

**BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**IN THE MATTER OF FACILITATING ACCESS TO COPYRIGHTED WORKS
FOR THE BLIND OR OTHER PERSONS WITH DISABILITIES**

Docket No. E9-24539

**REPLY COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE, THE
ELECTRONIC FRONTIER FOUNDATION, THE INTERNET ARCHIVE, AND
THE CHIEF OFFICERS OF STATE LIBRARY AGENCIES**

The Library Copyright Alliance, the Electronic Frontier Foundation, the Internet Archive, and the Chief Officers of State Library Agencies appreciate the opportunity to submit the following reply comments in connection with the Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities published in the *Federal Register* on October 13, 2009.

The Library Copyright Alliance consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries.

The American Library Association (ALA) is a nonprofit professional organization of more than 67,000 librarians, library trustees and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries (ACRL), the largest division of ALA, is a professional association of academic and research library and information professionals to serve the information needs of the higher education community and to improve learning, teaching and research.

The Association of Research Libraries (ARL) is a nonprofit organization of 124 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of

scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

Collectively, the ALA, ACRL and ARL represent over 139,000 libraries in the United States employing approximately 350,000 librarians and other personnel.

The Electronic Frontier Foundation (EFF) is a non-profit organization with over 13,000 members worldwide, dedicated to the protection of online freedom of expression, civil liberties, digital consumer rights, privacy, and innovation, through advocacy for balanced intellectual property laws and information policy.

The Internet Archive (IA) is a 501(c)(3) non-profit that was founded to build an Internet library, with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format. Founded in 1996 and located in San Francisco, the Archive has been receiving data donations from Alexa Internet and others. In late 1999, the organization began to include more diverse collections. The Internet Archive now includes texts, audio, moving images, and software as well as over a petabyte of archived web pages in its collections.

The Chief Officers of State Library Agencies (COSLA) is an independent organization of the chief officers of state and territorial agencies designated as the state library administrative agency and responsible for statewide library development.

We have reviewed the comments submitted by other parties on the proposed WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons (the treaty proposal). In Part I of this document we wish to highlight several arguments in support of the treaty proposal that have not received sufficient consideration in the comments filed to date. In Part II we address several points made in other submissions that contain inaccuracies and misstatements.

I. Policy Considerations Supporting the Treaty Proposal

Our organizations continue to believe that the treaty proposal is needed to address twin forces that have shaped the current global reality in which the world's visually impaired and reading disabled citizens find themselves. First, there has been a market

failure in that publishers have not chosen to supply the market because they perceive it is too small. Second, there has been an international policy failure because most other WIPO Member States have ignored the visually impaired by failing to adopt exceptions similar to 17 U.S.C. § 107 and § 121 in their national copyright laws.

A. Policy Failure

Eminent international copyright experts agree that it is possible to frame exceptions or limitations to national copyright laws for the benefit of the visually impaired and those with reading disabilities in a way that complies with the parameters of the international copyright framework, and specifically the three-step test, embodied in Article 9(2) of the Berne Convention, concerning the reproduction right, and expanded for rights recognized in TRIPs (Article 13), and in Article 10 of the WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonograms Treaty.¹ Indeed, many developed countries have created exceptions in national copyright law for the purpose of benefiting the visually impaired.²

However, despite the discretion left open to countries by the international copyright framework, only 57 countries, representing fewer than half of WIPO's Member States, were identified as having created specific exceptions in their national laws for the benefit of the visually impaired.³ One plausible explanation for this widespread trans-national policy failure is that countries are concerned about violating the three-step test

¹ WIPO Standing Committee on Copyright and Related Rights, Fifteenth Session, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan (SCCR/15/7), February 20, 2007, Chapter 6, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696; Comments submitted by Professor Daniel Gervais, Vanderbilt University Law School, , in this Copyright Office inquiry, <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/daniel-gervais-vanderbilt-university-law-school.pdf>, and Professor Jane Ginsburg and June Besek, Kernochan Center for Law, Media and the Arts, Columbia University School of Law, <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/ginsburg-besek-columbia-law-school.pdf>.

