

**A. TREATY FOR THE VISUALLY IMPAIRED:**

The WTO Panel's decision in DS 160 is highly instructive in determining whether copyright limitations and exceptions comply with obligations arising under TRIPS and the Berne Convention. The VIP Treaty at issue aims to improve access to copyrighted works for visually impaired persons. The proposed sections of the VIP Treaty implicate several exclusive rights of copyright holders under the Berne Convention and TRIPS, including the rights of reproduction, adaptation, distribution, rental, public performance and making available. Of the proposed treaty articles, VIP 4(a) deals with non-profit activity, VIP 4(b) covers personal copying, VIP 4(c) encompasses certain for-profit scenarios, and VIP 8 pertains to cross-border movement of copyrighted works.

Article 9 of TRIPS incorporates Articles 1-21 of the Berne Convention along with its *acquis*, which includes the minor exceptions doctrine – the acknowledgment that minor exception can exist in national copyright law. Copyright exceptions and limitations must satisfy a three-part test in order to pass muster under Article 13 of TRIPS (and Berne 9(2) and the minor exceptions doctrine). In analyzing the VIP Treaty provisions, we are assuming that the exclusive rights they implicate are each prejudiced equally.

The *first prong* of the test requires exceptions to be limited to “certain special cases.” These must be well defined and of limited scope, the scope being determined with respect to potential users, i.e. visually impaired persons. The WIPO report quoted an estimated figure of 180 million visually impaired worldwide. This accounts for less than 3% of world population, qualifying the occurrences as “special” (much less than 50%). “Certain special cases” can be “known and particularized, but not explicitly identified.” Thus, VIP 4(a) and 4(b) will likely be deemed “certain special cases,” since they are explicitly for the benefit of the visually impaired, and clearly state the conduct permitted and the authorized entities. This is likely true despite the broad range of “works” they cover and the lack of definition of “accessible formats.”

Since any of the conditions of 4(c) is sufficient to satisfy it, we analyze them separately. 4(c)(1) is not explicitly directed to the visually impaired, and is ambiguous regarding what the already-permitted “normal” exceptions are. In 4(c)(2), functional language like “extend access” and “equal basis with others” may render its scope unclear. However, its explicit limitation to the visually impaired should satisfy this prong. 4(c)(3) sets up what appears to be a compulsory licensing scheme, requiring notice, remuneration, and inadequate availability. This provision would be valid with respect to the rights implicated by Berne 11bis(2) which permits compulsory licenses. However, 4(c)(3) aims to make works available in a format accessible by visually impaired persons, but does not specify that them as the exclusive end users. Thus, an audiobook would qualify under 4(c)(3), but could be used by anyone, significantly widening 4(c)(3)’s scope. Unlike the test for patent exceptions, the Article 13 test does not consider third party interests, making compulsory licenses harder to justify. Finally, VIP 8 should qualify as a certain special case, since VIP 4 is being complied with in both countries.

The *second prong* requires that exceptions not conflict with the “normal exploitation” of a work, such exploitation being normal in both an empirical (economic) sense and a normative sense. Uses exempted under the exception conflict by entering into economic competition with the ways that the rights holders normally extract economic value, thereby depriving them of significant and tangible commercial gains. The WIPO report states that less than 5% of published works are available in an accessible format, and most visually impaired persons and organizations are financially weak. The low levels of access and the nature of the use (non-profit and personal, respectively) should mean that VIP 4(a) and 4(b) pass this prong. VIP 8 will, if anything, serve to defray the high costs of making works accessible, since works adapted in one country can be used in another. The 4(c)(1) provision purports to already be permissible under established exceptions. However, 4(c)(2) raises second prong concerns because, even when done on a non-profit basis, providing access on par with others would mean increasing access by 95%, which could affect the market significantly. Although 4(c)(3) provides for remuneration, it is potentially problematic because it does not explicitly limit either the nature of the works or the end users. Thus, works such as audiobooks and large-print could find their way into the regular stream of commerce and affect the market.

The *third prong* requires copyright exceptions to not “unreasonably prejudice” the “legitimate interests” of the copyright holders. Unreasonable prejudice results from the exception having the potential to cause an unreasonable loss of income to the copyright owner. Again, it is appropriate to

consider the exception's impact. Here, the exception generally serves to increase access to copyrighted works, potentially increasing their popularity, appeal, and perhaps even the market for derivatives (4(a)(2) specifically prohibits the creation of derivatives). As they did with the test's second prong, the 4(c) provisions raise concerns. Specifically, 4(c)(2) triggers concerns based on the difference between the actual and desired levels of access, and loss of income from foregoing payment from such large-scale use.

The proposed VIP Treaty is consistent with the stated objectives of TRIPS, including those contained in the Preamble and Article 7, such as promoting access, reducing barriers to trade, and promoting social welfare. TRIPS Article 7, and the nature of the copyright system itself, envisions a balance between access to copyrighted works and the legitimate rights of authors. Given the low levels of access enjoyed by the visually impaired, and the stated goals of international IP protection, the VIP Treaty is wholly appropriate. However, the provisions of VIP 4(c) may not pass muster under the 3-part test, with 4(c)(2) being of specific concern. Australia must therefore be wary of signing a treaty whose obligations may conflict with their existing obligations under TRIPS and the Berne Convention.

This essay is 977 words long, including headings.