

WIPO



SCCR/18/5

ORIGINAL: English

DATE: May 25, 2009

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Eighteenth Session
Geneva, May 25 to 29, 2009

PROPOSAL BY BRAZIL, ECUADOR AND PARAGUAY, RELATING TO
LIMITATIONS AND EXCEPTIONS: TREATY PROPOSED
BY THE WORLD BLIND UNION (WBU)

Document prepared by the Secretariat

The Annex to this document contains a proposal put forward by Brazil, Ecuador and Paraguay, in relation to Item 5 of the Standing Committee on Copyright and Related Rights (SCCR) on limitations and exceptions of the agenda, received together with a note dated May 25, 2009.

[Annex follows]

ANNEX

1. The Permanent Mission of Brazil to the World Trade Organization (WTO), the Permanent Mission of Ecuador to the United Nations Office in Geneva and other international organizations and the Permanent Mission of Paraguay to the United Nations Office and other international organizations in Geneva present their compliments to the International Bureau and have the honor to present the attached proposal to be discussed during the upcoming eighteenth session of the Standing Committee on Copyright and Related Rights, under Item 5 of the Agenda ("Exceptions and limitations"), as an example of norm-setting activity in the field of exceptions and limitations to copyrights, among those presented in document SCCR/16/2: for persons with disabilities, libraries and archives, educational activities and to foster technological innovations.

2. The attached document consists of the Treaty proposed by the World Blind Union (WBU), which presents possible ways and means of facilitating and enhancing access to protected works for the blind, visually impaired, and other reading disabled persons. Brazil, Ecuador and Paraguay recognize the merit of dealing without delay, but with careful deliberation, with limitations and exceptions that would allow people with disabilities, such as the visually impaired, to access, publish and distribute works that are accessible to them.

3. By undertaking such an initiative, the World Intellectual Property Organization (WIPO) would act in accordance with the efforts undertaken by the United Nations to address the need for enhancing, as foreseen in document SCCR/16/2, access to knowledge for the most vulnerable or socially prioritized sectors. Brazil, Ecuador and Paraguay also consider that the establishment of formal negotiations on limitations and exceptions would contribute to the broader aims of the Development Agenda, particularly the ones related to norm-setting, as foreseen in document SCCR/16/2.

4. The Permanent Mission of Brazil to the World Trade Organization (WTO), the Permanent Mission of Ecuador to the United Nations Office in Geneva and other international organizations and the Permanent Mission of Paraguay to the United Nations Office and other international organizations in Geneva avail themselves of this opportunity to renew to the International Bureau the assurances of their highest consideration.

Geneva, May 25, 2009

World Blind Union Proposal

WIPO Treaty for Improved Access for Blind, Visually Impaired
and other Reading Disabled Persons

23 October 2008

Preamble.....	2
Article 1. Purpose.....	3
Article 2. Nature and Scope of Obligations	4
Article 3. Relations to Other Agreements	4
Article 4. Limitations and Exceptions to Exclusive Rights under Copyright.....	5
Article 5. Acknowledgment and Moral Rights.....	6
Article 6. Circumvention of Technological Measures.....	6
Article 7. Relationship with Contracts	6
Article 8. Imports and Exports of Works.....	6
Article 9. Notice to Right Owners for Commercial Reproduction and Distribution of Works.....	7
Article 10. Database on Availability of Works.....	7
Article 11. Remuneration for Commercial Exploitation of Works.	7
Article 12. Orphaned Works.....	8
Article 13. Respect for Privacy.	8
Article 14. Limitations and Exceptions Applied to Non-Copyrighted Elements of Databases	8
Article 15. Disabilities Covered	8
Article 16. Additional Definitions.....	9
Article 17. Conference of Parties	9
Article 18. Optional Protocols.....	10
Article 19. Reservations	10
Article 20. Monitoring and Implementation	10

Preamble

The Contracting Parties,

Recognizing the importance of accessibility in the process of the equalization of opportunities in all spheres of society,

Aware of the many barriers to access to information and communication experienced by persons who are blind or have limited vision, or have other disabilities regarding access to published works,

Aware that 90 percent of visually impaired persons live in countries of low or moderate incomes,

Desiring to provide full and equal access to information and communication for the visually impaired,

Recognizing the opportunities and challenges for the visually impaired presented by the development of new information and communication technologies, including technological publishing and communication platforms that are transnational in nature,

Recognizing that similar opportunities and challenges are faced by people with some other disabilities,

Recognizing the need to seek, receive and impart information and ideas through any media and regardless of frontiers,

Aware that national copyright legislation is territorial in nature, and where activity is undertaken across jurisdictions, uncertainty regarding the legality of activity undermines the development and use of new technologies and services that can potentially improve the lives of the visually impaired,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the challenges and opportunities presented by economic, social, cultural and technological developments,

Emphasizing the importance of copyright protection as an incentive for literary and artistic creation, and as a means to ensure that everyone has the opportunity to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,

Recognizing that the ideal is for publishers to make their works accessible to people with disabilities at publication and that alternatives are needed to address instances when this does not happen,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

Article 1. Purpose

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 copyrighted works, focusing in particular on measures that are needed to publish and distribute works in 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.