² For instance, such exceptions can be found in the laws of the U.S., U.K., Australia, Canada, New Zealand and Singapore and many EU member states. See Sullivan, *Study on Copyright Limitations and Exceptions*, Annex 2.

³ Sullivan, *Study on Copyright Limitations and Exceptions*, 9, 28.

and risking potential adverse international action or challenges from national publishing rightsholder organizations should they do so.

A multilateral treaty is required to provide countries with guidance on how to construct exceptions and limitations compatible with the three-step test and provisions to facilitate the import and export of accessible copies of works, to increase the volume of accessible-format works available for use by the reading disabled.

In addition, a multilateral treaty is required to address the legal uncertainty arising from the divergence as to the types of activities permitted under different countries' national exceptions and the lack of clarity about the legality of exporting and importing accessible copies of works across national borders. As the 1985 joint report of the Executive Committee of the Berne Union and Intergovernmental Committee of the Universal Copyright Convention noted, this would encourage the most efficient use of the limited resources available for making accessible-format copies for the world's visually impaired citizens:

"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 material and services amongst member states without restriction.... This solution is offered on the ground that it would solve both production and distribution problems by providing a legal mechanism for sharing materials and services for the handicapped around the world."⁴

⁴ Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union), 24th Session (9th Extraordinary) [B/EC/XXIV/10] and Intergovernmental Committee of the Universal Copyright Convention, 6th Ordinary Session of the Committee of the 1971 Convention [IGC (1971)/VI/11], "Problems Experienced by the Handicapped in Obtaining Access to Protected Works, Taking into Account, in Particular, the Different Categories of Handicapped Persons," Annex II to a report of agenda item "Copyright Problems Raised by the Access by Handicapped Persons to Protected Works, prepared by Wanda Noel, Paris: 17-25 June 1985, <http://unesdoc.unesco.org/images/0006/000651/065169eb.pdf>

B. Market Failure

We support all efforts to increase the volume of accessible works available to those with visual and reading disabilities, including the Stakeholders Platform being facilitated by the World Intellectual Property Organization, in which the International Federation of Library Associations and Institutions is participating. However, we believe that voluntary licensing mechanisms cannot be a sufficient substitute for the proposed multilateral treaty because one of the key issues that needs to be resolved to increase the volume of accessible material available to the world's reading disabled is *market failure*.

Publishers are already at liberty to license or make available accessible-format copies of copyrighted works for purchase by visually impaired users or by libraries that provide materials to reading disabled and visually impaired users. Unfortunately, by and large, publishers do not make works available in accessible formats because they do not perceive that the visually impaired community constitutes an economically viable market.

The statistics speak for themselves. There is a dearth of copyrighted material in formats that are accessible to the world's blind, visually impaired and reading disabled citizens. Moreover, the meager successes that have taken place in countries which have seen an increase in the volume of accessible-format works for the visually impaired are due primarily to the existence of exceptions and limitations in national law permitting authorized entities to create accessible-format copies for the benefit of the visually impaired, and not to voluntary licensing agreements created by publishers.

In developed countries, such as the U.S., where the Chafee Amendment and the Individuals with Disabilities Education Act (IDEA) permit authorized entities such as Benetech's Bookshare and Recording for the Blind & Dyslexic to create accessible-format copies for those with visual impairment, and for specific use in education, 5% of published works are currently available in an accessible format.⁵ In the U.K., which has a similar exception in its national copyright law, only 4% of published works were available in accessible formats in 2008. As the Royal National Institute for the Blind

⁵ Letter from Christopher Friend, Chair, World Blind Union Copyright and Right to Read Working Group, to Director General of the World Intellectual Property Organization, Dr. Francis Gurry, October 28, 2008, http://www.keionline.org/misc-docs/tvi/wbu_coverletter_gurry.pdf.

notes, 96% of books published in the U.K. never make it into a format that a blind, partially sighted, dyslexic or other print disabled person can read, such as large print, audio, Braille or an electronic book.⁶

