

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

and Its Compatibility with TRIPS Three-Step Test and EU Copyright Law

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Abstract: Although the world's attention has on several occasions been turned to the plight of the vision impaired, there has been no international copyright instrument that specifically provides for limitations or exceptions to copyright for their benefit. Such an instrument becomes imperative amidst the growing number of persons in this category and the need to facilitate their access to information that will give them the opportunity to participate in public affairs. Brazil, Ecuador, Paraguay, and Mexico (Brazilian group) seek to fill this gap by submitting to the WIPO's Standing Committee on Copyright and Related Rights a draft treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons. How-

ever, this proposal has generated a lot of reactions, resulting in three other such proposals being submitted to WIPO for deliberations. Copyright owners have also opposed the treaty. Amidst these reactions, this work seeks to analyze the compatibility of the Brazilian group's proposal with the TRIPS three-step test, which has enjoyed a great deal of international recognition since its inclusion in the Berne Convention. It also seeks to find its compatibility with EU copyright law as harmonized in the Directive 2001/29/EC. In the end, we conclude that the proposed treaty is in harmony with the three-step test, and though it has some variations from the EU Copyright Directive, it nonetheless shares some underlying objectives with

Keywords: Three Step Test; Visually Impaired People; Reading Disabled Persons; TRIPS; EU Copyright Law

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A. Introduction

1 Finding the appropriate balance between the creative incentive of copyright for authors and the interest of the public to benefit from their intellectual work has been a controversial issue for ages.¹ The current attempt to internationally harmonize limitations and exceptions for the benefit of those who are visually impaired only causes this controversy to resurface. This battle, which simply consists of the

economic interest of authors to reap the fruits of their labor on the one hand, and the interest of the state in providing public access to literary works for the advancement of knowledge on the other hand, appears not to have been won or lost even 300 years after enacting the first copyright statute in England.² Although the earliest approach at securing a license to publish was in the form of a sovereign privilege,³ the transposition of such a privilege into a legally recognized right has shown both positive and

negative outcomes. While the authors were liberated from the shackles of publishers by the Statute of Anne, one of the major underlying principles behind the Act – to encourage public learning – is yet to be fully achieved.

- 2 While the Internet has helped millions of people globally to download and share intellectual works without any regard to copyright, it is obvious that such an advancement in technology has brought new challenges to authors, and therefore calls for greater protection of their creativity. However, what is often forgotten in this tension between copyright owners and pirates is that some special category of persons will often be caught in the midst of this battle, effectively finding it extremely difficult to access intellectual works. For instance, the increasing use of protective measures, both technological and otherwise – including digital rights management and collecting societies to check and enforce copyright – have adversely affected visually impaired persons (VIPs) in gaining access to intellectual works even for their private use.⁴
- 3 The request by the Authors Guild in the United States for Amazon to disable its Kindle 2's new robotic text-to-speech feature, which can read any Kindle book aloud in a synthesized voice, illustrates this point.⁵ This is a feature that would be an absolute delight for the vision impaired, and shows how technology could be used to better their lot. The Guild's contention was that such a facility would cut the sale of audio books, insisting also that eBooks were not sold with performance rights. Amazon yielded to this request and disabled the feature in order to avoid litigation. Often, such a situation will attract international sympathy and calls for the expansion of limitations and exceptions to copyright, especially for the benefit of those with disabilities. But while there have been some studies in the past detailing the plight of VIPs and suggesting ways of improving them, no concrete international approach of a mandatory nature has been taken on. Attempts to provide accessible formats of intellectual works to the vision impaired have been limited in jurisdiction, and this restricts cross-border transfer of such formats.⁶ It is in this light that the proposed treaty for improved access for the blind, visually impaired, and other reading disabled persons drafted by the World Blind Union and sponsored by Brazil, Ecuador, Paraguay, and now joined by Mexico (Brazilian group) becomes very important.⁷ The proposed treaty seeks *inter alia* to establish a multilateral legal framework in the field of limitations and exceptions for the benefit of persons with reading disabilities. It also aims at facilitating the cross-border transfer of copyrighted works that have been adapted for such purposes.
- 4 This international framework is necessitated by the fact that there is no provision in any international treaty relating to intellectual property that specifically provides for exceptions or limitations to copyright for the benefit of VIPs.⁸ Although the Berne Convention,⁹ the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement),¹⁰ and the World Intellectual Property Organization (WIPO) Copyright Treaty¹¹ allow states to include in their intellectual property law exceptions or limitations to copyright that do not conflict with the legitimate interests of right holders, this has not, in fact, improved the accessibility of copyright materials for the visually impaired.¹² While some states have either facilitated access to copyrighted works for the benefit of the disabled through flexible procedures in obtaining authors' permission or imposing a compulsory license scheme, there seem to be many fragmentations in these approaches globally. This creates uncertainty and impediments in either exporting or importing accessible formats across borders.¹³
- 5 The limitations proposed by the present draft treaty are far-reaching and have generated many reactions from all over the world. This is evidenced by three other proposals submitted to the WIPO Standing Committee on Copyright and Related Rights (SCCR) in this regard, all showing remarkable differences in their initial drafts. Similarly, copyright owners have voiced their concerns over the proposal as it affects their economic rights, pointing out the risk of massive piracy if such an exception is made in this digital era. When all these interests are considered, the next hurdle that the proposed treaty will face will be finding an internationally accepted standard for permitting such limitations. The three-step test has seemed to enjoy this acceptability since its inclusion in the Berne Convention in 1967. Though this test has generated a large number of controversies, especially after the WTO Panel gave it an extensive interpretation, it still appears to be one of the uniform instruments of international copyright law that takes care of the differences between the continental authors' system and the common law copyright system.
- 6 The three-step test simply embodies a notion that any limitation or exception to the exclusive rights of authors must be restricted as far as possible and confined to certain special cases that do not conflict with the authors' normal exploitation of their work and do not unreasonably prejudice their legitimate interests.¹⁴ This paper will review the draft treaty submitted to WIPO by the Brazilian group to determine its compatibility with international norms and conditions permitting derogations to copyright as seen in the three-step test that is enshrined in the TRIPS Agreement and EU copyright law. The paper will briefly make a comparison of the other proposals submitted by the African, United States, and European Union groups. The concerns of copyright owners regarding the treaty will be outlined, and

