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Proposed international instrument on limitations and exceptions for persons with print disabilities

Intellectual Property Office Consultation

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Submitted by the following members of the Intellectual Property Foresight Forum

Professor Charlotte Waelde, Chair in Intellectual Property Law, University of Exeter and Co-Director SCRIPT/AHRC Research Centre for Studies in Intellectual Property and Technology Law

Dr Abbe Brown, Lecturer in Information Technology Law, University of Edinburgh and Associate, SCRIPT/AHRC Research Centre for Studies in Intellectual Property and Technology Law

Shawn H.E. Harmon, Research Fellow, InnoGen, ESRC Centre for Social & Economic Research on Innovation in Genomics, and SCRIPT, AHRC Research Centre for Studies in IP & Technology Law

1. Does the text strike the right balance between rights holders and beneficiaries?

We welcome the proposed instrument on limitations and exceptions for persons with print disabilities (the Proposal) but consider that it does not go far enough to meet the UK's human rights obligations towards persons with disabilities as laid down in The Convention on the Rights of Persons with Disabilities 2006 (the Convention).

- While we recognise that current proposals are limited to persons who have print disabilities because of the view that was taken in the 1980s that auditory impairment could not be said to fall under the minor reservations doctrine in the Berne Convention,¹ we are concerned that the current narrow approach in the Proposal – both as regards excluding auditory and other impairments - is incompatible with the obligations laid down in the Convention.

The Convention does not limit persons with disabilities to those with print disabilities. Rather it includes those who have *'long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'*. (Article 1).

The Convention obliges States to take appropriate measures to ensure that persons with disabilities can:

- a) enjoy access to cultural materials in accessible formats
- b) enjoy access to television programmes, film, theatre and other cultural activities, in accessible formats;
- c) [sub-clause on physical access]

It is recognised that intellectual property may form a barrier to the inclusion of the disabled with respect to creative works and in Article 30.3 the Convention requires States to take appropriate steps: *'in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.'*

Given its obligations in the Convention, we would urge the UK to be more ambitious in encouraging the adoption of wider ranging exceptions and limitations that would meet

¹ See Intellectual Property Conference of Stockholm, 1967, S/271, July 7, 1967 paras 210 and 211: the minor reservations doctrine applies to the rights of public performance, broadcasting, public recitation, recording, the rights with respect to cinematography provided by Articles 11bis, 11ter, 13 and 14 of the Convention and translation referred to in Articles 11bis and 13 of the Convention. They may be invoked on occasions such as religious ceremonies and by military bands. Standing Committee on Copyright and Related Rights Nineteenth Session Geneva, December 14 to 18, 2009, Study on the Limitations and Exceptions to copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean SCCR/19/4 September 30, 2009 para 1.1.1.(c) For a discussion on the minor exceptions and obligations in TRIPS see *Conceiving an International Instrument on Limitations and Exceptions to Copyright* Final Report March 06, 2008 P. Bernt Hugenholtz & Ruth L. Okediji

the needs of disabled people in their quest to access books and other cultural objects more generally and to this end, along with other countries, seek to address the outdated limitations imposed by Berne. This approach would also be consistent with the obligations of the UK under article 10 European Convention on Human Rights and article 19(2) International Covenant on Civil and Political Rights regarding the right of everyone to receive information. The UK must ensure that the restrictions which are imposed on this right in respect of those with different abilities do not exceed the permitted restriction (within article 10(2) ECHR and article 19(3)(a) ICCPR) as being necessary to protect the rights of the IP owners.

- We welcome the fact that representatives of blind people, such as the World Blind Union (WBU), have been actively engaged in the process of developing this text, despite some of the difficulties that emerged most particularly for the WBU illustrated by its withdrawal of support due to concerns that the system proposed was likely to be expensive and unwieldy and not suitable to meet the needs of the users.

Beyond this we would like to know the extent to which evidence has been taken from those involved in the actual processes of making these works accessible to the print disabled to ascertain whether what is proposed actually meets the practical difficulties that arise on a day to day basis. We would cite here our recent involvement with colleagues in CALL Scotland based in Moray House at the University of Edinburgh, a publicly funded unit offering services to anyone in Scotland who has or is concerned with communication difficulties and who might benefit from Augmentative and Alternative Communication (AAC) or Assistive Technology (AT), particularly in a learning context. Included amongst the many projects carried out by CALL is one called 'Books for All' which is designed to make learning materials in accessible, alternative formats, for people who have difficulty reading ordinary printed books.

Our discussions have highlighted the excitement that colleagues feel about the ongoing development of new technologies (with present examples being the iPad and the Kindle) and the possibilities that these herald for the disabled. There will be other technologies that are developed over the shorter and longer term that could be used by the disabled to access works in different ways. For these reasons we would strongly oppose any enumeration of different formats under the definition of '*accessible format copy*' as we do not believe that these would keep pace with developments in technology and the ways in which it will become possible to make copies accessible.

We also welcome the inclusion of persons who are '*unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading*' under the definition of '*a beneficiary person*'. We understand that there are many ways in which technologies can assist those with physical disabilities to gain access to works, albeit that these people may not be conventionally considered print disabled (or blind).

- While not directly relevant to the wording in the Proposal, we would like to highlight the daily practical difficulties that we have evidenced during our research that are faced by those who have to interpret the current set of limitations and exceptions when making works available to the visually impaired. These difficulties are compounded by the fact that copyright exceptions and limitations often do not match rights and obligations under Equality legislation.

Once the WIPO process has concluded we would strongly support a thorough review of the current UK legislation to ensure that it is practically workable. Here, the recommendation in the Hargreaves Report that the IPO should be able to issue statutory opinions that would be taken into account by a court may be valuable (Recommendation 10).

4. Do you consider the text could form a joint recommendation or a treaty?

Our strong preference would be for this text to form a Treaty. Looking again at the Convention, this places obligations on States with regard to the rights of the disabled. Enshrining these in treaty form to be implemented in domestic legislation gives expression to those obligations for the benefit of the disabled. If the text forms a recommendation, then the disabled are merely beneficiaries of the largesse of others.

End of Submission