By comparison, in developing countries which do not have an exception allowing the creation or importation of accessible-format copies, the volume of material in accessible formats for the reading disabled is much smaller. For instance, in India, which does not have an exception for the benefit of the visually impaired in its national copyright law, only 0.5% of published copyrighted works are available in accessible formats for the country's almost 70 million reading impaired citizens. The impact of this upon the country's most vulnerable population was recognized in a recent WIPO press release commenting upon the Director-General's meeting with representatives of the Indian visually impaired community this month:

“More than 314 million blind or visually impaired people around the world stand to benefit from a more flexible copyright regime adapted to current technological realities. Individuals with reading impairment often need to convert information into Braille, large print, audio, electronic and other formats using assistive technologies. It is estimated that only 5% of published books in developed countries are converted into formats accessible to the reading impaired. In India, however, only 0.5% of works are published in accessible formats. This has an adverse impact on the educational and employment opportunities of the country's nearly 70 million reading impaired citizens.”⁷

We also believe that a licensing mechanism cannot provide a comprehensive

⁶ “Two Million People Denied the Right to Read,” Royal National Institute for the Blind weblog, November 5-11, 2008, <http://www.rnib.org.uk/aboutus/mediacentre/mediareleases/media2007/Pages/mediarelease02nov2009.aspx>.

⁷ “WIPO Director General Pledges Support for India’s Visually Impaired Community,” WIPO press release, Geneva, November 11, 2009 (PR/ 2009/615), http://www.wipo.int/pressroom/en/articles/2009/article_0048.html. See also the Accessibility Blog of the Centre for Internet and Society, India, <http://www.cis-india.org/advocacy/accessibility/blog/copyright-v-exercise-of-fundamental-rights>.

solution, because only an exception in national copyright law can facilitate the creation of accessible copies of works for which copyright clearance cannot be obtained.⁸

Finally, in relation to the WIPO Stakeholders Platform, we have significant reservations about the usefulness, penetration, and scalability of this initiative based on the nature of the representatives of the various stakeholder groups participating in the negotiations. It is our understanding that very few, if any, representatives of major publishers are participating in these negotiations. Instead the visually impaired community is attempting to negotiate with lobbyists from trade groups and reprographic collecting organizations, who may not have the requisite knowledge and authority to negotiate the types of broad trans-national licences for the educational, scientific and academic texts that would be most useful for ameliorating the current international scarcity of accessible-format material.

The current global situation is the product of longstanding policy failure and market failure. To think that the market or individual countries will suddenly change direction is unrealistic. Such a view ignores the recommendations of the previous international bodies that have seriously considered these issues. Increasing the volume of accessible-format material for the world's reading disabled community requires a multilateral treaty that will overcome the current international policy failure and market failure.

C. Opportunity for U.S. Administration to Show Leadership

The barriers to providing accessible works to the world's visually impaired are not purely legal and economic. Political leadership is needed to show how the existing international copyright law regime can meet the needs of the visually impaired, the

⁸ The Internet Archive is in the process of creating accessible-format copies of all the books in its collection. It estimates that approximately 50% of the works in major U.S. research libraries that have a U.S. copyright are works for which rights clearance cannot be ascertained or obtained. See Brian Lavoie, Lynn Silipigni Connaway, and Lorcan Dempsey, "Anatomy of Aggregate Collections: The Example of Google Print for Libraries," *D-Lib Magazine* 11 No. 9 (September 2005), <http://www.dlib.org/dlib/september05/lavoie/09lavoie.html>; Tim O'Reilly, "Oops—Only 4% of Titles are Being Commercially Exploited," O'Reilly Radar weblog, November 4, 2005, <http://radar.oreilly.com/archives/2005/11/oops-only-4-of-titles-are-bein.html>.

publishers, and all stakeholders in the knowledge economy. By supporting the proposed treaty and working with other countries at WIPO to have it adopted, the U.S. administration could create a well-rounded IP foreign policy that serves America's national interest, rather than the interests of certain narrow industries. We note that the U.S. publishing industry does not stand to lose any sales revenue as a result of the proposed treaty, which is broadly consistent with current U.S. law as described in our previous submission. At the same time, U.S. leadership on the treaty will demonstrate to the world's visually impaired citizens, and particularly those in developing countries with less access to accessible-format materials, that the U.S. administration is genuinely interested in promoting their welfare and educational opportunities, and not just in the profitability of major U.S. corporations, thus improving the stature of the U.S. in the eyes of many in the developing world.

