

REPORT OF THE ALAI AD HOC COMMITTEE ON THE PROPOSALS TO INTRODUCE MANDATORY EXCEPTIONS FOR THE VISUALLY IMPAIRED

While a treaty introducing copyright exceptions and imitations on behalf of the visually impaired may be permissible, analysis shows that it is not necessary, and that Berne-TRIPs member States may as a matter of their domestic law implement measures which are compatible with the Berne-TRIPs framework for national exceptions and limitations. Moreover WIPO can assist member States in achieving the proposed treaty's goals by drafting a WIPO Model Law devising appropriate exceptions or providing guidance toward formulating them.

A. Permissibility under Berne-TRIPs of a mandatory exceptions treaty

If proposed exceptions are incompatible with the framework for exceptions and limitations set out at Berne art. 9(2), TRIPs art. 13, and WCT art. 10, then Berne art. 20 (incorporated in TRIPs via art 9(1), and in WCT via art. 1(4)) would prohibit member States from enacting an international agreement mandating those exceptions. Article 20 bars Berne Member States from agreeing to provide a level of protection that is lower than that assured by the Convention's substantive minimum protections. By contrast, if the proposed exceptions conform to minimum conventional protections, then Member States may implement them as a matter of domestic law, and there is no need for an international treaty. Indeed, without analyzing the specific exceptions proposed in the draft treaty, it is nonetheless possible to affirm that some national exceptions permitting the reproduction, conversion to at least certain formats accessible to the visually impaired, and their communication to the public can be consonant with the norms of the "three-step test." In sum, either the proposed treaty is unnecessary or as shown in the next paragraph, also *ultra vires*.

At the same time, it seems that to make exceptions – that otherwise would be in accordance with the copyright treaties, and in particular with the "three-step test" – mandatory in a treaty would be in conflict with Berne art. 19 (also incorporated into the TRIPS Agreement and the WCT through the above-mentioned provisions) which provides that the provisions of the Convention "shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union." This might also raise doubts regarding the compatibility of the proposed treaty with Berne art. 20.

B. Is a treaty necessary?

Some of the previous submissions to WIPO suggest that a treaty is required because national exceptions do not enable cross-border communication of copies or transmissions of protected works, and because, even if its goals could be implemented through domestic laws, a treaty will supply impetus otherwise lacking to devise such laws. Both of these assertions are problematic.

1. Importation of copies derived from matrices produced abroad

With respect to importation, in fact, member States may, consistently with Berne-TRIPs, provide for the importation of appropriate accessible formats. The Berne-TRIPs framework accommodates not only the production within a member State of accessible formats, but also the importation by one member State of accessible formats produced in another. As a result, while an importation clause such as that proposed in art. 8 of the draft treaty may well be Berne-TRIPs-compatible, for that very reason the clause could be adopted into national law rather than imposed as part of a multilateral instrument.

The Berne Convention addresses the issue of importation of infringing copies in art. 16, which provides:

- (1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
- (2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.
- (3) The seizure shall take place in accordance with the legislation of each country.

Because art. 16 covers only “infringing” copies, member States have no obligation to make liable to seizure copies which would not have been unlawful had they been made in the country of importation. Moreover, because art. 16 does not require excluding copies derived from a copy lawfully made pursuant to an exception or a compulsory license in the country of production, it would seem that importations based on a lawfully made “matrix” copy would be permissible.

The TRIPs Agreement does not impose a higher level of protection in this regard. Importation controls under TRIPs arts. 44, 50 and 51 seem primarily to concern the lawfulness of the copy in the country of importation. Unlawful manufacture in the country of production is relevant to the classification of the copy as “pirated”, but the copy must nonetheless ALSO be unlawfully made under the law of the country of importation, at least with respect to any TRIPs requirements that local customs officials block the importation. .

Thus, a Berne/TRIPs member State that adopts a treaty-compatible exception or limitation for copies accessible to the visually impaired may also import the master copy from which to make and communicate further copies. As a result, a special treaty would not violate Berne art. 20, but it also would not be necessary because the requisite limitations could be introduced into domestic law.

2. Incentive to adopt domestic exceptions

Arguably, an unnecessary treaty could still be a worthwhile rhetorical contribution to the “development agenda”, but in fact it could end up harming those

interests it purports to advance. Currently, copyright exceptions and limitations are the primary means through which member States implement their national cultural policies under the fairly flexible Berne-TRIPs standards. If the task of devising exceptions devolves on the international agreement-making bodies, the result could both constrain member states and prove substantively undesirable. This is because any exception to which the WIPO member states ultimately agree risks being heavily negotiated and accordingly highly specific as to its particular applications. As a result, it may prove both unwieldy and inadaptably to changing technological or economic conditions. But member States may no longer be free to devise their own more flexible exceptions if an international treaty occupies the field. Notably, in countries in which treaty obligations are self-executing (a category that may include many civil law developing countries), there may be no local variation on the international norm. Yet copyright exceptions are an area in which the warning that “one size does not fit all” is especially pertinent.

[The history of the Appendix to the Paris Act of the Berne Convention tends to bear out this dreary forecast. The Appendices were intended to allow developing countries to reproduce and translate works under a lower-cost licensing system. The provisions are exceedingly complicated, as one might expect from the lengthy negotiations in Stockholm in 1967 and Paris in 1971. More importantly, very few developing countries declared an intent to avail themselves of the Appendix’s provision, and it is not clear if any of these States have in fact done so.

Thus, even if member States succeeded in agreeing on the details of a supranational obligation to provide exceptions and limitations in favor of the visually impaired, past experience does not encourage optimism that the result will in fact serve its intended beneficiaries].

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