Article 2. Nature and Scope of Obligations

- (a) Contracting 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;
- (b) Contracting Parties shall give effect to the provisions of this Treaty;
- (c) Contracting Parties shall be free to determine the appropriate method of implementing the provisions of this Treaty within their own legal system and practice. (Language similar to TRIPS Article 1);
- (d) Contracting Parties may, but shall not be obliged to, implement in their law more extensive protections for the visually impaired and reading disabled than are required by this Treaty, provided that such measures do not contravene the provisions of this Treaty. (Language similar to TRIPS Article 1);
- (e) Implementation of the Treaty shall be development-oriented and transparent, taking into account the priorities and the special needs of developing countries, as well as the different levels of development of Contracting Parties. (WIPO Development Agenda); and
- (f) Contracting Parties shall ensure that the implementation allows for timely and effective exercise of authorized actions covered by this Treaty, including expeditious procedures that do not in themselves create barriers to legitimate uses, are fair and equitable, and are not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays. (Language similar to TRIPS Article 41).

Article 3. Relations to Other Agreements

- (a) Contracting Parties agree that the provisions of this Treaty are consistent with obligations set out under those of the following treaties and conventions to which they are a party:
 - 1. the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention);
 - 2. the WIPO Copyright Treaty 1996 (the WCT);
 - 3. the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations done in Rome, October 26, 1961 (the Rome Convention);
 - 4. the WIPO Performances and Phonograms Treaty 1996 (the WPPT);
 - 5. the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement);
 - 6. the UNESCO Convention on the Protection and Promotion of the Diversity Of Cultural Expressions; and

7. the UN Convention on the Rights of Persons with Disabilities, including but not limited to Articles 21 and 30.

(b) Contracting Parties agree that, to the extent that this Treaty applies to literary and artistic works as defined in the Berne Convention, it is a special agreement within the meaning of Article 20 of that Convention, as regards Contracting Parties that are countries of the union established by that Convention.

Article 4. Limitations and Exceptions to Exclusive Rights Under Copyright

(a) It shall be permitted without the authorisation of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to a visually impaired person by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, when all of the following conditions are met:

1. the person or organisation 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.

(b) A visually impaired person to whom a work is communicated by wire or wireless means as a result of activity under paragraph (a) shall be permitted without the authorisation of the owner of copyright to copy the work exclusively for his or her own personal use. This provision is without prejudice to any other limitations and exceptions that a person is able to enjoy.

(c) The rights under paragraph (a) shall also be available to for-profit entities and shall be extended to permit commercial rental of copies in an accessible format, if any of the following conditions are met:

1. the activity is undertaken on a for-profit basis, but only to the extent that those uses fall within the normal exceptions and limitations to exclusive rights that are permitted without remuneration to the owners of copyright;
2. the activity is undertaken by a for-profit entity on a non-profit basis, only to extend access to works to the visually impaired on an equal basis with others; or
3. 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.

(d) In determining if a work is reasonably available in (c)(3), the following shall be considered:

1. for developed economies, the work must be accessible and available at a similar or lower price than the price of the work available to persons who are not visually impaired; and
2. for developing countries, the work must be accessible and available at prices that are affordable, taking into account disparities of incomes for persons who are visually impaired.

Article 5. Acknowledgment and Moral Rights

(a) Where a work or copy of a work is supplied to a visually impaired person as a result of any activity under Article 4, mention shall be made of the source, and of the name of the author as it appears on the work or copy of the work that the person or organisation acting under Article 4 has lawful access to.

(b) Use as permitted by Article 4 shall be without prejudice to the exercise of moral rights.

Article 6. Circumvention of Technological Measures

Contracting parties shall ensure that beneficiaries of the exception provided by Article 4 have the means to enjoy the exception where technological protection measures have been applied to a work, including when necessary the right to circumvent the technological protection measure so as to render the work accessible.

Article 7. Relationship With Contracts

Any contractual provisions contrary to the exception provided in Article 4 shall be null and void.

Article 8. Imports and Exports of Works

Provided that all the relevant conditions of Article 4 are complied with in the exporting and importing countries as appropriate, the following shall be permitted without the authorization of the owner of copyright:

1. the export to another country of any version of a work or copies of the work that any person or organisation in one country is entitled to possess or make under Article 4; and
2. the import of that version of a work or copies of the work by a person or organisation able to act under the provisions of Article 4 in the other country.

(Note: see *SCCR/15/7, the Sullivan Report, page 119-121*)

Article 9. Notice to Right Owners for Commercial Reproduction and Distribution of Works

In cases involving the reproduction and distribution of works for the visually impaired under Article 4(c)(3), reasonable efforts should be made to provide notice to the owner of a work protected by copyright. Such notice shall include the following:

1. the name, postal address and relevant telecommunications contact information for the party exercising their rights to reproduce and distribute works;
2. the nature of the use of the work, including the countries where the work is distributed and the terms under which the works are distributed; and
3. information regarding the right of copyright owners to obtain remuneration for the use of the work, or to challenge the use, on the grounds that the uses are not sufficiently restricted to persons who are visually impaired, or that the work is in fact reasonably available in an identical or largely equivalent form enabling its perception by the visually impaired.

