Copyright exceptions and limitations for persons with print disabilities: the innovative Greek legal framework against the background of the international and European developments

Maria-Daphne Papadopoulou, Ph.D., LL.M. mult
mdpap@DIKHGOROS.gr

1. Introduction

At a time when sighted people are swamped with information and enjoy unprecedented ease of access to copyright protected content, a combination of economic, technological and legal factors, including the operation of copyright systems are converging to impede access to this content by the blind or other print disabled people.

According to the World Health Organization (WHO) about 314 million people are visually impaired worldwide, 45 million of which are blind (Visual impairment and blindness, 2009). Studies in the UK (Visual impairment and blindness, 2009) indicate that only 5% of books are made available within one year of publication in a format accessible to visually impaired people (such as a Braille, large print or audio-formats) (Friend, 2009). 47% of blind and partially-sighted students in higher education are unable to obtain needed textbooks in their preferred formats and 33% of visually impaired children have problems accessing school books in an accessible format. This leads to a book famine phenomenon depriving people of access to education, culture and entertainment.

The paper is organized broadly as follows: Part II, after having examined the definition of the beneficiaries -an important and necessary background for determining the appropriate boundary lines to be drawn to define the circle of beneficiaries- it sets forth the copyright aspects of the problem, and examines the cross-border access to the accessible copyrighted works. In Part III, the international developments are analyzed in terms of the efforts being made to reach a balanced solution regarding the access problem of the print disabled. Part IV presents the European approach for the print disabled and the latest developments and initiatives on this issue. In Part V, the relevant Greek legal framework is analytically presented, so as to realize its innovative and forward looking provisions not only at national level but also against the background of the international and European developments. In Part VI the compliance of the Greek exception for the benefit of the print disabled with the three steps test is checked and finally, in last part the relationship between the exception in question and the technological protection measures are closely examined.

1.1 Beneficiaries

It is important to clarify at the outset the beneficiaries, in favour of who the exception has been introduced. Even in the framework of Standing Committee on Copyright and Related Rights (SCCR) different terms have being used regarding the description of beneficiaries: ‘visually impaired persons’ (Sullivan, 2006), ‘reading disabled’

(Conclusions of the 17th SCCR, 2008), 'persons with visual or hearing impairments' and 'persons with other sensory disabilities' (SCCR/18/2, 2009), 'visually impaired and other reading disabled' and 'visually impaired and persons with other disabilities' (Conclusions of the 18th SCCR, 2009) and finally 'persons with print disabilities' (Conclusions of the 19th SCCR, 2009).

Which one is the most appropriate term referring to problems of access to published written works? The term 'visually impaired', 'reading disabled', 'print disabled' or something else?

The term 'visually impaired persons' (or VIPs) refers to blind or partially sighted people. The term 'print disabilities' covers a wide range of issues beyond visual disabilities. However, the large majority of people regarded as having a print disability are included in this category because of greater or lesser degree of visual impairment (Dakin and Wijesena, 2005, Annex II of IGC, 1985). Reading or print disabled people are all those who due to an impairment that may be physical, sensory or other, cannot read standard print. For instance, a person without sight, a person whose sight is severely impaired, a person unable to focus or move his/her eyes. It also applies to those who have a perceptual or cognitive disability which prevents them from reading standard print. Nevertheless, the term does not apply to all disabled people. For instance, a wheelchair user who has no impairment preventing him or her from reading standard print is not a 'print disabled' (SCCR/19/13/Corr., Friend, 2009).

In national level various definitions of the visually impaired exist, some of them are inclusive in terms of the disabilities covered by copyright exceptions (*e.g.* the United Kingdom, Visually Impaired Persons, Act 2002 and Denmark, Section 17 of the Danish Copyright Act of 2003) others merely descriptive (*e.g.* USA, the Chafee Amendment to Chapter 1 of title 17, United States Code, section 121 and EU, Directive 2001/29/EC, Article 5 (3)(b) states 'people with a disability"").

