

UNITED STATES COPYRIGHT OFFICE

**Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to
Copyrighted Works for the Blind or Persons With Other Disabilities**

COMMENTS of MOTION PICTURE ASSOCIATION OF AMERICA

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MOTION PICTURE ASSOCIATION OF AMERICA

Motion Picture Association of America, Inc. (MPAA)¹ submits these comments in response to the Notice of Inquiry ("Notice") published in the Federal Register on October 13, 2009, at page 52507. MPAA is a trade association representing some of the world's largest producers and distributors of theatrical motion pictures, home entertainment, and television programming.

This is the second request for comment on the subject of facilitating access to copyrighted works for the visually impaired and persons with reading and other disabilities. In the first notice the United States Copyright Office ("Copyright Office") and the United States Patent and Trademark Office ("USPTO") requested comment on the experiences of the visually impaired or persons with other disabilities with respect to their ability to access and share copyrighted works.² In the instant notice, the Copyright Office and USPTO seek comment on "the objectives and text of a draft Treaty prepared under the auspices of the World Blind Union and proposed formally at the May 2009 session of the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights"³.

¹ MPAA members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Studios, and Warner Bros. Entertainment, Inc.

² 74 Fed. Reg. 13268 at 13269, (March 26, 2009).

³ Notice, at 52507.

At the outset, we would like to reiterate that MPAA member companies have a continuing commitment to addressing the special needs of persons with disabilities and therefore share the goal of the World Blind Union to expand access to works for the visually impaired. In furtherance of this shared goal, MPAA member companies have been actively involved for many years in providing voluntary solutions for the visually impaired, such as producing audio descriptions on motion pictures distributed theatrically and on DVD.⁴ Additionally, MPAA member companies have worked with organizations like public television broadcaster WGBH⁵ to make audio described movies available to an even wider audience. As an example of ways that new technology is enabling market-based efforts to facilitate access for the visually impaired, a descriptive video version of the newly-released movie "Up" is now available for download at the iTunes Store - a first for that form of digital distribution.⁶

A descriptive video version of the Disney movie, "Up," is currently available at the iTunes Store for blind patrons.

Notwithstanding our shared objective, we do not agree that the proposed Treaty is the best way, or even an appropriate way, to achieve it. We believe cooperative efforts and independent initiatives such as those already undertaken by MPAA member companies hold the greatest promise for facilitating access to copyrighted works for the visually impaired and others with disabilities. MPAA previously expressed its views as to why broad exemptions or limitations on copyright, and in particular, binding international instruments in this area,

⁴ The number of motion pictures released with audio descriptions every year varies among MPAA Member companies. Between 2006 and 2008, the percentage of motion pictures released with narrative descriptions were consistently between 50 to 60 percent. Audio Description International, an initiative of the Audio Description Project of the American Council for the Blind reports that 71 motion pictures were released with narrative descriptions in 2008. See www.adinternational.org

⁵ WGBH, a Boston, Mass., public TV station is considered a leader in accessible media services for people who are deaf, hard-of-hearing, blind or visually impaired. WGBH won a prestigious da Vinci Award in 2006 for its patented MoPIX(r) system for making movies accessible to patrons with vision or hearing loss. See <http://www.hearinglossweb.com/Issues/Access/Captioning/Movies/davinci.htm>

⁶ See <http://www.apple.com/itunes/charts/movies/>

would not constitute appropriate or effective solutions to the challenges faced by the visually impaired in securing wider access to motion pictures.⁷ The comments from other parties filed in response to the first notice confirm that a binding international instrument would do little, if anything, to solve the practical problems facing the visually impaired with respect to gaining access to copyrighted works.

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

Flaws in the objectives and text of the proposed Treaty

There is a complete absence of any justification for an international instrument mandating copyright limitations and exceptions for the benefit of the visually impaired.⁸ Moreover, the text of the draft Treaty proposed last May is vastly overbroad, imprecise and contradictory, and in conflict with the letter and spirit of existing international copyright instruments.

1) Copyright is Not an Impediment to Access in the Area of Audiovisual Works.

⁷ Comments of Motion Picture Association of America, Inc., April 21, 2009,

⁸ See generally, "Study on Copyright Limitations and Exceptions for the Visually Impaired," prepared by Judith Sullivan for the WIPO Standing Committee on Copyrights and Related Rights, SCCR/15/7, February 20, 2007. The recommendations in this exhaustive, 231-page study do not include adoption of an international instrument mandating exemptions and limitations. Rather, the study recommends, "It would be helpful for WIPO to facilitate a discussion about exceptions in this area, particularly how best to deliver access for visually impaired people without jeopardizing the legitimate interests of rights holders" (at page 134).

