

# **Accessible Works, Standards**

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## **Introduction**

New information technologies offer the promise of vastly expanding the number of works availability in accessible formats, and also to dramatically expand the usability of those works.

At present, most of the important new technologies involve the creation of digital copies of text, and the use of software and devices that can manipulate and present the data in a variety of ways.

The digitalization of works may be done by the original publisher, or by others, such as volunteers or third parties that key-in or scan works that can be converted to text using optical character recognition. The technologies for scanning and optical character recognition are constantly improving.

A high quality accessible work is more than just digital text. It may be a tagged XML formatted file that can be played back usefully in specialized devices. These devices allow people with reading disabilities to use searching tools in connection with table of contents, chapter and page numbers or key words, and to bookmark and annotate text. High quality accessible works also have descriptions for pictures, graphs and tables, and have the capacity to present text to readers as refreshable braille, enlarged type, or text to speech, as well as in some cases, text-to-sign-language-animation systems, or audio tracts read by authors, volunteers or performers.

It is important to note that there is no single solution for the visually impaired, but rather a plethora of rapidly evolving technologies that have great utility or promise for serving the diverse needs of reading disabled persons. A file format and a reading device that is acceptable and useful today may be considered woefully inadequate in the future. The global legal regime must recognize the importance of offering multiple possibilities for different reading disabled person, and to constantly anticipate the need to migrate texts to newer and better formats in the future.

## **DRM/TPMs**

Digital Rights Management (DRM) and Technical Protection (TPM) measures are used for a variety of purposes. Many countries, including the U.S., allow certain DRM/TPM regimes to be circumvented to provide access to reading disabled communities.

Publishers of accessible works also distribute works protected by DRM/TPM regimes, in order to limit access to qualified persons allowed under national copyright exceptions.

The use of DRM/TPM technologies to protect accessible works leads to many concerns about the lack of interoperability between devices and countries, and presents barriers to the global sharing of works.

## **Standards**

One important standard for accessible formats is the DAISY standard, which was first developed in

Sweden as a proprietary technology. Over time the DAISY standard has become an open standard, run by a global consortium, initially made up of non-profit organizations from Japan, Spain, the UK, Switzerland, the Netherlands and Sweden. Today the DAISY Consortium is the leading standards body for accessible formats, with a membership based in dozens of developing and developed countries, including the two full members in the US: the National Library Service for the Blind and Physically Handicapped (NLS) and Recording for the Blind & Dyslexic (RFB&D).

The DAISY standard has been modified and improved several times, as developers seek to expand the usability of texts through new features and other improvements.

There are also many other standards that are important in terms of accessibility issues, including those in non-commercial and commercial settings. For example, Adobe PDF players and the Amazon/Kindle 2 book reader both have an option, which can be disabled by DRM technologies, to convert text to speech. While these the Adobe PDF and the Kindle 2 formats are not fully accessible to many persons, they do expand access to works for some readers, and there is considerable interest in the evolution of these and other platforms.

## **Compatibility and Competition Concerns**

While open standards offer the possibility of wider adoption and greater interoperability of works, and are also a number of areas where standards are proprietary and closed. Closed standards may offer certain short term advantages, but over time they can lead to anticompetitive conduct by the entities that control the proprietary standards, including excessive pricing or barriers to innovation by competitors.

## **The Soundproof Book Issue**

Both Adobe and Amazon have been criticized by reading disabled groups for allowing works to be distributed as “sound proof books,” with text to speech disabled. We are attaching pictures from a recent demonstration by the Reading Rights Coalition. The RRC is concerned about efforts by the Authors Guild to disable assistive technologies like text to speech.

One possible solution to this problem would be for governments to adopt in procurement rules standards for accessibility that would discourage the soundproofing of books.

## **Optional Protocols**

In July 2008, a group of experts met at KEI office. The report from this meeting is attached in Appendix 2 and available at: <http://www.keionline.org/content/view/206/> .

