

**FOI Release**  
**Information released under the Freedom of Information Act**

**Title:** WIPO treaty for the blind

**Date of release:** 10 May 2013

**Information request:**

Emails, letters and any other written communications from the last six months, between the Publishers Association or representatives of UK publishers, and the Intellectual Property Office, on the subject of the WIPO treaty for the blind (formally, the "Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities".)

**Information released:**

A copy of the information, which can be disclosed, is attached.

The remainder of the information that you requested is exempt under either sections 27(1)(a)(c) and (d) or 40(2) of the Freedom of Information Act. It is therefore withheld and has been redacted from the attached file.

S.27(1)(a) applies to information, the release of which would be likely to prejudice relations between the UK and other states.

S.27 is a 'qualified' exemption which requires weighing the public interest considerations in favour of release of the information and the public interest considerations in favour of protecting it from disclosure. Having considered the public interest, the IPO's decision is to withhold the information. (The position of the information is indicated within the redacted text.)

Other information which has been redacted is exempt under s.40 (personal information) as it constitutes third party data and the names and contact details of officials whose identities are not in the public domain. S.40(2) provides that personal data is exempt information where disclosure would breach the fair processing principle contained in the Data Protection Act (DPA), where it would be unfair to that person, as we conclude to be so in this instance.

Please note that the supply of information in response to a freedom of information request does not confer an automatic right to re-use the information. Under UK copyright law you can use any information supplied for the purposes of private study and non-commercial research without requiring permission. Similarly, information supplied can also be re-used for the purposes of news reporting. (An exception to this is photographs.)

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<http://www.nationalarchives.gov.uk/doc/open-government-licence/open-government-licence.htm> .

If, however, the copyright is identified as belonging to somebody else, you will need to apply for permission. For information about how to obtain permission from a third party, please go to Intellectual Property Office's website at [www.ipo.gov.uk](http://www.ipo.gov.uk).

[REDACTED]

---

From: [REDACTED]  
Sent: 28 March 2013 14:36  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Possible meeting re VIP Treaty

Thanks [REDACTED] the way this is looking I think the Ministerial meeting on this will be in May but I think that will be useful ahead of the DipCon in June.

We can stay in touch in the run up to the next intercessional on the 18 and 19 of April.

[REDACTED]

Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

-----Original Message-----

From: [REDACTED]  
Sent: 28 March 2013 12:04  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Possible meeting re VIP Treaty

[REDACTED]

Many thanks for this, we'd be delighted to have that discussion. From us it would be me, [REDACTED] and - depending upon how technical-legal it was likely to get - [REDACTED] who continues to track this issue.

Kind regards

[REDACTED]

[REDACTED]

The Publishers Association Limited  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
f: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

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Registration number 3282879; Registered office: 2 Bloomsbury Street, London WC1B 3ST

-----Original Message-----

From: [REDACTED]  
Sent: 28 March 2013 10:01  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: Possible meeting re VIP Treaty

[REDACTED]

Just to let you know that we're going to suggest to the Minister that he meet the PA so that you can discuss the issue of the VIP Treaty with him. If the Minister agrees, who would you look to bring from your side?  
I don't have any idea re timing on this at the moment (or if it will take place) but we're suggesting that the Min office contact you [REDACTED] in the first instance.

Thanks

[REDACTED]  
[REDACTED]

Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

[REDACTED]  
From: [REDACTED] [IPO]  
Sent: 21 March 2013 11:23  
To: [REDACTED] [PA]  
Subject: Re: WIPO

We've not been able to find anyone suitable so it will just be the ipo delegation.  
[REDACTED] sent from BlackBerry.

---

From: [REDACTED]  
To: [REDACTED]  
Sent: Thu Mar 21 11:01:16 2013  
Subject: WIPO

Hello

Where have we got to with the IPO possibly taking someone with outside expertise as part of the UK delegation? I don't think we have been able to source anyone suitably independent, but have a few suggestions on the publisher side if helpful.

[REDACTED]  
[REDACTED]  
[REDACTED]  
The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]

w: [www.publishers.org.uk](http://www.publishers.org.uk) <<http://www.publishers.org.uk/>>

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[REDACTED]  
From: [REDACTED]  
Sent: 05 March 2013 14:52  
To: [REDACTED]  
Subject: WIPO

Hi Both

Just wondered if you'd read this essay:  
<http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf> Its written by Ruth Okediji.  
Perhaps this helps explain why we are all so concerned about the insertion of fair use  
into the Treaty text, in particular, p34.

