



Law Council  
OF AUSTRALIA

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Dear Ms Daniels

**SCCR meeting re Brazil, Ecuador and Paraguay Treaty Proposed by the World Blind Union**

The Intellectual Property Committee of the Business Law Section of the Law Council of Australia's Business Law Section ("**the Committee**") is pleased to provide this response to your invitation to provide comments on this treaty proposal. In the time available, however, the Committee can make only very limited comments.

The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been considered by the Directors of the Law Council of Australia.

The Committee notes that, in a speech on 11 November 2009, the Director General of WIPO stated that there are more 314 million blind or visually impaired people around the world. The Director General also reported that in developed countries only 5% of published books are converted into formats accessible to the reading impaired. He stated, however, that in India the percentage of published books in accessible formats for the reading impaired was only 0.5%.<sup>1</sup>

The Committee further notes that a joint working group from WIPO and UNESCO made recommendations to promote access to published works by the visually and auditory handicapped as long ago as 1982.

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<sup>1</sup> [http://www.wipo.int/pressroom/en/articles/2009/article\\_0048.html](http://www.wipo.int/pressroom/en/articles/2009/article_0048.html)

Having regard to these matters, it does appear to the Committee that blind or visually impaired persons face real and serious challenges in being able to access published works although a resolution of these challenges appears to be proving difficult.

Turning to the treaty proposal itself, the first thing that strikes the Committee is the very peculiar language of article 3 by which signatories purport to declare that the treaty proposal is consistent with a range of existing international treaties and agreements and is a "special agreement" within the meaning of art. 20 of the Berne Convention.

As a preliminary point, it is not clear to the Committee whether the document could ultimately have this effect especially under the TRIPS Agreement which has a formalised dispute resolution process through which binding interpretations are developed as well as procedures within the World Trade Organization for modifying and developing the operation of particular provisions. An example of the latter is the DOHA Declaration relating to public health issues.<sup>2</sup> (The history of that declaration's adoption and implementation may itself have cautionary indications.)

More importantly, the Committee is not clear that the terms of the treaty proposal are in fact consistent with, in particular, the so-called 3 step test first embodied in art. 9 of the Berne Convention.<sup>3</sup>

The Committee's concern arises in part because the terms of art. 4 in the treaty proposal are vague (even allowing for the fact that it is intended to be treaty language) and potentially, or arguably, inconsistent.

More generally, the Committee notes that art. 4 appears to apply to any kind of "literary and artistic works", not just published works. The considerations in the application of the 3 step test, however, may well be very significantly different according to whether or not a work has been published.

Draft art. 4(a) and 4(c) appear to be intended to establish different rules according to whether or not the activity is undertaken by a "non-profit" or "for profit" entity. The precise relationship between the two paragraphs, however, is not sufficiently clear. For example, draft art. 4(c) is directed at "for profit" entities. Draft art. 4(a), however, is not expressly limited to "non-profit" entities; instead it is limited in terms only to *activities* undertaken on a "non-profit basis". Thus, it could well be argued that a "for profit" entity which engages in a particular relevant activity on a "non-profit" basis would be protected under draft art. 4(a).

Subject to that ambiguity, draft art. 4(a) would seem to permit a "non-profit" entity to engage in reproduction in one (or more) accessible formats on a very

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<sup>2</sup> [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm).

<sup>3</sup> Professors Ginsburg and Gervais appear to have reached different views on this question in submissions to the US Copyright Register and USPTO – compare <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/ginsburg-besek-columbia-law-school.pdf> and <http://www.copyright.gov/docs/sccr/comments/2009/comments-2/daniel-gervais-vanderbilt-university-law-school.pdf>.

large and wide scale, provided it was undertaken on a "non-profit" basis. (Apparently, although this is not clear, only "commercial lending" is excluded.)

This seems to the Committee to go much further than Part VB of the *Copyright Act 1968* which, as you know, permits a much narrower range of reproductions to be made and also largely requires payment of equitable remuneration. While the Committee recognises that our national law does not dictate what could be the content of an international treaty, it nonetheless provides an indication of what was thought to comply with Australia's treaty obligations.