During the expert meeting, there was considerable discussion over the issue of interoperability and standards. The participants agreed that a treaty for reading disabled persons should include the possibility to adopt optional protocols to address future opportunities to expand access to works. The first possibility was to provide harmonized obligations or offers to promote standards, interoperability requirements, or regulatory measures to enhance access to works and communications.

### **Article 18. Optional Protocols**

Contracting Parties shall have the right to propose optional protocols for this

Treaty, to address measures such as:

1. harmonized obligations or offers to promote standards, interoperability requirements, or regulatory measures to enhance access to works and communications;
2. collaborative funding to support the digitalization and distribution of works; and or
3. other measures that are necessary to achieve greater equality of access to knowledge and communications.

## **Appendix 1: The April 7, 2009 Kindle 2 text to speech protest**

On February 9, 2009, Amazon announced the release of Kindle 2, a ebook reading device. One new feature of the Kindle 2 was the option of using a text to speech (TTS) function.

On February 24, 2009, Roy Blount Jr., the President of the Authors Guild (AG) asserted in a *New York Times* op-ed, that TTS would be an infringement of copyright and a threat to audio books.

On February 27, 2009, under pressure from the Authors Guild, Amazon announced it would modify its system so authors and publishers could turn off the TTS on a title by title basis.

The National Foundation for the Blind initiated a dialogue with the Authors Guild. The Authors Guild proposed to make e-book TTS available at additional cost.

On March 19, 2009, Amazon announced on its Kindle Blog that it will make the menus and controls on the device fully accessible to blind people.

On April 7, 2009, the newly formed Reading Rights Coalition (RRC) kicked off a campaign to reverse the stance of authors and publishers who have disabled text-to speech with a protest in New York city. Pictures of the protest follow:



## **Appendix 2:**

### **World Blind Union (WBU) and Knowledge Ecology International (KEI) Meeting on a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled Persons**

KEI Offices, Washington, DC  
July 24–25, 2008

## **Background/Introduction**

The World Blind Union (WBU) and Knowledge Ecology International (KEI) hosted an experts' consultation to consider a text for a possible Treaty for the Visually Impaired (TVI). The meeting was held on July 24-25, 2008, at the Washington, DC offices of KEI. Participants included nineteen experts from eight countries.

Prior to the meeting, a draft text had been circulated, dated 30 July 2008. The participants considered the challenges and opportunities for expanding access to copyrighted works, reviewed a July 21, 2008 draft text, and made a number of recommendations for the next draft.

## **The Blind, Visually Impaired and Reading Disabled Populations**

According to the World Health Organization (WHO), more than 161 million people worldwide are visually impaired. This includes 37 million persons who are considered blind and 124 million persons with “low vision.”<sup>1</sup> According to the WHO, more than 90 percent of visually impaired persons live in developing countries.

In addition to those who are visually impaired are large numbers of persons who have other disabilities relating to reading, including persons with inadequate access to reading aids, and persons who cannot turn pages of books, persons who cannot visit libraries, and persons suffering from dyslexia and other learning disabilities.

## **Accessible Formats**

The meeting began with a discussion of accessible formats for persons who are visually impaired. Traditional formats include Braille printed on paper, audio books, and large-print text for persons with low vision.

Louis Braille invented the Braille alphabet in 1829, empowering visually impaired persons to read, typically by using embossed paper Braille.

The development of new information technologies have vastly expanded the opportunities to make works available in accessible formats, particularly for works stored in digital formats. This includes works stored digitally by the original publisher, as well as works keyed in or read by volunteers, or scanned by third parties, in connection with a variety of devices that can perform optical character recognition.

One such technology is the refreshable Braille display, or RBD. The RBD produces Braille by raising

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1 <http://www.who.int/topics/blindness/en/index.html>.

and lowering pins in response to an electronic signal. There are numerous software programs that can convert text to RBD output, or which convert text to audio speech, or publish works in large print text. There also exist technologies and solutions to address other reading disabilities, such as for persons who have physical disabilities that prevent them from turning the pages of a book, or persons with a variety of reading disabilities such as dyslexia, or various comprehension problems.