Best

[REDACTED]  
[REDACTED]  
[REDACTED]  
The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk) <<http://www.publishers.org.uk/>>

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EC4A 4AB

[REDACTED]

---

From: [REDACTED]  
Sent: 27 February 2013 17:39  
To: [REDACTED]  
Subject: Re: WIPO

230?

[REDACTED]  
The Publishers Association  
298 Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

-----  
Sent using BlackBerry

----- Original Message -----

From: [REDACTED]  
To: [REDACTED]  
Sent: Wed Feb 27 17:36:45 2013  
Subject: RE: WIPO

I'm free the same until 4.15

[REDACTED]  
Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

-----Original Message-----

From: [REDACTED]  
Sent: 27 February 2013 17:36  
To: [REDACTED]  
Subject: Re: WIPO

I'll be available in the afternoon from 1.30. What's best for you [REDACTED] ?

----- Original Message -----

From: [REDACTED]  
To: [REDACTED]  
Sent: Wed Feb 27 17:32:12 2013  
Subject: RE: WIPO

That would be useful, thanks.  
Im around in the afternoon. Does that suit you?

[REDACTED]  
The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

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-----Original Message-----

From: [REDACTED]  
Sent: 27 February 2013 17:31  
To: [REDACTED]  
Subject: RE: WIPO

Are you around tomorrow? Perhaps we could give you a call?

[REDACTED]  
Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

-----Original Message-----

From: [REDACTED]  
Sent: 27 February 2013 17:03  
To: [REDACTED]  
Subject: WIPO

Hi Both

[REDACTED] - I hope you've recovered from what sounds like was a bit of a stressful session at WIPO last week!

Perhaps we can all three touch base to compare notes?..in particular to get your views on the 3ST...

Best  
[REDACTED]

[REDACTED]  
[REDACTED]  
The Publishers Association

298 Montague Street

London

WC1B 5BW

t: [REDACTED]

m: [REDACTED]

e: [REDACTED]

w: [www.publishers.org.uk](http://www.publishers.org.uk) <<http://www.publishers.org.uk/>>

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[REDACTED]

---

From: [REDACTED]  
Sent: 05 February 2013 18:33  
To: [REDACTED]  
Subject: Re: Are you around for a coffee on Thursday late morning early afternoon?

Could do 1130 our offices?

[REDACTED]  
The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

-----  
Sent using BlackBerry

----- Original Message -----

From: [REDACTED]  
To: [REDACTED]  
Sent: Tue Feb 05 17:08:33 2013  
Subject: Are you around for a coffee on Thursday late morning early afternoon?

It would be good to have a chat about VIP.

[REDACTED]  
Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

[REDACTED]  
From: [REDACTED]  
Sent: 12 December 2012 08:09  
To: [REDACTED]  
Subject: RE: Publisher position papers - VIP treaty

I understand that [REDACTED] support the concept of mandatory commercial availability as a condition for export under Article D. [S.27]

Whats the UK's view on this?

I know its very tricky, as you say below, but we really do need your support on this. And if we have enough MS speaking up then...

Best  
[REDACTED]

[REDACTED]  
The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

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-----Original Message-----

From: [REDACTED]  
Sent: 11 December 2012 19:23  
To: [REDACTED]  
Subject: Re: Publisher position papers - VIP treaty

I think the bigger problem is the whole idea of commercial availability even being mentioned in the treaty at all. [REDACTED] [S.27]  
[REDACTED] sent from BlackBerry.

----- Original Message -----

From: [REDACTED]  
To: [REDACTED]  
Sent: Tue Dec 11 18:58:29 2012  
Subject: Re: Publisher position papers - VIP treaty

[REDACTED]  
I know that the following wording is being informally discussed, which we would support. It is based on a formulation in Article 32 of the new Canadian law:

New paragraph at the end of Article D:

"If an authorised entity is relying on the exception set out in Article D (1) and (2) infringes copyright by reason only of making a mistake in good faith as to the commercial availability of an accessible format copy, an injunction is the only remedy that the owner of the copyright in the work has against the authorised entity".

This wording would mean that all that publishers could do would be to stop further exportation, and tries to balance commercial availability against ensuring that the authorised entities are not burdened by excessive search requirements.

What are your views on this?

