

Comments to the Copyright Office and the USPTO regarding the WIPO draft proposal to facilitate access to copyrighted works for persons, who are blind, have visual impairments and other reading disabilities in response to the Federal Register Notice of October 13, 2009 by Dr. Manon Ress, Director of Information Society Projects, Knowledge Ecology International (KEI), Cynthia Waddell, Executive Director, International Center for Disability Resources on the Internet (ICDRI), Scott Lissner, Chair of Government Relations and Public Policy, the Association on Higher Education And Disability (AHEAD), Jo Anne Simon, President, New York Branch of the International Dyslexia Association (NYBIDA) and Dr. Cynthia Stuen, Senior Vice President, Policy, Evaluation & Education, Lighthouse International

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## **Introduction**

In a joint session of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and the Intergovernmental Committee of the Universal Copyright Convention held in Paris in 1985, delegates examined the “copyright problems raised by the access by handicapped persons to protected works” (IGC(1971)/VI/11 – B/EC/XXIV/10). The Report of the meeting concludes with a discussion of the benefits and concerns raised by a possible “New International Agreement”.

One possible way to solve both the production and distribution problems would be to create an entirely new international instrument addressing both matters. Such a "convention" would provide that the Contracting States permit the production of special media materials and services within their borders in accordance with the terms set out and, in addition, permit the free circulation of those materials and services amongst Contracting States. (Annex II page 25)

The important role of the United States was highlighted in the following way:

In this context it is of the utmost importance to note that there are only a few producing countries, the most notable of which is the United States of America. To develop a successful international system of the kind envisaged will require the cooperation and good will of the producing countries in particular. The United States should be complimented for its sensitivity to the needs of its own handicapped citizens.

Furthermore, the report recommends in its conclusion:

Another solution to the dual problem of production and distribution is the suggestion to formulate an entirely new international instrument which would permit production of special media materials and services in member states, and the distribution of those materials and services amongst member states without restriction. The conditions under which production could take place, and the ultimate distribution of the materials and services so produced within the Contracting States, would require a thorough examination. A detailed proposal could be developed as a result of that examination. The proposal could then be presented to the Committees for consideration. This solution is recommended 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. (Annex II page 26)

It is our hope that today's U.S. Delegation will strongly support solving both problems of production and distribution of accessible materials for print disabled persons and thus again set a standard for the world.

Keeping in mind that a possible international instrument was already described and recommended as a solution by WIPO and UNESCO almost 25 years ago and recalling the evidence of scarcity presented at various WIPO SCCR and at the previous consultations in the U.S. (February-May 2009), we would like to focus my comments on question 1 and on some selected issues raised by the questions 2, 3 and 4.

**1. How would the treaty proposal interact with United States law under Title 17 or otherwise? The Copyright Office and the USPTO seek to learn interested parties' views on how the treaty proposal compares to U.S. law under Title 17, or any other statutory or regulatory provisions that might be affected. How consistent is the treaty proposal with current U.S. law? If the treaty proposal is adopted, would any changes to U.S. law be required in order to implement its provisions? Please reference with as much specificity as possible any U.S. statutes, regulations, or other provisions that should be considered in a review of the treaty proposal's implications on U.S. law.**

Assuming that the treaty proposed by Brazil, Ecuador and Paraguay is adopted as proposed, it would be consistent with historical and current practices and policies. While the U.S. has done well with designing policies that positively affect members of the disabled communities and is held by many as a model, it is also necessary to look at how to improve the accessibility issues of today's world.

The Congress has historically recognized that copyrighted works should, with respect to fair use, be accessible to and usable by people who are blind. The legislative history of the Copyright Act of 1976 states that:

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral reading (talking books), are not usually made by the publishers for commercial distribution. While making multiple copies or phonorecords of work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107<sup>1</sup>.

