



Comments of Knowledge Ecology International (KEI)

on the GREEN PAPER

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Submitted to the COMMISSION OF THE EUROPEAN COMMUNITIES

Request for Public Comments, via email: markt-d1@ec.europa.eu.

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¹ Available on the web here: http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf

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Introduction

Knowledge Ecology International (KEI)² offers the following comments on the question of whether the exhaustive list of exceptions under the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("the Directive") achieves “a fair balance of rights and interests between [...] the different categories of right holders and users.” Our comments take into consideration the question of whether “the balance provided by the Directive is still in line with the rapidly changing environment.”

New technologies and cultural practices are challenging the balance between exclusive rights and limitations and exceptions to copyright, and this will surely continue to be the case for years to come. In a global online environment, there is a trade related aspect to the management and enforcement of intellectual property rights, and also to the limitations and exceptions to those rights.

We focus on the impact of copyright policies on consumers and users including library patrons, educators students, and researchers and reading disabled persons and on possible solutions that would enhance access as well as promote innovations.

Our comments will address issues related to:

 General issues;

 The exception for the benefit of libraries and archives;

 The exception allowing dissemination of works for teaching and research purposes;

 The exception for the benefit of people with a disability;

 A possible exception for user-created content.

2 KEI is an international organization that searches for better outcomes, including new solutions, to the management of knowledge resources. KEI undertakes and publishes research and new ideas, engages in global public interest advocacy, provides technical advice to governments, NGOs and firms, enhances transparency of policy making, monitors actions of key actors, and provides forums for interested persons to discuss and debate knowledge ecology topics.
<http://www.keionline.org>

In general, KEI's position on copyright limitation and exceptions to exclusive rights is as follows:

- a) A statutory regime of limitations and exceptions to exclusive rights is necessary in order to promote access to protected works, and to enable the development of new knowledge goods and innovative services.
- b) In some cases, the limitations and exceptions should be implemented as non-remunerative exceptions.
- c) In other cases users should have the freedom to use works subject to remuneration.
- d) The world that is connected to the Internet is experiencing a new era of access, and a proliferation of new approaches to authorizing and using creative works and data. As dramatic as the changes have been, there will be more.
- e) Among the most important features of the new environment are the empowering experience of much more equal access to creative works and data, and an acceleration of the creation, transformation dissemination and re-purposing of information.
- f) The new information technologies have greatly expanded the opportunities to create and use information resources; enabling new actors, new business models and an immense role for non-commercial and user generated publishing.
- g) A legal framework that focuses on protecting commercial rights under the older publishing technologies is inferior to one that recognizes, appreciates and focuses on the value of the new opportunities to create and use information.

General issues

According to the Green Paper, Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society has harmonized the rights of reproduction, communication to the public, making available and distribution. The scope of the exclusive rights is thus broad and gives right owners high-level exclusive rights. The Directive has also introduced an exhaustive list of exceptions that limits the member states in their ability to introduce new exceptions. There is only one mandatory exception and 20 optional exceptions. This optional list of exceptions is drafted in vague language and has actually prevented harmonization and created a level of uncertainty detrimental to consumers.

The Three Step Test is Not Relevant in some areas

It is a common misunderstanding that all copyright limitations and exceptions are subject to the so called "three step test" (3ST). In many areas copyright limitations and exceptions can be implemented outside of the 3ST. These include the specific exceptions referenced in the Berne and Rome Conventions that are outside of the 3ST, such as the mandatory exception for the right to quotation, the Appendix to the Berne and some other user rights clearly spelled out in the Berne and the Rome. In addition, WTO members can use other types of flexibilities when implementing their copyright laws.

Part I of the TRIPS

In Part I of the TRIPS, WTO members are given very broad freedom to consider national, regional and international regimes for the exhaustion of rights in copyrighted works -- a very important and potentially broad exception to exclusive rights.

Additional context for limitations and exceptions are set out in Articles 1, 7 and 8 of the TRIPS.

Part II, Section 8 of the TRIPS

In Part II, Section 8, Article 40 of the TRIPS, WTO members are given very broad discretion in controlling anticompetitive practices. The text of paragraphs 40.1 and 40.2 is useful to review.

SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

Article 40 of the TRIPS should be read in connection with other parts of the TRIPS, including Articles 1, 6, 7, 8 and 44.2. Article 40 ensures that governments have the right to address unreasonable licensing practices in a wide range of areas. This includes cases of excessive pricing under guidelines or formulas, and also where there is no formal finding of dominance under a normal EU competition case.

In the context of traditional competition law cases, the EU has used the Article 40 flexibility in a wide range of cases, including but not limited to those involving software (Microsoft), programming guides and pharmaceutical sales data.

Non-voluntary uses under Part III of the TRIPS concerning remedies

Under Part III of the TRIPS, WTO members have very broad authority to issue compulsory licenses as an alternative to the enforcement of an injunction, under TRIPS Article 44. For example, the ability to enforce an exclusive right through an injunction can be waived in some cases (Article 44.1), or in every case (Article 44.2) when “these remedies are inconsistent with a Member's law” and “declaratory judgments and adequate compensation” are available. It is under Article 44.2 that the US government exercises its rights to use all copyrighted works without licenses or prior negotiation, under 28 USC 1498.

The importance of so called “Part III compulsory licenses” has been highlighted by the expanded use of non-voluntary uses of both patents and copyrights following a U.S. Supreme Court decision involving the online auction company eBay. KEI has written about this topic in the context of copyright:

“Compulsory licensing of copyright under Article 44.2 of the TRIPS, in light of eBay,” *KEI Research Note 2007:5*.

KEI notes that Article 44 non-voluntary uses of works are highly relevant in discussions of certain limitations and exceptions, including those such as:

1. the use of architectural plans, where the enforcement of the exclusive right could lead to an

- unreasonable burden on builders,
2. in inadvertent copyright infringement in newspapers, periodicals and books, and
 3. in schemes to grant freedom to publish orphaned works.

