



By electronic submission

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Copyright Office
Library of Congress
Washington, D.C.

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. 52508 (October 13, 2009)

Dear Ms. Pallante:

The Chamber of Commerce of the United States of America (the U.S. Chamber) submits these comments in response to the request by the U.S. Copyright Office and the U.S. Patent and Trademark Office (USPTO) for comments on the topic of “Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities.” The U.S. Chamber is very pleased to have the opportunity to submit these comments, and respectfully requests that U.S. Copyright Office and the USPTO consider the following remarks. The U.S. Chamber fully supports the goal of facilitating access to copyrighted works for the blind and visually impaired, and our comments below aim to propose the most effective, efficient, and expeditious means by which to expand access and achieve this very important goal over the long term.

I. Introduction

The U.S. Chamber is the world’s largest business federation, representing a membership of 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. Many of our members hold intellectual property rights that are critical assets for their business.

Intellectual property (“IP”), including copyright protection, is essential to the ability of U.S. businesses to compete and thrive in the global economy. IP-intensive industries employ 18 million Americans, account for more than 50% of all U.S. exports and represent 40% of economic growth. IP rights are vital to creating jobs, advancing economic growth, and generating breakthrough solutions to global challenges. The U.S. Chamber supports the goal of increasing access to copyright works for people with disabilities. The U.S. Chamber is also of the view that any proposed solutions be practical, feasible and without prejudice to the

international copyright framework, which supports the continued production of copyright works and creation of employment opportunities for all communities.

Many members of the U.S. Chamber are leading businesses and trade associations who support improving access to copyright works for disabled communities, and also rely on the protection afforded by copyright and related rights. These Members include entities across the entire spectrum of business activities, including the motion picture industry, the publishing industry, and software producers. Across this spectrum, U.S. Chamber members have been and continue

to be engaged in efforts to facilitate access to different types of copyrighted works for the blind and persons with other disabilities.

The growth in relevant technology through the years and our evolving understanding of reading and print disabilities illustrates the benefit that technological advances can bring to increasing access. For example, in recent years publishers have been able to produce market-ready, accessible versions of their copyrighted books, in forms such as audiobooks. Where resources are already scarce, the existence of copyright-exemptions further reduces incentives to invest in the production and distribution of works in accessible formats to market. An incentives-driven approach, instead, would provide the impetus for publishers and their licensees to make such works available in accessible formats in light of sustainable market conditions.

With regard to the draft treaty proposal (“treaty proposal”) by the delegations of Brazil, Ecuador and Paraguay to the WIPO Standing Committee on Copyright and Related Rights (SCCR) relating to a “new treaty for the benefit of blind, visually impaired and other reading disabled persons, based on a text prepared under the auspices of the World Blind Union”, the U.S. Chamber considers that such a treaty proposal to be not only premature, but more importantly, counterproductive to efforts to further accessibility of copyright-protected works.

In that light, although we respond to the points raised below, we urge the United States Government to focus on the consensus of WIPO Members to “establish timely and practical result-oriented solutions”¹ rather than to focus on one particular proposal. The best approach to reaching the envisioned solutions is to adopt a work stream aimed at adopting an incentives-driven approach in this area to harness the technological and other developments to spur greater diffusion of copyright-protected works to blind and visually impaired persons.

II. Response to Specific Areas Cited in the Federal Register Notice.

- A. Question 1: *How would the treaty proposal interact with United States law under Title 17 or otherwise?*

¹ *Conclusions of the SCCR: Prepared by the Chair, SCCR/18/Conclusions.*

The treaty proposal raises a number of serious concerns. As noted, the U.S. Chamber firmly believes that international norm-setting in respect of “limitations and exceptions” for the blind and visually impaired persons will be counterproductive and risks undermining the long-standing international framework governing the protection of copyrighted works.