comments on ways of harmonizing the conflicting interests will be made at the end.

B. Historical Background on the Protection of Interests of the VIPs

- 7 The establishment of the *L'Institut National des Jeunes Aveugles (L'INJA)* in Paris by Valentin Haüy in 1784 and its landmark achievement of inventing Braille in 1824 through a former student and teacher at the institute, Louis Braille, brought into the limelight the need for the community to take care of the visually impaired.¹⁵ This certainly attracted international attention to the activities of the blind, and later various European nations began to establish schools for the blind.¹⁶ Indeed, the first recorded international exchange of knowledge and experience by the blind occurred in 1873 when a conference was held in Vienna and attended by teachers and organizations working for the blind.¹⁷
- 8 However, the First World War increased international cooperation in alleviating the plight of the blind. This cooperation was seen in the formation of the American Foundation for the Blind in 1921¹⁸ and in the Esperantist movements spreading all over the world that later resulted into the formation of the Universal Association of Blind Esperantists (UABE) in 1923 in Nuremberg.¹⁹ While Jacobus Tenbroek had also founded the National Federation of the Blind (NFB) in 1940 in the United States, an economic depression followed by the Second World War delayed progress in the internationalization of the activities of the blind, especially in having a uniform body. In 1951 in Paris, a draft constitution for an international organization was adopted, bringing into being the World Council for the Welfare of the Blind (WCWB). The International Federation of the Blind (IFB) was also founded in 1964, raising the number to two international bodies that catered for the affairs of the blind.
- 9 However, due to administrative concerns, these two bodies were merged together in 1984 to form the World Blind Union (WBU).²⁰ Also worthy of mention here is the formation of the European Blind Union in the same year. The WBU is currently the umbrella body uniting the various associations in this area, and envisages a community where people who are blind or suffer from other visual impairment will be empowered to participate in society on an equal basis in any aspect of life they choose.²¹ It should also be noted that a landmark event took place in 1981 concerning the plight of the visual and auditory handicapped, when the governing bodies of WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) agreed to create a Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Produced by Copyright.²² The Working Group drew up “Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by Copyright” in 1982, but after almost three decades since drafting this instrument, no treaty that would enable the visually handicapped around the world to access and share copyright materials has been made to bring its provisions to fruition.
- 10 WIPO has equally taken significant steps toward bringing into focus the problems of VIPs in accessing intellectual works. It has commissioned several studies in this regard and has put the issue in its Development Agenda.²³ In order to legitimize the import and export of alternative format materials, the WBU through Brazil, Ecuador, Paraguay, and Mexico (which joined later) proposed to the SCCR of the WIPO a draft treaty for Improved Access for Blind, Visually Impaired, and Other Reading Disabled Persons in 2009. This is still under deliberation and forms the basis of this article. In a similar gesture, and following decades of work by the United Nations to change attitudes and approaches to persons with disabilities, the Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006, and came into force on 3 May 2008. This treaty, which reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms, has been seen as a major breakthrough in alleviating the suffering of the disabled.²⁴
- 11 But in spite of these international efforts, VIPs’ access to adapted formats of literary works has not been without challenges. Not only are these challenges economical, they are also technological and legal in nature, as highlighted in a WIPO study in 2006.²⁵ The World Health Organization (WHO) estimates that about 285 million people worldwide are visually impaired, of which about 90% are living in developing countries.²⁶ Other statistics show that only about 5% of all published books are available in accessible formats for these persons globally.²⁷ VIPs can only have access to some types of intellectual works, in particular literary works, if they exist in formats such as Braille, audio recording, audio-visuals, or digital-compatible formats. Ng-Loy Loon attributes these poor statistics to difficulties in getting licenses from copyright owners to adapt their works; the high cost of converting works into accessible formats; and the restrictions on importation of accessible formats from cheaper sources.²⁸ This view has been shared by many commentators and points out how copyright protection has adversely affected VIPs in accessing information that will benefit them in both public and private life.²⁹

C. The Proposed Treaty by the Brazilian Group

12 As mentioned earlier in section A, there is no provision in any international treaty relating to intellectual property that specifically provides for exceptions or limitations to copyright for the benefit of VIPs. This draft treaty by the Brazilian group is meant to serve such a purpose. Thus, it forms a basis for discussions about establishing a multilateral legal framework in the field of limitations and exceptions to copyright for the benefit of the blind and other VIPs, including the cross-border transfer of copyrighted works adapted into accessible formats for this special group of persons. In the course of WIPO's consultations on this issue, three other draft proposals were circulated for consideration – submitted by the United States,³⁰ the African group,³¹ and the European Union³² – each of which has remarkable differences from one another. While the Brazilian and the African groups' proposals are aligned to a large extent, and seek to harmonize the law on exceptions and limitations for the benefit of the VIP, thereby creating a mandatory obligation among contracting states, the US and the EU submitted a more limited and non-binding legal instrument. We shall look at these proposals below in this section.