One aspect of the new information technologies is the ability to create works that can be navigated more efficiently. For example, works that are published in the DAISY format use digital tags on data to allow the user to skip sections of a work, or return to areas of a work. This is possible not only for text, but also for audio sections. Some DAISY readers permit users to bookmark specific locations, including the ability to include voice annotations to accompany the bookmark.<sup>2</sup>

Among the devices that were demonstrated during the meeting was the knfbReader Mobile. Using a cell phone, it is possible to “take a picture” of a document, perform an optical character recognition of the content, and read it back using text-to-speech software. The device can store thousands of pages of text, and share the data with a computer or a Braille reader. There is even the capacity to have documents translated by a cell phone-accessible Google application. The current version of the reader is priced at \$2,195.<sup>3</sup>

Another device demonstrated was a small handheld book reader that was solar-powered via photovoltaic cells. The device, which is manufactured for only \$30, provides chapter and page navigation.

There is no single solution for the visually impaired, but rather a plethora of rapidly evolving technologies that have great utility or promise for serving the diverse needs of visually impaired persons.

## The Knowledge Famine

Despite advances in technology, only a small fraction of existing published works are available in formats that are accessible to persons who are visually impaired. The labor involved in making a new text accessible varies considerably, depending upon the formats in which the work is originally published, as well as the complexity of page layout designs.

Most books and periodicals today are created as digital works, and then printed in a variety of formats, including both paper and digital versions. It is technically possible for most books and articles to be published in modern digital formats such as DAISY at the same time they become available to persons without visual impairments. This rarely happens.

Some estimate that five percent of published books are available for visually impaired persons. Others estimate that far fewer works are accessible today, particularly for works that have smaller audiences. There is considerable variance in terms of access regionally and nationally. Developing countries typically have far fewer works available, due to existing restrictions in global copyright norms regarding the import and export of works created without the permission of copyright owners.

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2 Ron Graham, “Code Factory releases DAISY reader for Symbian mobile phones,” *Access Ability*, August 08, 2008. <http://accessability.blogspot.com/2008/08/code-factory-releases-daisy-reader-for.html>.

3 For one recent account of the usability of this device, see Michael D. Barber, “The KnfbReader Mobile: An Individual Perspective,” *Braille Monitor*, May 2008. <http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0805/bm080508.htm>

The non-profit sector plays an important role in making works available in accessible formats for the visually impaired, both in terms of developing new assistive technologies, and publishing works in accessible formats.

While the recent and continuing improvements in information technologies have created enormous opportunities to provide access to knowledge for visually impaired persons, it is necessary to address the global norms for copyright protection, including in particular the area of limitations and exceptions to copyright that are necessary to permit works to be re-engineered for accessible formats, and made accessible to persons who are visually impaired.

## **State Practice for Copyright Exceptions**

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. Some governments have addressed this issue by creating provisions in copyright law that allow the use of copyrighted works without the permission of the copyright owner, in ways that expand access for visually impaired persons.

In February 2007, the World Intellectual Property Organization (WIPO) published a report by Judith Sullivan, titled *Study on Copyright Limitations and Exceptions for the Visually Impaired, SCCR/15/7*. The Sullivan report described the diverse nature of limitations and exceptions for the visually impaired.

According to Sullivan in her report for WIPO, there are 57 countries that have specific provisions permitting activity to assist visually impaired people unable to access the written word, or to assist people with a print disability, by making a copyrighted work available to them in an accessible form without the permission of the copyright owner.<sup>4</sup> The specific provisions in national law vary considerably. In some cases, exceptions are limited to special formats such as Braille, and in some countries blind persons can only use accessible works in special facilities and for limited times when the facilities are open. Other countries have more liberal exceptions that apply to new formats and technologies, and include access to works at home, using portable devices including computers, or online.

### *Limits on Imports and Exports*

Entities using such exceptions to create accessible works often are prohibited from exporting outside of national boundaries, reducing considerably the access to works that are now in accessible formats.

