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Universal Copyright Convention

Item 11 of the Provisional Agenda of the Executive Committee of the Berne Union

COPYRIGHT PROBLEMS RAISED BY THE ACCESS BY HANDICAPPED
PERSONS TO PROTECTED WORKS

1. At their sessions in December 1983, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention decided, each on its own behalf, that the states should be invited to put forward any comments they might wish to make on the 'Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by Copyright' which was drawn up by the October 1982 Working Group on the subject convened jointly by Unesco and WIPO.
2. In pursuance of the above decision of the two Committees, their secretariats addressed on 19 March 1984 a circular letter (CPY/313/40) to the States Party to the Berne Convention or to the Universal Copyright Convention requesting them to submit any observations on those Model Provisions.
3. An analysis, made by the two Secretariats, of the observations received from the States appears as Annex I to this document.
4. Furthermore, at their said December 1983 sessions, the two Copyright Committees recommended, each on its own behalf, that the work with respect to the problems

experienced by the handicapped in obtaining access to intellectual works be continued, taking into account, in particular «the different categories of handicapped persons»; «the various aspects concerning use of works by the handicapped (public performances, libraries, etc.)>>; «negotiations between owners of copyright and the handicapped»; and «the possibility of entering into collective agreements». Both Committees requested their respective Secretariats to report to them on the subject at their 1985 sessions.

5. Accordingly, the two Secretariats drew up a study on the above-cited subject with the kind assistance of Ms Wanda Noel, Barrister and Solicitor, Ontario, Canada. This study constitutes Annex II of this document.

ANNEX I

ANALYSIS OF THE OBSERVATIONS, RECEIVED FROM THE STATES, ON THE
MODEL PROVISIONS CONCERNING THE ACCESS BY HANDICAPPED
PERSONS TO THE WORKS PROTECTED BY COPYRIGHT

1. In analysing the observations stated above, it is pertinent to recall that the relevant model provisions provides for two alternative drafts, A and B, of model provisions concerning the access by handicapped persons to the works protected by copyright, - one permitting reproduction in Braille of any published work or authorized translation thereof without the consent of the author and without payment of remuneration, subject to certain conditions; and the other permitting such reproduction against payment of remuneration and subject to the same conditions. They also cover reproduction in large print or by sound recording or broadcasting by means of a radio-reading service of the abovementioned works free or against payment of remuneration but with permission from the competent; authority, subject to similar conditions.

2. In response to circular letter CPY/313/40 of 19 March 1984 addressed by the Secretariats of the Executive Committee of the Berne Union and Intergovernmental Committee of the Universal Copyright Convention to the States party to either of those two conventions, and up to 28 February 1985, the following 11 States put forward observations on the Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by copyright' formulated by the October 1982 Working Group on the subject: Bangladesh, Barbados, Bulgaria, Finland, Hungary, Japan, Mali, Mexico, Netherlands, Portugal and the Union of Soviet Socialist Republics.

3. It is clear from the responses from the States that all of them favour, in principle, the special provisions to afford concession facilitating the access by the handicapped to works protected by copyright., albeit concern for the legitimate interests of the authors was also expressed by some of them and there are certain differences of opinion as regards the two alternative drafts A and B of the Model Provisions, as will be seen in the following paragraphs.

General Comments

4. One State (Hungary) informed that it has no comments to make. Another State (Barbados) commented that «the special provisions ... do not appear to conflict; with Barbados' copyright Act 1982-1». Two States (Japan and the Union of Soviet Socialist Republics) made it known that their copyright legislation covers the question of access by the visually handicapped to works protected by copyright (Article 37 of Japan' s Copyright Law and Article 103 of the Principles of Civil Law of the Union of Soviet Socialist Republics and of the Union Republics details appear in a subsequent paragraph under ("AS REGARD LEGISLATION») .

5. Though it is a known fact that few countries have special provisions in their copyright or other relevant legislation for the benefit of the handicapped

persons, three States (Bulgaria, Netherlands and Portugal) specifically mentioned that there are no such provisions in their legislations. However, Bulgaria also informed that in that country reproduction of works for cultural and educational purpose for the blind is effected freely without the consent of, or payment of remuneration to the author.

6. In their general comments, Japan, Mexico and Netherlands expressed their support for the provisions to give the handicapped ready access to protected works but also underlined that due consideration should be given not to unreasonably prejudice the legitimate interests of the authors.

7. Japan also made out the point that an effective solution of the problem, arising from the claims of the handicapped for additional use of protected works without authors' consent and the authors not; being in favour of such requirement, would be found in a mutual collective agreement between the parties concerned.

8. One State (Mexico) pointed out that paragraph 2 of Article 9 of the Berne Convention (Paris Act) and Article IVbis of the (revised) Universal Copyright Convention contain provisions to serve as bases for the national legislations towards the goal to benefit the handicapped subject to the protection of the legitimate interests of the authors.

9. Two States (Finland and Netherlands) stressed that such model provisions should also cover other handicapped persons than those with visual and aural handicaps, e.g. those whose handicap is due to accident, disease or senility, etc.

As Regards Preference between Alternative Drafts A and B

10. Six States indicated their clear preference for the Alternative 'A' of the draft model provisions. They are: (i) Bangladesh - «the Government of Bangladesh considers the model suggested in Alternative 'A' to be suitable for adoption; (ii) Bulgaria - «... the Bulgarian legislation will take into consideration the provisions of the first (A) alternative ••. »; (iii) Mali - «the two Alternatives have their advantages. However, the Alternative---A' has the advantage of taking much more account of the situation of the handicapped in the developing countries. These countries, in effect, have very limited resources at their disposal»; (iv) Netherlands - «... and taking into account the situation in developing countries, the Netherlands would prefer Alternative 'A'» (cf. Netherlands under next paragraph also); (v) Portugal - «the solution foreseen in the future copyright code of Portugal is the one of non-voluntary license without remuneration. In effect, if the handicapped can use the works of the mind specially conceived for them only against remuneration, the favourable regime from which they should benefit will lose much of its utility», and (vi) the Union of Soviet Socialist Republics - «... Alternative 'A' of the model provisions ... meets the prescribed purposes and creates conditions for access by the blind to works protected by copyright. As regards Alternative 'B' ... it merely waives the obligation to obtain permission ..• from the copyright holder and, therefore, does not entirely solve the problem ... »

11. Some of the responding States drew sharp distinction between reproduction in Braille of published work or authorized translation thereof on the one hand and

the reproduction in large print or by sound recording or broadcasting by means of a radio-reading service on the other hand, in so far as the former will only be for the visually handicapped, as they are unable to read anything in printed form and the latter may also be used by other sections of the public without any possibility of effective control. The provisions permitting the latter could therefore be disadvantageous to authors. These States expressed concern about the guarantee for the right holders' interest against abuse of the reproduction by the latter processes. Among these States, two clearly supported Alternative 'A' for reproduction in Braille and Alternative 'B' for other categories of reproductions envisaged in the provisions. They are: Finland - «As regards the legitimate interests of the authors or publishers, a reproduction of a work in Braille is no serious infringement upon their rights. In our opinion, this can be done without remuneration. On the other hand, reproduction by sound and video recording may affect the authors' and publishers' economic situation. In view of this, Finland is inclined to propose remuneration in case of sound or video reproduction (Alternative B»); Netherlands - «Braille reproductions will only be for the visually handicapped, as they are of course unable to read anything in printed form. This form of reproduction will have no negative effect on the copyright fees received by the authors of works protected by copyright. Nor is it to be expected that this form of literary provision will be used by anyone other than visually handicapped people. Alternative 'A' should therefore be adopted for the reproduction of works in braille.