Best

[REDACTED]  
[REDACTED]  
[REDACTED]  
The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

-----  
Sent using BlackBerry

----- Original Message -----  
From: [REDACTED]  
To: [REDACTED]  
Sent: Tue Dec 11 16:09:13 2012  
Subject: RE: Publisher position papers - VIP treaty

[REDACTED]  
Thanks - these are useful. I don't really understand the ask on commercial availability. I can see that the IPA want commercial availability to be in the treaty but for domestic legal provisions the current text says MS may limit to situations where they are not commercially available.

I'm not sure what the IPA want from the text. Do you know?

[REDACTED]  
[REDACTED]  
Copyright and IP Enforcement Directorate  
t: [REDACTED]  
m: [REDACTED]

[REDACTED]

---

From: [REDACTED]  
Sent: 11 December 2012 16:15  
To: [REDACTED]  
Subject: RE: Publisher position papers - VIP treaty

[REDACTED]

The current IPA position (and ours) is that the wording for domestic and international legal provisions on commercial availability should be a "must" rather than a "may" if that makes sense.

Best

[REDACTED]

The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

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-----Original Message-----

From: [REDACTED]  
Sent: 11 December 2012 16:09  
To: [REDACTED]  
Subject: RE: Publisher position papers - VIP treaty

[REDACTED]

Thanks - these are useful. I don't really understand the ask on commercial availability. I can see that the IPA want commercial availability to be in the treaty but for domestic legal provisions the current text says MS may limit to situations where they are not commercially available.

I'm not sure what the IPA want from the text. Do you know?

[REDACTED]

Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

[REDACTED]

---

From: [REDACTED]  
Sent: 11 December 2012 15:51  
To: [REDACTED]  
Subject: Publisher position papers - VIP treaty  
Attachments: IPA position on the three step test December 2012.doc.doc; IPA position on commercial availability December 2012.doc.doc; IPA position on Fair Use December 2012.doc.doc

[REDACTED]

Please see the attached papers.

Let me know if it would be helpful to chat.

[REDACTED]

The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk) <<http://www.publishers.org.uk/>>

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[REDACTED]

---

From: [REDACTED]  
Sent: 11 December 2012 16:15  
To: [REDACTED]  
Subject: RE: Publisher position papers - VIP treaty

[REDACTED]

The current IPA position (and ours) is that the wording for domestic and international legal provisions on commercial availability should be a "must" rather than a "may" if that makes sense.

Best

[REDACTED]

The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]  
w: [www.publishers.org.uk](http://www.publishers.org.uk)

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-----Original Message-----

From: [REDACTED]  
Sent: 11 December 2012 16:09  
To: [REDACTED]  
Subject: RE: Publisher position papers - VIP treaty

[REDACTED]

Thanks - these are useful. I don't really understand the ask on commercial availability. I can see that the IPA want commercial availability to be in the treaty but for domestic legal provisions the current text says MS may limit to situations where they are not commercially available.

I'm not sure what the IPA want from the text. Do you know?

[REDACTED]

Copyright and IP Enforcement Directorate

t: [REDACTED]  
m: [REDACTED]

[REDACTED]

---

From: [REDACTED]  
Sent: 11 December 2012 15:51  
To: [REDACTED]  
Subject: Publisher position papers - VIP treaty  
Attachments: IPA position on the three step test December 2012.doc.doc; IPA position on commercial availability December 2012.doc.doc; IPA position on Fair Use December 2012.doc.doc

[REDACTED]

Please see the attached papers.

Let me know if it would be helpful to chat.

[REDACTED]

[REDACTED]

[REDACTED]

The Publishers Association  
29B Montague Street  
London  
WC1B 5BW

t: [REDACTED]  
m: [REDACTED]  
e: [REDACTED]

w: [www.publishers.org.uk](http://www.publishers.org.uk) <<http://www.publishers.org.uk/>>

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## The Three-Step Test in International Copyright Law

The IPA strongly believes that the three-step test should be referenced in the WIPO instrument on copyright exceptions and limitations for persons with print disabilities as the framework within which ALL exceptions operate, including those designed to benefit persons with print disabilities.

1. The three-step test is firmly established in international and national law.
2. The three-step test is sufficiently flexible to provide for effective exceptions for persons with print disabilities.
3. Failing to acknowledge the applicability of the three-step test in this instrument will complicate future copyright debates.