Given the considerable flexibilities of Article 44.2 of the TRIPS, some are suggesting it can be used for a wide range of remunerative rights, including those relating to libraries, education, distance education, orphan works, the creation of documentary films, and user generated content.

Unfortunately, recent proposals by the European Commission in connection with negotiations for Economic Partnership Agreements (EPA), and possibly within the proposed Anti-Counterfeiting Trade Agreement (ACTA) would impose new TRIPS plus measures that would undermine the Part III flexibilities. KEI has written about this issue to the USTR:

“ACTA provisions on injunctions may undermine eBay Supreme Court decision,” September 22, 2008, Letter from KEI to USTR and the U.S. Department of commerce.³

The Limits of an Exhaustive List of Limitations and Exceptions

The European Union has embraced the notion of an exhaustive list of limitations and exceptions rather than a set of recommended exceptions coupled with principles to allow for new exceptions that will address future needs. This approach is too static, and stifles innovation.

The European Union is now confronting the need to consider new limitations and exceptions for user generated content as well as for new innovative services. In the area of disabilities, new information technologies are creating demands to expand limitations and exceptions to new formats, and across borders.

Many of the more interesting and useful areas of non-voluntary uses of works have evolved due to unexpected changes in technologies and business models. Bookshare.Org, which serves persons who are blind and disabled, uses a peer to peer technology that did not exist until recently. The pervasive use of hypertext linking, Internet search engines, the vast blogosphere, Facebook and other user generated content sites, and the exploding uses of low bandwidth video works, many involving partial remixes of copyrighted works, could not exist within a strict interpretation of copyright rules as understood just fifteen years ago.

A regime of exceptions that works only because it is largely ignored is one that is too rigid.

The Economic Benefits of Greater Freedom to Use Works

Europe needs to stop looking at the strict enforcement of intellectual property rules, including rules on copyright enforcement, solely as tools to increase European incomes, by collecting global rents for domestic content industries. A more accurate assessment is that Europe has been losing market and mind share to countries that provide greater freedom to innovate and use works.

It is shortsighted and unimaginative to define the markets for copyrighted works only as the rents collected by a handful of highly concentrated publishers. There is a market from the point of view of the seller of works. There is a market from the point of view of the buyer of works. Extracting more money from European consumers has a redistributive impact, but it is not the best way to expand the European economy. To appreciate why, one has to recognize that the overall market has grown when works and data were widely shared, transformed and re-purposed.

3 http://www.keionline.org/misc-docs/1/kei_injunctions_acta_21sep2008.pdf

There are new markets that are created for the services that enable the sharing, transformation and re-purposing of works and data. There are also new markets that are created because of the knowledge that has been shared – including markets for non-information goods and services that are improved, invented or marketed in the new knowledge ecology.

A stifling regulatory environment for knowledge goods suppresses economic development.

One recent area of evidence for this concerns the divergent efforts of the US and European Union with respect to the protection of non-copyrighted elements of databases. The EU took the more protectionist route and lost market share.⁴ Another area of evidence concerns the divergent views of the US and Europe on the topic of fair use of copyright as applied to new innovative services. Many EU states take a more protectionist view of the non-voluntary use of copyrighted works. But the value today is being created with firms (many US based) that provide remarkable freedom to use works. It will be a challenge for Europe to consider such new paradigms, in a world where content industry lobbyists are insisting on more and more enforcement of exclusive rights.

Copyright Terms and Formalities

One area of possible flexibility not addressed in the Green Paper would be to introduce formalities to use works for the period of protection that exceeded the terms set out in the Berne and Rome Conventions and in the TRIPS Agreement. Given the growing interest in access to older works that can be digitalized, including but not limited to the many works that have been orphaned by authors or publishers, there is great value now wasted because the European Union (and other countries) provide decades of extra years of exclusive rights, even when the owners of the works do not exploit the works commercially. Solutions to these issues are examined in Part 3 of the attached Draft Treaty on Access to Knowledge. From the point of view of users, there is no reason to extend exclusive rights to owners that are not even willing to register works for sale. While registration of works is not a condition for copyright protection under the minimum Berne/Rome/TRIPS mandatory terms, registration can be required for the extended terms, by converting the extended terms to *sui generis* regimes with different conditions (not dissimilar to supplementary protection regimes used to extend exclusivity for patented medicines in some countries). The right owners that have valuable assets to protect can easily do so, without laying waste to an enormously valuable body of knowledge.

Responses to Specific (General) Questions

Our responses to the Green Paper general questions are as follows:

Question 1: Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

Contractual arrangements should not replace implementation of exceptions. Guidelines should ensure that contractual terms that are contrary to copyright exceptions are not enforceable.

In some cases, the elimination of an exclusive right in favor of a remunerative right can be combined with guidelines in terms of the reasonableness of the remuneration payments, and create a framework where the exceptions to the exclusive rights effectively reduce transaction costs and support greater freedom to use works and greater access to works.

For example, a country may determine that certain licensing practices, such as refusals to license works on terms that are affordable, is an anti-competitive practice under Article 40 of the TRIPS, and should

⁴ James Boyle, “A natural experiment: Do we want 'faith-based' IP Policy?” *FT Online*, November 22nd, 2004.

be remedied through a compulsory license under Part II of the TRIPS, or a limit on remedies under Part III, Article 44 of the TRIPS. For example, governments may exercise certain government rights in copyrighted works, under Article 44 of the TRIPS, subject to remuneration or compensation.

In some other cases, the copyright exceptions should extend beyond the right of a copyright owner to control use through a license. An illustrative and non-exhaustive set of examples of areas where exceptions should not be subject to licensing obligations follows:

- rights to use works for quotations,
- certain uses relating to criticism or political speech,
- rights exercised by individuals for their personal use,
- uses of orphaned works,
- certain uses of works in connection with documentary audiovisual works,
- the exercise of certain rights associated with making works available in accessible formats for persons with disabilities,
- archival preservation, or to migrate content to a new format,
- cases involving the exhaustion of rights,
- reverse engineering of software in order to make products interoperable,
- some measures necessary to remedy anticompetitive practices, and
- a wide range of cases where the requirement to obtain licenses would result in unacceptable reductions in access, unreasonable delays and burdensome procedures, and high transaction costs.