I. The core features of the proposed Brazilian treaty

- 13 The proposed treaty is made up of preambles and 20 articles. Its core features include:
1. Giving VIPs full access to adaptable formats of copyrighted works. It does this by authorizing the creation and supply of alternative format versions of copyrighted works from lawfully acquired copy without the permission of the copyright owner for non-commercial purposes.³³
 2. Permitting the creation and supply of alternative format versions on a for-profit basis, under certain conditions, if the work is not reasonably available in an accessible format.³⁴
 3. Recognition of moral rights of authors in all circumstances.³⁵
 4. The possible creation of the right of VIPs to circumvent technological impediments in order to enjoy access.³⁶
 5. Nullification of any contractual provision that is contrary to the treaty.³⁷

6. Permitting the importation and exportation of accessible format versions without authorization from the copyright owners.³⁸
7. Standardizing remuneration of authors in cases of commercial exploitation of their works.³⁹
8. Establishment of a database by WIPO for the purpose of facilitating notice to authors and providing information on available converted formats.⁴⁰
9. Making mandatory the non-profit exception, while parties may opt-out of the for-profit exception.⁴¹

14 This proposal in effect derogates from the exclusive rights of authors in the areas of reproduction, distribution, communication to the public, and adaptation of their works.

II. A comparative analysis of all the proposals

- 15 As mentioned earlier, four different proposals emerged at the WIPO while deliberations were ongoing about including exceptions and limitations to copyright for the benefit of VIPs following the Brazilian proposal that formed the basis of the deliberations. The African group, the EU, and the United States submitted theirs, all of which have remarkable similarities and differences with one another in respect of their scope, legal nature, beneficiaries, formalities, limitations and exceptions, remuneration, terminology, etc.⁴² While the Brazilian and African proposals have striking similarities and are more favorable to VIPs on numerous points, those of the EU and US appear to be restrictive and more protective of right owners. However, despite the similarities between the African and the Brazilian proposals, other beneficiaries – including educational and research institutions, libraries and archive centers – were included in the African proposal.
- 16 One striking distinction among these proposals is the legal effect that they are intended to have on contracting parties. On the one hand, the US and EU proposals do not intend to create a legally binding instrument on contracting parties. The US proposal is merely a consensus instrument that specifically aims at facilitating cross-border transfer of accessible formats through trusted intermediaries without authorization from copyright owners. The EU's joint recommendation recommends that every state should include an exception on the exclusive rights for the benefit of VIPs on a non-commercial basis, as well as introduce a global system of mutual recognition of trusted intermediaries. On the other hand, the Bra-

zilian and African groups intend the opposite – to create a legally binding instrument – and are more elaborate in nature.

- 17 Various terminologies were used in the various documents to refer to the beneficiaries as seen in their titles, for example, blind, visually impaired and other reading disabled persons, persons with print disabilities, and disabled (for the purpose of this work, they are simply referred to as visually impaired persons). Although all the groups refer as their primary beneficiary to those who are blind or visually impaired, whose impairment cannot be corrected by lenses, the Brazilian and African proposals include persons with other disabilities, who due to such disabilities need an adaptable format in order to access a work like a normal person. The US limited these others to persons whose physical disabilities were orthopedic or neuromuscular based, while the EU's extend only to those who cannot hold or manipulate a book, are dyslexic, or whose physical disability requires reformatting the content of the work but does not require that the text itself be rewritten in simpler terms to facilitate understanding.⁴³ This clearly indicates that the US and EU intend to have a more restricted beneficiary in the exceptions proposed.
- 18 Again, while the Brazilian, African, and US proposals tried to make a list, albeit not exhaustively, of “accessible formats,” the EU's is silent on that, simply referring instead to a format that is modified prior to publication or afterward. More importantly, the EU's recommendation enshrines the three-step test as a condition for applying its provisions; further, together with the US proposal, it provides that cross-border transfer of accessible formats should be done only through the trusted intermediaries. The Brazilian and African proposals make no mention of trusted intermediaries, but suggest that export and import could be made between any individual or organization whose countries have exceptions in this regard.
- 19 In all circumstances, the EU proposes that prior notice should be given to the right holders through the trusted intermediaries, and they shall receive adequate remuneration for any such exploitation of their work.⁴⁴ This sharply contrasts with the Brazilian and African groups' proposals, which require that notice shall only be given on a for-profit exploitation, and no remuneration shall be paid for a non-profit use of the work.⁴⁵
- 20 Another remarkable difference witnessed in the proposals is in the area of related or neighbouring rights. While the Brazilian and African groups extend the limitation to related right, the US and EU were silent on the issue. Similarly, circumvention of technological protection measures were permitted by the Brazilian and African proposals, while the US and EU were also silent on that.