### 1. The three-step test is well-established in international and national law

The three-step test was conceived in 1967 and introduced in Article 9 (Reproduction Right) of the Berne Convention. Article 13 of the WTO TRIPS Agreement has extended it to all exceptions and limitations of economic rights under copyright. Since then, it has been included in the WCT, the WPPT, and, in June 2012, the Beijing treaty for the protection of audiovisual performances. It has been incorporated verbatim into numerous national laws, EU directives and regulations, free trade agreements and executive orders. It has been applied directly by courts around the world, as well as used to interpret the limits of specific national exceptions. Its application has been expanded into patents and trademarks.

In 2000, two WTO panels confirmed its effectiveness in balancing the interests of rightsholders and consumers at the international level. It is one of the most broadly accepted and deeply embedded principles in international copyright law.

### 2. Providing effective exceptions for persons with print disabilities

Many countries have already provided effective national exceptions benefiting persons with print disabilities under the three-step test. The three-step test leaves ample space for wording that works under different national circumstances. For example, it allows for exceptions under fair dealing or collective licensing solutions, but is equally open to other solutions. It does not require remuneration, but also does not stand in the way where this is considered appropriate.

The balance that the three-step test achieves with its simple yet clear wording demonstrates that effective copyright exceptions can be framed within its limits.



**3. Complicating future copyright debates**

Failing to acknowledge the applicability of the three-step test creates an unhelpful and confusing precedent. A new line of argument would become part of every exception debate: whether a certain purpose or group has similar merit to benefit from a broader exception as persons with print disabilities do. Such a debate is not helpful in the context of copyright, nor necessary, as persons with print disabilities can be served under the three-step test.

**Conclusion:**

The three-step test is a widely adopted and well understood legal tool to determine the limits of copyright exceptions and limitations. It has demonstrated time and again that it can enable fair and balanced solutions. A legal instrument introducing copyright exceptions for the benefit of persons with print disabilities can enable access for persons with print disabilities in an equal manner, while respecting the three-step test.

**Berne Convention:**

**Article 9  
Right of Reproduction**

...  
(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.  
...

**WTO TRIPS:**

**Article 13  
Limitations and Exceptions**

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.

**Beijing AV Treaty:**

**Article 13  
Limitations and Exceptions**

...  
(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.



## Why WIPO Should Not Introduce Fair Use Into the Instrument for Persons with Print Disability

**IPA strongly believes that the print disability instrument should implement its goals through specific copyright limitations and exceptions, rather than through general exceptions with which few Member States have any experience or precedent.**

The current negotiating text, WIPO SCCR25/2 includes a, disputed, reference to fair use/ fair dealing. The purpose of this paper is to set out why publishers, and other creative industries including from countries with fair use provisions, oppose the inclusion of such wording in the current text. In summary:

1. **The introduction of fair use weakens the most important features of the Instrument/treaty.**
2. **Fair use is ambiguous: it is not defined in an international context.**
3. **Fair use slows down access as, without court decisions, uncertainty persists**

### 1. **Weakening the most important features of the instrument**

The relevant provision gives the impression that implementation of the instrument can be accomplished through specific implementation of its model-law type provisions or through a fair use clause. But the exceptions for the benefit of print disabled persons exist within a broader set of obligations. It is unclear how fair use could take this context into account and accomplish the same end result. If there is a desire to extend policy options, why not include many other concepts of law that could equally achieve the desired outcome, such as voluntary and collective licensing?

### 2. **Creating Ambiguity: fair use is not defined in an international context**

Terms such as exceptions and limitations or the three-step-test itself have an internationally recognized meaning. In contrast, fair use is an ambiguous concept at international level. Only three countries use the term in their national laws: the USA, Philippines and Israel. Each of these countries has or will have independent case law to support and interpret fair use. It is critical to note that none of these Member States have been promoting its use at international level. As fair use relies on extensive case law, the implementation in legal systems outside of common law countries raises a number of salient legal questions. This instrument is clearly not the right place to provide the requisite answers. It is by extension, not the right place to raise these critical questions.

### 3. **Fair use slows down access**

Fair use is a circumstantially-applied national exception, applied on the basis of the facts of particular cases, rather than a categorical or per se exception. It would undoubtedly make it overbroad and

**International Publishers Association**

unwieldy for purposes of establishing an efficient regime for authorizing the very specific actions of importation and exportation of accessible format copies. If applied correctly in this context, a fair use exception would slow down and complicate, rather than speed up and simplify, export/import authorizations in individual cases.

**Conclusion:**

The IPA opposes the introduction of "fair use" in this text for the reasons set out above.

