the lack of harmonization of exceptions between countries would present other complexities and costs that would discourage the global distribution of accessible works.

The proposed treaty would provide an authoritative answer to the legality of cross-border sharing of accessible formats, it would create sufficient harmonization to lower the costs of cross-border distribution services, and it would make it far easier to modernize laws in many countries, including those countries where the treaty would be self executing.

The Ginsburg/Besek recommendation that the needs of blind and other reading disabled persons should have a national solution is not consistent with important evidence that shows that a country-by-country approach has not worked and is not likely to work very well in the foreseeable future. Furthermore, The Ginsburg/Besek recommendation suggests a double standard regarding the appropriateness of global norms, and a lack of appreciation of the needs and rights to read of millions of persons who have disabilities.

While it is possible that WIPO could improve its technical assistance program and publish model laws that allow for the import and export of accessible works, there should be greater sensitivity to the fact that WIPO first published model laws for disabilities 27 years ago, and this alone has

12 Ginsburg, Jane C.: Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace, 15 *Cardozo Arts & Ent. L.J.* 153 (1997)

only marginally benefited a very vulnerable population.

The negotiation of a treaty is in fact a more powerful, quicker and cost-effective mechanism to improve access to works for persons with disabilities than the slow dissemination of norms through model laws.

The right holders and publishers have long understood the advantages of global norm setting and treaties. Why should blind people and persons with other reading disabilities have to wait any longer for a legal framework that will support their full and effective participation in society on an equal basis with others, and ensure their opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

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