In any event, if sub-paragraphs (a) and (c) are seeking to draw a distinction between activities undertaken by, respectively, "non-profit" entities and "for-profit" entities, it is a false distinction. A copyright owner will be equally, if not even more so, affected by production on a commercial (albeit "non-profit" basis) scale as by a similar scale of production on a "for profit" basis. If such production is to be allowed, therefore, it would seem that it should only be on a basis where equitable remuneration be payable as well as compliance with any other relevant requirements such as the copyright owner's failure to supply the need within a relevant time frame.

Similarly, why is a "for profit" entity permitted to engage in commercial rental of copies in an accessible format (draft art. 4(c)(ii)) but a "non-profit" entity is not (draft art. 4(a))?

Conversely, noting that draft art. 4(b) appears to confer rights of personal use much wider than currently recognised formally under Australian law, it is not clear why art. 4(b), if adopted, would apply only to copies communicated by "non-profits" but not a "for profit" exercising the rights proposed under draft art. 4(c). If such a proposal be adopted, the Committee would think that the controlling question should be the nature of the use made by the particular visually impaired person, not whether material was lawfully supplied by a "non-profit" or a "for-profit".

Next, the Committee has very great difficulty in understanding how it is envisaged that the sub-paragraphs (1) to (3) of draft art. 4(c) are intended to, or would in fact, operate. At a minimum, this appears to require very considerable clarification. It is not clear to the Committee what sub-paragraph (1) is intended to add to, or how it clarifies, the operation of the "normal" exceptions and limitations". As already indicated, at this stage, sub-paragraphs (2) and (3) appear to proceed on a false distinction.

As with the distinction attempted to be drawn between "non-profit" and "for profit" entities, the Committee questions the distinction sought to be drawn in draft art. 4(d) between developed economies and developing countries. The Committee suspects that both matters are factors which should be taken into account, if established by evidence in a particular case, in any country where equitable remuneration is being established. Presumably, what equitable remuneration would be payable should be determined according to the circumstances in the market in the particular country where the proposed power is being exercised.

The introduction of a broad power to make and supply copies in accessible formats subject to payment of equitable remuneration along the lines

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envisaged by draft art. 4(c)(iii) appears at least superficially attractive. As you will appreciate, it goes much wider than the rather limited rights permitted under our law by, for example, sections 135ZP and 135ZS. The Committee does note, however, that the past few years have seen the emergence of alternative ways of exploiting works including, in particular, in the case of published literary works talking books. Talking books are certainly not new. However, the emergence of digital technologies and the internet appear to be leading to considerably greater availability and distribution of talking books. For example, the operator of audible.com claims to have over 65,000 titles in its catalogue. Several thousand new titles appear to be added every few months. Care needs to be taken, therefore, to ensure that incentives for copyright owners to develop or license such activities are not undermined.

The Committee is not in a position to identify whether or not the concerns motivating the treaty proposal outweigh such considerations.

In this connection, the Committee notes that the Appendix to the Paris Act of the Berne Convention seeks to lay down conditions to cater for the special needs of developing countries. The Committee is not familiar with the extent to which the provisions have been deployed. However, as you will be aware, the Paris Act Appendix resulted from the complete failure of the rather more 'liberal' proposals adopted in the Stockholm Act.

The concerns motivating the treaty proposal should be identified and, if draft art. 3 in the treaty proposal can be taken at face value, the areas in which existing treaty obligations fall short need to be clearly identified.

Furthermore, if, draft art. 3 is correct, it is difficult to see why an additional international treaty or special agreement is required. In this regard, the Committee believes that the efforts of WIPO and its member states might be more usefully directed towards developing model guidelines or model laws that would provide guidance to member states as to how the existing limitations and exceptions under present treaty instruments might be applied under national laws in the area of the visually impaired. WIPO itself already has considerable experience with the development of such forms of 'soft law', for example in relation to the use of marks and names on the internet, the licensing of trade marks, famous marks and, in the copyright field, the model copyright law for developing countries.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Ian Pascard, on [03] 9254 2567.

Yours sincerely,



Bill Grant  
**Secretary-General**

26 November 2009