



Publishers' Association of South Africa: Position on an International Copyright Treaty to Improve Access for Persons with Print Disabilities

1. Background

From 18 to 28 June 2013 Member States of the World Intellectual Property Organization (WIPO) will be meeting in Marrakesh, Morocco, at a Diplomatic Conference to negotiate an international copyright treaty to improve access to literary works (books, e-books, etc.) for persons who are blind or have other print disabilities.

The outcome will be a treaty that upon ratification requires states to introduce national copyright exceptions which, for the first time, will enable the international distribution of copies of works made accessible via trusted intermediaries ("authorised entities") exclusively for blind or print-disabled people.

The treaty is of great interest to publishers because it is the first treaty that mandates copyright exceptions internationally and it is the first treaty that does not strengthen rightsholder protection. The treaty could set a precedent for possible future legal instruments on copyright exceptions for libraries, archives, museums and education. It also potentially affects the international distribution of e-books.

2. Introduction to PASA position

PASA fully supports the conclusion of this treaty.

PASA wishes to work with the delegation of the International Publishers Association to the Diplomatic Conference to achieve a good outcome that gives visually impaired readers access to the books they need, without changing the principles of international copyright law.

3. Informing principles supported by PASA

Specifically, PASA supports the following underlying principles:

Equality:

We want equal access for persons with disabilities. This principle should be the clearly stated aim of the Treaty. The treaty should not be misused to weaken international copyright protection.

Focus on minimum change:

International copyright law should only be changed where it needs to change. A clear focus will give better results and increase the chance of success for the treaty, namely adoption at Marrakesh of a text and ratification by as many countries as possible thereafter.

Partnerships:

The best solutions are developed in partnership. There are already important constructive partnerships between rightsholders and VIP organisations, for example between the South African Library for the Blind and certain publishers.

4. A targeted treaty

In view of these principles, PASA is in favour of a **targeted treaty specifically for the print disabled**, yet without undermining the life-blood of publishers, a major part of the creative sector.

Publishers want the adoption of a treaty that ensures that the blind and visually impaired have increased and meaningful access to books, and we believe that the elements required for such a treaty can be developed on the basis of the existing text, if it is simplified.

This means that only issues that serve the purpose of providing for the blind and otherwise visually impaired persons should be included in the treaty. Issues that are seeking to modify the tenets of the international copyright system, that are highly contentious and which are not needed to address the issue of equal access for the blind (“Extraneous issues”) should be left out. Examples of extraneous issues proposed in bracketed text for inclusion in the basic proposal at the moment are:

- (i) a weakening of the three-step test¹
- (ii) internationalising the concepts of fair use and fair dealing, and
- (iii) a general exception for the translation of works.

None of these issues is necessary or relevant to deliver an enabling legal framework for equal access to literature for the blind and visually impaired. These provisions weaken existing well-established international minimum standards of copyright protection that exist to enable fair and balanced access to works.

For example, the issue of *translation*: It has nothing to do with visual impairment and should be left out. Translation is of course an important issue in a country with as many languages as South Africa. But putting it in this treaty will raise additional concerns and

¹The three-step test is a clause that has been included in all copyright treaties since the 1970s. The Berne Convention, for example, states: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

does not go to the stated aim of equal access for the blind. Translation is a too important and too complex issue to be addressed as part of this treaty.

Another example relates to the debate about *fair use* clauses and their relationship with international copyright law: this is not a concern that is linked to access for persons with print disability.

Both the above issues have clearly not been included because such provisions are required to enable better access to special format copies for persons with a print disability.

To the extent that these elements are included, they jeopardise the success of an equal access treaty for the blind. Instead, they are intended to weaken the very copyright system that has so far successfully provided both rightsholders with the protection, and persons with disabilities with the flexibility they need. More than 57 countries have introduced exceptions for visually impaired persons.

PASA will support a treaty, and its national implementation, if the text addresses the concerns set out above. We are confident that wording could be found that would resolve these issues, without affecting the real purpose of the treaty.

5. Publishers' constructive views

Publishers are for equal access: same book, same day, at no higher price. This also means that where commercially accessible works are provided (e.g. e-books, large print editions) these take precedence over exceptions.

A treaty should focus on those issues that must be changed in international law to facilitate the cross-border exchange of special, accessible format copies. It should also recognize that where publishers are already offering commercial e-books that visually impaired persons can read, then equal access is being achieved through market solutions and without further cost to charities.

Access for the blind will primarily be delivered through technology and “mainstreaming”, i.e. building accessibility features into e-book devices and format standards that make e-books the delivery method of choice for print disabled.

Together with libraries for the visually impaired, online booksellers and the vendors of smart phones and e-book readers, publishers are already producing more and more books in the formats that visually impaired people (VIP) need. This new Treaty will further increase the number of books accessible to persons with print disabilities. In the UK 75% of the top 1 000 trade titles are available and Amazon recently agreed to an app that makes 1.5 million children's titles available to young print disabled readers.

In this way 80% of the gap can be closed, while 15% of the gap is closed through publisher-charity collaborations as is already happening in South Africa – publishers licensing the use

of files in educational institutions and sharing e-files on a trusted intermediary basis. The remaining 5% will be closed through exceptions.

Thus, for meaningful progress in closing the gap, it is vital to keep incentives to publish alive and specifically incentives to format and mainstream content to make it “born-accessible”, that is, in a format that lends itself to full accessibility by using the right software and navigational tools.

Commercial availability is an important concern to publishers: only publishers can quickly and efficiently provide books to persons with print disability at the same time and under the same terms as to persons without a print disability. Wherever we do this already, there is no need for copyright exceptions.

PASA supports the IPA in its willingness to work with all delegations attending the diplomatic conference in Marrakesh to negotiate a treaty text that achieves the end of enabling blind and otherwise visually impaired persons.

6. Specific demands with respect to the new treaty

Negotiations should focus on the issues that must be changed in international copyright law to facilitate international exchange. This includes the transmission and exchange of digital accessible format copies from countries of a high level of protection to countries of a lower level and vice-versa. In order to do this and at the same time not jeopardise the international copyright system, a clear commitment to copyright safeguards must be in place applicable to the right of reproduction, distribution and communication to the public (so-called “making available right” by electronic transmission).

In this regard, as has been the case for the past 40 years whenever exceptions have been introduced into all previous international copyright treaties, there must be a simple and clear extension of the so-called “three-step test” to all new copyright exceptions created through this treaty, especially to the import and export of works.

The way this Treaty addresses the circumvention of technical protection measures (“TPM”) should not change the way TPMs can be protected under other international copyright treaties and in different countries.

The main purpose of this Treaty is equal access for persons with print disability. This means that commercially available accessible files should be taken into account before distributing or making available fully accessible works, in particular across borders.

The Treaty must therefore also recognize that where local publishers are already offering commercial e-books that visually impaired persons can read, then equal access is being achieved. The advent of smartphones, text-to-speech and other technologies means that even publishers in developing countries can serve print-disabled readers. The incentives for publishers to provide such accessible works will be undermined unless there is a

commercial availability provision that makes it clear that new copyright exceptions need not apply to works that are already being made available to the visually impaired community in an accessible format.

7. Conclusion

PASA and its international body, the IPA, want the treaty to work in practice.

We believe that wording can be found that would fully address the unique human rights and anti-discrimination issues at stake. We would be happy to work with all stakeholders to find the right wording that meaningfully addresses the needs of the VIP and also ensures that local publishers will continue to publish works in formats that give blind and visually impaired persons equal access, under fair and reasonable terms, and at the same time as persons without disability.