Where reproductions in large print or via tapes and radio broadcast are concerned, consideration should be given to the fact that they may be used by other sections of the public too. This could be disadvantageous to authors, and safeguards against the practice could never be fully effective, partly because it would be impossible to monitor its extent and intensity. For practical reasons, Alternative 'B' would therefore be preferable for this type of reproduction; this would mean that copyright fees could be collected for authors.»

12. One of these States (Japan) emphasized that further considerations be given to both Alternatives 'A' and 'B' and also underlined the importance of mutual collective agreement between the parties concerned.

«As for the reproduction in large print and the broadcasting by means of reading service, the authors in Japan fear that such uses might be easily extended to normal (non-handicapped) persons and that there would be much danger that their interests might be prejudiced.

Therefore, it would be advisable, for the time being, to leave it to the author's discretion to permit such uses or not. In this sense, further considerations should be given to both Alternatives 'A' and 'B' in this respect.

However, in such a case if one appeals to a mutual collective agreement between the parties concerned with regard to the clearance of copyright, there would be no difficulty for handicapped persons to have access to copyrighted works».

Another State in this group (Mexico) underlined that the main problem is to determine what will be 'adequate guarantee' for the competent authority to be certain that the works (specially reproduced) will be used exclusively for the benefit of the handicapped since the drafts do not mention if such situation will be left for customary regulations in this regard.

As Regards Legislation

13. Two States (Japan and the Union of Soviet Socialist Republics) have, as indicated in paragraph 4 supra, certain provisions in their respective legislations in favour of access by the handicapped to protected works.

Japan states, «In order to maintain an adequate balance between the welfare for the visually handicapped persons and the legitimate interests of the authors, it is permitted under the Article 37 of the Copyright Law for any person, without the consent of the author and without payment of remuneration, to reproduce any published work in braille, and it is also permitted for braille book libraries and other specified establishments acting for the promotion of the "welfare of the blind, without the consent of the author and without payment of remuneration, to reproduce any published works by sound recording exclusively for the purpose of lending to the blind.

However, the publication in large print, the recording service by public libraries in general and the broadcasting by means of a reading service are not permitted by its law and, therefore, such uses are subject to the consent of the author and payment of remuneration.

In Japan, the visually and auditory handicapped persons call for the amendment of the copyright law so that such additional uses could be done without the consent of the author. However, the authors are not always in favour of such requirement.» On its part, the Union of Soviet Socialist Republics cited Article 103 of the principles of Civil Law of the Union of Soviet Socialist Republics and of the Union Republics which provides that the reproduction of published works in characters composed of raised dots for the blind is permitted without the consent of the author and without payment of remuneration, but with obligatory mention of the name of the author whose work is used and of the source from which the work is taken.

14. It is a fact that few countries have at the moment any special provision, in their relevant legislation, for the benefit of the handicapped. Among the States which responded to the circular letter under reference, as many as four indicated that they are going to introduce such provisions in their legislation in the future - two of them (Finland and Mexico) are already considering the revision of their copyright law. These States informed as follows: Bulgaria- «... that the Bulgarian legislation will, in the future, take into consideration the provisions proposed by the Working Group in the first alternative (Le. Alternative 'A') »; Finland - «The copyright legislation is being revised in Finland. According to the present legislation, 'a published literary or musical work may be reproduced in copies printed in Braille and by means of the fixation of sound for use by lending libraries for the blind'. So far, the need for material by different groups of handicapped persons has been met by negotiation. There are plans for including provision also for persons with severe aural or motion handicaps in the new legislation»; Mexico stated that in the draft decree for the revision of the Federal Copyright Law prepared by the Director General, provisions governing such situations in favour of the handicapped are being included; and Portugal - «As for Portugal, inclusion of provision in this direction is foreseen in the future copyright code».

ANNEX II

PROBLEMS EXPERIENCED BY THE HANDICAPPED IN OBTAINING ACCESS TO
PROTECTED WORKS, TAKING INTO ACCOUNT,
IN PARTICULAR, THE DIFFERENT CATEGORIES OF HANDICAPPED PERSONS

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INTRODUCTION

This Study is divided into three parts. Part One discusses the definitional issue referred to by the Committees and in particular examines the meaning of the term "handicapped" to determine if there are additional categories of handicapped persons other than "the visually or auditory handicapped" which could benefit from a special copyright status. The visual and auditory handicapped were identified in a previous study, referred to above. A definition of "handicapped" specially designed for copyright purposes is suggested.

Part Two discusses various aspects concerning the "use" of works by the handicapped. The part identifies the ways in which a handicapped person can use an intellectual work such as by listening to radio reading services, attending public performances in educational institutions and hospitals, by viewing captioned audiovisual works, or by subscribing to various library services providing Braille, large print and talking books. Each use of an intellectual work is examined from the perspective of the copyright right affected. Each use is described, the use is then related to the appropriate copyright right and, finally, the relevant provisions of the international conventions are related to the use identified.

Part Three addresses five alternative methods of providing access to and use of intellectual works by the handicapped. The first is a special provision in national law envisaging limitations on the rights of authors to permit handicapped access to and use of intellectual works. The second is the voluntary exercise of rights either collectively or individually at the time when special media materials or services are produced or provided. Alternatives three and four deal with international instruments: bilateral agreements between countries with respect to exchange of special media materials or services, and multilateral agreements to facilitate the sharing of special media materials or services for the handicapped among facilities around the world. Fifth, and finally, the possibility of either amending or adding a Protocol to the Berne and Universal Copyright Conventions is examined.

PART ONE
MEANING OF THE TERM "HANDICAPPED"

The Report of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee of the Universal Copyright Convention at its December 1983 sessions contains the following pertinent reference in paragraph 104:

All the delegations that took the floor indicated that the studies had related only to the visually handicapped, whereas those with auditory, motor and all other physical handicaps ere faced with difficulties of access to intellectual works¹.

The previous study commissioned by WIPO and UNESCO on the subject centered upon two specific handicaps: those of a visual and auditory nature. As both visual and auditory handicaps have already been addressed there remains the matter of "motor and all other physical handicaps" for discussion. Paragraph 105 of the Report states:

In that connection, the delegations of Australia, Austria, Brazil, Canada, Finland, Hungary, the Netherlands and the United States of America considered it desirable to continue the studies in this field, broadening them to cover all categories of handicapped persons and referring them to all aspects of the problem².

The word handicapped has been defined in a variety of ways. For example, the World Health Organization defines handicap as "the disadvantage that is consequent upon impairment and disability. It represents the social and environmental consequences to the individual stemming from the presence of impairments and disability. Impairment is a generic term that embraces any disturbance of or interference with the normal structure and functioning of the body, including the systems of mental function. Disability is the loss or reduction of functional ability and activity that is consequent upon impairment".

¹ Copyright, Monthly Review of the World Intellectual Property Organization, February 1984, page 64.

² Id.

From this general definition it is possible to create a special definition of "handicap" for copyright purposes. Ideally such a definition should avoid the specific mention of a type of handicap. A definition which is broad enough to include any type of handicap, regardless of its nature, would better serve the needs of the handicapped. At the same time a definition of the term "handicap" must be restrictive enough so as not to unduly limit or restrict the legitimate interests of authors.

In developing a special definition of "handicap" for copyright purposes it is necessary to begin by relating the term "handicap" to the subject-matter of copyright. This relationship yields one of the essential elements of the definition. This concerns the various types of handicap which can impair or prevent access to or use of intellectual works. The qualification of the term "handicap" as only those handicaps which "can impair or prevent access to or use of intellectual works" is necessary. The focus is upon what appropriate copyright provisions can be devised to address the problems of access and use.