For example, in the United States certain authorized entities are allowed to distribute works that are accessible for the visually impaired without the permission of copyright owners, but this exception only applies to access in the United States – exports to other countries are not allowed. The non-profit organization BookShare.org is a leading U.S. provider of books in accessible formats for the blind and visually impaired. At the time of the meeting, BookShare had a total of 37,477 books in its database, but only 13.5 percent of its collections were available worldwide. Among the copyrighted works in its database, only 4.2 percent were available worldwide.

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4 “Study on Copyright Limitations and Exceptions for the Visually Impaired,” SCCR/15/7, page 9.

## **The WIPO Standing Committee on Copyright and Related Rights (SCCR)**

Since 2003, the World Blind Union has been asking WIPO to address the needs of the visually impaired, including in particular to achieve greater harmonization on minimum limitations and exceptions to copyright, and to address the need to export and import works in accessible formats.

Beginning in 2005, the government of Chile began petitioning WIPO to address the subject of mandatory minimum limitations and exceptions to copyright. The Chile proposal focused on the concerns of the visually impaired, as well as issues involving education, libraries, archives, and innovative services.

In February 2007, WIPO published a detailed report by Judith Sullivan, titled: "Study on Copyright Limitations and Exceptions for the Visually Impaired."

The broader context for the WIPO SCCR was also discussed at the July 2008 meeting. Since 1998, the SCCR had been considering a proposal for a treaty for broadcasting and webcasting organizations. By 2003, these discussions had completely taken over the SCCR policy space. Also, beginning seriously in 2003, there was a large effort to reform WIPO, and to refocus WIPO's work program so that it was sensitive to the impact of policies on development, and to consider the impact of intellectual property policies on consumers and on innovation. In 2007, WIPO adopted a new "WIPO Development Agenda" and also agreed to halt work on the broadcasting treaty. Both actions opened up new space within the WIPO SCCR.

From March 10-12, 2008, the SCCR met, with the subject of L&E on its agenda. Brazil, Chile, Nicaragua and Uruguay presented a new proposal, which elaborated further upon the earlier proposal by Chile (SCCR/13/5). The discussion of the L&E agenda item was generally quite interesting and constructive and, according to the report of the meeting, several delegations "underlined the need for speedy action to improve the access of visually impaired persons to protected works." Some areas of dispute were also aired. For example, "Group B" in WIPO, which includes the members of the European Union, the United States, Japan and other high income countries, collectively objected to engaging in analysis and norm-setting for L&E, an activity central to the requests by the WBU, and the United States delegation objected to stronger language concerning speedy action to address the access of visually impaired persons.

The March 2008 SCCR meeting had as its main agenda item the topic of L&E. The European Union proposed several new items that will be considered at the next SCCR, including such topics as orphan works, collection societies, and jurisdiction of law.

The next meeting of the SCCR is scheduled for November 3 to 7, 2008. There is a possibility that the concerns about access to protected works by the visually impaired may become a priority area for work, including a possible treaty to address access for visually impaired persons. However, some negotiators may seek to create a new SCCR work program on a different topic. In short, there is now a very important opportunity to address the concerns of visually impaired persons at the WIPO SCCR, but unless there are concrete proposals to consider, that opportunity may disappear, and the SCCR may turn to other issues.

### **Objectives of the Meeting**

Many experts believe that this is the right moment to table a concrete proposal at WIPO to address the

needs for the visually impaired community at a global level. In particular, the proposal should provide for harmonization of mandatory minimum limitations and exceptions to copyright for the benefit of the visually impaired, and ensure that works published under these provisions can be legally exported and imported across borders.

The goal of the meeting was twofold. First, to consider a proposal for a WIPO Treaty for the Visually Impaired. Second, to consider the political strategy to move such a proposal forward to a diplomatic conference.

The invited participants represented the blind, visually impaired and disabled persons, publishers for the visually impaired, country negotiators, libraries, publishers, technologists and NGOs from the US, UK, India, Chile, Kenya, Canada, and Spain.

Prior to the meeting an initial draft text dated 21 July 2003 was distributed for discussion. At the meeting this text was discussed, beginning with the preamble and Article 1.