The proposal is not consistent with U.S. Copyright Law in many ways. For example: the exceptions envisioned are significantly broader than those under U.S. law, e.g., there is no “authorized entity” requirement as per the Chafee amendment; rights are specifically granted to “for-profit” entities to make “an accessible format” for copyrighted works for commercial purposes; broad exceptions are proposed for import/export between countries; and the proposal

provides a broad “right” to circumvent technological protection measures “so as to render the work accessible.” In addition, the treaty proposal includes a regime to establish an exception so that “for-profit” entities would be able to provide unauthorized accessible formats of certain works where the copyright owner provides such formats but certain pricing limitations are not met.²

In the context of the Chafee Amendment, U.S. Copyright Law specifically includes a number of definitional limitations that encourage greater accessibility to these works while protecting copyright holders from suffering economic harm – an aspect entirely lacking in the treaty proposal. Indeed, the recent comments submitted by Recording for the Blind and Dyslexic note that the treaty proposal may “unintentionally exacerbate existing confusion and conflict among the various U.S. laws.”³

The treaty proposal raises fundamental concerns regarding compatibility not only with the letter of U.S. Copyright Law, but also with the economic and social policies underpinning that the delicate balance struck by Congress therein. As the treaty proposal will be taken up at the WIPO SCCR as only one of many potential proposals in the continuing discussion on limitations and exceptions, we suggest that focus should remain on “practical result-oriented solutions” to the problems at hand.

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

The current international intellectual property framework is based on harmonizing national laws or establishing “minimum standards” of protection subject to flexibilities that permit limited exceptions. In the copyright area, e.g., WIPO administers treaties such as the Berne Convention,

² *Proposal by Brazil, Ecuador and Paraguay Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union*, WIPO Document SCCR/18/5, Article 4(c)(3).

³ Recording for the Blind and Dyslexic (RFB&D) Response to Notice and Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities (Nov. 13, 2009), available at <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/brad-thomas-rfb-d.pdf>.

the Rome Convention, the WIPO Copyright Treaty and the WIPO Producers and Phonograms Treaty. Each of these agreements follows the basic formula. These agreements have created a global network of protection for copyright owners that has improved the availability and predictability of rights across borders.

The treaty proposal takes the exact opposite approach by seeking to establish “necessary minimum flexibilities,” which threaten to undermine existing norms in copyright.⁴ In fact, the treaty proposal expressly envisions that countries permit even more extensive limitations and exceptions than those proposed, provided that doing so would not contravene the provisions of the treaty (notwithstanding that doing so may contravene the provisions of other treaties and agreements, such as Berne and TRIPS).⁵ This approach would reduce the ability of countries to tailor approaches to promote accessibility of protected works to their own national circumstances. In our view, such a process would be counterproductive.

In addition, this would set a negative precedent for other areas of intellectual property. Existing treaties, including the Paris Convention and the TRIPS Agreement, establish a framework in the areas of patents, trademarks, industrial designs, trade secrets and other forms of intellectual property, which is based on agreed “minimum standards” of protection subject to limited exceptions that provide for reasonable exceptions to these rights that do not interfere with the legitimate exercise of the rights by the owner. If a “minimum flexibilities” approach were adopted, even in an agreement limited in scope to accessibility of copyrighted works for persons with certain disabilities, this approach could be adopted in other areas as well. Such a precedent could have a broad impact in international organizations beyond WIPO, such as the World Trade Organization (WTO) and other UN agencies.

The treaty proposal, if adopted by the U.S. and its trading partners, would have a direct impact existing multilateral and bilateral agreements of the United States. While the proposed text expressly provides that provisions of the proposed treaty would be deemed to be consistent with obligations in existing treaties, it is clearly not.⁶ An agreement cannot become consistent with prior obligations merely by saying so.

For example, the TRIPS Agreement is administered by the WTO TRIPS Council, which is tasked with monitoring the operation of the agreement and WTO Members’ compliance therewith.⁷ Questions relating to permissibility of particular acts or omissions under the

⁴ SCCR/18/5 at Article 1.

⁵ Treaty Proposal, *supra* note 2. Draft Article 2(d) proposes that: “(d) Contracting Parties may, but shall not be obliged to, implement in their law more extensive protections for the visually impaired and reading disabled than are required by this Treaty, provided that such measures do not contravene the provisions of this Treaty.”

⁶ *Id.* Article 3 would deem the provisions “consistent with obligations” in the Berne Convention, the WIPO Copyright Treaty, the Rome Convention, the WIPO Performances and Phonograms Treaty, the TRIPS Agreement and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

⁷ TRIPS Agreement, Article 68.

exceptions provisions of the TRIPS Agreement are within the remit of, and should remain with, the TRIPS Council. The validity of a mere assertion of compatibility with TRIPS or other agreements is therefore highly questionable.