In 1931, an Act of Congress established the free national library program of reading materials for visually handicapped adults. The program was expanded in 1952 to include blind children, in 1962 to include music materials, and in 1966 to include individuals with physical impairments that prevent the reading of standard print. It depended on the cooperation of authors and

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<sup>1</sup> H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

publishers who granted permission to reproduce works in special formats without royalty. In 1984, the U.S. Supreme Court stated that copying “of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying<sup>2</sup>.”

There are also other U.S. specific limitations on the exclusive rights of copyright owners in order to ensure access for blind and visually impaired individuals are to be found in Section 110(8) which excludes performances specifically designed for and directed to people who are blind or visually impaired using particular facilities; and in Section 121 (the Chaffee amendment)<sup>3</sup> which allows authorized entities to reproduce copyrighted materials and convert these materials to accessible formats for the use by blind or other persons with disabilities.

However, as Dr. Maurer, president of the National Federation of the Blind (NFB), pointed out in his comments to the copyright office (April 21, 2009), the Chaffee amendment is far from being a perfect legal tool. The NFB assessment of the existing legal environment for accessibility to print-disabled communities shows that several features of the statutory language need to be either clarified or changed to fit the current technological context. For example, the definition of a text in a “specialized format,” which Sec. 121(d) (4) states is “exclusively for use by blind or other persons with disabilities” is too limiting in a world where parent or teacher may need access to help a print disabled student. Another example is Sec. 121 which permits production and distribution of texts in specialized formats only by an “authorized entity,” defined as a “nonprofit organization or government agency that has a primary mission” to promote accessibility. The fact that this should include the office of disability services in any university or a public library must be clarified. According to the NFB assessment, at the time Sec. 121 was adopted, the concept of accessibility was limited to “the production of unique, individual, physically accessible copies (in Braille or recorded book format), which were designed to be consumed by individual users; each request from such a user typically would trigger the making of another such copy. Obviously, this model is a poor fit for e-texts, which (once they have been generated) can be widely shared at relatively low cost”.

Furthermore, at every rulemaking, the Library of Congress must continue to ensure that the DMCA’s “Circumvention of Copyright Protection Systems” provisions do not undermine the nation’s commitment to fair use rights that enable participation by blind and visually impaired people.

There are two most important elements of laws and policies that would be clarified by the

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<sup>2</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 714 (1984)

<sup>3</sup> The Legislative Branch Appropriations Act, 1997, added section 121. Pub. L. No. 104-197, 110 Stat. 2394, 2416. The Work Made for Hire and Copyright Corrections Act of 2000 amended section 121 by substituting “section 106” for “sections 106 and 710.” Pub. L. No. 106-379, 114 Stat. 1444, 1445. The Individuals with Disabilities Education Improvement Act of 2004 amended section 121 by amending paragraph (c)(3) in its entirety; by adding a new paragraph (c)(4); by redesignating subsection (c) as (d); and by adding a new subsection (c). Pub. L. No. 108-446, 118 Stat. 2647, 2807.

adoption of a treaty to facilitate sharing of accessible work: 1) a better definition of who would benefit from an exception and 2) the possibility to import and export accessible work.

1) A consistent and functional definition of beneficiaries of an exception would be an improvement. The Chafee amendment to chapter 1 of title 17, United States Code, adds section 121, establishing a limitation on the exclusive rights in copyrighted works. The amendment allows authorized entities to reproduce or distribute copies previously published nondramatic literary works in specialized formats exclusively for use by “blind or other persons with disabilities”.

In other related laws, such as the Education for All Handicapped Children Act (P.L. 94-142) of 1975 and the Individuals with Disabilities Education Act (IDEA) (P. L. 101-476) the term "child with a disability" means a child: "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services." Article 15 of the treaty proposal would reconcile the various definitions in U.S. laws.

(a) For the purposes of this Treaty, a ‘visually impaired’ person is:

1. a person who is blind; or

2. a person who has a visual impairment which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no visual impairment and so is unable to access any copyright work to substantially the same degree as a person without a disability.

(b) Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.