- 21 It should be noted at this juncture that at the SCCR 21st session, two committees were set up to undertake a text-based work on the proposals, with the objective of separately reaching agreement on appropriate exceptions and limitations for persons with print and other reading disabilities; and limitations for libraries, archives, educational, teaching, and research institutions.⁴⁶ Pursuant to this, many negotiations were made and at the SCCR 22nd session, a consensus document in the form of a “proposal on an international instrument on limitations and exceptions for persons with print disabilities” was presented for discussion by Argentina, Australia, Brazil, Chile, Colombia, Ecuador, the European Union and its member states, Mexico, Norway, Paraguay, the Russian Federation, the United States of America, and Uruguay.⁴⁷ In spite of the many compromises made in the document, many commentators have welcomed the development as a step in the right direction, even though there are still differences as to the legal nature of the final document that may emerge from the consensus document.⁴⁸ It is also not clear whether the consensus document will be accepted by all the contracting states. This could be gleaned from the fact that no African or Asian state signed the document, and a subsequent version of the document prepared by the chair of the SCCR reveals that the controversial issues are far from being resolved.⁴⁹ It is hoped that a clearer picture concerning this proposal will emerge at the 23rd session of the SCCR in November 2011.

D. Limitations and Exceptions under the Proposed Treaty and the Three-Step Test

- 22 As we have seen above, the proposed treaty clearly limits the exclusive rights of authors as recognized under international copyright law. By setting out exclusive rights of authors, copyright law ensures that creators of literary works can control the exploitation of their work for a period of time. However, in order to ensure the social value of intellectual works, a balance has to be established between these exclusive rights and the privileged free uses, thus necessitating the inclusion of exceptions and limitations of these rights into copyright law. At the interface between both sides of the balance, the three-step test seems to accomplish the task of preventing copyright limitations from encroaching upon authors' rights.⁵⁰ Although the Brazilian proposal did not emphasize the three-step test criteria, instead justifying limitations on lawful acquisition of a copy, the EU and the US proposals made reference to this test.
- 23 The three-step test can be found in several international copyright laws. At the 1967 Stockholm Conference for the revision of the Berne Convention, the test was introduced to pave the way for the formal

acknowledgement of the general right of reproduction. This was later reflected in Article 9(2) of the Convention as a standard under which derogation to the reproduction right of authors can be permitted. In 1994, it reappeared in the TRIPS Agreement, and later in the WIPO Internet Treaties in 1996.⁵¹ In the same vein, Article 5(5) of the EU Directive 2001/29 EC on copyright in the information society also reiterates these conditions as necessary for allowing limitations and exceptions on the economic rights of authors.⁵²

- 24 Article 13 of TRIPS, which embodies this test, stipulates the following:

*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*⁵³

- 25 In summary, this test requires that limitations and exceptions to exclusive rights of authors

1. be confined to “certain special cases”,
2. do not conflict with a normal exploitation of the work, and
3. do not unreasonably prejudice the legitimate interests of the right holder.

- 26 Its current ambit of application is no longer confined to the right of reproduction, but to all kinds of exclusive rights. In substance this is the only difference between the provision in Article 9(2) of the Berne Convention and the other instruments mentioned above. These three conditions apply cumulatively, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the exception being disallowed.⁵⁴

- 27 Although there is a paucity of international legal interpretation of this concept, it has, however, been interpreted twice by the WTO’s Dispute Settlement Body (DSB). In the first case bordering on patent, the European Communities (EC) brought a complaint against Canada, alleging that Canadian provisions that allowed competing generic manufacturers to test patented products before the required period of protection expired, and the manufacturing and stockpiling of pharmaceutical products without the consent of the patent holder during the six months immediately prior to the expiration of the 20-year patent term, violated its obligations under Articles 28(1) and 33 of the TRIPS Agreement.⁵⁵ Canada argued on the contrary that such measures were “limited exceptions” to the exclusive rights conferred by a patent within the meaning of Article 30⁵⁶ of the TRIPS Agreement. While the DSB found

that the provision allowing for the testing of the invention for experimental purposes was limited in nature and not in conflict with the normal exploitation of the patent, it did rule that the “manufacturing and stockpiling exception” constituted a substantial curtailment of the exclusive rights granted to patent owners to such an extent that it could not be considered a limited exception within the meaning of Article 30 of TRIPS.⁵⁷ This is mainly because such acts took away at least three of the five fundamental patent rights, including the right to prevent others from making and using the invention. There was also no limitation as to the quantity of material that could be manufactured and stockpiled.⁵⁸ These in effect conflicted unreasonably with a normal exploitation of the patent.

- 28 In the second case, *US – Section 110(5) of the US Copyright Act*,⁵⁹ which centers on copyright and which we shall rely on in our analysis here, the EC also brought a petition against the United States in relation to Article 110 (5)(B) of the US Copyright Act,⁶⁰ which places limitations to the exclusive rights in respect of certain performances and displays. In effect, the Act exempted certain restaurants, bars, and shops from paying licensing fees when they play radio and TV broadcasts. The EC contended that this violated US obligations under Article 9(1) of the TRIPS Agreement together with Articles 11(1)(ii) and 11bis(1)(iii) of the Berne Convention.

