

Preliminary questions on the proposal by Brazil, Ecuador and Paraguay, relating to limitations and exceptions: treaty proposed by the World Blind Union (WBU) (document SCCR/18/5) as asked by the European Union during the 21st session of the SCCR (8 - 12 November 2010)

At the 21st session of the SCCR (8-12 November 2010) the European Union and his 27 Member States asked some preliminary questions on the proposal by Brazil, Ecuador and Paraguay, relating to limitations and exceptions: treaty proposed by the World Blind Union (WBU) (document SCCR/18/5). The questions below are structured article by article.

Article 1. Purpose

Questions:

1) Generally the purpose of a treaty measure is explained in the preamble. As the articles of a treaty usually contain operative legal provisions, through which the overall purpose becomes clear, there are generally no articles on the general background, context, purpose or goal. Therefore we would like to learn the reasons why in this case the purpose is contained in Article 1 of the proposed treaty.

2) This deliberate choice to list these principles in an operative provision of the text leads, inter alia, to the following questions and remarks:

“The purpose of this Treaty is to provide the necessary minimum flexibilities in copyright laws that are needed to ensure full and equal access to information and communication for persons who are visually impaired or otherwise disabled in terms of reading copyrighted works”.

In this regard we wonder what is meant by the notion “minimum flexibilities in copyright laws”. Does this relate to exceptions and/or compulsory licenses? Would contracting parties be obliged to introduce such flexibilities in their national legislation? If this implies that contracting parties have to introduce an exception, then how does this relate to the optional character of exceptions, and to the three steps test as contained in the Berne Convention (Article 9.2), the WCT (Article 10), the WPPT (Article 16), the Rome Convention (Article 15) and the TRIPs Agreement (Article 14)?

3) The Article states that the purpose is to ensure “full and equal access to information and communication for persons who are visually impaired or otherwise disabled in terms of reading copyrighted works”? As the purpose is to provide access for persons who are “visually impaired or otherwise disabled in terms of reading copyrighted works”, we presume that by the notion “information and communication” is meant copyrighted works?

Article 2. Nature and Scope of Obligations

- this Article uses the wording “who are visually impaired or have other disabilities in accessing copyrighted works”. In Article 1 the words “visually impaired or otherwise disabled in terms of reading copyrighted works” are used. Is there a specific reason to use different language? Is the purpose to open the scope to all persons with disabilities?

In general, the text of the proposed treaty, the introductory note of 25 May 2009 (doc SCCR/18/5 “Annex”), and the background paper contain ambiguities and conflicting provisions as regards the beneficiaries of the desired exception/s.

Article 3. Relations to Other Agreements

This Article provides under (a) that Contracting Parties agree that the provisions of this Treaty are consistent with obligations set out under those of 7 enumerated treaties and conventions to which they are a party. In this regard we would have the following preliminary questions:

1) We wonder what is meant by the sentence “Contracting Parties shall agree that the provisions of this Treaty are consistent with obligations set out under the following treaties”. Why does this formulation differ from a more “classical” formulation that is e.g. contained in Article 1 of the WCT and Article 1 of the WPPT (which reads as follows: “nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention/ Rome Convention (...)”)?

2) Article 4 appears to provide for a mandatory exception for VIPs. As mentioned in the commentary to Article 1, the question arises how/ to what extent such a provision would relate to the Berne Convention (Article 9.2), the WCT (Article. 10), the WPPT (Article 16), the Rome Convention (Article 15) and the TRIPs Agreement (Article 14), i.e. five of the seven instruments mentioned in this Article.

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

Such a special agreement should comply with the conditions laid down in Article.20 (i.e. only contracting parties to Berne Convention and provisions shall be “not contrary to” the Berne Convention). The three steps test as contained inter alia in Article 9.2 of the Berne Convention, is not mentioned in the proposal. Does this mean that the three steps test does not apply to the exceptions that are introduced on the basis of the proposal?

Article 4. Limitations and exceptions to exclusive rights under copyright

1) In art. 4, under (a) the copyright relevant acts and rights to which the an exception is provided, (e.g. right of reproduction, right of communication to the public, ...) are not clearly mentioned. We wonder what the reason is for this.

2) Under art. 4 (a), 3 we wonder how the precondition that any copies of the work are supplied exclusively to be used by visually impaired persons can be guaranteed. The EU proposal advances the solution of Trusted Intermediaries.

3) Under art. 4 (c) a possibility of commercial rental is provided to for profit-entities, if any of 3 enumerated conditions are met.

The commercial rental is provided as an exclusive right in Articles 7 WCT, 9 WPPT, and 11 TRIPS. One might query how conferring a commercial rental right to for profit entities on the basis of an exception for the benefit of disabled persons would relate to the aforementioned provisions and to the three step test as enshrined in the Bern Convention (Article 9.2), the WCT (Article 10), the WPPT (Article 16), the Rome Convention (Article 15) and the TRIPs Agreement (Article 14). Furthermore, we wonder whether some safeguards against possible abuse by for profit entities should not be foreseen. The word “any” appears to imply that these conditions are alternative and not cumulative. In light of the above, we query whether such an exception would not be too broadly formulated?

Article 12 Orphaned works

The provision under Article 12, (b) provides de facto for an exception for orphaned works, whereas orphaned works can still enjoy copyright protection. During past standing committees, the EU has proposed to tackle the phenomenon of orphaned works in the SCCR, as it concerns a complex subject which merits appropriate consideration. It involves, inter alia, the identification and location of the rightholder and to provide for solutions enhancing legal certainty in case the right holder cannot be found. Would it not be advisable to study and discuss the issue more in depth before advancing particular solutions?