Finally, by supporting the proposed treaty and working with other countries at WIPO to have it adopted, the U.S. administration could satisfy the obligations it will take on upon ratification of the U.N. Convention on the Rights of Persons with Disabilities (CRPD), which the U.S. Ambassador to the United Nations signed on behalf of the U.S. on July 30, 2009, including the obligation in Article 30(3) for contracting parties to ensure that national intellectual property laws do not constitute an unreasonable or discriminatory barrier to access by citizens with disabilities to cultural materials.⁹

⁹ See also House Resolution 416 of the 111th Congress, introduced May 7, 2009, expressing the sense of the House of Representatives that the Senate should give its advice and consent to ratification of the CRPD, referred to Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, June 12, 2009. On July 30, 2009, the Senior Advisor to President Obama and Assistant to the President for Intergovernmental Affairs and Public Engagement, Valerie Jarrett, demonstrated the Administration's commitment to ensuring the full participation and inclusion in society of all persons with disabilities by announcing the creation of a new, senior level disability human rights position at the State Department, who will "be charged with developing a comprehensive strategy to promote the rights of persons with disabilities internationally; he or she will coordinate a process for the ratification of the Convention in conjunction with the other federal offices; last but not least, this leader will serve as a symbol of public diplomacy on disability issues, and work to ensure that the needs of persons with disabilities are addressed in international situations. See Blogpost of Kareem Dale, Special Assistant, on White House Office of Public Engagement weblog, "Valerie Jarrett & Ambassador Rice at the U.S. Signing of the UN Convention

The CRPD obliges Member Countries to undertake various actions to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. Article 9 of the CRPD requires State Parties to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others” to “information and communications, including information and communications technologies and systems”. State parties are required to take appropriate measures to promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information; to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet; and to promote the design, development, production and distribution of accessible information and communications technologies and systems so that they may become accessible at minimal cost.¹⁰

Article 30 requires State Parties to recognize the rights of persons with disabilities to take part on an equal basis with others in cultural life, and to take all appropriate measures to ensure that persons with disabilities enjoy access to cultural materials in accessible formats, and to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential.¹¹ Article 30(3) specifically requires State Parties to:

“take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”

Finally, Article 32 recognizes the importance of international leadership and cooperation in harmonizing international standards providing for accessibility, to achieve the goals of the CRPD. It requires State Parties to undertake appropriate and effective measures between, and among, States, and, as appropriate, in partnership with relevant

on the Rights of Persons,” July 30, 2009, <http://www.whitehouse.gov/blog/Valerie-Jarrett-and-Ambassador-Rice-on-the-UN-Convention-on-the-Rights-of-Persons/>.

¹⁰ CRPD Art. 9(f), (g) and (h).

¹¹ CRPD Art. 30((1)(a) and (2).

international and regional organizations and civil society, to facilitate access to scientific and technical knowledge.¹²

U.S. government support of the proposed treaty would facilitate the process of ensuring that U.S. intellectual property laws appropriately balance the rights of American visually and reading impaired citizens under the CRPD and the Americans with Disabilities Act¹³ with protections offered within the international copyright framework of the Berne Convention and other international treaties.

II. Specific Comments

We would now like to address a number of specific issues raised in the initial comments, with emphasis on points made in other submissions that contain inaccuracies and misstatements.