It is important to note that the underlying cause of the issues purported to be addressed by the Treaty typically have nothing to do with copyright. No international instrument mandating copyright limitations and exceptions will meaningfully contribute to increased access, because the assumption that existing copyright law is an impediment to access by the visually impaired or other disabled people is wholly inaccurate. A gap in access certainly exists, but not one that an international legal instrument could hope to fill. Measures that will truly facilitate access include greater funding for entities that distribute products accessible to the visually impaired, technological development and greater coordination among stakeholders. The focusing of attention and resources on an international instrument, at the expense of practical measures that would have a real world impact, stands to harm the interests of the visually impaired and other disabled people. Moreover, to the extent that the proposed Treaty would mandate gaping fissures in the current level of copyright protections with potentially devastating impact on incentives to create new works, society as a whole would be left with fewer works to access.

2) The Proposed Treaty is Vastly Overbroad.

We would draw your attention to six key aspects of the proposed Treaty that create significant problems without addressing the needs of the visually impaired.

(i) The provisions of the Treaty are far broader than the stated purpose of the Treaty.

As set forth in the Notice,

The stated purpose of the proposal is to "provide the necessary minimum flexibilities in copyright laws that are needed to ensure formats that are accessible for persons who are blind, have low vision, or have other *disabilities in reading text*, in

order to support their full and effective participation in society on an equal basis with others, and to ensure the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society."⁹ (emphasis added)

Yet the proposed Treaty, and particularly Article 4 (Limitations and Exceptions to Exclusive Rights under Copyright), is not restricted to literary works in text formats. The Treaty mandates exceptions and limitations that permit copying of all works, in text or any other format, so long as they "are supplied exclusively to be used by visually impaired persons."¹⁰

(ii) The Treaty would require Parties to allow unauthorized duplication and distribution even where the work is already available in a format accessible to the visually impaired.

The proposed Treaty provides in Article 4(a) that if copies are made and distributed on a non-profit basis, unauthorized copying must be allowed even if the work is already available in formats accessible to the visually impaired.

Article 4(c) extends that unauthorized duplication and distribution right to commercial ventures where any one of three conditions is met. Article 4(c)(3) makes reference to works that are "not reasonably available in an identical or largely equivalent format enabling access for the visually impaired." Such a limitation would appear to apply even in circumstances where a work is readily available in accessible formats that are distinct from the particular format of the copy being reproduced. In any event, this limitation is effectively meaningless both because it does not apply to Article 4(a), 4(b), 4(c)(1) or 4(c)(2) and because, even with regard to Article

⁹ Notice at page 52508.

¹⁰ Proposed treaty, Article 4(a)(3).

4(c)(3), Article 19 specifically allows Parties to decline to implement the reasonably available condition.

Article 4(b) further compounds these problems by requiring Parties to allow unlimited copying for personal use of any work transmitted over the Internet to a visually impaired person pursuant to 4(a), regardless of any accessibility-related purpose, regardless of the availability of accessible copies from the author or publisher, and without any other justification for limiting the rights of the author in such an unprecedented fashion.¹¹

(iii) The Treaty requires Parties to allow unauthorized duplication and distribution even where the work is not available to individuals who are not visually impaired.

The rights granted by Article 4 are without reference to whether a work is lawfully available to individuals who are not visually impaired.

While the stated goal of the Treaty is to provide the same level of access to individuals who are visually impaired, the language of the Treaty grants the visually impaired the right to duplicate and distribute works without regard to their availability to the general public.

(iv) The Treaty requires Parties to allow unauthorized duplication and distribution based on the price of a copyrighted work.

In defining whether work is reasonably available, Article 4(d)(2) mandates that for developing countries “the work must be accessible and available at prices that are affordable.” Leaving aside the unprecedented step of conditioning copyright protection on the price of the work, and the fact that there is

¹¹ Such a vast limitation of authors' rights is clearly inconsistent with existing norms, see Section 4), *infra*.

no price-exception to copyright protection for individuals who are not disabled, the Treaty contains no definition of how affordability is to be determined or how it would apply across a range of abilities to pay. Even for developed economies, the Treaty would effectively dictate a pricing structure for accessible formats, defining a work as not readily available if the price for a work in an accessible format is higher than non-accessible formats.