The introduction of fair use in this text does not serve the interest of persons with a print disability in rapid improvement of access to accessible format copies of literary works. The reference to fair use contradicts the logic and the careful craftsmanship of the current negotiating instrument. Unlike the three-step-test it is not a well-defined or globally understood concept. Reference to fair use serves political purposes outside of the focus of the instrument, and should therefore be left out.

[www.internationalpublishers.org](http://www.internationalpublishers.org)



## Easy to find, useful for all

### How “Commercial Availability” can work for all

Publishers are increasingly offering accessible books to persons with print disability, including in the developing world. How can the language of the current negotiating text, WIPO SCCR25/2, balance the interest of publishers and users with print disability to learn about commercially available accessible works as they become available, with the interest of authorised entities today in a simple process?

1. Checking for commercial unavailability is a reasonable thing to require, because print disabled users want such commercial services and want to know what is available to them, and publishers want them to know what publisher offerings have particular accessibility features that may already meet their individual needs.
2. Because there is this shared interest, publishers do not insist on an absolute search standard, but on what is reasonable given the resources and discovery tools available at a particular time in a given situation. Only where an Authorised Entity positively knew, or had reasonable grounds to know, that in fact the work in question is available in the particular accessible format through ordinary channels of trade, fulfilling the request by an authorised entity would run counter the spirit of the instrument/treaty which is all about equality: same book, same price, same day.
3. Obtaining information about the accessibility features of commercially available works is now technically possible, thanks to work done by standards organisations, and supported by WIPO, and the on-going close collaboration between the book industry and print disability service providers that aims at mainstreaming works in accessible formats. The publishing industry has begun to deploy these standards and technologies and we have good reasons to assume that they will be a regular feature of commercial e-book retail platforms within three to five years.
4. We understand the concern of authorised entities, in particular in developing countries, that such a search for commercially available works would remain cumbersome. We believe that wording can be found that fully addresses this concern but maintains the principle of priority for commercial works.
5. For these developing countries, and for the transition period in industrialised countries, we would suggest that WIPO provides facilities where discovery tools could be signposted or developed. Such a resource currently does not exist and would be an additional valuable policy measure in itself to improve access for charities and authorised entities looking for accessible works, and in particular for individuals around the world who are looking for accessible works.
6. Such commercial availability should in no way affect the ability of individual persons with print disability to make use of library services. Individual persons

[www.internationalpublishers.org](http://www.internationalpublishers.org)

International Publishers Association

with print disability, like persons without disability, should have the choice to obtain a book from a library or purchase it from a commercial provider.

**Conclusion**

Respect for authors and common sense require the maintenance of the principle of incentivising publishers to create accessible copies, while ensuring that this can be done in a way that creates no undue burden for organisations serving persons with print disability. The instrument itself can provide tools both to facilitate the search, and include wording that ensures that the search requirements remain realistic and practical under different circumstances.

[www.internationalpublishers.org](http://www.internationalpublishers.org)

[REDACTED]

---

From: [REDACTED] [iPO]  
Sent: 23 November 2012 18:41  
To: [REDACTED] [PA]  
Subject: RE: EU has announced it has now a mandate to negotiate a treaty for the blind.

Conclusions adopted.... And it is still friday!

No movement on text so all key issues in square brackets.

Hightlights

Vip conclusion is to agree that the extraordinary ga takes place in December and that the ga evaluate the text as it is and decide whether to convene the dip con in june.

The assumption is that if the ga decides to convene the dipcon then further work by the sccr will be needed in early 2013 to conclude the text.

There is a precedent for this with the broadcast dip con which followed the same pattern.

Also intersessional on broadcasters for three days agreed in the first half of 2013.

Chat soon.

[REDACTED] sent from BlackBerry.

---

From: [REDACTED]  
To: [REDACTED]  
Sent: Fri Nov 23 09:26:52 2012  
Subject: RE: EU has announced it has now a mandate to negotiate a treaty for the blind.

[REDACTED]

Thanks for your reply.

