

TACD

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Resolution on WIPO Negotiations on Copyright Limitations and Exceptions, with Special Reference to the Needs of Visually Impaired Persons and Access to Orphan works

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Resolution

TACD strongly supports the proposal to the WIPO Standing Committee on Copyright and Related Rights (SCCR) by Chile on November 22, 2005 (SCCR/15/5) and elaborated in March 2008 by Brazil, Chile, Nicaragua and Uruguay, for a working program on limitations and exceptions (L&E) for copyright. This proposal focuses on the concerns of and will be of benefit to consumers. The Brazil/Chile/Nicaragua/Uruguay proposal could be paraphrased as having three main elements:

1. To have the SCCR identify and share information on state practices in the area of L&E in the area of copyright,
2. To undertake research and to analyze the L&E needed to promote creative and innovative activity, and for the dissemination of creative and innovative works and services,
3. To establish agreements (including one or more treaties) to ensure member states adopt the minimum L&E needed to protect the public interest, especially as concerns the needs of the most vulnerable or social prioritized sectors of society.

TACD was deeply disappointed that during a March 2008 WIPO SCCR meeting, the EC and the US limited their support for a WIPO program on L&E to the sharing of information on state practices, and opposed activities relating to further analysis and norm setting.

TACD requests the EC and the US eliminate their opposition to the elements of the proposed L&E work program that relate to analysis and norm setting.

Needs of Visually Impaired Persons

A particularly compelling aspect of the Brazil/Chile/Nicaragua/Uruguay proposal is the opportunity to address concerns of visually impaired persons. The World Blind Union (WBU) has on several occasions petitioned and provided comments to WIPO asking the SCCR to address the need for norm setting in the area of minimum L&E, in order to improve their access to protected works. As detailed in their several submissions and comments to the SCCR, and discussed at length in WIPO's February 2007, 227 page "Study on Copyright Limitations and Exceptions for the Visually Impaired" (SCCR/15/17), the products and services that are needed by the visually impaired are most effectively provided globally, across national borders. As WIPO's 2007 study noted, "copyright legislation is territorial in nature... Where activity is undertaken across jurisdictions, it is usually, therefore, extremely difficult to determine with certainty what parts of that activity are lawful and what parts are not." The World Blind Union reports and WIPO confirms the extreme complexity and legal uncertainty of navigating different national copyright regimes, in order to publish works and services for the visually impaired in one country that are used in another country. The WBU has called for global norm setting to create the type of harmonization and legal certainty needed in the area of *minimum* L&E, in order to facilitate investment in services that are essential for expanded access to protected works for visually impaired persons.

Given the extensive documentation and the several years of petitioning WIPO for action, TACD is concerned that the EC and the US have not been sufficiently supportive of efforts to solve the problems of visually impaired persons. In this regard, we are particularly grateful for the delegations from Brazil, Chile, Nicaragua and Uruguay for their initiative.

What is true for the visually impaired is true for others groups and industries – namely that there are areas where cross-border publishing and innovative services cannot fully develop without greater harmonization and legal certainty regarding *minimum* L&E. However, the case for early action for the visually impaired is particularly clear, given the extensive research already undertaken in this sector, and the fact that it involves a highly vulnerable population.

An agreement on minimum L&E for visually impaired persons will present challenges, but with a modicum of good will by the EC and the US, it should be achievable. One benefit of early action to address the concerns of the visually impaired is that it may provide a concrete model for addressing other areas where there are compelling benefits of harmonization of minimum L&E. But in any event, it should move forward now.

TACD specifically calls upon the EC and US to meet with representative of TACD and World Blind Union to discuss this issue, and to propose, by the WIPO General Assembly in September 2008, a concrete proposal for addressing norm setting for the minimum L&E needed to expand investments in publishing and services for visually impaired persons. This proposal should anticipate a draft treaty on minimum L&E for the visually impaired be presented in the November 2008 SCCR meeting, and discussed further in the 2009 SCCR meetings, with a goal of scheduling a diplomatic conference in early 2010.

Access to Orphan Works

TACD supports work on the problem of access to orphan works, not as a separate agenda item in the SCCR, as proposed by the members of the European Union in the March 2008 SCCR meeting, but as part of the larger SCCR work program on L&E, within the framework set out by Brazil/Chile/Nicaragua/Uruguay.

In terms of the solutions to the problem of access to orphaned works, state practice is quite limited at this point, and it may be fruitful to focus on research and analysis as much as sharing of experiences. The EC and the US should ask WIPO to prepare an experts report on the areas where flexibilities in the enforcement sections of the TRIPS can be used to address the orphan works problem, including in particular, the flexibilities in Article 44.2 of the TRIPS.

Relationship between term extensions and orphan works

TACD also calls attention to the relationship between the problem of access to orphaned works, and the extension of copyright terms. Many of the problems of access to older orphaned works are caused by the extension of copyright terms beyond that required by the Berne, Rome or WCT treaties or the TRIPS agreement. The older the work, the more difficult to locate “owners,” as records become lost or difficult to access, companies change addresses, go bankrupt or change names, and there is no recent history of exploiting the works commercially.

TACD members oppose such extensions of the terms for protected works. While reiterating our opposition to term extensions, TACD notes that in cases where governments do in fact extend terms, the harm to consumers can be limited somewhat by the introduction of limitations and conditions on the works that benefit from such term extensions. In particular, to the extent that any works benefit from term extensions, the extended term should only be given in those cases where the owners of the rights register the works, and pay at least nominal fees, in order to ensure that the works for which right owners are not actively exploiting commercially enter the public domain, and become freely available, without a requirement to obtain a license or pay royalties.

Summary of Action Items for EU and US

1. The EC and the US should eliminate their opposition to the elements of the proposed WIPO SCCR L&E work program that relate to analysis and norm setting.
2. The EC and US are requested to meet with representative of TACD and World Blind Union to discuss a treaty for *minimum* L&E for the visually impaired.
3. The EC and US should submit to the WIPO General Assembly in September 2008, a concrete proposal for or addressing norm setting for the minimum L&E needed to expand investments in publishing and services for visually impaired persons.
4. The EC and the US should propose a draft treaty on minimum L&E for the visually impaired at the November 2008 WIPO SCCR meeting,
5. The EC and the US should ask WIPO to prepare an experts report on the areas where flexibilities in the enforcement sections of the TRIPS can be used to address the orphan

works problem, including in particular, the flexibilities in Article 44.2 of the TRIPS.

6. The EC and the US should not extend the term of copyright or related rights beyond that required by Berne, Rome or WCT treaties or the TRIPS agreement. In cases where such term extensions are used, the extended term should only be given in those cases where the owners of the rights register the works, and pay at least nominal fees, in order to ensure that the works for which right owners are not actively exploiting commercially enter the public domain, and become freely available, without a requirement to obtain a license or pay royalties.