In respect to the last point, we recall Article 2(f) of the October 23, 2008 World Blind Union (WBU) proposal for a WIPO Treaty for Blind, Visually Impaired and Other Disabled Persons.⁵

Contracting Parties shall ensure that the implementation allows for timely and effective exercise of authorized actions covered by this Treaty, including expeditious procedures that do not in themselves create barriers to legitimate uses, are fair and equitable, and are not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays.

Question 2: Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

Technological Protection Measures (TPMs) are designed to prevent, in the digital networked environment, the unauthorized access to or use of creative works or data. Their legal protection comes as a second layer of protection for rights owners, in addition to copyright protection itself.

The obligation to grant legal protection for the use of TPMs arises from Article 11 of the WCT and Article 18 of the WPPT. Article 11 of the WCT: 'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.'

⁵Available here: http://www.keionline.org/index.php?option=com_content&task=view&id=210

Article 11 of the WCT requires that protection of TPMs be granted only with respect to technologies used by rights owners in connection with the exercise of a right protected by copyright law. This means that the application of TPMs to public domain material does not fall within the scope of Article 11 and that it is not enough that TPMs are ‘used in connection with the exercise’ of a copyright. In other words, the circumvention of a TPM in order to use a work while benefiting from one of the exceptions to copyright is, in principle, not prohibited by Article 11 of the WCT.

It is also important to address related rights, including those associated with the **protection of non-copyrighted elements of databases**. Here it is useful to consider language from the WBU proposal on three points:

parties shall ensure that beneficiaries of the exception provided by . . . have the means to enjoy the exception where technological protection measures have been applied to a work, including when necessary the right to circumvent the technological protection measure so as to render the work accessible.

Any contractual provisions contrary to the exception provided . . . shall be null and void.

The provisions . . . shall apply *mutatis mutandis* to non-copyrighted elements of databases.

Question 3: Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

No, the lack of certainty has increased and with evolving cross-border Internet technologies, it is necessary to have mandatory minimum exceptions implemented across Member states, and also between Member states and other countries. In this respect, the European Union should also abandon its opposition to analysis and norm setting on the question of mandatory minimum copyright limitations and exceptions in the WIPO Standing Committee on Copyright and Related Rights. People who live and work in Europe have a profound and economically important interest in communicating with people who live in countries outside of Europe.

Question 4: Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

Yes.

Question 5: If so, which ones?

KEI endorses the minimum limitations and exceptions that are included in Part 3 of the May 9, 2005 draft Treaty on Access to Knowledge (attached in Appendix A). The May 9, 2005 draft Access to Knowledge Treaty was developed by a multi-stakeholder group. It addressed a wide range of areas where mandatory minimum copyright limitations and exceptions are appropriate and welfare enhancing.

KEI also calls attention to the recent report by Professors Bernt Hugenholtz & Ruth Okediji, “Conceiving an International Instrument on Limitations and Exceptions to Copyright,” a March 6, 2008 study supported by the Open Society Institute (OSI).

On the special topic of persons with reading disabilities, KEI attaches a copy of a report of a July 24-25, 2008 experts meeting hosted by the World Blind Union and KEI, and the October 23, 2008 proposal by the WBU for a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled

Persons (attached). KEI endorses the WBU proposal for a treaty, and asks the European Union to support WIPO SCCR discussions regarding such a treaty.

On the topic of persons with reading disabilities, this population is clearly a vulnerable group, and special measures are required to make access to works more equal. Persons with disabilities, like everyone else, need to communicate with persons in foreign countries, and to read works published everywhere. It is expensive to transform works into accessible formats, and it is important to allow the import and export of such works. The vast majority of works in accessible formats are created under limitations and exceptions. People who are blind or have other disabilities cannot today obtain access to the bulk of the vast collections of accessible works published in the United States by Bookshare.Org or works created in other countries. Blind and disabled European nationals who migrate to work and live in countries outside of the European Union do not have access to works created in Europe under copyright limitations and exceptions. These inefficiencies and barriers to knowledge not only harm persons with disabilities – they harm society as a whole, as we are deprived of the talents and skills of millions of persons who can contribute more if they have access to more works. Today, New York State has a governor who is blind, but millions of persons who have lost their ability to read works in traditional formats through illnesses or injuries are too frequently marginalized, and we do not fully benefit from their talents and skills. The technological opportunities to serve this population have expanded dramatically with the development of digital technologies, and platforms such as the DAISY format, and ingenious new reader technologies such as refreshable braille, computer generated (and searchable) audio, and large type displays. The systems of limitations and exceptions to exclusive rights should empower blind and other persons with disabilities to fully participate and contribute to society. That obviously requires systems of cross-border information flows.

The European Commission should support the proposal by persons who are blind or have other disabilities for work at the WIPO SCCR on a WIPO Treaty for Blind, Visually Impaired and Other Disabled Persons.

Exceptions for Libraries and Archives

Libraries and archives do not enjoy a blanket exception for the right of reproduction and may only copy to preserve a work. It is not always clear if format shifting is allowed and how many copies can be made. This is left to the national level. Another important issue is the electronic delivery of copies to consumers. Finally, while the Commission has been encouraging Member states to create mechanisms to facilitate the use of orphan works and provide lists, there is no harmonized regulatory approach to this cross-border issue yet.

Today publicly accessible libraries, educational establishments, archives and museums may benefit from two exceptions in the Copyright Directive:

1. an exception to the reproduction right for specific acts of reproduction for non-commercial purposes (Art. 5(2)(c) of the Directive), and
2. a narrowly formulated exception to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (Art. 5(3)(n) of the Directive).

Question 6: Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

No.

Question 7: In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

Libraries already engage in extensive licensing of copyrighted works. Unfortunately, while some licenses between providers of digital knowledge goods and libraries are negotiated on reasonable terms, in many cases libraries are faced with unequal bargaining power or non-negotiable “take-it-or-leave-it” license terms that are quite unreasonable, for the use of databases or online journals.