Copyright legislation is not an appropriate vehicle to solve non-copyright problems. One example is what is referred to as the "architecturally handicapped". An architectural handicap prevents access to buildings and exterior sites. This access problem can be remedied by different design of new facilities or renovations of existing ones. It cannot be remedied by copyright law. Legislation in the form of building codes, focussing on such things as wheelchair ramps and automatic door openers for the ambulatory handicapped is the appropriate solution.

These physical access problems cannot be solved by copyright legislation. The term "handicap" for copyright purposes is not simply a handicap that impairs or prevents access to intellectual works but, also, a handicap of such a nature that access can be provided by an appropriate copyright provision. A handicap which can be overcome by an appropriate building code is not of concern here. Thus, the term "handicap" for copyright purposes involves two elements. First, the handicap impairs or prevents access to or use of intellectual works. Second, the handicap is of such a nature that access or use can be provided through an appropriate copyright provision.

The types of handicaps which are known to impair or prevent access to intellectual works can be used to test the proposed definition. Many intellectual works are now accessible to the handicapped through special media materials. Printed works can be made accessible to the visually handicapped by a variety of special print such as Braille, large print versions, or by rendering print into aural forms such as talking books and radio reading services. Two tests must be met. First, does the visual handicap impair or prevent access to intellectual works. In the case of a visual handicap print media cannot be used in the normal manner. The first test is met.

The second test is whether an appropriate copyright provision for the benefit of the handicapped could provide access. The production of Braille, large print versions, talking books and radio reading services requires the authorization of the copyright owner. The copyright rights affected in the production of these special media materials and services are wide. Literary and dramatic works are publically performed and broadcast when they are read on radio. Works are converted and adapted when a script of an audiovisual programme

is abridged to create captions. Literary works are reproduced when they are recorded to make a talking book, or a braille or large print version. A captioned audiovisual work is broadcast and can be publicly performed. Translation rights can also be effected. The second test is also met. The handicap is of such a nature that access to and use of intellectual works can be provided through an appropriate copyright provision.

Another example is an auditory handicap. Many audiovisual works which were largely incomprehensible to the auditory handicapped have been made comprehensible through a process known as captioning. This is a process similar to that of sub-titling a motion picture film. The first test to be met is whether an auditory handicap impairs or prevents access to intellectual works. The test is met by a person who cannot hear, or comprehend the audio portion of an audio visual work. The second test is whether provisions can be devised to provide access to the auditory handicapped. This test is also met. Captioning an audiovisual work provides access.

In addition to visual and auditory handicaps specific reference was made by the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright 1 to "motor and all other physical handicaps". These have not been addressed to the writer's knowledge in any of the work done to date with respect to copyright and the handicapped.

Without examples of the type of "motor or other physical handicapped" of concern to the Working Group it is advisable to address the matter of the meaning of "handicap" in a generic way so as to include any type of handicap which, first, prevents or impairs use or access and, second, is of such a nature that access can be provided by an appropriate copyright provision.

For example, a physical handicap which deprives someone of the ability to turn the pages of a book would not meet the two criteria. The first criteria is met: access to an intellectual work is impaired. But the second criteria is not. There is no copyright provision which would enable a person with this type of physical handicap to turn pages. However, should some device be developed which would eliminate the need to turn pages, as for example reproducing the work in another media without pages, then the handicap would be encompassed by the definition. This definitional approach meets the needs of the handicapped.

Two ways in which such a definition could be framed follow:

1. handicap means any disability which impairs or prevents access to an intellectual work protected by copyright and for which it is possible to provide access to that work by an appropriate copyright provision; or
2. handicap means any disability which impairs access to or prevents the use of works protected by copyright and in respect of which a solution by means of copyright law could be devised.

I. Met at Unesco, October 25-27, 1982.

One advantage of this type of definition is that they are not restricted to the special media materials or services available at the time provisions are enacted. They encompasses special media materials and services now known as well as those to be developed at some time in the future. Another advantage is that this generic type of definition will encompass a broad range of handicaps. In addition to the more usual visual and auditory handicaps it includes such physical handicaps as a speech impediment.

For example, Article 18 of the Danish copyright law would be included within the ambit of the proposed type of definition. The Article provides that copies of a literary or musical work can be photographed for educational use in schools for those handicapped with a speech impediment. A speech impediment is considered there to be a physical handicap which impairs access to intellectual works and for which access can be provided by a copyright provision. Both criteria are met. The proposed definition is functional as it meets the needs of the handicapped as they relate to access to intellectual works.

The proposed definition would benefit from close analysis to test, by practical example, whether the definition accomplishes the thrust that is intended. It does encompass the visual and auditory types of handicapped which were discussed in the study. Whether it is also wide enough to encompass the other types of handicap envisaged by some members of the Working Group will be a test of whether the definition has accomplished the purpose for which it is intended.

PART TWO

USE OF WORKS BY THE HANDICAPPED

a) Introduction

Part Two will identify the various ways in which a handicapped person can use an intellectual work. Once identified, the use will be described and related to the exercise of the appropriate copyright right. The possibility of limiting that right within the obligations imposed by the Berne and Universal Copyright conventions will then be discussed in connection with each use. In accordance with the terms of reference, no consideration is given to the right of reproduction.

b) Radio Reading Services

I) Described

Radio reading services offer programming for the reception of blind persons and other individuals who are unable to access print information in the usual manner. The service provides the print handicapped with programming not available to them on commercial radio or television, such as the reading of newspapers, magazines, periodicals and novels. The intention is to encourage participation in the community's cultural life, and to provide recreation and up to the minute information about daily life. The service is usually locally based.

Radio reading services are widely available in the United States of America. The service is much less developed in other countries. In the United States, radio reading services are usually distributed by special receiver, using a multiplexing technique. A radio station frequency has a main channel for the carriage of regular programming but an entirely separate program can also be simultaneously "piggy-backed" on the side band signal. Radio reading services can also be delivered over a main radio channel or through a cable system.

ii) Copyright Right Affected

The provision of radio reading services can involve "broadcasting" and communication to the public by wire. Although in some countries the domestic law does not impose any copyright liability for this kind of service, the laws of other countries do. The United States of America and Canada provide examples of the two situations.

In the United States of America subcarrier transmissions are considered as private point-to-point communications which are not acts requiring the authorization of the copyright owner. In Canada, these same communications are "radio communications" pursuant to the Copyright Act requiring the authorization of the owner of the right. In Canada this requires the operator of a radio reading service to obtain permission to transmit any work protected by copyright on its service.

iii) Universal Copyright Convention¹

This Convention is based upon the principle of national treatment. This principle applies to limitations on exclusive rights as well as to the rights granted by domestic law. Article IV bis of the Universal Copyright Convention explicitly requires Contracting States to provide three basic rights: those of reproduction, broadcasting and public performance without, however, defining the three rights. Of particular import to radio reading services is the requirement to provide a broadcasting right.

The same Article also provides that domestic legislation may make "exceptions" that do not conflict with the "spirit" of the Convention. Any state enacting such "exceptions" must, however, provide "a reasonable degree of effective protection" to the rights affected by such exceptions. Radio reading services may affect the broadcasting right where such a use comes within the scope of broadcasting, and any provision permitting such a service must fall within the parameters of this provision.

The range and scope of exceptions which would not conflict with the "spirit" of the conventions is properly a question of interpretation for the jurisdiction concerned. The introduction of an exception for the benefit of the handicapped would arguably leave the author or other copyright proprietor with a "reasonable degree of effective protection" with respect to the general scope of the right.