## **Preamble**

Discussion of the preamble was largely related to the underlying principles of the treaty and the strategies to advance the Treaty. The preamble set the tone for the treaty, and makes it clear that providing accessible formats for the blind is the central purpose. Issues which arose in the wording of the preamble included an extensive discussion of the definitions and ultimate beneficiaries (see following section on beneficiaries). The participant agreed that “full and equal” rather than “more” access should be the treaty's ultimate goal. Also discussed was the relationship between blindness and poverty, and the possibility of framing the agreement in both a development context and a human rights context.

## **Beneficiaries**

Discussants considered at length the possible beneficiaries of a such a treaty. The issue arose early, with many participants discussing both the need to be inclusive, and concerns that publishers oppose more inclusive definitions of beneficiaries. There was discussion of the term “print disabled”, which in George Kerscher's definition, includes “A person who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.” This expands beneficiaries beyond persons who are blind or who have low vision, to dyslexics, quadriplegics, and persons with cognitive limitations. Not everyone was certain this was the best solution for the draft treaty, but there was considerable support to include persons who have disabilities that are not based upon vision.

Participants discussed their experiences in the wording of other legislation, such as in Section 121 of the U.S. Copyright Act, where the phrase “blind persons and persons with other disabilities” was used. Judith Sullivan noted that when UK laws were being amended to open access to many of the disability groups that lobbied for inclusion.

Many members of the expert group discussed the fact that there are many persons who are not blind or visually impaired, but who have severe disabilities in terms of access to copyrighted works. This include people whose limbs are missing or paralyzed and cannot turn the pages of a book, people who have physical disabilities that make it impossible from them to use libraries, persons who suffer from dyslexia and other disabilities.

The participants' agreed that the treaty would focus on the provision of accessible formats, and include disabilities beyond blindness or low vision.

## **Non-Profit and For-Profit Exceptions**

The 21 July 2008 Treaty draft provided for exceptions to exclusive rights for both non-profit and for-profit exceptions. The 21 July 2008 text used as its focus the WIPO model law text, with a modification that extended the exception to for-profit uses in some limited cases:

### **Article 6. Limitations and Exceptions to exclusive rights under copyright.**

(References for the chapeau of this section are Nick Garnett, page 97 of SCCR/14/5, and WIPO Draft model law)

It shall be permitted without the authorization of the author or other owner of copyright to reproduce a published work for visually impaired persons in an alternative manner or form which enables their perception of the work, and to distribute the copies exclusively to those persons, provided that the work is not reasonably available in an identical or largely equivalent form enabling its perception by the visually impaired; if any of the following conditions are satisfied:

1. The reproduction and distribution are made on a non-profit basis,
2. The reproduction and distribution are made on a for-profit basis, but only to the extent those uses fall within the normal exceptions and limitations to exclusive rights that are permitted without remuneration to right owners,
3. The reproduction and distribution are made by a for-profit entity on a non-profit basis, only to extend access to works to the visually impaired on an equal basis with others,
4. The reproduction and distribution are made on a for-profit basis, consistent with requirements for notice to right owners and adequate remuneration to copyright owners.

Many of the participants in the meeting were critical of proposed text, on the grounds that for non-profit entities, it would be more restrictive than the laws in several countries. For example, Section 121 of the US copyright law provides an exception for “an authorized entity” that does not depend upon an assessment that the work is “not reasonably available in an identical or largely equivalent form enabling its perception by the visually impaired.”

### **17 USC 121. Limitations on exclusive rights: reproduction for blind or other people with disabilities**

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously

published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

(b)(1) Copies or phonorecords to which this section applies shall —

(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;

(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

(C) include a copyright notice identifying the copyright owner and the date of the original publication.

(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.

The United States case is not unique, as the the non-profit exception in national laws is often not restricted to cases where works are not “reasonably available in an identical or largely equivalent form.” The extension of the exception for-profit uses is less common in national laws.