Libraries rely on millions of dollars of mass-market retail computer information products. Many of these products use non-negotiated or standard form licenses in which the licensor or vendor determines the terms without input from the licensee. Libraries, like consumers, should be protected from unfair contract terms.

There are also areas where approaches that require licensing are inappropriate, and statutory rights for users better accomplish policy goals regarding the creation, dissemination, transformation, use and archiving of works.

Question 8: Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to

(a) Format shifting;

(b) The number of copies that can be made under the exception;

(c) The scanning of entire collections held by libraries;

Yes, the exclusive economic rights of copyright holders (including but not limited to reproduction, distribution, display, performance, adaptation and communication to the public) should not apply to the use of works for purposes of library or archival preservation, or to migrate content to a new format.

Question 9: Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

Only if the clarification permits the searching of content on the Internet.

Orphan Works

Question 10: Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

Yes.

Question 11: If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

The Commission should consider an instrument that permits works to be used without prior consent, under a system that limits the remedies available to the unknown copyright owners. This would use the flexibility now allowed under Article 44.2 of the TRIPS. As noted above, the Commission should also consider requiring registration of works for the period of the term that exceeds the minimum terms set out in the Berne/Rome and TRIPS Agreements.

Question 12: How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

All Member States should agree to implement measures that ensure access to works that are unidentifiable, un-locatable or unresponsive, or referred to as orphan works. Any use by reproduction in copies or by any other means of use within the rights of the copyright owner, is not an infringement of copyright when the user has conducted a reasonable investigation and can conclude that the work is an orphan work. The Commission Recommendation 2006/585/EC of 24 August 2006 established a multi stakeholders group that set up guidelines for search and general principles concerning a database of orphan works. The Commission should draft a model law based on these principles to be implemented in a harmonized fashion by all Member States. This model law should fruitfully explore options under Part III of the TRIPS on enforcement of rights, as the flexibility regarding injunctions and remuneration rights is greater under Part III of the TRIPS than it is under Part II.

If we want to learn from the past, we have to know what happened in the past. The cross border trade of orphaned works is extremely important. KEI's own research efforts depend extensively upon access to foreign works, and this is certainly true for a growing number of scholars, researchers, policy makers and businesses in Europe. KEI recommends that the EU study the provisions for cross-border distribution of works in the October 23, 2008 WBU proposal for a WIPO Treaty for Blind, Visually Impaired and other Persons with Disabilities.

Exceptions for the benefit of people with disabilities

Summary of issues:

The Directive provides for an exception to the reproduction rights and the communication for the benefit of persons with disabilities but some Member States restrict it to certain categories of disabled persons. Also some Member states require a payment of compensation while others do not. The number of available works for the reading disabled is still minimal in Europe and the need to have cross border issues addressed to enhance access and lower the costs has not been met.

According to the World Health Organization (WHO), more than 161 million people worldwide are visually impaired. This includes 37 million persons who are considered blind and 124 million persons with "low vision." According to the WHO, more than 90 percent of visually impaired persons live in developing countries.

In addition to those who are visually impaired are large numbers of persons who have other disabilities relating to reading, including persons with inadequate access to reading aids, and persons who cannot turn pages of books, persons who cannot visit libraries, and persons suffering from dyslexia and other learning disabilities.

On July 24-25, 2008, the World Blind Union (WBU) and KEI hosted an experts' consultation to consider a text for a possible Treaty for the Visually Impaired (TVI). Participants included nineteen experts from eight countries. Sections of this answer are drawn from the report of that meeting.

Louis Braille invented the Braille alphabet in 1829, empowering visually impaired persons to read,

typically by using embossed paper Braille. The development of new information technologies have vastly expanded the opportunities to make works available in accessible formats, particularly for works stored in digital formats. This includes works stored digitally by the original publisher, as well as works keyed in or read by volunteers, or scanned by third parties, in connection with a variety of devices that can perform optical character recognition.

One such technology is the refreshable Braille display, or RBD. The RBD produces Braille by raising and lowering pins in response to an electronic signal. There are numerous software programs that can convert text to RBD output, or which convert text to audio speech, or publish works in large print text. There also exist technologies and solutions to address other reading disabilities, such as for persons who have physical disabilities that prevent them from turning the pages of a book, or persons with a variety of reading disabilities such as dyslexia, or various comprehension problems.

One aspect of the new information technologies is the ability to create works that can be navigated more efficiently. For example, works that are published in the DAISY format use digital tags on data to allow the user to skip sections of a work, or return to areas of a work. This is possible not only for text, but also for audio sections. Some DAISY readers permit users to bookmark specific locations, including the ability to include voice annotations to accompany the bookmark.

Despite advances in technology, only a small fraction of existing published works are available in formats that are accessible to persons who are visually impaired. The labor involved in making a new text accessible varies considerably, depending upon the formats in which the work is originally published, as well as the complexity of page layout designs.

Most books and periodicals today are created as digital works, and then printed in a variety of formats, including both paper and digital versions. It is technically possible for most books and articles to be published in modern digital formats such as DAISY at the same time they become available to persons without visual impairments. This rarely happens.

Some estimate that five percent of published books are available for visually impaired persons. Others estimate that far fewer works are accessible today, particularly for works that have smaller audiences. There is considerable variance in terms of access regionally and nationally. Developing countries typically have far fewer works available, due to existing restrictions in global copyright norms regarding the import and export of works created without the permission of copyright owners.

The non-profit sector plays an important role in making works available in accessible formats for the visually impaired, both in terms of developing new assistive technologies, and publishing works in accessible formats.

While the recent and continuing improvements in information technologies have created enormous opportunities to provide access to knowledge for visually impaired persons, it is necessary to address the global norms for copyright protection, including in particular the area of limitations and exceptions to copyright that are necessary to permit works to be re-engineered for accessible formats, and make accessible to persons who are visually impaired.