1. In discussing both the Universal and Berne Copyright Conventions the latest texts, revised at Paris (1971), will be separately examined to determine whether the provisions of the conventions may be interpreted to meet the needs of the handicapped

For the purposes of analysis it is necessary to distinguish between an exception from, copyright liability and compulsory access. The question of whether the introduction of compulsory access mechanisms is possible under the Universal Copyright Convention is not easily resolved.¹ In the writer's opinion, the better view is that compulsory access is permitted. Many Universal Copyright Convention countries have compulsory licences in their copyright laws which are not licences specifically referred to in the Convention. One pertinent example is the law of the United States of America where there are four compulsory licences none of which are specifically mentioned in the Convention.² Thus, the application of the principle of subsequent practice supports the conclusion that compulsory access is permitted under the Universal Copyright Convention.

iv) Berne Convention for the Protection of Literary and Artistic Works

The primary objective of this Convention is to enhance the protection afforded to literary and artistic works. However, the Convention leaves to national legislations varying degrees of flexibility in providing or not providing, or limiting protection. The Berne Convention in Article II bis provides three cumulative rights attaching to convention works: broadcasting to the public; further communication by wire or rebroadcast of the original broadcast of the work; and communication to the public by loudspeaker or analogous means of the broadcast. The provision of various reading services can involve all of these rights in one form or another.

There is no express mention in the Convention of the possibility of limiting the rights provided in Article II bis by means of an exception. The Convention does permit what are called "minor reservations" with respect to certain rights. What is "minor" has been broadly interpreted in a number of countries to cover such diverse activities as performances at religious ceremonies and on public holidays. The provision of radio reading services specifically designed for the handicapped could be perceived to fall within the broad ambit of the "minor reservations" umbrella. Such a provision can be characterized as "minor" because in size and degree it has a comparatively minimal effect upon the author in that it does not interfere with the normal exploitation of the work.

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1. See pages 14 and 15 of the Previous Study. (available on request)
 2. Compulsory licenses are enacted for cable retransmission, jukeboxes, mechanical reproduction of musical works and public broadcasting.
 3. See Report, Intellectual Property Conference of Stockholm, 1967 s/271, July 7 paragraphs 210 and 211 which state that the minor reservations doctrine applies to the rights of public performance, broadcasting, public recitation, recording, the rights with respect to cinematography provided by Article 14 and translation. The Guide to the Berne Convention, 1978, page 65 refers to the agreement reached at both the Brussels and Stockholm revision conferences concerning the ability of member countries to maintain those special provisions in their national laws which were "minor reservations" to the rights of public performance, broadcasting, public recitation, recording of musical works and cinematographic and translation rights.

The legal mechanisms which can be used to enact "minor reservations" appears not to be restricted and includes the exception as well as various forms of compulsory access. However, the mechanism set out in Article II bis, paragraph (2) requires prior unsuccessful negotiation as a condition precedent to compulsory access¹. This raises the question of whether broadcasting for the benefit of handicapped persons can be considered a minor reservation or, when compulsory access is chosen as the legal mechanism, the special provision is more correctly regarded as a compulsory licence pursuant to Article II bis, paragraph (2). The provision of radio reading services involves the broadcasting of literary works in some jurisdictions. If it is a minor reservation then compulsory access would appear to be permitted without meeting any condition precedent of prior negotiation. If, however, it is a compulsory licence falling within paragraph (2) then prior unsuccessful negotiation would be a condition precedent. This is an important condition when the current nature of radio reading services is considered. The time delays involved in negotiating permission would alter the nature of radio reading services as a source of current information to a source of information weeks or perhaps months old.

A special provision permitting compulsory access for the purpose of the broadcasting of works protected by copyright for the benefit of handicapped persons is, in the writer's opinion, more appropriately characterized as a "minor reservation" rather than a compulsory licence within the ambit of Article II bis (2). This conclusion is reached having regard to the purpose for which paragraph (2) was inserted in the Convention. The licence is intended to cover those situations where authors cannot reach an agreement with broadcasting organizations regulating the use of their works and payment. The intent of the paragraph is to provide a method of striking an equitable balance between the parties. Matters such as agreements with broadcasting organizations refer to commercial broadcasting operations and not to a local radio service serving a small number of handicapped listeners. The latter is a "minor" use whereas commercial broadcasting is not. Therefore, a special provision providing compulsory access for the purpose of the broadcasting of works protected by copyright for the benefit of handicapped persons is more appropriately viewed as a minor reservation and need not be subject to the requirement of prior unsuccessful negotiation set out in Article II bis, paragraph (2).

The limited range of material used by radio reading services and its nature are such that the matter can be regarded in another way. What is it to be broadcast to a limited number of handicapped persons is, essentially, current and topical material. This consists in the main of newspapers, and extracts from periodicals and magazines, as well as news. Article 10 bis (1) provides that national legislation may permit the broadcasting of articles published in newspapers and periodicals where the authors have not expressly reserved such communications. Similarly, Article 2(8) relating to news of the day and Article 2 bis (2) relating to public lectures and addresses, leave it to the countries of the Union to determine the nature and scope of protection.

1. Article II bis (2). The possibility of compulsory broadcasting of works is subject to the condition that negotiation must first be entered into. It is only after negotiations have failed that the possibility of compulsory access arises.
2. This is the law, for example, in Canada but not in the United States. Each member State must determine for itself whether radio reading services are within the scope of the broadcasting right.

v) Conclusion

An, exception and, in the writer's opinion, compulsory access for the provision of radio reading services for the benefit of handicapped persons is permitted under the 1971 texts of the Berne and Universal Copyright Conventions.

c) Public Performance

i) Described

One can envisage a number of situations where the public performance of works protected by copyright might take place for the benefit of the handicapped. These would include educational and vocational institutions, hospitals and recreational facilities where music or plays might be performed, films exhibited or stories read aloud. The viewing of a film in both a captioned and non-captioned form could also be a public performance in many institutional settings. It is neither possible nor necessary to state the infinitive variety of situations where a public performance by, or for the benefit of, handicapped persons could take place. It is necessary, however, to determine whether a limitation can be placed upon the rights of copyright owners to permit such public performances where a need has been demonstrated.

ii) Copyright Right Affected

Among the exclusive rights provided by many copyright laws to an owner of copyright in a work is the right to perform the work, or any substantial part thereof, in public. Whether a performance takes place in public is to a certain extent a question of both fact and law. Law in the sense that the meaning of the words "in public" must be interpreted, and fact in the sense that it must be determined whether the facts of a particular case do or do not fall within this meaning. However, performances in schools or other institutions in most jurisdictions would, in general, be considered a performance in public. Similarly, performance at recreational centres for the handicapped would be considered as public performance.

iii) Universal Copyright Convention

Article IV bis explicitly requires Contracting States to provide the right of public performance. The same article also provides that domestic legislation may make "exceptions" that do not conflict with the "spirit" of the Convention. Any state enacting such "exceptions" must, however, provide "a reasonable degree of effective protection" to the rights affected by such exceptions. The range and scope of exceptions which would not conflict with the "spirit" of the convention is properly a question of interpretation for the jurisdiction concerned.

The fact that some Universal Copyright Convention countries are of the view that exceptions can be introduced is illustrated by the exception in the copyright law of the United States of America with respect of certain performances for the benefit of, inter alia, the handicapped. The introduction of an exception for the benefit of the handicapped would arguably leave the author or other copyright proprietor with a "reasonable degree of effective protection".

