

Essay A— I certify 1,000 words exactly.

Under TRIPS Art. 13 and Berne 9(2) a limitation or exception (L&E) to copyright protection must satisfy a 3 step test: 1) must be confined to certain special cases and 2) must not conflict with normal exploitation of the work and 3) must not unreasonably prejudice the legitimate interests of the copyright holder. To be compatible with TRIPS and Berne each prong must be satisfied.

The first prong does not require the cases to be specifically identified, only known and particularized (IMRO). The word “special” means the “opposite of a non special case.” (IMRO). In this regard, the IMRO panel looked at other possible avenues of exploitation. The number of visually impaired people listed in the WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired (“WIPO Study”) should not cause 4 (a) and (b) to fail the first prong. The VIP treaty gives access to visually impaired where there was no access previously. The visually impaired, although large in number, can still be the opposite of a non special case because they are not a major group of potential users of the copyrighted works. Next, 4(a) is probably known and particularized to satisfy the first prong. The conditions imposed in (a)(1)-(4) give a rough idea of when (a) will apply. There could be an issue with the vagueness of the term “accessible format” in article 4(a) however there is a good argument that “accessible format” is sufficient because article 4 is clear the format must be used to make the work accessible to the *visually* impaired. There are probably only a rough number of identifiable formats that are implicated under the treaty. However, an opponent may point out that 4(a) “accessible format” seemingly allows for changing of the format to enhance font size, to convert into brail and also to convert into audio format such as a “book on tape.” An audio recording of a dramatic work (such as a screenplay) may implicate a public performance right within the meaning of Berne Article 11 and 11bis incorporated into TRIPS via Art. 9. Additionally 4(a) and (b) provide for the wireless transmission of the work, which also could implicate the public performance right of Berne and TRIPS. However a conflict with public performance right is unlikely because listening to a book on tape or viewing a wireless communication “for personal use” is probably not “public” within the meaning of Article 11 or 11bis. 4(b) will pass the first prong if 4(a) passes since it only permits copying of a wireless transmission by a visually impaired person meeting the qualifications of (a), limited to their own personal use. 4(b) is known and particularized. The last sentence in (b) will have no bearing on the compatibility, the panel has rejected similar wording.

The second prong requires that the L&E does not conflict with normal exploitation of the work considering exploitation of each right individually rather than the bundle of rights conferred as a whole. The test is whether there is an exclusion of acts that would normally be a significant or tangible source of profit for the copyright holder. 4 (a) and (b) pass the second prong because the beneficiaries of (a) and (b) are not a source of significant or tangible monetary gain because they previously did not have access to the work and 4(a) only applies on a nonprofit bases to works that the person or organization already has lawful access to. This means that the person or organization holding the original work properly paid for it.

The third prong requires the L&E does not unreasonably prejudice the legitimate interests of the right holder. Prejudice means “injury or harm,” and “unreasonably” is a stricter standard than reasonably. (IMRO). Legitimate interests were decidedly separate from legal rights in IMRO and in Canada-Patent Protection of Pharmaceutical Products the Panel confirmed that legitimate interests can be normative values that aren’t legal values. Furthermore, in their article, Hughenholtz and Okediji (H & O) suggest that the existence of statutory compensation may lead to a finding that an L&E does not unreasonably prejudice legitimate interests of copyright

holders. 4(a) and (b) pass the third prong. From a normative perspective the copyright holder cannot be said to have a legitimate interest in keeping their works from being easily accessible to the visually impaired, and even so there would be no prejudice rising to the level of unreasonable. Additionally the WIPO Study has shown that at least 57 member countries to TRIPS have an exception for visually impaired, demonstrating a normative value. Unfortunately the 3 step test of TRIPS does not take into account the legitimate interests of third parties, only the legitimate interests of the copyright holder are considered (unlike TRIPS Article 30).

4(c)(1) will pass the 3 step test because TRIPS allows for the states to have a lot of “wobble room” with respect to limits to economic rights. (H &O article). The minimum set by TRIPS is the right of reproduction but TRIPS leaves room for a statutory carves out permitting acts of economically insignificant temporary copying, such as library exceptions and also the US fair use defense. 4 (c)(1) operates similar to a library exception for the benefit of the visually impaired so it will most likely be compatible with TRIPS and Berne. 4(c)(2) will pass if 4(a) passes . A commercial purpose does not matter under minor exceptions doctrine. 4(c)(3) will likely pass the 3-step test because it is clearly defined (1st prong), it provides that the work is not already reasonably available in an “identical or largely equivalent form,” limiting the conflict with normal exploitation and also remuneration is provided so arguably the copyright holder would not be deprived from tangible or significant monetary gain (2nd prong), and lastly remuneration suggests that 4(c) will pass the third prong. (H & O article).

As to the 3 step test, if article 4 passes then article 8 should pass as well. The WIPO study on copyright limitations notes that this type of cross border provision is complicated but not conflicting with TRIPS.