Entities using such exceptions to create accessible works often are prohibited from exporting outside of national boundaries, reducing considerably the access to works that are now in accessible formats.

For example, in the United States certain authorized entities are allowed to distribute works that are accessible for the visually impaired without the permission of copyright owners, but this exception only applies to access in the United States – exports to other countries are not allowed. The non-profit organization BookShare.org is a leading U.S. provider of books in accessible formats for the blind and visually impaired. Less than 5 percent of Bookshare.Org works are licensed from publishers and available worldwide.

Question 13: Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?

People with disabilities already engage in extensive negotiations for licenses for works, as well as for agreements to get access to the underlying digital files, in order to facilitate the publishing of works in DAISY and other accessible formats. Unfortunately, there is massive evidence that publishers are not very responsive, which is illustrated quite powerfully by the paucity of works accessible to people who are blind or otherwise disabled.

A strategy that relied only on voluntary licensing by publishers will not allow persons who are blind and disabled to have access to most works. It would be an appalling, ethically repugnant policy that either ignores massive evidence of access disparities or considers such disparities acceptable.

Mandatory exceptions for blind and visually impaired persons force publishers to consider pro-active strategies to make works available to blind and disabled populations. Donors will not focus on funding the publishing of works in accessible formats when such works are actually available in accessible formats from the publishers themselves on a timely basis.

It is not necessary and not desirable to create a legal regime that conditions the exceptions for blind and disabled users by donor supported non-profit entities with prior negotiation for contracts, or endless disputes over the degree to which publisher versions are actually accessible. Donors themselves will act responsibly, without burdensome procedures and unwarranted access denying delays.

When people with reading disabilities or their representatives enter into a licensing scheme with the publishers, any contractual provisions contrary to the necessary mandatory exception should be null and void.

Question 14: Should there be mandatory provisions that works are made available to people with a disability in a particular format?

Yes. KEI Supports the WBU October 23, 2008 proposal for a WIPO Treaty for Blind, Visually Impaired and other Reading Disabled Persons.

All works should be made available in an ‘accessible format’, meaning an alternative manner or form which gives a visually impaired person or reading disabled person access to the work, including to permit a person with a visual impairment to have access as flexibly and comfortably as a person without a visual impairment. For publishers for the blind, the accessible format should include, but not be limited to, large print, with different typefaces and sizes all being permitted according to need, Braille, audio recordings, digital copies compatible with screen readers or refreshable Braille and audiovisual works with audio description. It should also be understood that whether a format is accessible or not varies depending on the purpose for which the work is to be used and so, for example, an audio recording of a book without indexing may be accessible for a visually impaired person listening for pleasure but not where a visually impaired person needs access for the purposes of study.

Question 15: Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?

Yes. This exception should be extended to persons with any other disability who, due to that disability, need an accessible format in order to access a copyright work to substantially the same degree as a person without a disability.

Question 16: If so, which other disabilities should be included as relevant for online dissemination of knowledge?

For example, people who do not have the use of their limbs may have excellent vision, but may not have the ability to turn the pages of a book or manipulate a standard computer. There are technologies that enable such persons to read works. Some persons have physical handicaps that do not allow them to enter libraries. In such cases, libraries should be allowed to make works available outside of the library. There are important cognitive disabilities that can be addressed with new information and learning technologies.

Question 17: Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?

Beneficiaries of the exception for people with a disability should not be required to ask for permission or pay remuneration for using a work in order to convert it into an accessible format, if the activities are conducted on a non-profit basis.

If the activity is on a for profit basis, reasonable remuneration should be available if requested by the rights owner.

In the area of remuneration, KEI supports the approach taken in the October 23, 2008 proposal by the WBU for a WIPO Treaty for Blind, Visually Impaired and other Reading Disabled Persons.

Question 18: Should Directive 96/9/EC on the legal protection of databases have a specific exception in favor of people with a disability that would apply to both original and sui generis databases?

Yes, the Database Directive should include a specific exception that would apply to both original and *sui generis* databases, similar to a mandatory exception to copyright works for the reading disabled. The WBU proposal includes an Article 14 that addressed this issue as follows:

Article 14. Limitations and Exceptions Applied to Non-Copyrighted Elements of Databases. The provisions of this treaty shall apply *mutatis mutandis* to non-copyrighted elements of databases.

Dissemination of works for teaching and research purposes

Summary of issues:

The Directive includes an exception for teaching and research purposes. It provides for exceptions or limitations to the rights of reproduction and communication to the public when a work is used "for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible." In some countries (Denmark, Finland, Sweden and France) the use of work for teaching and research is dependent on negotiations with collecting societies. In addition, some Member states have implemented this exception in such a way that it does not cover distance education or Internet-based learning. Many states such as Spain and Greece do not have an exception for research and when there is one it is implemented in a narrow sense since it may cover copying only short excerpts of the research material. Again, the limited harmonization has created a legal uncertainty that prevents online networks to benefit European education and research communities.

Question 19: Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

The scientific and research community already enters into many such licensing schemes, with mixed results. As one might expect, there are examples where licenses work well, and examples where licenses are excessively priced and too restrictive. The progress of scientific and research efforts is too important to be solely determined by these licensing negotiations, particularly given the excessive concentration of ownership among publishers of journals, and the widespread evidence of excessive pricing for journals and textbooks. Such licenses also often lack the flexibility to allow works to be distributed across borders, inhibiting the development of distance education services.

Question 20: Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Member States should agree to adopt measures for limitations and exceptions to copyright that are effective in promoting greater access to education through new distance education tools. These tools often involve cross border delivery of educational content and services, making it highly appropriate to address in European-wide agreements and legislative frameworks, as well as to explore the need for the harmonization needed for a global platform for distance education.

In appropriate cases and circumstances, distance educators should be able to use copyright protected materials on websites and by other digital means of sharing works--without permission from the copyright owner and without payment of royalties.

Question 21: Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Yes. And also to consider education services that are outside of a formal academic institution.