- 29 The panel ruled that the US exception was not justifiable as it fails to meet the three conditions of the three-step test. The DSB found with regard to the first step that “certain special cases” requires that a limitation or exception in national legislation should be clearly defined and narrow in its scope and reach. Although the panel did not emphasize the qualitative reason for the limitation, it did state that the purpose for any limitation may not be normatively discernible, but the public policy purpose may be useful from a factual perspective for making inferences about the scope of an exception or clarity of its definition.⁶¹ Relying on a quantitative approach, the DSB noted that the majority of drinking and eating establishments and close to half of all retail establishments were covered by the exception, which makes it appear more like a rule than an exception. Therefore, the panel ruled that the exception does not qualify as “certain special case” within the meaning of the first condition of Article 13 of TRIPS.

- 30 In interpreting the second step, DSB adopted both empirical and normative approaches in defining the words “normal exploitation” and stated that they connote regular or ordinary activities that copyright owners engage in, to extract economic value from the use of their works. The overall conclusion of the panel on this step was that an exception to a right rises to the level of a conflict with a normal exploitation of the work if uses, which in principle are co-

vered by the right but are exempted by the exception, enter into economic competition with the ways in which right holders normally extract economic value from that right, and thereby deprive them of significant or tangible commercial gains.⁶² Thus, in the present case, the limitation meant significant loss of income that would have accrued to the right owners in terms of royalties.

- 31 Looking lastly at the third step of the test – that exceptions “do not unreasonably prejudice the legitimate interests of the author” – the DSB remarked that this hinges on the term “unreasonable.” It finally noted that prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner. It found that excluding a large percentage of users of musical works from payment of compensation would deprive right owners of substantial income, which is unreasonably prejudicial.

E. Will the Proposed Treaty Pass this Test under the TRIPS Agreement?

- 32 The three-step test has enjoyed international recognition since its introduction to the Berne Convention.⁶³ Although various comments have been made about the DSB interpretation of the test in the US case,⁶⁴ we hope to rely on it in weighing the justification of this proposed treaty under international law. This is based on the fact that the panel’s decision has an international effect. Second, cases from national courts show divergent approaches and results when applying the test.⁶⁵

I. First, is the exception confined to “certain special cases”?

- 33 According to the WHO statistics mentioned above, the number of VIPs has been identified: about 285 million persons who represent only about 4% of the world’s population.⁶⁶ The proposed treaty also lists specific formats for which works may be converted. This clearly justifies the quantitative approach that was adopted by the DSB in the US decision. It is also not in doubt that the vision of VIPs makes them fall within a special category of persons who deserve to be protected. In this regard, the UN Convention on the Rights of Persons with Disabilities⁶⁷ and the Sullivan report all attest to the fact that VIPs are special category of persons.
- 34 The above facts bring the treaty in line with the DSB’s interpretation of the first test that exceptions must be clearly defined and narrow in scope and reach. Either adopting a qualitative or quantitative

element, the exception seems to pass the first test because of the following:

- 35 There is an imperative public duty of providing access to information to the visually impaired.
- 36 The number of visually impaired persons has been clearly identified, and they represent a special set of the world’s population.
- 37 This stand is also supported by Ricketson’s interpretation of the first test that exceptions are justifiable if they are for a quite specific purpose and the purpose should be “special” in the sense of being justified by some clear reason of public policy or other exceptional circumstance.⁶⁸ If we also adopt a holistic approach with regard to rights of authors and the policy goals of this exception, it is arguable that the proposed treaty is in harmony with the objectives of TRIPS Agreement as stated in its Article 7.⁶⁹ However, the African group’s proposal may well be out of scope when weighed against the first test, since the beneficiaries are not limited only to VIPs but also include others that may not be easily ascertained.⁷⁰
- 38 Placing this justification in a wider context, the guarantee of freedom of expression and the right to receive information can be seen as a foundation for communicative interaction in a democratic society. The freedom to seek and receive information must be ensured as an indispensable prerequisite for the formation of an opinion. Thus, a consideration of the concerns of the recipient of information should be an integral part of copyright law. This has accordingly been reflected in international human rights instruments. For instance, the Universal Declaration of Human Rights (UDHR) enunciated the following:
- 39 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁷¹
- 40 It is believed that this provision persuaded the 1996 WIPO Diplomatic Conference in the preparatory work to the Internet treaties to remark:
- 41 When a high level of protection is proposed, there is reason to balance such protection against other important values of society. Among these values are ... the need of the general public for information... and the interests of persons with handicap that prevent them from using ordinary source of information.⁷²
- 42 Mentioning the needs of VIPs in the above remark is also in line with the examples of “specific purposes” outlined by the 1967 Stockholm study group that equally includes access to disabled persons.⁷³

All these lend credence to the fact that this proposed treaty is in line with a common underlying interest: to improve the conditions of VIPs by giving them access to information contained in copyrighted works.