A. Timing of the Treaty Proposal

Several comments suggested that the time may not be right for consideration of a treaty for the blind and visually impaired. One comment called the effort premature (Software and Information Industry Association), and several comments indicated that voluntary, collaborative efforts should first, or instead, be made among book publishers and other stakeholders (Microsoft Corporation, Motion Picture Association of America, National Public Radio, AAP/IFTA/MPAA/NMPA/RIAA).

¹² CRPD Art. 32(c).

¹³ On Internet accessibility, see *National Federation for the Blind v. Target Corp.* 452 F. Supp. 2d 946 (N.D. Cal. 2006) and *NFB v. Target*, No. C 06-1802 (N.D. Cal. Oct. 2, 2007), <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2006cv01802/177622/149/>, order certifying class in class action. Lawsuit subsequently settled on terms requiring Target.com to make certain changes to its website and to ensure that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use. Settlement Agreement, August 27, 2008, clause 6, http://www.nfbtargetlawsuit.com/final_settlement.htm and <http://www.nfb.org/nfb/NewsBot.asp?MODE=VIEW&ID=357>.

We believe that a solution is long overdue. It is well known that need for a solution within the international copyright system has been under discussion since the early 1980s. The 1985 report issued by the Executive Committee for the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention recommended a solution in the form of a new treaty.¹⁴

Within the momentum of discussion on the issue of limitations and exceptions within WIPO, the time to reach an international solution is now. The WIPO Secretariat, focusing on the issue of adequate limitations and exceptions for public interest purposes in response to earnest requests by Member States,¹⁵ in the last six years has initiated five expert studies highlighting the importance of copyright limitations and exceptions.¹⁶

¹⁴ Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and Intergovernmental Committee of the Universal Copyright Convention “Problems Experienced by the Handicapped in Obtaining Access to Protected Works, Taking into Account, in Particular, the Different Categories of Handicapped Persons,” prepared by Wanda Noel. See note 4, *supra*. See also Knowledge Ecology International, *Timeline: Addressing Copyright Related Barriers to Overcoming Reading Disabilities*, <http://www.keionline.org/timeline-reading>.

¹⁵ WIPO Standing Committee on Copyright and Related Rights, Twelfth Session, “Proposal by Chile on the Subject ‘Exceptions and Limitations to Copyright and Related Rights’” (SCCR/12/3), November 2, 2004, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=34747; WIPO Standing Committee on Copyright and Related Rights, Thirteenth Session, “Proposal by Chile on the Analysis of Exceptions and Limitations” (SCCR/13/5), November 22, 2005, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53350; WIPO Standing Committee on Copyright and Related Rights, Sixteenth Session, “Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related to Exceptions and Limitations” (SCCR/16/2), July 17, 2008, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=107712; WIPO Standing Committee on Copyright and Related Rights, Eighteenth Session, “Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU)” (SCCR/18/5), May 25, 2009, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122732.

¹⁶ The four completed studies are: WIPO Standing Committee on Copyright and Related Rights, Seventeenth Session, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, prepared by Kenneth Crews (SCCR/17/2), August 26, 2008, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192; WIPO Standing Committee on Copyright and Related Rights, Fifteenth Session, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan (SCCR/15/7), February 20, 2007, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696; WIPO Standing

WIPO is conducting an examination of the issue of accessibility because Member States know that after three decades of discussion, the situation for the blind and visually impaired has not improved.

It is not clear that any meaningful market or volunteer solution is forthcoming, despite assurances by rightsholders and other stakeholders that they are being sought. In the U.S. the recent Kindle controversy serves as recent evidence of the unwillingness of rightsholders to recognize the needs of the blind and visually impaired. At a time in history when technology has evolved to solve issues of accessibility, it is time for the law also to evolve, to recognize the moral obligation of nations to guarantee the basic right to read.

B. Finding an Appropriate Solution

Beyond the discussion of voluntary or market solutions, several responses opposed the idea of an international treaty as a means for facilitating access for the visually impaired. There were suggestions that solutions are not to be found in copyright law, that there is no evidence that flexibilities in the Berne Convention and other international instruments are insufficient in allowing Member States to provide effective measures to facilitate access (Motion Picture Association of America), and that a solution should be found in a mechanism other than an international treaty, such as in a WIPO model law (Columbia University School of Law).