If I've understood correctly, youre asking if we'd be okay with fair use appearing in the text, if there was also a reference to the 3ST. Im afraid the answer is: absolutely not. There is no basis or precedent (as far as I know) for fair use appearing in an international treaty, and there is no clear definition of this term anyway. From the UK's perspective, Id also point to the conclusions of the Hargreaves Review on the feasibility and legality of fair use appearing in UK (and European) law:

"The Review considered whether the more comprehensive American approach to copyright exceptions, based upon the so called Fair Use defence, would be beneficial in the UK. We concluded that importing Fair Use wholesale was unlikely to be legally feasible in Europe." Further, the Review acknowledged that arguments that Fair Use would bring "massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and

1  
[COPY IN FULL BELOW]

[REDACTED]

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From: [REDACTED] [IPO]  
Sent: 23 November 2012 09:32  
To: [REDACTED] [PA]  
Subject: Re: EU has announced it has now a mandate to negotiate a treaty for the blind.

No ms would not have to adopt fair use. The wording would allow a contracting party to implement the exception in its national law using the method it chose.

So for example a ms which already had fair use could maintain or implement a new exception using fair use - provided their fair use exception complied with the three step test.

Equally the eu could continue to implement its exceptions using an exception or fair dealing - but again provided any exception they implemented this way was compliant with the three step test.

The treaty even without this reference would not prevent other ms from implementing via fair use if they decided to do so.

Do you want to chat? Hard to cover on bb.

[REDACTED] sent from BlackBerry.

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From: [REDACTED] [PA]  
To: [REDACTED] [IPO]  
Sent: Fri Nov 23 09:26:52 2012  
Subject: RE: EU has announced it has now a mandate to negotiate a treaty for the blind.

[REDACTED]

Thanks for your reply.

If I've understood correctly, youre asking if we'd be okay with fair use appearing in the text, if there was also a reference to the 3ST. Im afraid the answer is: absolutely not. There is no basis or precedent (as far as I know) for fair use appearing in an international treaty, and there is no clear definition of this term anyway. From the UK's perspective, Id also point to the conclusions of the Hargreaves Review on the feasibility and legality of fair use appearing in UK (and European) law:

"The Review considered whether the more comprehensive American approach to copyright exceptions, based upon the so called Fair Use defence, would be beneficial in the UK. We concluded that importing Fair Use wholesale was unlikely to be legally feasible in Europe." Further, the Review acknowledged that arguments that Fair Use would bring "massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods. These are important arguments." To press the legal feasibility point still further: The advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law.

I wonder therefore how its even being considered by the MS that Fair Use could appear in a Treaty it would have to adopt? Having the 3ST in as well is not a 'safeguard' and actually makes things even more unclear in the law. I also question how we could avoid having discussions about fair use in further treaty negotiations (which would be extremely detrimental to the UK's interests) if we allow it to remain in the current VIP text. This would be even more dangerous when we come on to discuss other areas such as libraries, archives and possibly even education.

Id be grateful for your views on this.

Also, is there anything we can do/information we can provide to support you on the commercial availability point?

Best

[REDACTED]

-----Original Message-----

From: [REDACTED] [iPO]  
Sent: 23 November 2012 08:35  
To: [REDACTED] [PA]  
Subject: RE: EU has announced it has now a mandate to negotiate a treaty for the blind.

[REDACTED]

Just finished EU co-ordination.

Dealing first with your comment re fair use, it is currently in the text alongside a list of other ways in which MS may implement the treaty. It is currently in square brackets as not agreed. The reference to compliance to the three step test is now also in square brackets as not agreed.

Looking at the current reference to fair use/fair dealing it sits within various square brackets but what the clause says is that member states may fulfil their obligations under the treaty through a range of mechanisms including exceptions, limitations, and one of which is fair use and one of which is fair dealing provided they are consistent with the MS international obligations. The reference to the three step test applies here and the three step test is set out with wording that would "confine exceptions and limitations to"..... set out three step test.



So what this is saying is that anyway in which a MS implements this treaty you must comply with your obligations under the three step test.

If the [] on the three step test reference is removed would you still have concerns about the reference to fair use/fair dealing being mentioned provided they subject to the three step test?

As you've picked up commercial availability in particular is proving difficult even in respect of a "may" provision on any domestic exception - that is, MS may confine to cases where not commercially available. There is also a reference to this with regard to authorising export and commercially availability in the importing country but this hasn't been discussed as yet.

I'll be in and out of meetings all day today - and expect to be here until the early hours of tomorrow morning.

[REDACTED]

-----Original Message-----

From: [REDACTED] [PA]

Sent: 22 November 2012 23:42

To: [REDACTED] [IPO]

Subject: RE: EU has announced it has now a mandate to negotiate a treaty for the blind.