II. Second, does the exception conflict with a normal exploitation of the work?

- 43 In the opinion of the DSB, an exception to a right rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by the right but exempted by the exception, enter into economic competition *with the ways in which right holders normally extract economic value from that right* (italics are mine) and thereby deprive them of significant or tangible commercial gains. From available facts, the 5% of accessible formats of works available to VIPs were made by organizations working for the VIPs.⁷⁴ This shows that right holders do not exploit this means and *a fortiori* do not extract any economic value from these converted formats. Assuming that they receive remuneration from these converted formats, it is only for 5% of all their works, which is rather abnormal and too insignificant compared with their major source of income. It should also be noted that this venture is mostly carried out on a non-profit basis in view of the resources available to VIPs. So there is no likelihood that authors will exploit this market in the future because of the meager income available to VIPs.
- 44 Although the Brazilian treaty permits derogation on a for-profit nature, this ordinarily does not bring it into conflict with the economic interests of the authors. Besides, the proposal provides that adequate compensation will be paid to the right holders when conversion is on a profit basis. The DSB, while echoing the deliberations at the 1967 Stockholm Revision Conference of the Berne Convention, observed that the test permits commercial uses.⁷⁵ The interpretation of this second criterion must not be drawn too widely; otherwise, it will be difficult to ensure a sufficient flexibility for the establishment of a proper copyright balance.⁷⁶ A normal exploitation does not necessarily imply that each and every market segment has to be scrutinized. It needs not be interpreted too broadly to impose a hurdle that all parts of the overall commercialization of a work must be surmounted before a limitation can be justified. Rather, a limitation should only be seen to conflict with a normal exploitation of a copyrighted work if it substantially impairs the overall commercialization of that work by divesting the author of a major source of income.⁷⁷ It has not been proven that income from sales of copyrighted works in places where adapted formats exist has dwindled because of these formats. So there is no likelihood of conflict in this regard.

- 45 Public interest should not be threatened by the three-step test. The WIPO Diplomatic Conference reflected this in their statement referred to earlier, and we have shown that this treaty proposal will not divest authors of their normal income. We therefore conclude that the exception for the benefit of VIPs will not deprive right owners of any potential or tangible commercial gains because they do not exploit this market in the normal course of their dealings.⁷⁸

III. Third, does the exception unreasonably prejudice the legitimate interests of right holders?

- 46 Prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception causes or has the potential to cause an unreasonable loss of income to the right holders. We have shown earlier that this is not likely to happen in view of the fact that the right holders have not in the past exploited this avenue for their economic gains and there is nothing to show that they will in the future.
- 47 While it is legitimate for copyright owners to receive economic value for their work, and this should not be unreasonably prejudiced, the legitimate interest of the public in providing access to information to a vulnerable group of society should be weighed in balancing the equation. An appropriate solution is seen in the provisions of the proposed treaty that makes payment of adequate compensation a condition when these works are adapted on a for-profit basis. Thus, insofar as the objectives underlying a limitation justify the entailed prejudice to the right owner's legitimate interest, such a limitation should be approved. Furthermore, the treaty does not in any way preclude authors from publishing their works in these accessible formats for VIPs and distributing those for profit. In fact, the treaty precludes conversion for profit purposes if there are reasonably identical formats enabling access for VIPs by the author.⁷⁹ To our understanding, these secure the interests of right owners.

F. The Proposed Treaty and EU Copyright Law

- 48 The EU Directive 2001/29 on copyright in the information society harmonizes copyright laws within the EU.⁸⁰ The Directive seeks to provide a high level of protection of intellectual property that not only favors copyright owners, but also takes into consideration the interest of the public by allowing for limitations and exceptions on copyright. Although the Directive does not harmonize exceptions comple-

tely, it does place some constraints on the exceptions that EU member states may provide in their national laws. Specifically, Article 5(3)(b) of the Directive permits limitation on the rights of reproduction and communication to the public in respect of copyrighted works “for the benefit of people with disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.” Undoubtedly, VIPs fall within the range of persons envisaged by this provision. However, Article 5(5) imposes the three-step test as criteria for justifying exceptions or limitations made pursuant to the Directive. Although EU member states have included certain exceptions and limitations into their national laws based on the Directive, no case has been decided by the European Court of Justice on their compatibility with the three-step test.