This language is consistent with recommendations by Judith Sullivan in Standing Committee on Copyright and Related Rights, (Fifteenth Session Geneva, September 11 to 13), 2006 Study on Copyright Limitations and Exceptions for the Visually Impaired. She wrote:

The best way to define the end beneficiary is likely to be by using a functional definition. A functional definition would be based on a person’s inability to read the material that has already been published.” (p. 111).

It is also consistent with George Kerscher, Secretary general of the DAISY Consortium, also working for the non-profit Recording for the Blind & Dyslexic (RFB&D). George Kerscher began working on document access in 1987 and coined the term “print disabled” to describe people who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.

The proposed functional definition would not only allow the clarification of the U.S. definitions

but also be consistent with Canada<sup>4</sup>, the UK<sup>5</sup>, the EU<sup>6</sup>, Denmark<sup>7</sup> and Australia<sup>8</sup> to name a few.

But perhaps the most important standard is the inclusive standard incorporated in the UN Convention on the Rights of Persons with Disabilities in Article 1 Purpose:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

2) Secondly, and it is a flaw that need to be corrected, the Chaffee Amendment does not expressly allow for exportation and importation of works in accessible formats which is inefficient and contributes to the unnecessary scarcity of available titles not only for print disabled persons in the United States but around the world.

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<sup>4</sup> In Canada, Section 32 of the Copyright Act of 1997: "Persons with Perceptual Disabilities" Persons with Perceptual Disabilities 32. (1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; (b) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or (c) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.

<sup>5</sup> In the United Kingdom, the Visually Impaired Persons, Act 2002: A visually impaired person is defined broadly, as a person (a) who is blind; (b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; (c) who is unable, through physical disability, to hold or manipulate a book; or (d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

<sup>6</sup> In the EU: "people with a disability" Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 5. 3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: [...] (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

<sup>7</sup> In Denmark: Section 17 of the Danish Copyright Act of 2003: "blind, visually impaired, the deaf and sufferers from speech impediments, and besides persons who on account of a handicap are unable to read printed text." 17. (1) It is permitted to use and distribute copies of published works if the use and the distributed copies are specifically intended for the blind, visually impaired, the deaf and sufferers from speech impediments, and besides persons who on account of a handicap are unable to read printed text

<sup>8</sup> In Australia, the Copyright Act of 1968, as amended, defines Print Disabled as follows: COPYRIGHT ACT 1968 – SECT 10 Interpretation "person with a print disability" means: (a) a person without sight; or (b) a person whose sight is severely impaired; or (c) a person unable to hold or manipulate books or to focus or move his or her eyes; or (d) a person with a perceptual disability.

It is with flexibilities that the Treaty proposed by Brazil, Ecuador and Paraguay seeks to greatly expand access to works by allowing a global platform for distributing accessible works. It will create an harmonized global minimum standard for copyright limitations and exceptions for print disabled persons, a minimum standard that will expressly authorize exports and imports of accessible works to qualified persons. It is also important to note that the treaty will both facilitate greater access to works under copyright limitations and exceptions, and motivate publishers to publish works in accessible formats.

The basic structure of the proposal by Brazil, Ecuador and Paraguay, which is based on a proposal by the World Blind Union, is essentially a two-tiered set of limitations and exceptions to the rights of copyright owners for the benefit of the print-disabled persons. The first tier, which gives rights to non-profit institutions, is similar to the Chaffee Amendment (with necessary improvement on definition and export/import and to fit the technological context).

Non-profit institutions would have the right to publish and distribute works in accessible formats if four conditions were met:

1. The person or organization wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;
2. the work is converted to an accessible format, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to a visually impaired person;
3. copies of the work are supplied exclusively to be used by visually impaired persons; and
4. the activity is undertaken on a non-profit basis.

In the second tier, the Treaty proposal also provides for much more limited exceptions for commercial publishers to make works available to the visually impaired in some specified and limited cases. If:

the work or copy of the work that is to be made into an accessible format is not reasonably available in an identical or largely equivalent format enabling access for the visually impaired, and the entity providing this accessible format gives notice to the owner of copyright of such use and adequate remuneration to copyright owners is available.