The growth and potential of distance education is great. However, the expansion of copyright protection (terms, rights and enforcement), the lack of harmonization and narrowing of exceptions related to distance education materials are preventing progress.

Most materials used in educational programs whether in a classroom or through transmission are protected under copyright law. Because copyright protection is automatic in nearly all works most writings, images, artworks, videotapes, musical works, sound recordings, motion pictures, computer programs, and other works that an educator needs to use in his or her teaching are protected by copyright law.

The students, in a classroom or in different cities in front of their computers constitute a "public" and educators frequently incur possible violations of owners' rights whenever they use materials. When they copy materials to distribute as an handouts, upload works to a virtual classroom websites, "display" slides or "perform" music or videos, they are teaching and often not asking for any permission.

The rules for distance education are significantly more rigorous than those in face to face, in classroom setting. Clearly, when the materials are uploaded to websites and can be transmitted anywhere in the world, this is a possible threat to the interests of copyright owners.

However, this has led to a situation where educators and students cannot use the benefits of innovative

educational services. It is built around the notion that mediated instructional activities must only occur in discrete installments, in a limited span of time, and be as much as possible like a traditional classroom sessions and most importantly in one country only. In other words the lack of specific and harmonized exceptions in Europe is not allowing the immense possibilities of distance education.

Distance education exceptions should expand the range of works that educators are allowed to use. Educators should be able to lawfully display and perform all types of works for instructional purposes.

Limiting the transmission of content to classroom or other specific locations is denying the benefits of distance teaching and learning. A new exception for distance education should include the expansion of receiving locations.

Exception to copyright for distance education must explicitly allow retention of the content and student access for an appropriate period of time established by an instructor. It must permit copying and storing if is necessary to teaching/learning process and the technical aspects of digital transmission systems.

The exception must allow digitization of analog works when they are not already available to facilitate digital transmissions.

These benefits must be available to distance educators without undue burdens. Following the WBU formulation:

. . . Parties shall ensure that the implementation allows for timely and effective exercise of authorized actions . . . including expeditious procedures that do not in themselves create barriers to legitimate uses, are fair and equitable, and are not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays.

Question 22: Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

It may be difficult to have a hard rule on length. It may be useful to distinguish between cases where the commercial rights to a work in an education setting are aggressively pursued by publishers, such as textbooks and other materials that are prepared explicitly for use in a education setting, and the growing body of research that is primarily intended to be shared, without payment to copyright owners, but often with formal licensing programs, or works that are published with non-educational markets in mind, and where use in an education setting, including even the full text, will have a *de minimis* impact of the core sustainable market for the work.

One of the inefficiencies of the current system is overly broad enforcement of exclusive rights to communities that do not need or manage them, leading to under-utilization and under dissemination of works in education and research settings.

Question 23: Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Yes. Some mandatory exceptions should cover both teaching and research. In some cases, restrictions on access will cause more harm in research than in teaching, if in teaching there are opportunities to substitute one work for another in a curriculum, while in high level research, there may be less flexibility.

User-created content

Summary of issues:

The Directive does not include an exception that would allow the use of protected content for creating new or derivative works. The Gowers Review recommended an amendment to the Directive in order to facilitate innovative uses and increase production of new or “transformative” works. While there are some flexibilities for free uses of works for criticism or review (see 5 (3) (d)) and in some cases caricature, parody and pastiche (see 5 (3) (k)), it is in a narrow sense since this can become “unfair practice” if the commenting is addressing a wider issue than the work itself.

Question 24: Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

There should be some areas where users have a clear right to use works. In other cases, user rights should be determined by the context and purpose of the use, such as the fair use provisions in the United States.

Overall, the Commission should review the actual practice in web sites featuring user generated content, such as personal or group blogs, sites distributing user uploaded videos, personal networking sites, and similar services and platforms and ask several questions, including those asked and answered here:

1. Do these sites operate within copyright law in the European Union? Probably not.
2. Do these sites have a valuable function? Do they enrich the lives of people? Do they create greater access to knowledge? Do they enhance other social goals regarding raising awareness or knowledge? Do they contribute to greater efficiency and productivity of businesses? Based upon our own experiences and research, the answer is a resounding yes.
3. Would a system of required licensing with individuals discourage and limit such activity. Yes. Quite a few very important things will not happen unless the person who creates, uploads or redistributes the user generated content faces zero costs when people access the re-purposed work.
4. Are there commercial services that host such activity, that make money? Yes.
5. Would it be reasonable to ask that such sites share some of their revenues with copyright owners? Yes, in principle, for some sites, doing some things, under some circumstances. It may be reasonable if the demands for revenue sharing were realistic and reasonable, and did not impose transaction costs shifted to users. However, if the demands for revenue sharing are unreasonable, they can be quite harmful. Demand may be unreasonable, considering for example, (1) the ability to pay, (2) the actual role of the commercial works in an otherwise non-commercial setting with much value added from users themselves, (3) if the activity itself is fundamentally protected, such as the right to use excerpts of works in criticisms or journalism, or (4) if services that generate commercial sales are not treated differently than sites than operated without fees, advertising or other methods of commercialization.

The European Commission has a credibility problem. It is seen as being captured by a handful of large publishing interests, and hostile to consumer concerns, as evidenced by the recent push to extend protection terms for recorded music, or to retain the *sui generis* database regime despite lack of empirical evidence that it is improving economic development in Europe. How much trust is there that the Commission would create an appropriate set of rules regarding user generated content at this time? At present European consumers generally ignore strict interpretations of copyright rules, or use and

post content on foreign hosted sites. This may be a preferable short term solution to the adoption of an inadequate rule now.

Question 25: Should an exception for user-created content be introduced into the Directive?

Possibly, but that would depend upon the substance of the exception.

Persons who create “user generated content” and do not benefit commercially from such works should have certain rights and freedoms to use copyrighted works. When a commercial firm sells advertising for sites that host access to user generated content, it may be appropriate to provide remuneration to the copyright owners, from the entity providing the advertising, subject to the concerns set out in the answer to Question 24.