- 49 Article 5(3)(b) of the Directive has been transposed in a wide range of ways by member states.⁸¹ While some states have simply maintained a very narrow application of this limitation, others have placed a payment of compensation as a prerequisite. For instance, in France, the right to consult works by disabled persons is limited to private purposes, to be carried out only in the premises of authorized legal entities or publicly accessible establishments such as libraries, museums, or archives.⁸² No payment of compensation is foreseen under the French Code, unlike the German and Dutch Copyright Acts.
- 50 Guibault has argued that Article 5(3)(b) of the Directive is vague, thereby resulting in nationally implemented provisions setting out diverging conditions for its application, and also being addressed to different individuals or entities in some quarters.⁸³ For instance, it is not entirely clear from the Dutch and German provisions whether they are directed to the physically impaired themselves or to any other legal or natural person engaged in the reproduction and publication of works for disabled persons.⁸⁴ On the other hand, the French provision would seem to be directed primarily at the disabled individuals themselves, via the institutions that make the works available on their own premises and subject to strict conditions for application.⁸⁵
- 51 In spite of the differences in the EU member states’ provisions implementing Article 5(3)(b), a pertinent question that will be relevant for our purpose here is whether the proposed treaty is compatible with the copyright Directive and other EU law on intellectual property. Although the EU has voiced its opposition to the proposal as reflected in its joint recommendation, it may not be absolutely correct to assume that the provisions of the proposed treaty are incompatible with EU copyright law. While it is admitted that there are some clauses in the proposal that are not in harmony with the copyright Directive, a critical review of the two instruments shows that they share some fundamental objectives. We shall highlight some of these differences and similarities below.
- 52 First, Article 5(3)(b) of the Directive permits an exception on this subject only on a non-commercial basis, while the Brazilian proposal allows for a for-profit exception under certain conditions, though parties may opt out of this provision when signing the treaty. Again, the Directive also favors a system of compensation to the author, even when an exception is applied for private use and on a non-commercial basis as seen in Article 5(2)(b). In implementing Article 5(3)(b), some states such as Germany, Austria, and the Netherlands require payment of compensation to the right holders for the use of their works for the benefit of disabled persons.⁸⁶ In our opinion, this places a great hurdle in the way of member states that already provide for payment of compensation to lower the standard based on this proposed treaty, which only allows compensation when work is used on a for-profit basis.
- 53 Second, the Directive permits derogation from the limitations and exceptions based on contractual agreement.⁸⁷ However, this is not the case with the proposed treaty, which nullifies any contractual provision that is contrary to its provisions.
- 54 Furthermore, contrary to the proposed treaty, the Directive enjoins member states to provide adequate legal protection against the circumvention of any effective technological protection measures used by copyright owners to protect their works, which in effect does not permit circumvention in any circumstance.⁸⁸ However, Article 6 (4) of the Directive seeks to address the problem of users – who might otherwise benefit from certain limitations – being denied access by the application of these technological protection measures. While the Directive foresees the possibility of voluntary measures being taken by right holders to secure access and use of works by certain beneficiaries, the extent which such voluntary measures may restrict beneficiaries from using such works is uncertain.⁸⁹ In other words, the Directive does not provide a certain solution as to what beneficiaries would do when technical measures deny them access to any benefit from copyright limitations. The solution to this uncertain scenario depends largely on national implementing law because states were enjoined to take appropriate measures to ensure that right holders make available to the beneficiaries the means of benefiting from the exceptions or limitations, to the extent necessary, where those beneficiaries have legal access to the protected work. While Article 6 (4) has not been implemented in Austria, the Czech Republic, and Poland,⁹⁰ which makes it unclear what the outcome will be in these states, other states have provided a legal basis detailing procedures for enforcement, which excludes any notion of a self-help right, thereby making such proceedings mandatory.⁹¹ In our view, it is this

costly approach that the proposed treaty seeks to forestall by including, when necessary, the right to circumvent the technological protection measure so as to render the work accessible for VIPs.

- 55 A related hurdle is that the exception for people with disabilities is not specifically provided for in Directive 96/9/EC on the legal protection of databases. This raises the concern that the proposed treaty could be undermined by invoking database protection on the basis that a particular literary work is simultaneously protected as a database.⁹²
- 56 As stated earlier, the application of exceptions and limitations under the Directive is hinged on the three-step test. A general overview of cases involving the three-step test within the EU member states shows a divergent application of the doctrine, which arguably means that it is uncertain whether the proposed treaty may pass the test in member states' courts. A highlight of some of the cases reveals that the application of the test could be a stumbling block for the enforcement of the proposed treaty within these states. In a famous case in France, the *Mulholland Drive*,⁹³ a DVD purchaser who was prevented from making a copy into VHS because of certain encryption introduced by the manufacturers brought an application to enforce his right to make a private copy under the exception in Article L122-5 of the French Intellectual Property Code. The court refused to grant the application after applying the three-step test, reasoning that such an exception would impair the normal exploitation of the work and would increase the risk of piracy in the digital era. Similarly, in the Dutch case of *Ministry of Press Reviews*,⁹⁴ the court held that the scanning and reproduction of press activities for internal electronic communication in the ministries without authorization from right owners fails the three-step test, endangers the normal exploitation of the work, and is unreasonably prejudicial to the publishers' legitimate interest in digital commercialization.
- 57 Having stated the above, however, it is very important to look at the overall objectives of the Directive, especially concerning exceptions for the benefit of persons with disabilities. While it is the aim of the Directive that harmonization of copyright and related rights must provide a high level of protection for intellectual creation, it is recognized that this protection must also ensure the maintenance and development of creativity in the interests of authors and the public at large.⁹⁵ Thus, copyright should permit exceptions or limitations, at least for public interest, which include the purposes of education and teaching. This has been rightly recognized in the Directive by providing that it is important for the member states to adopt all necessary measures to facilitate access to works by persons suffering from a disability that constitutes an obstacle to the use of the works themselves.⁹⁶ In this respect, the Directive

shares the same purpose with the proposed treaty: to better the lot of persons with visual disabilities.