In international level different approaches have been expressed. In the Proposal for a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons (SCCR/18/5, 2009) the following language is proposed for the issue in question:

"*Article 15. Disabilities Covered*
(a) For the purposes of this Treaty, a 'visually impaired' person is:
1. a person who is blind; or
2. a person who has a visual impairment which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no visual impairment and so is unable to access any copyright work to substantially the same degree as a person without a disability.
(b) Contracting Parties shall extend the provisions of this Treaty to persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability".

In the last Draft proposal of the USA for a consensus instrument to WIPO during the open-ended consultations in May 2010 the term "persons with print disabilities" is

used and its definition includes the following: "*a) a person who is blind, or b) a person who has a visual impairment or a perceptual or reading disability which cannot be improved by the use of corrective lenses to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability, c) a person who has an orthopedic- or neuromuscular-based physical disability that prohibits manipulation and use of standard print materials*".

'Reading' is also defined pursuant to WHO's International Classification of Functioning, Disability and Health (ICF). According to ICF 'reading' (class d 166) is defined as: *"Performing activities involved in the comprehension and interpretation of written language (e.g. books, instructions or newspapers in text or Braille), for the purpose of obtaining general knowledge or specific information.*"

In the European Proposal also the term 'person with a print disability' is adopted and it means any person:

"*a) who is blind; or*
b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; or
c) who is dyslexic; or
d) who is unable, through physical disability, to hold or manipulate a book; or
e) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading; and whose disability results in an inability to read commercially available standard editions of works; and who can be helped to read by reformatting the content (but, does not require the text itself to be re-written in simpler terms to facilitate comprehension)."

The choice of the beneficiaries' definition is clearly not only a legal but also a political choice. In the national legislations, where an exception in favour of the print disabled is provided, in most cases the issue has been solved. In the international forum the question has to be answered in the case of the establishment of a legal instrument and kind of the answer is crucial, since it will designate the beneficiaries.

The best approach seems to be a language consistent with the recommendations by Sullivan expressed in the "Study on copyright limitations and exceptions for the visually impaired" prepared for WIPO: *"The best way to define the end beneficiary is likely to be by using a functional definition. A functional definition would be based on a person's inability to read the material that has already been published"* (2006).

For the needs of the present paper we will mainly use the term 'print disabled', since on the one hand it seems to gain ground lately in the international fora and on the other hand it covers a wide range of issues beyond visual disabilities.

2. Copyright implications of the problem

One of the most important problems of the print disabled is their inability to read a printed document, *i.e.* the access to information and consequently to knowledge.

According to national constitutional rights and -most importantly- according to the UN Convention on the Rights of Persons with Disabilities (especially relevant are the Articles 4, 9, 21 and 30), these persons do enjoy a right for equal access to information products, publications and cultural material in accessible formats. Nevertheless, the equal access to knowledge and information presupposes that the information is technically accessible and that there are no legal obstacles for this access (no mention is made to the economic barriers to access the information, because this analysis goes beyond the needs of this paper). From a technical point of view several possibilities have been developed during the last decades in order those works to be accessible by the persons with print disabilities. Works have to be adopted in some way, including enlarging, altering features such as color or font, transferring into a tactile code or into an audio format. The result may be hard copy Braille, large print, tape or CD, or it may take the form of temporary output from computer peripherals, such as synthetic speech or enlarged screen display (e.g. Moon, Daisy, talking books) (Garnett, 2006, Bergman-Tahon, 2009). From a legal point of view the making of an accessible copy of a work in traditional formats or with advanced access technologies involves making both a reproduction and an adaptation of the original work. The different distribution methods for getting accessible copies to the print disabled either as physical copies or by electronic delivery online could implicate acts controlled by the rights of distribution and communication to the public. All these acts, the reproduction, the adaptation, the distribution and the communication to the public, are restricted by copyright, since they belong to the exclusive economic rights of the rightholder and his permission must be acquired in advance, in the case of usage of a copyright protected work. Generally, any use of the work requires copyright clearance, unless it falls within the scope of an exception. Without copyright clearance and without the existence of an exception, print disabled encounter insurmountable obstacles accessing works and consequently receiving information.