In interpreting the scope of the "exceptions" permitted to the rights provided by Article IV bis (I) the 1971 revision conference report states:

... the "spirit" of the Convention also comprehended the convictions expressed in paragraphs 1 and 2 of the Universal Declaration of Human Rights: that everyone has a right "freely to participate in the cultural life of the community" and that everyone equally has a right "to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author".

Special provisions for the benefit of the handicapped would enable those who would not otherwise be able to participate in the cultural life of a community to do so. At the same time the moral and material interests of authors, although limited to some extent, would still be protected.

There is another condition to be met in enacting "exceptions" to the rights provided by Article IV bis: where exceptions are made they must have a logical basis and must not be applied arbitrarily. It is submitted that special provisions for the benefit of the handicapped would also meet this condition.

An alternative to an exception is some form of compulsory access. The matter of whether compulsory access is possible with respect to the rights provided in Article IV bis was examined in detail in the previous study. Some of the more pertinent arguments were reviewed earlier when the broadcasting right, also provided in Article IV bis, was discussed in connection with radio reading services. Based on that analysis the writer is of the view that a compulsory access to intellectual works to permit public performances for the benefit of the handicapped are permitted under the obligations imposed by the Universal Copyright Convention.

iv) Berne Convention for the Protection of Literary and Artistic Works

Article II provides the right of public performance. The right attaches to dramatic, dramatico-musical and musical works with respect to performances in public and any communication to the public of a performance, except by broadcasting. Article II ter provides to authors of literary works the right of public recitation. This latter right in many copyright laws is subsumed within the right of public performance. '

1. Public Law 94-553, Title 17 USC section 110.
2. Pages 14 to 17. (the Study is available on request)
3. Page 8, supra

No express mention of the possibility of limiting the right of public performance by means of an exception is made in the Convention. However, the Convention, does permit what are called "minor reservations" with respect to certain rights 1, one of which is the right of public performance. Limitations which are "minor" are considered permissible. The provision of public performances specifically designed for the handicapped could be perceived to fall within the broad ambit of the "minor reservations" umbrella. Such a provision can be characterized as "minor" because in size or degree it has a comparatively minimal effect upon the author in that it does not interfere with the normal exploitation of the work. The legal mechanisms which can be used to enact "minor reservations" appear not to be restricted and includes the exception as well as various forms of compulsory access.

Public performance of cinematographic works in both captioned and non captioned format is an example of how access can be provided to the handicapped. However, unless the permission of the owner of the copyright in the cinematographic work to be publically performed is obtained an infringement can occur. This is so even where the performance is for the handicapped.

Article 14 bis (1) provides that a cinematographic work is protected as an original work and that the copyright owner enjoys the same rights as other authors of original works. One of these rights is that of public performance. Although the right of public performance itself is subject to the minor reservations doctrine it appears that the minor reservations doctrine does not apply to Article 14 bis. It is submitted that such an interpretation would be at odds with the spirit of the doctrine of minor reservations. Article 14 bis (1) provides film copyright owners with "the same rights as the author of an original work". It can therefore be argued that the enjoyment of the rights should be coupled with the range and scope of exceptions and reservations as are applied to other original works. It would not appear reasonable that cinematographic works are to be accorded a status superior to other works, and particularly those from which they are derived.

v) Conclusion

Under the Universal Copyright Convention both exceptions and compulsory access to permit the public performance of intellectual works for the handicapped can, in the writer's opinion, be provided. Under the Berne Convention, both exceptions and compulsory access to the public performance right are also permitted.

1. See Report, Intellectual Property Conference of Stockholm, 1967, S/271, July 7, 1967 paragraphs 210 and 211 which state that the minor reservations doctrine applies to the rights of public performance, broadcasting, public recitation, recording, the rights with respect to cinematography provided by Article 14 and translation. '

2. See Report, Intellectual Property Conference of Stockholm, S/271, July 7, 1967, paragraphs 210 and 211. See also, The Guide of the Berne Convention page 65.

d) Making Captions

i) Described

Technology has now made it possible for viewers with auditory impairment to fully comprehend audio visual material. Captions are written words which are super-imposed on the audiovisual display, and are synchronized with the visual action to convey the plot to the auditory handicapped viewer. The programme appears as a complete entity. The visual effect is closely analogous to the subtitling of motion picture films. Captioned television programmes can be an important vehicle in meeting the educational, information and cultural needs of those with an auditory handicap.

Captioning involves converting the dialogue or commentary of an audiovisual programme into condensed language. The process requires compressing, editing and abridging the spoken material. The purpose is to convey the thrust of the perceived visual action to enable an auditorially impaired audience to more fully comprehend the mix of visuals and sound. The captions take into account the constraints of time imposed by the pace of the visual action and the space available in the visual display. The result of this process are written captions synchronized with the visual action. Usually, the captions are embodied in a "floppy disc" which is separate and distinct from the motion picture film or video tape. The captions are used in conjunction with the audiovisual material to effect a television broadcast. Captions, in closed format, are not perceivable without the use of a decoding device attached to the particular viewing equipment which deciphers what would otherwise be invisible captions. Open captions can be seen by all viewers.

The captioning of audiovisual works for use of the hearing impaired is not as developed as the services provided to the visually handicapped, nor is the role model the same. As was the case with radio reading services, this type of service is highly developed in the United States where the National Captioning Institute prepares captions of popular television programming in the "closed" format on a commercial basis. Permission to make the captions is sought and paid for. Use of the captions is also paid for. In Canada, a National Captioning Centre has been established which provides captioning services to the handicapped. This centre is not commercially based but publicly funded.

ii) Copyright Right Affected

The making of captions involves what can be generally described as the right of adaptation. Authors in most copyright laws are provided with a right to authorize the adaptation of their work. In the case of captions the authorization of the owner of the copyright in a film is required before captions can be made. Permission may also be required from the owner of the copyright in any novel or script upon which the film is based. Thus the making of captions is regarded as an adaptation of the captioned film and of any novel or script from which the film is derived. Making captions can therefore require several separate permissions.

iii) Universal Copyright Convention

The two previous uses of intellectual works by the handicapped involved the specific rights of broadcasting and public performance set out in Article IV

bis of the Convention. In the case of captions no specific right of adaptation is set out. Reference to the general principle set out in Article I is therefore required.

Article I requires that each Contracting State provide "adequate and effective protection of the rights of authors and other copyright proprietors". The meaning of "adequate and effective protection" is not defined and the phrase has been variously interpreted by Member States. Similarly, limitations of the rights of authors also vary according to particular interpretations.

At the national level exception to rights, other than those addressed in Article IV bis, appear to be permissible. The guiding principle is that of providing "adequate and effective protection". Special provisions for the benefit of the handicapped would enable those who would not otherwise be able to participate in the cultural life of a community to do so. At the same time, the moral and material interests of authors, although limited to some extent, would still be protected. Ultimately, what is "adequate and effective protection" is a matter which each jurisdiction must determine for itself.

The limitations of rights by compulsory access was addressed in the records of the revision conference of 1971 but only with respect to those rights provided by Article IV bis. The previous study concluded that the answer to the question of whether compulsory access could be provided to the rights not mentioned in Article IV bis was not free from doubt. The arguments on both sides of the question are set out in that study. In the final analysis the answer must remain a matter which each Contracting State must determine for itself.

iv) Berne Convention for the Protection of Literary and Artistic Works

The Convention provides the adaptation and related rights in five separate articles. Article 2(3) provides protection for derivative works, in this case adaptations, as original works. Article 12 provides for a general adaptation right which accords authors of literary or artistic works the right to authorize the adaptation of their work. Article 14(1) provides a specific right of cinematographic adaptation to the author of a pre-existing literary or artistic work. Article 14(2) also protects the adaptation rights of authors of literary or artistic works against an adaptation from a cinematographic work, without prejudice to the author of the cinematographic production. Finally, Article 14 bis (1) provides that a cinematographic work is protected as an original work.