There is sufficient evidence in the *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan, that copyright law presents significant barriers to accessibility.¹⁷ The fact that only 57 specific exceptions for the blind and visually impaired were identified in national laws worldwide,

Committee on Copyright and Related Rights, Fourteenth Session, *Automated Rights Management Systems and Copyright Limitations and Exceptions*, prepared by Nic Garnett (SCCR/14/5), April 27, 2006,
http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=59952; WIPO Standing Committee on Copyright and Related Rights, Ninth Session, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, prepared by Sam Ricketson, (SCCR/9/7), April 5, 2003,
http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805.

¹⁷ See note 3, supra.

representing only slightly more than one-fourth of nations on the globe, is itself a telling statistic.

But copyright is not the only problem, and this is not an either/or argument. Any solution to the problem of accessibility must include changes in international copyright norms and national copyright laws (legal solutions) as well as cooperation and collaboration of all interested parties (market solutions), and also continued development toward better applications and communications technology to enable accessibility (technological solutions). The matter is too large, too critical, and too complex, for just one solution. The treaty proposal leaves room for all solutions.

With respect to the suggestion that a solution may be found through a WIPO model law, we think that this would not be feasible. It is our understanding that WIPO has moved away from the practice of working openly with Member States using model laws. While WIPO in the past used model, or draft, laws to assist nations in developing and enhancing their national laws, WIPO has more recently adopted the practice of providing legislative assistance on a confidential and bilateral basis, structured on various modalities tailored to the needs of individual nations. The documentation used for this legislative assistance is not available to the public, or even to other Member States, for review.

WIPO has removed former versions of model laws from its website, and its current site on Legislative Assistance indicates: “WIPO provides legislative advice under a number of different modalities, in accordance with the specific interests and the requests of Member States. Legislative advice is provided on a strictly bilateral and confidential basis.”¹⁸

While WIPO model laws in the past were available to any nation for use or review, they are now largely inaccessible. Furthermore, WIPO legislative assistance is available to Member States only upon request. If a Member State does not request assistance, it is not provided. Because WIPO’s legislative assistance is confidential to the Member State that requests it, inclusion of a provision in a WIPO model law would not

¹⁸ See http://www.wipo.int/ip-development/en/legislative_assistance/modalities.html.

facilitate the creation and cross-border distribution of works in accessible formats, because it would not provide the necessary guidance to Member States as a whole for the creation of appropriate exceptions and import/export provisions. In addition, WIPO model laws are not binding. Finally, because WIPO's technical and legislative assistance is provided prospectively, on a country-by-country basis, inclusion in a model law would have little impact in countries that had recently adopted copyright provisions.

A bilateral, confidential, inaccessible, non-binding document that is made available only to individual WIPO Member States and only upon request cannot possibly substitute for a publicly available, mandatory, broadly vetted instrument on a matter of public interest. The possibility that WIPO would revert to abandoned practices is unclear, and seems more likely to be remote. In any case, any progress from such an approach would be slow and incremental at best. The process for finding effective legal solutions for the blind and visually impaired needs to be open, transparent, timely, and multilateral.

C. The Context for Mandatory Limitations and Exceptions

Several comments suggested that the treaty would have the effect of changing longstanding international principles by introducing mandatory limitations and exceptions in a system in which limitations and exceptions have always been optional (AAP/IFTA/MPAA/NMPA/RIAA; Motion Picture Association of America, Software and Information Industry Association).

However, contrary to these assertions, copyright limitations and exceptions in international treaties have not been, and are not, always optional.

Article 10(1) of the Berne Convention is a mandatory exception: "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries." This provision has been in the Convention since the Brussels Act of 1948.