Some national legislation do provide exceptions in favour of print disabled and these exceptions cover a range of restricted acts and protected material. A survey published by the World Intellectual Property Organization (WIPO) in 2006 showed that the copyright laws of 57 countries (out of 184 WIPO member states) contain specific provisions to assist visually impaired people, or people with other print disabilities (Sullivan, 2006; SCCR/19/3, 2009).

Nevertheless, no provision exists in any international treaty or convention concerning specifically copyright, which provides for exceptions in favour of the print disabled (Sullivan, 2006). A number of international agreements address merely the need for solutions to the difficulties encountered by print disabled, such as the Universal Declaration of Human Rights (UDHR), especially Articles 19 and 27,[i] the General Assembly of Standard Rules on the Equalization of Opportunities Persons with Disabilities (Rule 5)[ii] and the Convention on the Rights of Persons with Disabilities (Articles 9, 21, 30 and 32)[iii]. Some of those instruments require countries to take the needs of print disabled into account when framing their copyright laws (Article 30(3) Convention on the Rights of Persons with Disabilities).

The first supranational instrument, where an exception to the benefit of the print disabled is regulated, is European Directive 2001/29/EC (hereinafter Information Society Directive) (Article 5(3)(b)). In this Directive it is stipulated that all member states shall adopt necessary measures which will facilitate access to works by persons

suffering from a disability which will constitute an impediment to use of the works, and to pay particular attention to accessible formats (Preamble 43). The Information Society Directive permits exceptions to the reproduction, communication to the public and distribution rights[iv] for the benefit of people with a disability subject to certain conditions and under the condition that it is complied with the three step test.

The situation already described can be characterized as the basic copyright problem of getting access to copyrighted works by print disabled. Part of this problem is that nowadays it is requested by the beneficiaries access to publishers' electronic files, which can greatly facilitate the production of accessible formats (*i.e.* Dedicon in Netherlands, where Dedicon that has been producing alternative format material under an agreement with the Federation of Dutch Publishers (NUV) is able to request a digital file from publishers, and of course the Greek case). However, these files are what the International Publishers Association has described as the publishers' "Crown Jewels" (Sullivan, 2006) and the rightholders believe that appropriate protection against piracy and misuse needs to be guaranteed, when it concerns the online delivery of digital formats, which can be easily reproduced and instantly disseminated over the internet. Any exchange of those files could be possible with effective security measures to protect rightholders' interests.

2.1 Cross-border access to the accessible copyrighted works

The abovementioned copyright problems that the print disabled have to confront in order to have access to copyrighted works are limited to national boundaries. The relevant copyright problems though have also an international nature, such as the problem of national boundaries around accessible copies or otherwise the cross-border access to accessible content. This is basically the reason why international fora, such as WIPO and UNESCO are dealing recently intensively with the subject, as we will analyze in the following section.

How the individual provisions on exceptions for the benefit of print disabled that have been found in national copyright laws might work when accessible copies move between different countries is very important matter for print disabled and those organizations assisting them (Sullivan, 2006).

The problem has not only legal implications but also economic and pragmatic ones. The ability to move accessible copies between jurisdictions would allow the costs of making accessible copies to be reduced. The effort and cost of making a master copy would not have to be repeated in each country where that accessible copy is needed. The expense per accessible copy made will be less where a large number of copies are made (economies of scale). This would in turn enable the number of titles available in accessible formats to be increased as the limited resources that can be devoted to this activity would not be wasted in unnecessary and repetitive work (SCCR/19/13/Corr., 2009).

For example, there are collections in the USA, Canada, the UK, Australia and New Zealand and literally millions of print disabled readers in the 60 other countries, where English is either spoken as the first or second choice language, could benefit from having access to these collections (Friend, 2009a).

It is evident that it would be more than useful to export and import accessible copies over borders, but there may be less agreement about what, if anything, needs to –and could- be done to facilitate this in the legal framework (Sullivan, 2006; SCCR/19/3, 2009).

Despite the fact that there are a number of international treaties and conventions governing the framework for national copyright laws, the underlying premise is that copyright legislation is territorial in nature. This means that each national law can generally only make provision for the precise form of rights that exist in that territory and any exceptions to those rights only determines what activity can be undertaken in that territory without infringing copyright (Sullivan, 2006). Due to the absence of international agreements, someone who has made an accessible copy of an item in one country may not be entitled to provide a copy to somebody in another country (Dakin and Wijesena, 2005). Where activity is undertaken across jurisdictions, there will usually be a need to consider the law of both jurisdictions and decide which law to apply to which part of the activity according to the rules of private international law.