#### *Non-profit uses*

In terms of the exception for non-profit uses, the U.S. Groups favored the approach in U.S. Law. One U.S. participant said it was important that a treaty proposal would “do no harm,” and at least provide the freedom that already existed in the U.S. Copyright law to use protected works. Some other members thought that it might be useful to provide flexibility for countries to adopt either the strong U.S. approach or something closer to the WIPO model law approach, for non-profit uses. There was, however, concern that adding an arguably ambiguous test of whether or not the publisher had made the work “reasonably available in an identical or largely equivalent form” would create a potentially time consuming and costly hurdle in using the exception. It was also noted that the exception would only apply to to works distributed exclusively to blind, visually impaired and reading disabled persons, and that for non-profit entities, such an exception had already been accepted in several national markets including the U.S.

#### *For profit uses*

There was considerable discussion over the issue of extending exceptions to for profit entities. Among the issues to be considered were (1) would the exception be available if copyright owner had made the work available in an accessible format, (2), would the exception involve remuneration, and (3) could countries opt-out of the commercial exception?

The July 21 draft text identified three areas where a for-profit exception would be important. These included the following cases:

1. Uses that fall within the normal exceptions and limitations to exclusive rights that are permitted without remuneration to right owners;
2. to extend access to works to the visually impaired on an equal basis with others; and
3. the reproduction and distribution on a for-profit basis, when the work is not “reasonably available in an identical or largely equivalent form,” and there is notice to right owners and adequate remuneration to copyright owners.

In the discussion of the for-profit exceptions, some participants were concerned that such an exception would be perceived as controversial by publishers. Others strongly supported the for-profit exception on the grounds that it would be necessary to allow new innovative services to make works available to the reading disabled.

For example, it was noted that Google, Microsoft and other firms had digitalized copies of library collections, that it was possible for these digital works to be made available in accessible formats to reading disabled persons, but only if the exception were to be available to for-profit entities.

In terms of implementing the for-profit exception, there was much discussion of the incentive effects when the for-profit exception is limited to cases where the work is not “reasonably available in an identical or largely equivalent form” enabling access for reading disabled persons. Under such terms, a publisher could prevent the use of their copyrighted material by for-profit entities simply by “pressing the DAISY button,” saving the digital file in DAISY format.

In a perfect world, the copyright owners would routinely publish works in DAISY or other accessible formats, making this exception irrelevant. The participants noted, however that we were far from this ideal world, and expressed hope that the Treaty would stimulate progress on this front.

The group recommended including a for-profit exception in the proposed treaty text, but that the text allow for a reservation on this exception, so that a country could sign the treaty and not implement the for-profit exception.

Because Member States have contradictory traditions in defining profit and non-profit, and in what constitutes commercial activity, decisions on whether to allow for commercial and non-commercial use would best be decided in the implementation phase, which could be a factor in generating support from northern countries.

## **Relationship to other treaties and agreements**

Participants specifically considered the relationship of a Treaty for the Visually Impaired (TVI) to other treaties and agreements. It was agreed by the discussants that the TVI would provide for minimum limitations and exceptions, and these would be consistent with the Berne Convention, the WTO TRIPS Agreement, and the UN Convention on the Rights of Persons with Disabilities.

Technically this would be considered a special agreement under Article 20 of the Berne Convention. Participants suggested also that the text make it clear that the agreement would be implemented in a manner that was consistent with WIPO WCP and WPPT, the Rome Convention, and the UNESCO Convention on the Protection and Promotion of the Diversity Of Cultural Expressions.

## **Relationship to Contracts**

The participants considered the issue of contracts. It was agreed that contracts which contradicted the exceptions shall be null and void.

## **Technical Protection Measures**

There was strong agreement that the exception should extend to works protected by Technical Protection Measures (TPMs).

## **Works Covered by the Treaty**

Discussion of what works would be eligible under the treaty started from the draft text, which initially proposed that the exception would be limited to “published works.” and in some versions or cases, those works “not reasonably available in an identical or largely equivalent form enabling its perception by the visually impaired.”

### *Published Works versus “lawful access”*

In many countries a “published work” refers to a work published specifically in that country, and so, for example, Kenya might not have access to all of the works published in the United States, even if the restrictions on imports and exports were eliminated. Participants discussed possibilities including defining a published work as any work published in any Berne member state.