At this point official policy makers are faced with a public that is making its own rules, and innovating around the regulatory environment. There is some value in deferring policy making decisions, while things sort out. However, if there is in fact enormous pressure to enforce exclusive rights, and notions of third party liability for user generated content are endorsed and implemented by policy makers, then a set of exceptions becomes important, if Europe is to protect activities that are valuable to individuals, businesses and society.

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Appendix A

Elements of the May 9, 2005 Draft of a Treaty on Access to Knowledge

Part 3 - Provisions Regarding Limitations and Exceptions to Copyright and Related Rights

Article 3-1 - General Limitations and Exceptions to Copyrights

(a). Members agree that the exclusive economic rights of copyright holders (including but not limited to reproduction, distribution, display, performance, adaptation and communication to the public), shall not apply to:

1. The use of relevant excerpts, selections, and quotations for purposes of explanation and illustration in connection with not-for-profit teaching and scholarship;
2. The use of relevant excerpts, selections and quotations for purposes of criticism and comment, including but not limited to parody;
3. The use of works, by educational institutions, as secondary readings by enrolled students;

4. The use of works, by educational institutions, as primary instructional materials, if those materials are not made readily available by right holders at a reasonable price; provided that in case of such use the right holder shall be entitled to equitable remuneration;
5. The use of works for purposes of library or archival preservation, or to migrate content to a new format;
6. The use of works in connection with legitimate reverse engineering;
7. The use of works specifically to promote access by persons of with impaired sight or hearing, learning disabilities, or other special needs;
8. The use by libraries, archivists or educational institutions, to make copies of works that are protected by copyright but which are not currently the subject of commercial exploitation, for purposes of preservation, education or research.
9. The use of works in connection with Internet search engines, so long as the owners of works do not make reasonably effective measures to prevent access by Internet search engines, and the Internet search engine service provides convenient and effective means to remove works from databases upon request of the right owner.

(b) It shall be presumed that these uses constitute special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

(c) In determining whether applying any limitation or exception to exclusive rights to a particular use of a work would conflict with its normal exploitation or unreasonably prejudices the legitimate interests of the right holder, the extent to which the use benefits the larger public interest shall be taken into account.

(d) In addition to implementing specific exceptions for the cases listed in subparagraph (a), parties to this treaty also shall implement a general exception to copyright law, applicable in special cases where the social, cultural, educational or other developmental benefit of a use outweigh the costs imposed by it on private parties, [and providing for equitable remuneration to the copyright owner in appropriate circumstances.]"

Article 3-2 - Provisions regarding Distance Education

(a) Members agree that the convergence of telecommunications, publishing, broadcasting and computing, is creating a media environment with enormous implications for flexible learning, and mass higher education and training, including through programs of distance education. The cross border nature of information flows provides compelling justification for harmonization of minimum limitations and exceptions for distance education. In order to take full advantage of new technologies in the delivery of education and flexible learning, it is necessary to ensure that educators have sufficient rights to use works.

(b) The exclusive economic rights of copyright owners shall not extend to the following uses in connection with distance education projects:

1. Performances of non-dramatic literary works;
2. Performances of any other work, including dramatic works and audiovisual works, but only in "reasonable and limited portions" and
3. Displays of any work in an amount comparable to that which is typically displayed in the course of a live classroom session.

(c) The works described in (b) do not include works that are marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks; and performances or displays given by means of copies not lawfully made and acquired, if the educational institution knew or had reason to believe that they were not lawfully made and acquired.

(d) Non-voluntary authorizations for education institutions and programs to use works in distance education should not involve overly restrictive or burdensome procedures.

(e) Educational institutions shall be permitted to record and retain copies of the distance-education transmission, even if it included copyrighted content owned by others, for (1) retention of the content for student access for a period of time that is necessary to achieve the learning objectives, and (2) copying and storage that is incidental or necessary to the technical aspects of digital transmission, including transient or temporary storage of material, provided that the copyrighted content on a system or network is not available for a longer period than is reasonably necessary to facilitate the transmissions for which it was made, and to the extent technologically feasible, the material is not accessed by anyone other than the anticipated recipients.

Article 3-3 - The rights of persons with disabilities

(a) Members recognize the importance of accessibility in the process of the equalization of opportunities in all spheres of society, and the right of equitable access to knowledge irrespective of disability. This requires:

1. a right to access knowledge through a diversity of formats to meet the individual's specific needs,
2. a right to transcend national frontiers,
3. a functional definition of accessibility, and
4. a functional definition of disability.

(b) Libraries, education institutions, or other institutions or organizations duly designed shall have the authority to convert material from one format to another to make it accessible to persons with disabilities.

(c) The dissemination of works in formats that enable access by disabled persons shall be permitted to any country that duly authorizes the non-voluntary use of such works.

(d) Inclusive design principles to promote accessibility shall apply to government web pages and other public documents.

(e) National legislation to protect copyrighted or non-copyrighted works using digital rights management or technological protection measures shall provide for appropriate exceptions that are necessary to ensure access by persons with disabilities.

Article 3-4 - First Sale Doctrine for Library Use

A work that has been lawfully acquired by a library may be lent to others without further transaction fees to be paid by the library.

Article 3-5 - Internet Service Providers

Members agree that the exclusive economic rights of copyright owners (including but not limited to reproduction, distribution, display, performance, adaptation and communication to the public), shall not

apply to:

(a) An internet service provider's (ISP) transmitting, routing or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if -

1. the transmission of the material was initiated by or at the direction of a person other than the service provider;
2. the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
3. the service provider does not select the recipients of the material except as an automatic response to the request of another person;
4. no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
5. the material is transmitted through the system or network without irreversible modification of its content.

(b) An ISP's intermediate and temporary storage of material for the purposes of caching material, as long as they do not modify the material or provide it in a manner inconsistent with access conditions set by the copyright holder;

(c) An ISP's storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider;

(d) The referring or linking to an online location containing infringing material or infringing activity; in cases in which the service provider has the right and ability to control such activity, this exemption applies only if the ISP does not receive a financial benefit directly attributable to the infringing activity.