The dilemma of applicable law in cross border copyright disputes comes to solve a specific rule -closely associated with the principle of territoriality- the *lex locis protectionis, i.e.* the principle of the protecting country. The principle of the protecting country, first established in the Berne Convention (Article 5(2)), means that the law of each country for which protection is claimed applies. International copyright disputes raise intricate problems related to the effect of IP rights. Effects are understood as the scope, limitation and exceptions as well as duration of copyright. The law of the protecting country would usually apply to determine the question of limitations of rights and the question of exhaustion of rights (Toshiyuki and Paulius, 2010). Restrictions placed on the exclusive right modify the content of the latter. So, if all issues concerning the content of the exclusive right must be governed by the principle of the protecting country, exceptions and limitations to the rights granted belong to the same category. The same exceptions could play a role as defenses against copyright infringement (Torremans, 2009).

Within the European Union Rome I and Rome II Regulations cover private international law issues also with regard to IP. The prevailing approach though is that such IP related questions as existence, content, duration are not governed by the Rome II Regulation (law applicable on non-contractual obligations). These issues will have to be determined according to the choice of law provisions of the forum country. Rome II Regulation introduced a special regime only for non-contractual obligations arising from an infringement of IP rights. Rome II Regulation preserves the *lex locis protectionis* principle according to which *"non contractual obligations arising out of infringements of IP rights are governed by the law of the country for which protection is claimed"* (Article 8(1)). Additionally, parties are not allowed to make a choice of law agreement under the Rome II Regulation (Article 8(3) and Article (13)) (Toshiyuki and Paulius, 2010).

From the short analysis above it becomes evident that, since national laws differ, the protection afforded to the rightholder is country specific. Choice of laws arises because laws of different countries might provide different rights or right with different scope. No equal protection could be afforded, since the existence and the

conditions of the exceptions in favour of disabled people vary across the nations. For this reason, a solution is sought and must be found in the international forefront.

In order to realize the complexity of this copyright problem and to comprehend the number of the exclusive rights that are implicated in the situation of international exchange of accessible copies we have to analyze a concrete example. Imagine that in country A there is a need to create an accessible format of one work for the needs of one print disabled person X. First of all it has to be checked, whether an exception exists and what its application conditions are. Assuming all the necessary conditions are met, it is allowed to proceed to the creation of an accessible copy. Depending again on the exception's regulation it can be permitted only a Braille reproduction or it could be permitted the possibility to make a digital version available online. This happens in country A. In the case where another print disabled person Y in country B, needs the same book in the same format and because he does not want to spend time and money to create another one anew asks to receive it from person X (instead of persons with print disabilities could be trusted intermediaries, where of course other implications could arise, since there are not individuals but organizations). To export the work in Braille format, the relevant exportation right should be able to be limited, based on the exception in country A. And since the exportation right does not form usually any exclusive right of the right holder, we refer to the distribution right. This means that in country A the exception in favour of print disabled X has to cover also the distribution right. This regarding country A. In country B it has to be examined whether an exception does exist for the same purpose and that all the necessary conditions apply. If the answer is positive, the next issue that arises is whether the importation of the accessible copy is legal. There are some countries that make provision limiting importation both of copies made illegally and copies made without the authorisation of the right holders. The latter would seem to include copies made quite legally under an exception (Sullivan, 2006). For some countries, there could be a particular problem with an exception that is limited to reproducing works that have been 'published'. For countries that provide for international exhaustion of the right to judge whether a copy should be published, it may not be problematic. A copy that has been published with the consent of the rightholder anywhere in the world can probably be brought into the country B perfectly legally and so the work also counts as 'published' in country B, even if the copyright owner has not published any copies in that country. So, even if a work must have been 'published' in both the exporting and importing country, so long as a work has been 'published' in the country where the accessible copy has been made (A), then it may also count as 'published' in the country into which the accessible copy is being imported (B). The approach is not the same for countries that do not provide for international exhaustion of rights, since international treaties give the possibility to the countries to decide what provision they make in this regard. Rightholders may therefore quite legally have published a work in country (A) which is not yet available to the public in country B and importation of an accessible copy of the published work from the country A to B could be illegal, if an exception in the country B only applies to published works. Thus, what provision is appropriate regarding distribution of accessible copies made abroad, where a country does not provide for international exhaustion of rights should be considered very carefully. It would be necessary, for instance, to decide to what extent a provision in copyright law should permit accessible copies made in another country to be circulated, even on a not-for-profit basis, and even where they benefit print