One solution was to strike the references to “published works” and to refer to cases where the person or organization wishing to undertake any activity have “lawful access” to that work (or a copy of the work).

### *Reasonably Available*

There was considerable uneasiness about the use of the term “reasonably available” in “identical or largely equivalent form,” as applied to the non-profit exception, but broader acceptance in the context of the commercial exception. There was discussion regarding what constituted “reasonably available.” One definition, in the context of a book, was “same book, same time, same price.” However, some developing country participants emphasized the issue of affordable access for disabled persons. It was noted that in many developing countries the unemployment rate for visually impaired and other reading disabled persons was extremely high and incomes were very low. An exception that was based upon “same price” would not take into account the lower ability to pay for disabled persons.

It was noted that recommendation 15 of the WIPO Development Agenda called for norm-setting activities to “take into account different levels of development.”

There was also discussion of whether or not a database would help to clarify which works were, in fact, accessible.

After a discussion, it was also agreed that the provisions of the treaty should extend to work in the public domain, as well as the non-copyrighted elements of databases, when contracts or Technological Protection Measures (TPM) restrict access.

## **Acknowledgment and Notice Requirements**

There was discussion of various provisions in the treaty for acknowledgment, and notice to copyright owners.

### *Acknowledgment*

When a work or copy of a work is supplied to a visually impaired person using the exceptions, there would be a requirement for mention of the source, and of the name of the author as it appears on the work.

### *Notice of copyright owners of commercial use*

When the commercial use exception is used, there was a requirement for notice the copyright owner. The treaty text would set out the specific obligations of that notice.

## **Moral Rights**

It was agreed that the minimum exceptions in the treaty exceptions be without prejudice to the exercise of moral rights.

## **Database on Availability of Works**

There was extensive discussion regarding the proposal to create a voluntary database on the availability of works in accessible formats. Some participants were concerned that this could be portrayed as a registration requirement. Others argued that it would provide a strong mechanism to protect the rights of publishers who did make works availability in accessible formats. The databases would also potentially make it much easier and less costly for third parties to obtain licenses or access to works. In this context, it was noted that Appendix to the Berne Convention was widely considered a failure, and that one reason for this failure was the costly and time consuming obligations regarding prior negotiation with copyright owners.

## **Export and Import of Works**

A core rationale for the treaty is to authorize the exporting and importing of works under the exceptions. By providing for exports and imports, there would be a vast increase in the works available for visually impaired persons. This would be true even for large markets such as the United States, both because the U.S. could import works from other countries and because it could distribute works to more persons, and realize larger economies of scale. The biggest difference however would be in small market countries, where economies of scale make it very costly to publish works in accessible formats, and where few titles are currently available. One immediate consequence of the treaty would be to make the extensive collections of BookShare and other large publishers of accessible works more widely available globally.

Related to export and import rights are questions of how providers will certify blindness and other disabilities. Several participants said that library-to-library export/import agreements would gain the support of publishers, as previous negotiations between publishers and libraries have developed a certain level of trust between the two entities. Others warned that infrastructure is severely lacking in many developed countries, that intermediaries such as schools and other institutions need similar

exceptions, and there was conversation about whether import/export rights should vary by level of national development, with import/export laws being more flexible and requiring less administrative burden in the developing world.

There was a consensus that national implementation will vary, and that national rules should prevail. For example, if, in Sweden, the blind can self-certify, then providers can sell to self-certified people in Sweden.

Related to this discussion was the definition of “published” and whether a work published in one country could or could not be exported to a country where it was not published. As noted above, it was decided that the exception, including the export and import right, should refer to any work for which one has “lawful access.”

## **Remuneration**

The commercial use exception requires remuneration to be available, and the treaty text will include an article addressing this topic. It was agreed there would be a two tiered approach to remuneration.

For developed economies, copyright owners would be entitled to remuneration that is reasonable for normal commercial licensing of works, regarding the terms normally associated with the country, population and purposes for which the work is used.