It has been previously concluded that the minor reservations doctrine would permit the enactment of special provisions for the benefit of the handicapped. The minor reservations doctrine applies to Article 14, but not to Article 14 bis. It is submitted that to apply the minor reservations doctrine to the making of an adaptation goes beyond a reservation which is "minor" in nature. Just as the spirit of the minor reservations doctrine can logically and equitably permit the public performance of captions, that same spirit cannot either in logic or equity be interpreted to permit the making of those same captions.

1. Pages 16 and 17. (the Study is available on request)

The rights of adaptation are set out, in general, in Article 12 and, in particular, with respect to cinematographic works in Article 14. The minor reservations doctrine applies to Article 14 but not to Article 12. This results in an inference that adaptation rights were not intended to be subject to minor reservations. If this had been intended then Article 12 would have been made subject to the minor reservations doctrine. This view coincides with the practice currently in place in North America where permission to make captions is sought, and where copyright rights are asserted and enforced in the captions themselves. ~

v) Conclusion

Pursuant to the obligations imposed by the Berne Convention the making of captions would not be permitted within the ambit of the minor reservation doctrine. Pursuant to the Universal Copyright Convention an exception to permit the making of captions could be possible if a Contracting State was of the view that "adequate and effective protection" was provided. The matter of compulsory access is one which must be determined by each Contracting State.

e) libraries

i) Described

Traditionally, libraries have played a leading role in the production of material for the handicapped. Library service to the handicapped is usually provided without charge and limited resources often do not permit meeting the demand for the service. Libraries provide various kinds of services to handicapped users. Blind students and working persons require texts and other printed material in usable form. Libraries supply recorded and braille books through circulating and, in some cases, public libraries. The latter meets a need which exists in every community by bringing printed matter to many people who are not blind but are unable to read because of some physical handicap or failing vision.

The traditional role of specialized libraries as the main producers and suppliers of the special media materials is changing. In North America many public libraries now acquire, rather than produce, special media materials for loan to their handicapped users. The materials are available from specialized libraries as well as from commercial sources. There is a growing phenomena of specialized organizations whose purpose is to produce special media materials. The Library of Congress in the United States of America and the Canadian National Institute for the Blind are examples of this phenomena. These organizations produce special media materials and loan them to other libraries. Such organizations may operate their own library services but they also have the additional role of supplier to other non-producing libraries.

Within the specialized libraries themselves there is a growing trend towards the employment of professional librarians. New and higher standards of cataloguing and classification have been adopted. However, further work in this important area is required. No one knows what material is available in special format throughout the world. This is a waste of resources and, for the potential user, a barrier to education and therefore culture. A UNESCO representative in a policy meeting convened by the International Federation of Library Associations

on "Copyright and Library Materials for the Handicapped" in Montreal in August 1982, expressed a willingness on the part of UNESCO to consider assisting in establishing a series of national union catalogues of special format materials. Such catalogues would go a long way to providing already scarce resources to as many users as possible.

Networks of services have been established and both products and services are provided on a standardized basis, Specialized libraries are still involved in large scale production of special media materials, international loans and exchanges, and the provisions of other special services. These developments will result in better service to the handicapped while at the same time emphasizing the problems copyright law raises in the operations of these libraries because of the large scale production and the growing practice of international exchange of special media materials.

ii) Copyright Right Affected

Libraries provide a variety of services to their handicapped patrons. In general, libraries produce braille, large print and talking books. Each of these involve the right of reproduction. The terms of reference of this study specifically excluded consideration of the right of reproduction as full examination of that right was contained in the previous study]. Reference can be made to that study for an analysis of the two copyright conventions with respect to the right of reproduction.

f) Conclusion

Any decision as to whether it is possible to enact special provisions permitting the use of copyright material in national laws is a matter for each country to determine in the light, inter alia, of its international convention obligations. Interpretation of the copyright conventions of which a State is a member is a matter upon which each jurisdiction must reach its own conclusions. In succeeding revisions of both conventions provisions for the social and cultural needs of Member States have been made. These have been introduced for varying reasons and purposes. Such provisions, while limiting author's rights, and their exercise, are deemed necessary to permit national goals to be achieved.

Copyright legislation at the national level reflects a compromise amongst many considerations, including meeting educational, information and cultural objectives. At the international level, compromise has been reached as a result of seeking to accommodate differing legal systems, while also taking into account the educational, informational and cultural needs expressed by Member States. Thus, the conventions have addressed the extent to which it may be possible to limit rights. In the main, however, the kinds and scope of limitations on the exclusive rights of copyright owners has been left to national legislations to permit national considerations to be taken into account. Notably, both conventions and many national provisions have provided exceptions or the possibility of compulsory access with respect to works, and the rights attaching to those works.

PART THREE

ALTERNATIVE WAYS OF PROVIDING ACCESS TO INTELLECTUAL WORKS

a) Introduction

For the purposes of analysis, five alternative ways of providing access to and use of intellectual works for handicapped persons are identified. The first two alternatives concern the domestic production of special media materials and services. The last three concern the international exchange of those same materials and services.

The first alternative is a special provision for the benefit of the handicapped in national copyright law. This method was thoroughly examined in the previous study. The second alternative is the voluntary exercise of rights by copyright owners either individually or by the negotiation of collective agreements between author's associations and either the handicapped or those producing materials or services for their benefit.

The third way of providing the handicapped with access to intellectual works concerns the introduction of the doctrine of exhaustion. A fourth is the conclusion of bilateral agreements between two countries which permit the free exchange of special media materials and services between those two countries.

This kind of bilateral arrangement could be extremely important to the handicapped where one of the countries involved was a major producer of special media materials or services, such as the United States of America. The discussion also includes reference to multilateral agreements involving the same considerations but with the numerical difference of encompassing more than two countries. This involves a separate international convention dealing with the international exchange of special media materials and services for the handicapped. The fifth and final alternative involves amending, or adding a Protocol to, the two copyright conventions to permit the free circulation of special media materials and services amongst Contracting States.

The text which follows will use the phrase "special media materials and services". Wherever this phrase is used, it refers to the various materials and services which can provide the handicapped with access to intellectual works. "Materials" includes such things as braille, large print and talking books and a floppy disc containing captions. "Services" includes such things as broadcasts, radio reading services and public performances of intellectual works. Although most current circulation and distribution problems relate to physical objects the problems with respect to such things as broadcasting services will become more problematic as technology develops. The following discussion which addresses these problems is applicable to "services" as well as "materials".

b) Special Provisions in National Laws

The previous study discussed, in great detail, the possibility of enacting special provisions in national copyright laws to permit the use of protected works in special media materials and services for the benefit of the handicapped. A special provision in these terms can be defined as a statutory consent to do

what would otherwise be illegal. In sociological terms a special provision can be defined as an attempt to balance the interest of the creator in exploiting and controlling his creation with the interest of a particular segment of the public in having access to the products of the intellect. At the national level copyright legislation can be a barrier to both the production and international distribution of special media materials.

Alternative legislative action at the national level to ease or eliminate access problems for the handicapped is possible. Such action could involve an exception to copyright protection permitting the use of works without either the authorization of, or payment to, the owner of the copyright. Another is the various forms of compulsory access which permits access without the authorization of the copyright owner for specified purposes but requires payment for that use.

Whether the Berne and Universal Copyright Conventions can be interpreted to permit the enactment of these kinds of special provisions in domestic copyright laws is a matter of interpretation of the copyright conventions for the country concerned.