Article 10. Database on Availability of Works

(a) WIPO shall create a database that is accessible through the Internet and other means that will allow copyright owners to voluntarily identify works for purposes of facilitating the notices obligations in Article 9 of this Treaty, and to provide information regarding the availability of a work in forms enabling its perception by the visually impaired.

(b) After consultation with publishers and visually impaired persons, WIPO should ensure that the database includes a standard machine readable code to uniquely identify works registered in the database. This code shall be suitable for use in published works in a variety of formats.

Article 11. Remuneration for Commercial Exploitation of Works.

(a) When implementing Article 4(c)(3), Contracting Parties shall ensure that there is a mechanism for determining the level of adequate remuneration to be paid to the owner of copyright in the absence of voluntary agreement. In determining adequate remuneration under Article 4(c)(3), the following principles shall be followed:

(b) Right owners shall be entitled to remuneration that is reasonable for normal commercial licensing of works, regarding the terms normally associated with the country, population and purposes for which the work is used, subject to the requirements of Article 11(c);

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

(d) It shall be a matter of national law to determine if remuneration under (a) is waived for works in certain formats, such as Braille, or for certain qualified entities; and

(e) Persons who distribute works across borders will have the option of registration for remuneration payments in a single country, if the mechanism for remuneration in the country meets the requirements of this Treaty, and addresses the legitimate concerns of the copyright owners in terms of transparency, and remuneration is considered reasonable either for a global license for works that are distributed globally, or for a license to use works in specific countries, calibrated for the countries, users and purposes for which works are used.

Article 12. Orphaned Works

(a) It shall be a matter for national law to determine if certain commercial use of works for which the author or copyright owner cannot be identified or who do not respond to notices require payment of remuneration.

(b) In cases where right owners cannot be identified or do not respond to notices, liability for uses of works shall not exceed 24 months from the date of use.

Article 13. Respect for Privacy

In implementing this Treaty, Contracting Parties shall protect the privacy of persons who are visually impaired on an equal basis with others. *(from Article 22 of the Convention on the Rights of Persons with Disabilities).*

Article 14. Limitations and Exceptions Applied to Non-Copyrighted Elements of Databases

The provisions of this treaty shall apply *mutatis mutandis* to non-copyrighted elements of databases.

Article 15. Disabilities Covered

(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.

Article 16. Additional Definitions

For the purposes of this Treaty:

‘Work’ means any work of a type in which copyright could subsist whether or not such protection is provided by national laws or was provided but has expired, and includes literary, dramatic, musical and artistic works, databases and films.

‘Owner of copyright’ includes any person or body which can control access to a work by the exercise of exclusive rights or through other means, even where copyright does not subsist or no longer subsists.

‘Exclusive rights’ mean any rights provided in accordance with the other agreements identified in Article 4 or otherwise and includes the rights of reproduction, adaptation, and distribution and communication by wire or wireless means to the public.

‘Accessible format’ means an alternative manner or form which gives a visually impaired person or reading disabled person access to the work, including to permit a person with a visual impairment to have access as flexibly and comfortably as a person without a visual impairment.

‘Accessible formats’ shall include, but not be limited to, large print, with different typefaces and sizes all being permitted according to need, Braille, audio recordings, digital copies compatible with screen readers or refreshable Braille and audiovisual works with audio description. It shall also be understood that whether a format is accessible or not will vary depending on the purpose for which the work is to be used and so, for example, an audio recording of a book without indexing may be accessible for a visually impaired person listening for pleasure but not where a visually impaired person needs access for the purposes of study.

‘Lawful access’ means access provided by or with the permission of the copyright owner or through other legal means.

References to ‘copyright’ include copyright and any relevant rights related to copyright that are provided by a Contracting Party in compliance with the Rome Convention, the TRIPS Agreement, the WPPT or otherwise, and references to the ‘owner of copyright’ and ‘author’ shall be construed accordingly.

‘Database’ means a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means.

Article 17. Conference of Parties

(a) A Conference of Parties shall be established among the Contracting Parties. The Conference of Parties shall be the plenary and supreme body of this Treaty.

(b) The Conference of Parties shall meet in ordinary session every five years. It may meet in extraordinary session if it so decides or upon request to that effect from at least one-quarter of the Parties.

- (c) The Conference of Parties shall adopt its own rules of procedure.
- (d) The functions of the Conference of Parties shall be, inter alia:
 - 1. to consider possible measures to enhance the implementation or modify this Treaty, including the development of optional protocols; and
 - 2. to take whatever other measures it may consider necessary to further the objectives of this Treaty.

Article 18. Optional Protocols

Contracting Parties shall have the right to propose optional protocols for this Treaty, to address measures such as:

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

Article 19. Reservations

Any Contracting Parties may declare that it declines to implement Article 4(c)(3) of the Treaty.

Article 20. Monitoring and Implementation

Every three years WIPO shall solicit voluntary contributions from Contracting Parties and other possible donors in order to finance one or more studies of the implementation of this Treaty.

[End of Annex and of document]