In developing countries, the remuneration should also take into consideration the need to ensure that works are accessible and available at prices that are affordable, taking into account disparities of incomes for persons who are visually impaired.

In the discussions in the WTO over the implementation of paragraph 6 of the Doha Declaration on TRIPS and Public health, a system was created that allowed the royalties to be determined and paid only in the export countries. Something similar was possible in the text, focusing on the benefits of efficient distribution over the Internet. There would be the possibility of a global licensing system, if the licensing from the exporting country addressed the legitimate concerns of the copyright owners in terms of transparency, and remuneration is considered reasonable either for a global license for works that are distributed globally, or for a license to use works in specific countries, calibrated for the countries, users and purposes for which works are used.

## **Respect for Privacy**

It was agreed to include an article requiring the contracting parties to protect the privacy of reading disabled persons on an equal basis with others, following Article 22 of the Convention on the Rights of Persons with Disabilities. This was considered important in that the works distributed under the treaty will only be made available to persons who are blind, visually impaired or otherwise reading disabled, suggesting systems of record keeping relating to what individuals read.

## **Orphan Works**

A provision was included to address the issue for “orphaned” works. It was decided that it would be a matter for national law to determine if certain commercial use of works for which the author or copyright owner cannot be identified or who do not respond to notices require payment of remuneration, and to have a statute of limitations regarding liability for such works.

## Optional Protocols

The group discussed the proposals for “optional protocols” to be added to the treaty at a future date, to address measures such as:

1. harmonized obligations or offers to promote standards, interoperability requirements, or regulatory measures to enhance access to works and communications;
2. collaborative funding to support the digitalization and distribution of works; and or
3. other measures that are necessary to achieve greater equality of access to knowledge and communications.

The optional protocols were measures that countries could proposed and agree to as the need for such measures developed, over time.

## Advocacy Strategy and Next Steps

Many experts at the table expressed the opinion that with the end of the Broadcast Treaty, there was policy space available on the WIPO Standing Committee on Copyright and Related Rights (SCCR) agenda for considering this treaty proposal. However, without a concrete proposal, that space may be filled with other agenda items.

It was agreed that the best strategy for moving forward would be to have a draft text available for delegates before the next SCCR meeting in November. It was also decided that the text should always be presented as a draft proposal, to invite comments and criticism from all interested parties.

## List of Participants

UK: Christopher E.B. Friend, MBE FInstF,

Chair, WBU Copyright and Right to Read Working Group, Expert Resource Person, IFLA Copyright Committee;

Judith Sullivan, formerly with the UK Intellectual Property Office, Current Consultant, Copyright and Government Affairs.

Vera Franz, OSI;

USA: James Love, Director Knowledge Ecology International, Director

Jim Fruchterman, President and CEO Benetech

George Kerscher, DAISY Consortium

Winston Tabb, International Federation of Library Associations (IFLA)

Douglas Newcomb, Chief Policy Officer, Special Libraries Association (SLA)

Carrie Russel Copyright Specialist, Office for Information Technology Policy American Library Association (ALA)

Lori Driscoll, International Copyright Advocate, Library Copyright Alliance, University of

Florida

James Gashel, Vice President of Business Development, K-NFB Reading Technology, Inc.

Prof. Ruth Okediji, Minnesota University Law School

France: Manon Ress, Knowledge Ecology International, Head of Information Society Programs

Chile: Luis Villaroel-Villalon, Vice Chair of the WIPO SCCR and Chile's Delegate;

Kenya: Marisella Ouma, Kenya Copyright Board and Kenya's Delegate at WIPO;

India: Rahul Cherian Jacob, Copyright Attorney in India,

Malini Aisola, KEI

Canada: Margaret Williams, CNIB Library for the Blind

Spain: Judit Sanjuan Rius, KEI Attorney.

## **Appendix**

Appendix 1 WBU Proposal for WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, dated 16 October 2008.

Appendix 2 Proposal By Brazil, Chile, Nicaragua And Uruguay For Work Related To Exceptions And Limitations, SCCR 16/2 .