There are thus possible changes to existing U.S. law. But one has to note the flexibilities included in the proposal. For example, Article 19 (Reservations) states that "Any Contracting Parties may declare that it declines to implement" the article extending the exceptions to commercial entities. (Article 4(c)(3) of the proposed Treaty.) However, it is reasonable to assume that the U.S. government would see this possibility as a positive as private entities such as Google or Yahoo or any other U.S. corporations could benefit from the exception and significantly and rapidly increase the number of available accessible works. In addition one has to note that this would be a powerful incentive for the publishers to provide access themselves since the exception would not be applicable if the publishers made the works accessible at the

point of publication. Of course, only authorized entities would be qualified to determine when and if a format is fully accessible to people with various print disabilities or contexts. An interesting example is the difference between an audio book and a book with text to speech and navigation. They are both “accessible” but not to the same people in the same ways. For work, studies or research, an audio-book could not be considered accessible to a person with print disabilities. Just as a book in Braille is not accessible to most older people suffering from macular degeneration.

In addition, just as it is recognized by the U.S. Delegation and noted in the Federal Register Notice: "Respect for technical standards would improve the interoperability of file formats and improve accessibility to hardware, including for refreshable Braille and Text-to-Speech capabilities." That could be clarified in U.S. and international laws to the benefits of persons with print disabilities. Article 18 of the treaty proposes "Optional Protocols" that could be added to the treaty at a future date, to address measures such as the elaboration of harmonized obligations or offers to promote standards, interoperability requirements, or regulatory measures to enhance access to works and communications.

To conclude, the treaty would be consistent with U.S. policies regarding access to knowledge, information and education for print-disabled persons. It would improve the legal context by making the right to import and export legal and clear and create a commercial mechanism for increasing access. It would greatly improve the book famine that affects the print-disabled communities today.

Regarding the implementation of the treaty and potential changes to U.S. laws. The harmonization of a minimum standard for limitations and exceptions for people with print disabilities will not necessitate as much changes to our laws as the latest harmonization of new rights and obligations. The U.S. has signed and implemented treaties that changed U.S. copyright laws (such as the WIPO Internet treaties that resulted in the DMCA) and this treaty to facilitate sharing and access to works for people with print disabilities, just as the UN Convention for the Rights of People with Disabilities, will have to be implemented in the best way for our country and its citizens.

**2) How the treaty proposal would interact with existing international obligations of the U.S.; Please comment on whether, and how, the treaty proposal would affect the existing multilateral and bilateral agreements of the United States. Please reference with as much specificity as possible the provisions of any treaties, conventions, agreements or other instruments that should be considered, as well as any conclusions or analyses that might be instructive.**

The Treaty proposal will provide for minimum limitations and exceptions, and these are consistent with the Berne Convention, the WTO TRIPS Agreement, and the UN Convention on the Rights of Persons with Disabilities. Technically, the treaty could be considered special agreement under Article 20 of the Berne Convention.

Article 20

Special Agreements Among Countries of the Union

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

The agreement should be implemented in a manner that is consistent with WIPO WCP and WPPT, the Rome Convention, the UNESCO Convention on the Protection and Promotion of the Diversity Of Cultural Expressions and the Convention on the Rights of Persons with Disabilities.

There are at least 3 articles, namely 9, 30 and 32 specifically related to the WIPO proposal in the Convention on the Rights of Persons with Disabilities. Article 9 deals with a broad range of accessibility issues, Article 30 focuses on access to culture and Article 32 on international cooperation.

Here are the most relevant excerpts:

#### Article 9 - Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

[...]

b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

[...]

f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

## Article 30 - Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

- a) Enjoy access to cultural materials in accessible formats;
- b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

[...]

2. States Parties shall take appropriate measures to enable persons with disabilities to have 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.

3. States Parties shall 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.

[...]