Once a country determines that it is possible to enact a special provision within the ambit of the obligations imposed by the two copyright conventions a decision must then be made by national legislators to do so. The factors involved in making this decision are many. What one country deems to be a justifiable limitation on the rights of authors in the public interest may not be so regarded in another country. A list of common socially desirable objectives benefitting from special provisions in Berne and Universal Copyright Convention countries includes provisions for charitable, political, social, juridical, legislative and religious purposes.

The activities deemed socially desirable and for which special provisions exist include a wide variety of activities. It is submitted that special provisions dealing with the production of material or services for the benefit of the handicapped can be included with logical consistency within any sampling or listing of limitations on copyright categorized as achieving a socially desirable objective. Charitable or religious objectives are certainly no less socially desirable or necessary than the production of special media materials or services for the handicapped. The definition of what is socially desirable and therefore meriting a particular provision in a copyright law is a matter which must, in the final analysis, be determined by the jurisdictions concerned. That determination is not of a legal nature but is subjective in character.

Once it has been decided that a particular provision for the benefit of the handicapped should be legislated it remains to be determined how the provision will be framed. The choice of legal mechanisms is a matter for the country concerned. Various legal mechanisms have been utilized in legislating these special provisions including the exception, compulsory access, arbitration, compulsory purchases and collectives: Each of these mechanisms is of varying utility to the handicapped. In general, the greater the limitation on the right the greater the freedom granted by the special provision.

Canada is a recent example of a state member of both the Berne 1 and the Universal Copyright Conventions 2 interpreting its convention obligations so as to permit the enacting of an exception for the benefit of the handicapped. In May of 1984 the Canadian government announced its intention to include an exception from copyright protection for the handicapped 3. Many other Convention countries also have special provisions in their copyright laws utilizing a variety of mechanisms 4. Canada has interpreted its obligations under the two copyright conventions to permit the enactment of limitations upon the rights of copyright owners. Canada has also determined that the access needs of handicapped persons are such as to justify a limitation on copyright rights in the public interest. The legal mechanism chosen was that of the exception. Other convention countries have enacted different provisions in meeting the needs of its handicapped. Ultimately the decision as to whether it is possible to enact a special provision, whether such a provision should be enacted, and how, are matters to be determined at the national level, in the absence of any international accord.

c) Voluntary Exercise of Rights

A second method of providing access to handicapped users is through individual negotiation. Individual negotiations are not satisfactory primarily because of time delays in obtaining permission to use the work. This system is used in those countries which do not have any special provisions concerning use by the handicapped in their copyright laws. The domestic law prohibits, usually indirectly, the production of special media materials or services without the authorization of the copyright owner. In order to produce these materials or services it is necessary to obtain the permission of the copyright owner. Permission is often subject to various monetary, territorial and quantitative restrictions. It is these restrictions which the handicapped seek to avoid.

Individual copyright rights can also be exercised collectively. The term "collective" defines an organization to which copyright owners assign or licence all or some part of their rights for the purpose of exploitation and enforcement. In the case of the handicapped the right to produce various kinds of special media materials could be assigned or licensed to a collective to permit the production of special media materials and services.

1. At 1928, Rome.

2. At 1952, Geneva.

3. From Gutenberg to Telidon: A White Paper on Copyright, Government of Canada, May 4, 1984, page 45.

4. See Françoise Hebert and Wanda Noel, Copyright and Library Materials for the handicapped, K.G. Saur, Munchen, New York, London, Paris, 1982, pages 23 to 27 and 72 to 78.

Collective exercise of rights can have advantages for both owners and users. Collective administration of copyright can ensure that copyright owners secure equitable revenues for the use of their works without unnecessarily restricting user's access to them. In this sense it may be in the interests of all parties to provide cooperative mechanisms for the enforcement of rights, collection of fees and the conditions governing access to intellectual works.

One essential element of the collective exercise of rights is that the payment of fees is required. The concept involves an agreement between copyright owners and handicapped users. In return for immediate use of a collective's repertoire of works handicapped users would be required to pay fees for the privilege. While the fees would be subject to negotiations, payment would still be required.

Another element involved in the collective approach is the necessity of determining whether the work needed by a handicapped user is within the collective's repertoire. If the owner of copyright is not a member of the collective then individual negotiations would have to be resorted to. A collective is only as viable as the number of members participating in it 1.

On the copyright owners' side of the agreement authors associations, publisher's associations, poets, film producers and periodical writers would have to be involved. On the handicapped side, producers of special media materials and services together with handicapped associations would be required to agree to negotiate both the fees and conditions of access to the collective's repertoire. The notion of a collective approach to handicapped access involves a number of obstacles. These include the sheer number of individuals involved in this kind of agreement. the dissention within the ranks on both sides as to whether fees should be paid at all, and the quantum of fees assuming handicapped associations are willing to pay.

The Report adopted by the Intergovernmental Committee of the Universal Copyright Convention, Fifth Session states:

The delegations of Finland, the Netherlands, the United Kingdom and the United States of America considered that exceptions to copyright were not necessary, as negotiations on a voluntary basis between the handicapped and the representatives of authors generally produced satisfactory solutions The delegation of the United States of America, for its part, considered that. .. the problems facing the handicapped did not stem mainly from copyright but rather from a lack of financial means, ignorance of existing provisions and the absence of appropriate equipment. 2

1. The non-formalities provisions of the Berne Convention prevent a special provision which requires the joining of a collective in order to exercise rights.

2. As reported in the Copyright Bulletin, UNESCO, Copyright Review, Volume XVIII No.1, 1984, page 34, paragraph 104.

Although scarce resources to meet the multi-faceted needs of the handicapped is a chronic problem throughout the world, it is respectfully submitted that negotiations on a voluntary basis cannot produce satisfactory solutions. The production of even one special media material or service requires the permission of the copyright owner. Many owners, quite correctly, feel that they are under no social obligation to give their property away and that this kind of social obligation is more appropriately met by society as a whole. In short, owners think it is unfair to isolate them for a compulsory charitable donation of property. Generally, copyright owners readily grant permission, often without charge. However, there are refusals. There are also lengthy delays in obtaining permission and conditions attached to the permission, such as restrictions on the extent of the use and the distribution of the materials and services. From the handicapped users perspective, the obtaining of permission is an expensive and frustrating exercise.

It is this frustration which has given rise to the work of UNESCO and WIPO with respect to the need of the handicapped for access to works protected by copyright. The Canadian experience is a good illustration of the point that the problems go beyond money and equipment. This is not to say that Canadian handicapped persons have more than enough money and equipment at their disposal. By no means, more would always be welcome. The fact remains, however, that in Canada, the emphasis has been placed on the delays in obtaining, and the conditions attached to, permission to produce special media materials and services.

Through years of negotiation leading up to a revision of the Canadian copyright law it was impossible to reach a consensus even on the matter of remuneration. The Canadian experience is repeated in many other countries. The matter consists of two irreconcilable rights in opposition to each other. The right of the copyright owner to control and be paid for the use of his work and the right of handicapped persons to fully participate in society. A compromise will suit neither copyright owners or the handicapped. In this kind of situation the imposition of a legislative reconciliation may be the only alternative.

d) Introducing Exhaustion

The previous section was concerned with the production of special media materials and services. This section assumes that the materials or services have been legally produced with the permission of the copyright owner or pursuant to an exception or compulsory license. The question is what can be done with these special media materials or services outside the country of production.