Article 2(8) of the Berne Convention is a mandatory limitation: "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the

character of mere items of press information.” As one of several provisions designed for the “promotion of the free flow of information,”¹⁹ its concepts can be traced to the original Berne Act of 1886, and were reformulated in later revisions resulting in the current provision.²⁰

Virtually all of scholarship and education exist on the basis of Article 10(1), and the news industry runs on the basis of both Articles 2(8) and 10(1). It is impossible to overstate the importance of mandatory limitations and exceptions in the international copyright system, as they make possible the most necessary forms of communication in society, allowing people to communicate, to engage in intellectual activity, and to develop knowledge. The treaty proposal under discussion is designed to bring blind and visually impaired persons into the world that embraced the importance of mandatory limitations and exceptions long ago.

D. Exceptions for the Blind and Visually Impaired Pre-date the Three-step Test

One comment included the statement that “[t]he 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.” It also characterized the three-step test as “the very foundation upon which existing copyright norms governing limitations and exemptions rest” (Motion Picture Association of America). These statements are inaccurate, because the general exception known as the three-step test has only existed since the 1967 Stockholm Revision of the Berne Convention. The reproduction right itself was only introduced in 1967.

Professors Ricketson and Ginsburg remind us that in discussions leading to the Stockholm Revision, in the matter of developing both the general reproduction right (that became Article 9) and the general exception to the reproduction right, known as the

¹⁹ Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed. (Oxford: Oxford University Press, 2006), vol. 1, 796.

²⁰ Ibid, 497-8.

three-step test (that became Article 9(2)), a key point was that the Convention had to recognize exceptions to reproduction rights, including those for the benefit of the blind, that already existed in national laws.

Before the right of reproduction was adopted in the Berne Convention, national laws widely recognized both reproduction rights and also exceptions to reproduction rights; they varied across national laws. An important consideration in discussions concerning the adoption of a reproduction right was that “care would be required to ensure that this provision did not encroach upon exceptions that were already contained in national legislation.”²¹

The most frequently recognized exceptions pre-existing the three-step test included those for public speeches, quotations, school books and chrestomathies, newspaper articles, reporting of current events, ephemeral recording, private use, reproduction by photocopying in libraries, reproduction in special characters for use by the blind, sound recording of works for the blind, texts of songs, sculptures on permanent display in public places, use of artistic works in film and television as background, reproduction in the interests of public safety, and reproductions for judicial and administrative purposes.²²

The three-step test was formulated around these pre-existing limitations and exceptions in national laws-- not the opposite. History shows that exceptions for the blind are a norm and that Article 9(2) was formulated to accommodate them.

The 1964 report of the study group consisting of members of the Swedish government and of the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (The Swedish/BIRPI Study Group) formed in 1963 in preparation for the Stockholm Revision stated: “[I]t must not be forgotten that national legislations already contain a series of exceptions in favour of various public and cultural interests and that it

²¹ Ibid, 759.

²² Ibid, 759, note 6.

would be in vain to suppose that States would be ready at this stage to do away with these exceptions to any appreciable extent.”²³

E. Precedents in National Law

Another comment states: “Even where treaty obligations include relatively innovative mandates, there are generally some national law examples that prefigure them. Here, by contrast, the exception that would be mandated by the draft treaty has no real precedent in national law” (AAP/IFTA/MPAA/NMPA/RIAA).

As the preceding section clarifies, exceptions for the benefit of the blind existed in national laws long before the general reproduction right (Article 9) or the general exception to the reproduction right (Article 9(2)) were recognized in the Berne Convention. Various claims that a treaty for the blind and visually impaired would “reverse” basic international policy (Motion Picture Association of America), represent a “sharp departure” from longstanding practices, drive a “wedge” into or signal a “U-turn” in global copyright norms, “dismantle the existing global treaty structure of copyright law,” or create a “rip in the encompassing fabric of global copyright law” (AAP/IFTA/MPAA/NMPA/RIAA) are inaccurate and misleading.

F. The Existence of Specific Exceptions in the International Copyright Framework

One comment indicated that by recognizing “a specific, detailed exception to copyright protection, the draft treaty would break the mold of every previous treaty instrument that forms part of the long-standing global framework of copyright norms” (AAP/IFTA/MPAA/NMPA/RIAA). This statement is also not accurate.