(e) The caching of electronic documents for the purposes of enhancing functionality of internet search engines, as long as the original webpage address is clearly indicated on the cached page, and it is clear that the cached page may not be the most up-to-date version;

(f) The transmitting of a universal resource locator or other electronic pointer, that has the effect of instructing a user's browser to load electronic documents from a third-party server;

Article 3-6 - Digital Rights Management and Measures Regarding Circumvention of Technological Protection Measures

(a) Members agree that measures concerning Digital Rights Management (DRM) systems and prohibitions against the circumvention of technological protection measures (TPMs), referred to as DRM/TPM measures, present the following risks:

1. The DRM/TPM measures may undermine traditional limitations and exceptions to exclusive rights,
2. DRM/TPM measures may present barriers to mechanisms that enable or enhance access for the visually impaired or other people with disabilities,
3. The DRM/TPM measures may effectively extend of the term of protection beyond that provided

in copyright law, including perpetual protection,

4. Unfair contract terms and the inadequate disclosure of the limitations of uses of works may harm consumers,
5. Anticompetitive practices, including market segmentation and technological tying to other potentially competitive products, may result in high prices and reduced innovation,
6. DRM/TPM measures may make it difficult or impossible to archive or preserve works.

(b) Therefore, legal prohibitions against anti-circumvention of DRM/TPM measures shall be limited, and not be enforced in the following cases:

1. When DRM/TPM licensing terms preclude implementation in Free and Open Source Software (FOSS),
2. When DRM/TPM systems are marketed without adequate disclosure of their restriction modes and the terms under which they can be invoked, or when terms can be modified without a user's explicit consent,
3. When DRM/TPM systems do not provide mechanisms to permit works to be accessible by persons with visually impairments or other disabilities,
4. When DRM systems rely upon social entities that such as households and families in their technology more narrowly or restrictively than have been defined in local law,
5. Unless the use of DRM/TPM measures do not substantially interfere with uses that are authorized by the right holders or permitted by law, circumvention is permitted for the following works:
 - i. Works consisting predominantly of public-domain material;
 - ii. Works of medical and scientific literature;
 - iii. Works substantially financed by national governments or international organizations;
 - iv. Works consisting predominantly of factual information available from a single source, if equivalent information cannot readily be gathered or compiled by others;
 - v. Works currently protected under extended terms of copyright that exceed those required by the Berne Convention or TRIPS.

(c) In providing legal protection and remedies against the circumvention of technological measures, contracting parties shall not prohibit circumvention undertaken in connection with uses of works that are authorized by rightholders or permitted by law.

(d) In providing legal protection and remedies against the circumvention of technological measures, contracting parties shall not prohibit the making available of any technology or service that is intended primarily to facilitate uses of works that are authorized by the right holders or permitted by law.

Article 3-7 - Non-original or creative works

Facts and works lacking in creativity, should not be subject to copyright or copyright-like protections.

Article 3-8 - Orphan Works

(a) Members agree to implement measures that ensure access to works that are unidentifiable, unlocatable or unresponsive, referred to as orphan works.

(b) Use by reproduction in copies or phonorecords or by any other means of use within the rights of the copyright owner, is not an infringement of copyright when the user has conducted a reasonable investigation and can conclude that the work is an orphan work.

Article 3-9 - [Retroactive] Extensions of Term of Protection for Copyright and Related Rights

Members agree that for works protected under Article 9 through 13 of the TRIPS agreement, not to extend the term of protection beyond the minimum required term [retroactively].

Article 3-10 - Requirements When Term of Protection for Works Protected by Copyright and Related Rights Have Been Previously Extended to Exceed TRIPS Requirements

For countries that have previously extended terms of protection for works protected by Article 9-13 of the TRIPS agreement, beyond the terms required the TRIPS agreement, such protection shall be converted to a *sui generis* system of protection that includes the following features:

- (a) The *sui generis* regime shall include limitations and exceptions to rights that are least as supportive of access to knowledge as exist for copyrighted works;
- (b) The *sui generis* regime shall require that the extended term of protection is based upon the registration of the work and the inclusion of a notice of extended term of protection, identifying the right owner and the date the work will enter the public domain; and
- (c) The *sui generis* regime may be subject to additional public interest measures that promote access to knowledge, including additional limitations and exceptions to rights, obligations to support public knowledge goods, or the deposit of the work in an archive in a format that will ensure public access after the expiration of the extended term.

Article 3-11 - Works For Which Author Has Alienated Economic Rights

For works when the term of protection is based upon anything other than the life of a natural person, or in any case for any work for which the author has alienated all economic rights,

- (a) Extensions of the term of protection will not be retroactive,
- (b) Terms of protection shall not exceed the requirements of the TRIPS agreement.

Article 3-12 - Compulsory licensing of copyrighted works in developing countries

- (a) Members agree that:
 - 1. In the past quarter of a century, technical progress has changed the ways and means of transmitting information and knowledge;
 - 2. Developments that have taken place in the field of international trade during this period reflect in greater freedom of exchanges;
 - 3. The needs and concerns of the developing countries should be taken into consideration, with a view to giving them easier and less costly access to education, science, technology and culture;
 - 4. The Appendix to the Berne Convention has been of limited benefit to developing countries, due to complex procedures, high transaction costs, limitations on exports and the limited scope of

works and uses; and

5. The Appendix to the Berne Convention is not a viable mechanism to promote access to works that are distributed on the Internet.

(b) A new protocol for access to copyrighted works in developing countries will be developed for compulsory licenses for copyrighted works that will feature:

1. Simpler procedures,
2. Lower transaction costs,
3. Faster decision making,
4. Appropriate scope of works and uses, including for translations in major languages,
5. Permission to export to other developing countries that have issued compulsory licenses for the same works,
6. Feasible implementation for works distributed in electronic formats, including over the Internet, or in distance education.

(c) The protocol described in (b) will be set out in the Regulations to this agreement.