Consider an example. Assume that a copyright owner permits 100 copies of a mathematic text book to be transcribed by the Library of Congress for use by those eligible for the service provided by the Library 1, Can some of those 100 copies be sent to Canada for use by handicapped persons there? Can additional

1. This means that the handicapped users must meet the Standards and Guidelines of Service for the Library of Congress Network of Libraries for the Blind and Physically Handicapped which contains a detailed certification procedure.

copies be made for sending to Canada? If Canada gets one copy can others be made from it? For the purposes of discussion, the text will address only special media "materials ". The discussion, however, is equally applicable to special media "services".

To answer these questions reference must be made to the original permission, from the copyright owner and the copyright law of the country into which the copy is being imported. In this example the original permission restricted use to the United States and the number of copies to 100. This means that use outside the United States of America is prohibited by the production contract. So too is any reproduction beyond 100 copies.

In this example, the act of importing one, or some of the 100 copies legally made in the United States would infringe the importation prohibition in the Canadian copyright law. In Canada, copyright legislation provides rights to authors to exclude importation. Similar provisions exist in most copyright laws. National copyright laws vary in their substance. Typically, copyright legislation, which protects indigenous industries prohibits importation. Such a prohibition usually applies to copies unlawfully printed abroad, the so-called "pirated" copies which are made without the authority of the copyright owner. It can also apply to copies which, while lawfully made in the jurisdiction in which they are made, are infringing in the country of importation. Special media materials, in the example, fall into the category of being lawfully made in the United States but which are infringing in Canada.

The divisibility of markets has prompted consideration of introducing the doctrine of exhaustion in the copyright laws of certain countries. Essentially, the doctrine of exhaustion says that the right of a copyright owner is "exhausted" after it is exercised. Once a copyright owner puts an article protected by copyright on any market he has used up his right to do so: the right is said to be "exhausted". A user is then free to do what he wishes with the copy, including importing it into another country, without interference from the owner of the copyright in the country of importation. This means that with exhaustion the copy can be freely imported from one market to another where exhaustion applies, regardless of any contractual arrangements made with respect to territorial markets and distribution.

Applying the doctrine of exhaustion to special media materials would remove the ability of copyright owners to control the international circulation of those materials. To return to our example, one, some or even all of the 100 copies produced with the permission of the copyright owner in the United States of America could be imported into Canada without infringement.

Applying exhaustion to special media materials only facilitates the international exchange of those materials. The doctrine of exhaustion does not permit the production of special media materials. Exhaustion applies only to copies already legally produced. For example, copies produced with the permission of the copyright owner or pursuant to a special provision. The production

of special media materials would still require a special provision in the national copyright law or permission from the copyright owner. Copies made without permission or statutory authorization are usually the subject of an importation barrier in copyright legislation. Because pirated copies are the result of an illegal act it would be difficult to argue that the handicapped should be able to benefit from the wrong of an infringer. For this reason the application of exhaustion to illegally made copies of special media materials would be an unjustifiable limitation on the rights of authors.

The application of exhaustion removes any importation barrier to the free circulation of special materials. The introduction of exhaustion in the copyright law of the country into which the importation of special media materials is desired permits entry of the copies into that country. Therefore, if the consuming countries enact the doctrine of exhaustion with respect to special media materials, they will remove any access barrier to those materials, provided of course, that legally produced copies are available.

It may be argued that any substantive variance in copyright protection with respect to importation is a function of the perceived role of copyright, and of defining the proper scope of the exclusive rights of copyright owners, in each jurisdiction. It is often said that copyright law is a balancing of the interests of two groups: of creators in exploiting their works, and of the public in having access to products of the intellect. Accordingly, a creator is granted rights to enable the exploitation of his work but those rights are subject to a variety of restrictions and limitations. The appropriate scope of copyright rights is a matter to be determined by each country, having regard to its own interests. Limiting the rights of authors so as to remove the right to control the international circulation of special media materials by applying exhaustion to them could be addressed in terms of a socially desirable limitation in the public interest. In determining whether to protect an author or whether to introduce exhaustion to benefit the handicapped, national legislators must consider the effects on both groups.

The substance of the provisions for importation in any domestic copyright legislation is determined by a variety of factors, such as economic status, the social conscience of legislators, and biases in favour of creator or handicapped. Once the issue is so defined, the substance of the law is simply a matter of legislative implementation of the chosen bias. The existence of a particular bias is a matter dictated by national concerns.

Finally, it should be noted in this context that the Florence Agreement¹ is of no material assistance in solving the problem of the free circulation of special media materials around the world. That Agreement is concerned with the reduction of tariffs. It is not concerned with non-tariff barriers such as the importation prohibitions contained in the majority of the world's copyright laws. Moreover, Article VI specifically provides that the agreement does not modify or effect, the laws and regulations of any Contracting State, or any of its international conventions, with respect to copyright.

1. Agreement on the Importation of Educational, Scientific and Cultural Materials, UNESCO, 1952.

e) A New International Agreement

The introduction of exhaustion is an action which can be taken by a nation unilaterally. The viability of such a unilateral action will depend upon the availability of legally produced copies outside that country. In this sense, the introduction of the doctrine of exhaustion by anyone country solves only the international circulation half of the problem. The problem of the actual production of the special media materials still remains.

One possible way to solve both the production and distribution problems would be to create an entirely new international instrument addressing both matters. Such a "convention" would provide that the Contracting States permit the production of special media materials and services within their borders in accordance with the terms set out and, in addition, permit the free circulation of those materials and services amongst Contracting States. Additional matters covering costs of production and appropriate safeguards for creators would have to be carefully developed to achieve an acceptable balance between the competing interests.

In this context it is of the utmost importance to note that there are only a few producing countries, the most notable of which is the United States of America. To develop a successful international system of the kind envisaged will require the cooperation and good will of the producing countries in particular. The United States should be complimented for its sensitivity to the needs of its own handicapped citizens. The services provided by the Library of Congress set a standard for the world. This sensitivity could be shared around the world provided the costs of the system are borne by those wishing to benefit from it.

In this context, the Report of the Intergovernmental Committee of the Universal Copyright Convention with respect to its 1983 meeting, in paragraph 104, states that the delegation of the United States of America noted "the importance of the role of libraries and the necessity to facilitate sharing materials for the handicapped among libraries in developed and developing countries"¹. It is difficult to argue with the position of the handicapped when they seek to avoid the wasting of resources when the same book has to be recorded or transcribed into braille more than once. Those concerned may wish to consider this approach.

Finally, apart from an international initiative the notion of a new and separate international instrument could also be pursued on a bilateral basis. Any two countries can enter into an agreement to provide for the production and distribution of special media materials between themselves.

f) Conclusion

The problem of access to and use of intellectual works by the handicapped consists of two elements. The first deals with production of special media materials and services. This is a matter of primarily domestic concern which can be addressed by means of an exception or a compulsory access provision in domestic copyright law. Model provisions have already been developed and debated under the auspices of WIPO and UNESCO. The second problem concerns the distribution of special media materials and services. The example used determined that free international circulation of special media materials is prohibited because of importation provisions contained in the copyright laws of most countries. One remedy would be to remove those importation provisions by introducing exhaustion. This would permit free circulation of special media materials and services amongst those countries with exhaustion.

Another solution to the dual problem of production and distribution is the suggestion to formulate an entirely new international instrument which would permit production of special media materials and services in member states, and the distribution of those materials and services amongst member states without restriction. The conditions under which production could take place, and the ultimate distribution of the materials and services so produced within the Contracting States, would require a thorough examination. A detailed proposal could be developed as a result of that examination. The proposal could then be presented to the Committees for consideration. This solution is recommended on the ground that it would solve both production and distribution problems by providing a legal mechanism for sharing materials and services for the handicapped around the world.