(v) The Treaty requires Parties to allow circumvention of technological protection measures even where circumvention is not necessary to gain access to the work.

The unprecedented mandatory limitation to allow circumvention of technological protection measures in Article 6 applies even where circumvention is not necessary to gain access to the work. That limitation applies “including” [*i.e., not limited to*] when circumvention of a technological protection measure is necessary to render the work accessible.

The unfettered exemption to circumvent technological protection measures also fails to take into account different purposes served by technological protection measures and again creates an exemption not enjoyed by individuals who are not visually impaired.

(vi) The required exemptions to allow for unauthorized duplication and distribution and the circumvention of technological protection measures applies to all “disabilities,” not just to the visually impaired.

The definition of “Disabilities Covered” by the Treaty in Article 15(a) applies to all forms of visual impairment, not just to the blind. This broad definition raises questions about whether individuals who are unable to “access any copyright work to substantially the same degree as a person without a disability” would include individuals suffering from dyslexia, from

attention deficit disorder, or other conditions which may make access to printed material difficult.

Those concerns pale in comparison to the following provision, Article 15(b) which mandates that “Contracting Parties *shall* extend the provisions of this Treaty to persons with *any other disability* who, due to that disability” lack access to copyrighted works to substantially the same degree as a person without a disability.

The result is that, with all of the problems detailed above, the required exemptions to allow unauthorized duplication and distribution of copyright works – even for commercial purposes – and the circumvention of technological protection measures can be invoked by any person who is self-defined as having any form of disability.

3) The Proposed Treaty Text is Imprecise and Inconsistent.

In addition to those six specific concerns, the proposed text of the Treaty is both imprecise and inconsistent.

Article 1 of the proposed Treaty states that:

The purpose of this Treaty is to provide the necessary minimum flexibilities in copyright laws that are needed to ensure full and equal access to information and communication for persons who are visually impaired or otherwise disabled in terms of **reading copyright works**... (emphasis added)

This language suggests that the Treaty is intended to address only reading disabilities and therefore to be limited to text works. However, Article 2 of the proposed Treaty states that:

Parties agree to undertake certain measures to enable full and equal access to information and communication for persons who are visually

impaired or have other **disabilities in accessing copyrighted works** (emphasis added)

And, as noted above, the definition of “Disabilities Covered” in Article 15 applies to all disabilities without limitation.

This language throws the door open to benefiting not just those with disabilities, but rather those whose disabilities are defined according to whether they are in some way impeded from accessing copyright works – including where the impediment may be from an external cause such as poverty or lack of access to technology.

A similar lack of precision can be seen in Article 16 which defines "accessible format" as one that gives a visually impaired person "access as flexibly and comfortably as a person without a visual impairment." This further underscores the deficient manner in which the Treaty attempts to cover such a broad range of copyright works, since issues of access are different for particular types of works, depending on a variety of issues, such as the market in which the work is distributed, the mode of distribution and the type of experience the work intends to convey. In the context of motion pictures, the above statement is an aspiration without practical meaning.

Perhaps the most glaring examples of imprecision can be found in Article 11, which imposes a compulsory licensing system for unauthorized commercial exploitation of copyrighted works, and in Article 12, which imposes a broad exception for “orphaned works.”

As we saw with discussions in the U.S. of orphan works provisions, the exception of orphan works from the full panoply of copyright protection is not a matter that can be dealt with in two short sentences.

4) *The Proposed Treaty is in Conflict with both the Policy and Substance of Existing Norms.*

Since 1883 international copyright norms have established minimum levels of protection, leaving member states flexibility to provide higher levels of protection and also to establish exceptions and limitations to protection in "special cases" where such exceptions and limitations do "not conflict with a normal exploitation of the work and [do] not unreasonably prejudice the legitimate interests of the author."¹² This "three-step-test" has provided the necessary flexibility for the U.S. (and other countries around the world) to adopt myriad limitations in its copyright law specifically geared to the particular needs of its citizens,¹³ including copyright limitations for visually impaired individuals or other people with disabilities.¹⁴

There has been no evidence presented in this proceeding that existing international copyright norms have prevented the U.S., or any other nation, from adopting limitations and exceptions necessary for the well being of its citizens, including those who are visually impaired or otherwise disabled.