C. Question 3: *What benefits or concerns would the treaty proposal create?*

The fundamental purpose of the treaty proposal is to provide for “full and equal access to information and communication for persons who are visually impaired or otherwise disabled in terms of reading copyrighted works.”⁸ This is a laudable goal. U.S. Chamber Members have been and continue to be actively engaged in improving access to copyrighted works through a number of successful efforts. These efforts have been documented in the comments submitted by various industry sectors in response to the previous Notice of Inquiry on this topic.⁹

However, the means of establishing “minimum flexibilities” or providing a treaty on limitations and exceptions is not an appropriate approach. In fact, this type of approach would put legitimate copyright-protected works at risk, undermine the incentives for companies to engage in development of products or efforts to expand access to blind or visually disabled persons, and would thereby be counterproductive.

Further, the treaty proposal raises significant concerns in respect of the ability to maintain transparent and predictable copyright protection for affected works. There would be significant potential to undermine appropriate protection of works in foreign markets, particularly emerging markets, in light of permissive provisions providing for broader exceptions. Existing flexibilities for countries to implement exceptions under the so-called “three-step test” already exist. This system has stood the test of time for many decades. To simply discard this in favor of a set of mandatory exceptions and limitations would remove such flexibility and undermine the predictability of the international copyright framework.

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

The WIPO SCCR is in a unique position to be able to exchange national practices relating to access to works for the blind and visually impaired. WIPO should support further studies not only of national laws implemented pursuant to the “three-step” test, but also the efforts of the private sector and other stakeholders to promote further access to these works. This exchange could result in a report of “best practices” that have been adopted around the world in this area

⁸ SCCR/18/5, Article 1.

⁹ See, e.g., Comments submitted by the Association of American Publishers (AAP), the Motion Picture Association of America (MPAA), and the Software & Information Industry Association (SIIA) responsive to the Notice of Inquiry on Facilitating Access to Copyrighted Works, 74 FR 13268 (Mar. 26, 2009). The comments are available at <http://www.copyright.gov/docs/sccr/comments/2009>.

Ms. Maria Pallante
December 2, 2009
Page 6

that are consistent with the existing international framework. This work should build on the extensive work already done by WIPO in this area.

In pursuing these efforts, the WIPO SCCR could draw on the efforts of the Stakeholders Platform that was established to explore the “concrete needs, concerns and suggested approaches” of facilitating access.¹⁰ As a matter of priority to addressing the issues affecting access of the blind, visually impaired and other reading-disabled persons to protected works, the SCCR should be provided ample opportunity to discuss progress of the Stakeholder Platform, contribute national experiences and direct the Platform’s future work based on consultations with stakeholders at the national level.

In addition, the SCCR could draw from recent experiences of stakeholders. As noted, there are ongoing efforts by U.S. Chamber Members across the range of copyright-based industries.¹¹ This points to the fact that incentives-driven opportunities should be considered the prime mechanism in furthering accessibility for blind and visually impaired persons into the future. The WIPO SCCR could use such experiences as a basis to distill best practices for establishing the necessary enabling conditions to promote such incentives-driven arrangements to most effectively promote accessibility to these works.

III. Conclusion

The U.S. Chamber and its Members are committed to facilitating access to copyright-protected works for blind and visually impaired persons. However, in doing so, technological advances and recent developments in understanding the nature of vision-related disabilities should be taken into consideration. In this light, we consider that the most appropriate approach to addressing these matters is to favor sustainable incentives-driven approaches to provide the impetus to publishers and other entities to provide works in accessible formats.

The WIPO SCCR should also focus on exchange of best practices existing in market-based practices, and should not engage in pursuing a copyright-exemption based paradigm, such as that followed in the treaty proposal. The U.S. Chamber stands ready to further engage both with the United States as well as its counterpart countries in WIPO in future efforts to achieve “result-oriented solutions” in furtherance of the goals articulated by WIPO members.

Sincerely,

Brad Huther
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U.S. Chamber of Commerce

¹⁰ *Stakeholders’ Platform: Interim Report*, WIPO Document SCCR/18/4 (May 11, 2009).

¹¹ See Comments from AAP, MPAA, and SIIA, *supra* note 9.