## Article 32 - International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

- a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
- b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
- c) Facilitating cooperation in research and access to scientific and technical knowledge;
- d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

**3. What benefits or concerns would the treaty proposal create? Please comment generally on the objectives of the treaty proposal, and how such objectives could facilitate access for the blind and visually impaired. Is the treaty proposal likely to meet its objectives? Would there be any legal or practical impediments to implementing the treaty proposal in the United States?**

The treaty proposal would immediately create a legal global platform to share accessible works for people with print disabilities. The U.S. has today the largest collection of accessible titles and would be able to export its titles to countries with limited or non-existent collections<sup>9</sup>. The U.S. would also be able to import foreign accessible works in English and other languages<sup>10</sup>. As we showed in our comments to the U.S. Copyright Office and US PTO in April 2009, there are many U.S. residents who want to read a language other than English<sup>11</sup>. See also answer to Question 1.

**4. Other possible courses of action that would facilitate access by “blind, visually impaired, and other reading disabled persons. Please comment on any additional, possible methods of improving accessibility about which the Copyright Office and the USPTO should be aware, including possible roles for WIPO, the U.S. government, and the commercial and noncommercial private sectors.**

At the request of publishers and collection societies, WIPO has created a stakeholders platform to examine ways the private sector can expand access to works, through voluntary actions. These negotiations have involved several organizations representing persons who are blind or have other reading disabilities, as well as trade associations for publishers and collection societies. The WIPO stakeholder platform is likely to produce some models for possible voluntary licensing of works. It will include small tests of those models, over a period of years. It will not address the more general issue of how limitations and exemptions work across borders, and it will not address the need for greater harmonization of limitations and exceptions. What the WIPO Stakeholder Platform will provide is a dialogue about how countries might want to implement both voluntary and non voluntary distributions of works, using trusted intermediaries. This should be seen as a complement to rather than a substitute for the treaty.

The World Intellectual Property Organization could play an important role in the creation of a database for accessible works. There is an obvious need to create a voluntary database on the availability of works in accessible formats. It would also provide a strong mechanism to protect the rights of publishers who make works available in accessible formats. The databases would also facilitate and make it less costly for third parties to obtain licenses or access to works. Of course it would be important not to impose costly and time consuming obligations (the main reasons the Appendix to the Berne has been considered a failure.)

As stated in the UNESCO report of 1985 the U.S is the biggest producer of works in accessible

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<sup>9</sup> See data here: <http://www.keionline.org/blogs/2009/04/28/accessible-spanish>

<sup>10</sup> For example, Tiflobros in Argentina can only share 4 percent of their books with Bookshare. There are many US citizens with reading disabilities who read Spanish and they would certainly benefit from getting access to Tiflobros collection. In fact there are many countries in the world that are producing accessible works in Spanish that these US citizens cannot access. Considering the number of Spanish speakers in the US this is a serious problem that an international treaty would solve.

<sup>11</sup> See data here: <http://www.keionline.org/blogs/2009/04/22/access2foreign-works>

formats, and the U.S. government also makes public sector investments in new technologies, and sometimes promotes open standards for information technologies. All of these things are important, and should continue.

The recent actions by Random House to turn off text to speech in Kindle 2, and the intimidation of Barnes and Noble to not include text to speech in the Nook, raise grave questions about the intentions of private publishers to serve the community of persons with print disabilities. We suggest the U.S. government adopt procurement rules that promote and not discourage the supply of access enabling technologies, like text to speech, in commercial book readers.

We would like to conclude with a few points regarding the roles of commercial and noncommercial private sectors. Firstly, as publishers make their digital files available, they have legitimate concerns about persons not entitled to benefit from the exceptions making their files available for the entire world. However, trusted intermediaries such as libraries or Bookshare have not been a threat and there is no evidence of any kind of theft or misuse of files by such organizations' members. Traditional trusted intermediaries have demonstrated that they are a fair and safe way to make more works available in a variety of formats for people with print disabilities.