In the matter of *free use* provisions alone, the Berne Convention contains nine specific limitations and exceptions, in Articles 2(4), 2(8), 2^{bis}(1), 2^{bis}(2), 10(1), 10(2), 10^{bis}(1), 10^{bis}(2), and 11^{bis}(3). Furthermore, the Appendix to the Berne Convention, regarded as a compulsory license to address educational needs in developing countries, is

²³ BIRPI, *General Report of the Swedish/BIRPI Study Group Established at 1 July 1964*, Document DA/22/2. 47ff. Ricketson and Ginsburg, *International Copyright*, vol. 1, 121-22; 760.

a specific, detailed exception introduced in 1971 concerning the translation right and the reproduction right. Encompassing seven pages of text, which make up over one-fourth of the text of the Berne Convention, it is an obvious precedent for a specific, detailed exception within international copyright norms.

There are times in history when human and technological evolution require new approaches for balancing the scales of copyright protections and limitations. The Berne Appendix and the other specific exceptions were introduced for this purpose. It is once again time to focus on a just balance. WIPO and the international copyright system it administers thrive on the idea of creativity and innovation that enable people and societies to evolve and achieve. This is a time when reshaping the mold should be seen as essential to the integrity of nations and the well-being of their citizens in all parts of the world.

Reading is an essential experience for the development of human cognition. In the matter of the right to read, no exception is too specific or detailed if it succeeds in making it possible for the blind and visually impaired to read.

G. The Personal Use Exception

One comment criticized the treaty proposal for its provision in Article 4(b), that “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” (Motion Picture Association of America).

Again these claims are overstated. Broad limitations for personal or private use are common in national laws worldwide. Many national copyright laws allow for reproduction for personal use, without consent of the author or other rightsholder or payment of remuneration.

H. Cross-border Provisions

Finally, with respect to criticism of the cross-border provisions of the treaty, it bears repeating that the cross-border provisions are an essential mechanism for enabling access to blind and visually impaired persons, who represent a multilingual community requiring access to materials regardless of origin.

In the U.S., it has been estimated that approximately half of the books in major U.S. research libraries, as well as in library collections reflected in the OCLC WorldCat database, are foreign-language books.²⁴ It is also known that the international collections of the Library of Congress make up over half of that Library's collections.²⁵ Restricting the flow of accessible copies by nation or language (for example, to domestic works or to English-language materials) is a practice based on norms that do not function effectively. The cross-border provisions are based in the reality that blind and visually impaired persons worldwide need access to the same works read, studied, and enjoyed by their sighted peers.

Conclusion

For the reasons outlined above, our organizations believe that a multilateral treaty is required to resolve issues of accessibility for the blind and visually impaired. There is widespread agreement that an international solution to facilitate the production and cross-border distribution of accessible copies of books and digital information is long overdue. A multilateral treaty is needed because other proposals, such as market and voluntary mechanisms, or a WIPO model law, do not offer a comprehensive solution to the problems that must be addressed and will not deliver the results required to change the current situation. The treaty proposal offers a framework that accommodates a range of legal, market, and technological solutions that will enable the world's blind and visually

²⁴ Lavoie, Silipigni Connaway, and Dempsey, "Anatomy of Aggregate Collections."

²⁵The Library of Congress Global Resources Gateway indicates: "The Library of Congress is the world's foremost repository of the accumulated knowledge and wisdom of humankind. Its diverse collections number some 130 million items; over half of its book and serial collections are in languages other than English." See <http://www.loc.gov/rr/international/int-aboutcoll.html>.

impaired persons to read and access culture on an equal basis with other members of society.

Contrary to claims made in some comments, the treaty proposal is consistent with the international copyright framework and the norms that have guided its development.

Accordingly, we respectfully urge the U.S. Copyright Office and other members of the U.S. delegation to WIPO to support the treaty proposal and to work with other Member States at WIPO towards its adoption.

December 4, 2009