[REDACTED]

Thanks for this. Naturally we would expect any Treaty (or international instrument) to uphold the principles set out in the joint rightsholder and publisher position statement I know you are already aware of and agree with (explicit reference to 3ST; commercial availability; authorised entities, compliance with international treaties etc).

We are hearing reports however that, in addition to the above remaining controversial (commercial availability in particular), the notion of fair use has been reintroduced into the discussions - and possibly into the draft text itself. As I'm sure you will appreciate, we are strongly opposed to any reference to fair use appearing in any Treaty. Not only is there absolutely no basis for this concept in UK law (and Hargreaves himself even rejected this concept on the ground that it lacked legal definition in the UK and would be massively disruptive to introduce - which the Government agreed with), we believe such an introduction would be extremely confusing and damaging to UK and other Members states interests. This has been flagged to those leading the EU delegation, but I wanted to make sure that we (as in The PA, rights holders and the IPO) were all on the same page here.

Grateful for your views.

Best



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From:  [IPO]

Sent: 28 November 2012 17:06

To:  [PA]

Subject: Re: EU has announced it has now a mandate to negotiate a treaty for the blind.

[REDACTED]

The Commission now has a mandate to negotiate a binding treaty (to the extent that it falls within the EU's exclusive competence).

I can't remember the exact terms of the mandate, but the Commission has been given a degree of flexibility - ie. the mandate says the treaty should strike a reasonable balance between the needs of visually impaired people and protection of copyright, respect international copyright law, etc but doesn't detail exact provisions that must appear in the text. More specific negotiating objectives and textual proposals, consistent with this general position, are agreed with the Member States in coordination meetings prior to/during WIPO meetings.

The Commission will need a separate authorisation to conclude/sign any treaty, as will the Member States.

[REDACTED]

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From: [REDACTED]

To: [REDACTED]

Cc: [REDACTED]

Sent: Tue Nov 20 16:10:47 2012

Subject: FW: EU has announced it has now a mandate to negotiate a treaty for the blind.

[REDACTED]

Im not sure if Im seeing you tomorrow or not (maybe just your colleagues re: ERR Clauses) but I was wondering if there was anything you (or [REDACTED]) could offer by way of an update on the below - in particular whether there were any caveats or red lines associated with the mandate?

Happy to chat if easier.

Best

[REDACTED]

[REDACTED]

[REDACTED]

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On 19 November 2012, the European Union announced to WIPO's Standing Committee on Copyright and Related Rights (SCCR) that it now had the mandate to "negotiate the conclusion of an instrument including a binding treaty" for the blind.

EUROPEAN UNION

Statement by the European Union and its Member States 25th Session of WIPO Standing Committee on Copyright and Related Rights

Mr Chairman,

The European Union and its Member States would like to thank you and the WIPO Secretariat for the work on exceptions and limitations for visually impaired and print-disabled persons.

Mr Chairman, in the last year we made considerable progress to find a solution to this very specific problem with a very specific objective - to remove barriers which prevent the access of the visually impaired persons to books in accessible formats, including by helping, in a secure manner, the cross-border distribution of such accessible format copies.

At the last session in this Committee we had extensive discussions on the proposal for an international instrument on limitations and exceptions for persons with print disabilities. Based on the comments made by delegations and Regional Groups during the debate the Secretariat prepared the working document SCCR/24/9.

The European Union and its Member States actively engaged in the work of the intersessional meeting organised by WIPO in October. We have found these discussions very useful as they helped to achieve a better understanding of the positions of the delegations and Regional Groups. We look forward to continuing the discussions in a constructive manner.

Our objectives for the 25th session of the SCCR for this item are to concentrate the negotiations on the specific needs of visually impaired and print-disabled persons and to achieve a strong convergence of views on the solutions that we need to deliver. We need to advance as much as possible on the text. Only a focussed and balanced approach will allow the Standing Committee to recommend that the General Assembly convene a Diplomatic Conference in 2013.

Our goal is clear; we want to ensure that visually impaired and print-disabled persons anywhere in the world have the same access to books than any other person. We believe this goal is within reach if we stay on course and target the specific problems we have set ourselves to address while being mindful of the need to have effective protection of the rights of creators.

The EU and its MS are now also in the position to negotiate the conclusion of an instrument, including a binding treaty. They recall their political commitment to address the needs of visually impaired and print-disabled persons in an effective and balanced manner that does not affect the principles of the existing international copyright framework.