disabled, but where there are no copies in normal circulation within the country (Sullivan, 2006).

Another major issue is what happens, when, although the exception in question does exist in both countries A and B -to continue our previous example- and the exception covers also the right of exportation but there is an agreement between the rightholder and the publishers prohibiting the exportation, what will be the case. The problem of the contractual overiddability appears. Is it possible a contractual agreement to override the exception in favour of the print disabled? The analysis of this issue exceeds the scope of this paper but it is unquestionable that the international copyright instruments are silent regarding the relationship between contractual freedom and copyright law and it is left to national legislators. At European level the issue is dealt in a contradictory way. Some concrete exceptions regarding computer programs (Article 9 Directive 91/250/EE) and databases (Article 15 Directive 96/9/EC) prevail contractual agreements and the contrary provisions are deemed null and void. For all the rest exceptions though exists the rule of prevalence of contract not only in online context (Article 6(4) and Recital 53 Information Society Directive) but also in analogue environment (Article 9, which provides that the Directive shall be without prejudice to the provisions concerning the law of contract). Thus, the only remedies against abusive contractual clauses are to be found in the general rules of law. There are some proposals arguing that in certain cases the public may need to be protected from the ability to alienate the possibility to benefit from copyright exceptions, based on the rationale of the exceptions. Particularly when an exception is attributable to the protection of fundamental rights, as it is in the case of the exception in favour of the print disabled since it provides them the constitutional right of access to knowledge, contractual overridability should not be possible. The only concern is that this approach is a product of interpretation and expressly formulated in a legal text (Akester 2010).

For all those reasons, any legislative provision regulating this issue should be carefully and sensitively drawn (Sullivan, 2006).

The aim of allowing international access to accessible copies can be met by international negotiation and eventually agreements and in many cases will require amendment of national laws. This aim is within the scope of the project currently under way under the auspices of WIPO (Dakin and Wijesena, 2005) eventually with the establishment of an international binding legislative instrument.

2.2 Solutions instead an international treaty

There are though also alternative ways of providing access to copyrighted works.

The conclusion of bilateral agreements between two countries which permit the free exchange of accessible formats between those two countries could be one. Instead of bilateral the agreements could be multilateral encompassing more than two countries. This involves a separate international instrument dealing with the international exchange of accessible formats, adopted in the framework of WIPO. Another way providing the print disabled access to copyrighted works concerns the introduction of the doctrine of exhaustion. The third alternative involves amending or adding a

protocol to the Berne Convention or the WCT, to permit the free circulation of special media among contracting states TRIPs (Hugenholtz and Okediji, 2008).

Softer versions of the instrument could be framed as a resolution declaration guideline or model law with the endorsement of WIPO, WTO or both (USA proposed this solution of the Model Law during the 20th Session of SCCR). Examples of such soft law initiatives include the Joint Recommendation on Internet Use developed by the WIPO Standing Committee on Trademarks (SCT) and adopted by the WIPO General Assemblies and the Paris Union in 2001, and the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks. Neither is a binding instrument, but the latter clearly is evolving into an international legal standard through its incorporation by the U.S. into several bilateral agreements (Hugenholtz and Okediji, 2008). The soft law solution is the approach that both EU and USA seem to favour at framework of SCCR negotiations.

3. International Developments

The international effort to address the copyright related barriers to overcoming print disabilities is not a recent story. Already back in 1982 (25-27 October) the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright met at UNESCO for this purpose and a report was presented in January 1983.