The proposed Treaty would require member states to comply with maximum levels of copyright protection with certain flexibility to provide lower levels of protection so long as they "do not contravene the provisions of this Treaty."¹⁵ Nothing is said about the provisions of existing instruments that are in absolute conflict with the proposed Treaty.

The proposed Treaty would reverse the basic policy established during 125 years of norm setting, which is predicated on the notion of setting minimum levels of protection, with exceptions allowed within the broad framework of the three-step-test. This Treaty inverts that by obliging member states to implement broad exceptions to copyright, thereby establishing

¹² Berne Convention for the Protection of Literary and Artistic Works, Article 9(2).

¹³ See 17 U.S.C. §107, 108, 109, 110, 111, 112, 117, 119 and 121.

¹⁴ 17 U.S.C. §121.

¹⁵ Proposed treaty, Article 2(d).

a ceiling on protection, with the addition of further downward flexibility to enlarge on such mandatory exceptions as long as they "do not contravene the provisions of this Treaty."¹⁶

The Treaty therefore allows a degree of flexibility, but only in the direction of providing greater "protections for the visually impaired" (i.e. exceptions), even where more narrow exceptions would suffice. The proposal runs counter not only to international instruments, but intrudes into areas where domestic legal principles are well established, such as in Article 7, by invalidating any contractual agreements between parties that may run contrary to the mandatory exceptions in Article 4.¹⁷

Instead of reconciling the proposed Treaty with existing international norms, the drafters simply assert that "the provisions of this Treaty are consistent with [existing] obligations."¹⁸ This statement cannot repair the reality that the Treaty is, on its face, inconsistent with such norms. There is nothing in the proposed Treaty that would require contracting parties to fashion the mandated limitations and exceptions in Article 4 so as to "not conflict with a normal exploitation of the work and ... not unreasonably prejudice the legitimate interests of the author."¹⁹ In fact, Article 4 of the proposed Treaty is directly at odds with the three-step-test which is the very foundation upon which existing copyright norms governing limitations and exemptions rest.²⁰

Consistency with the three-step-test would require, at the very least, measures such as those found in U.S. copyright law governing distance learning activities which require policies

¹⁶ Proposed treaty, Article 2(d).

¹⁷ Compliance with this obligation would require radical changes in U.S. law and raise serious constitutional issues of due process.

¹⁸ Proposed treaty, Article 3(a).

¹⁹ *Ibid.*, note 11.

²⁰ The proposed Treaty is also at odds with Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights which tracks the Berne three-step test with the mandate: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

and technical measures to prevent dissemination and unauthorized uses beyond the class of beneficiaries the limitation is intended to serve.²¹ This particular example illustrates why the crafting of exceptions is better left to local authorities who can better assess what provisions would safeguard the legitimate interests of copyright owners, while ensuring that the objective of the exception is still achieved.

Another glaring inconsistency with existing norms is found in Article 6 of the proposed Treaty which establishes a "right" to circumvent technical protection measures. Such an unqualified exemption is totally at odds with existing international obligations to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures."²² Moreover, beyond being flatly inconsistent with existing U.S. law, such an exemption would likely violate U.S. commitments in a number of bilateral trade agreements.²³

²¹ 17 U.S.C. §110(2)(D).

²² WIPO Copyright Treaty, Article 11 and WIPO Performances and Phonograms Treaty, Article 18.

²³ See, for instance, U.S./Australia Free Trade Agreement, Article 17.4: 7, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf.

Conclusion

There has been no showing that existing international copyright norms fail to provide adequate flexibilities to allow copyright limitations and exceptions necessary to make works accessible to the visually impaired and others with disabilities. Indeed, the myriad limitations in U.S. copyright law, including effective limitations for the visually impaired, demonstrate that such flexibilities do exist.

Moreover, there has been no showing that the proposed Treaty would result in greater accessibility to works by the visually impaired and others with disabilities. The circumstances that impede access to copyrighted works by the visually impaired and others with disabilities are many and varied, but in most instances have nothing to do with copyright protection. The proposed Treaty does not address the principal barriers that confront people with disabilities.

While providing little or no real assistance to the intended beneficiaries, the proposed Treaty is vastly overbroad, is imprecise and inconsistent, and dramatically conflicts with both the policy and substance of existing international copyright norms.

Rather than giving support for a flawed treaty that will have no positive impact on those it is intended to serve, the U.S. Government should urge WIPO member states to discard the proposed Treaty and focus on practical measures that will actually make works more accessible for the visually impaired and for individuals with other disabilities.