- 58 Although issues such as payment of compensation and circumvention of technological protection measures may seem weighty, it is not uncommon within the EU member states to see states that have implemented this exception without any compensation. France, Lithuania, and Latvia all have provisions allowing exceptions for the benefit of persons with disabilities without compensation. Furthermore, in view of the cost of converting works to accessible formats, and the limited resources available to VIPs, the EU Green Paper questions whether payment of compensation should apply to this exception.⁹⁷ Similarly, states like Latvia and Lithuania provide a positive obligation on right holders to grant access to works so the beneficiaries can fully enjoy the benefits of limitations.⁹⁸ In the Scandinavian countries, the existence of a self-help right in case of non-compliance with an order indicates further that beneficiaries may more fully enjoy limitations in the absence of voluntary measures. For instance, in Denmark, Finland, Norway, and Estonia, the obligation to provide circumvention means by right holders is formulated as a positive obligation with an ensuing self-help right should right holders not comply with an order.⁹⁹ Cyprus did not expressly prohibit the circumvention of technological protection measures in its transposition of the Directive.¹⁰⁰ All these cases support the argument that the proposed treaty is not a radical departure from what prevails within the EU.

G. Addressing the Concerns of Copyright Owners

- 59 As the debate continues over expanding exceptions and limitations for the benefit of VIPs, copyright owners have voiced their concerns in opposition to the proposal. Both in the US and the EU, these copyright owners, including authors and publishers, have maintained that the proposal is prejudicial to the existing international copyright framework. They have argued that such an exception will open the flood-gate for people who are not visually impaired to pirate their works. They equally insist that where resources are already scarce, the existence of copyright exemptions further reduces incentives to invest in the production and distribution of works in accessible formats into the market.¹⁰¹ This will make the treaty counterproductive, in their view. Rather, they would prefer an incentives-driven approach that would provide the impetus for publishers and their licensees to harness technological developments to spur greater diffusion of copyright-protected works in order to make such works available in accessible formats to VIPs in the light of sustainable market conditions.¹⁰²

- 60 They have also pointed out that copyright owners will suffer economic harm where for-profit entities would be able to provide unauthorized accessible formats of works without incurring certain pricing limitations, especially where the copyright owner also provides such formats. Furthermore, most of the provisions in Article 4 of the proposed treaty would make exceptions mandatory without reference, for example, to whether the copyright owner already produces or licenses copies of their works in suitable accessible formats.¹⁰³
- 61 In further reactions, Australian publishers have shown concern that the provision allowing the circumvention of technological protection measures would expose right holders to a very considerable risk of piracy. Instead, they argue that the advent of new digital technologies should result in better access for the print disabled, while still protecting the interests of right holders if the issue is handled correctly.¹⁰⁴ Right holders believe that appropriate protection against piracy and misuse needs to be guaranteed, especially when it concerns the delivery of digital formats, which can be easily reproduced and instantly disseminated over the Internet. In this regard, copyright owners favor the use of “trusted intermediaries,” like collecting societies, as a medium of facilitating access to copyright material. These trusted intermediaries would form a bridge between copyright owners and persons with print disabilities to ensure that the interests of all stakeholders are protected. It was this approach that the Federation of European Publishers adopted when they signed a Memorandum of Understanding with the European Blind Union to cross-border transfer in the EU of accessible copies under appropriate conditions, through the network of trusted intermediaries and under appropriate conditions.¹⁰⁵
- 62 While it is not the intent of this write-up to question the plausibility of these concerns and counter-arguments, it is believed that WIPO committees will address these concerns in their future deliberations and come up with a harmonized position.

H. Conclusion

- 63 Basically, limitations and exceptions for the benefit of VIPs are not likely to switch the field of copyright much in any direction. These exceptions are justifiable by the public duty to provide access to information to the visually impaired, who have an extremely limited amount of information compared to non-impaired persons in any case. While it is not disputed that copyright law should provide incentives to copyright owners, public interest is not well served if copyright law neglects the interests of individuals and vulnerable groups in society when establishing these incentives for the right holders only.

In this respect, there is a need to balance all interests involved. The EU Green paper on knowledge economy rightly recognized this:

*...people with a disability should have an opportunity to benefit from the knowledge economy. To this end they not only need physical access to premises of educational establishments or libraries but also the possibility of accessing works in formats that...are adapted to their needs.*¹⁰⁶

- 64 In view of the foregoing, we conclude that the proposed treaty under consideration passes the three-step test as enshrined in the TRIPS Agreement. Although it is not clear whether EU member states will accept it in its present state because of its far-reaching effects, especially concerning the payment of compensation and circumvention of technological protection measures, we have shown that the proposed treaty and the copyright Directive share the same underlying objective: to improve access for people with visual disabilities to information that would allow them to participate in public affairs. Limitations and exceptions for the benefit of disabled persons have been gaining international recognition and attention even in the EU, giving the hope of a light at the end of the tunnel. No doubt the Witten Group has included it in the provisions of their proposed European Copyright Code as part of the limitations requiring no permission or payment of remuneration when carried out on a non-commercial basis.¹⁰⁷
- 65 However, it will be necessary for the SCCR of WIPO to harmonize the conflicting proposals to soothe the various interests identified, especially the recognition of trusted intermediaries, as this tends to remove the fears of copyright owners over pirated works. The various stakeholders' forums can be a tool toward a harmonized treaty that will take care of how to supply digital copies without violating security and protection of copyright in the works concerned. In the end, it is believed that the proposed treaty will eliminate to a large extent the expense and time needed to make accessible copies to VIPs.

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