In December 1983, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention decided, each on its own behalf, to ask states to provide comments on the "Model Provisions Concerning the Access by Handicapped Persons to the Works Protected by Copyright," which was drawn up by the October 1982 Working Group on the subject convened jointly by UNESCO and WIPO.

In 1985, the Executive Committee for the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention published a Report on the issue of 'Problems Experienced by the Handicapped in Obtaining Access to Protected Works' as Annex II to a report of the agenda item "Copyright Problems Raised by the Access by Handicapped Persons to Protected Works". The 26 pages long Report is a concise presentation of the main issues facing the SCCR today. In its conclusions it was recommended to be established "*an entirely new international instrument which would permit production of special media materials and services in member states, and the distribution of those material and services amongst member states without restriction*".

The last years the issue came with a new dynamic at the international forefront and WIPO deals intensively with it.

WIPO's top copyright negotiation forum, SCCR, is working to facilitate access of the blind, visually impaired and other reading-disabled persons to copyright-protected works. Acknowledging the special needs of visually impaired persons (VIP) the member states gave a mandate to the 17th session of the SCCR held in November 2008, to deal, without delay and with appropriate deliberation, with those needs of the blind, visually impaired, and other reading-disabled persons. This was to include

analysis of limitations and exceptions and the possible establishment of a stakeholders' platform at WIPO, in order to facilitate arrangements to secure access for disabled persons to protected works. In pursuit of this mandate WIPO has structured the VIP Initiative with the objective to make available published works in accessible formats in a reasonable time frame (all the meetings and the relevant documents are online at http://www.visionip.org/stakeholders/en/documentation.html).

Based on the above mandate the Stakeholders' Platform was established. The WIPO Secretariat invited various major stakeholders representing copyright rightholders and VIP interests to participate in the meetings realized in the framework of this Stakeholders' Platform with the aim of exploring their concrete needs, concerns, and suggested approaches in order to achieve the goal of facilitating access to works in alternative formats for people with disabilities (by the time of this paper already four meetings have taken place: The first meeting took place in Geneva, on January 19, 2009, the second meeting took place in London, on April 20, 2009, the third meeting in Alexandria (Egypt), on November 3, 2009 and the fourth meeting in Geneva, on May 26, 2010). Two working subgroups were created among the stakeholders, respectively the trusted intermediaries' subgroup and the technology subgroup, to advance common understanding in both of these areas and identify practical solutions.

In those meetings of the Stakeholders' Platform a set of elements were identified which could form the focus of a WIPO-led process involving multiple public and private sector stakeholders. These included consideration of: (1) enabling legal regime; (2) technological tools for the conversion of works; (3) issues of formats, standards and interoperability; (4) concerns relating to development and specific needs of developing countries; (5) creating and disseminating information materials and training modules; and (6) assessment of particular challenges posed by the digital environment. A number of studies were identified and commissioned relating to new technologies, trusted intermediaries and technical formats, which would enhance understanding of complex technical issues and contribute to development of greater trust between the print disabled community and the rightholders. The focus of the last meeting was to take stock of the work carried out by the two subgroups of the Platform and to identify further steps needed to pursue the mandated objectives.

A recognized challenge in this regard is to achieve concrete progress within a reasonable period while dealing with the technical complexities of this endeavour. The details of the work carried out in those meetings are included in three Interim Reports (SCCR/18/4, 2009, SCCR/19/10, 2009 and SCCR/20/6, 2010).

It is gratifying that during the 18th and 19th SCCR, held in May and in December 2009 respectively, the member states, on the basis of the interim Reports have endorsed the progress made so far, approved the further proposed steps and encouraged the WIPO Secretariat to continue the work of the Platform. Greater emphasis on participation and concerns of Developing Countries, raised by a number of member states, has been noted and will be taken on board for the future.

WIPO in the meanwhile has organized a series of other meetings dealing with the same subject. To mention some of them an international conference took place in Geneva in July 2009 (http://www.wipo.int/meetings/en/2009/vip_ge/), another

meeting, hosted by WIPO in December 2009 with a number of UN specialized agencies in Geneva, concluded with agreement on the need for closer inter-agency collaboration in favour of VIP (http://www.wipo.int/pressroom/en/articles/2009/article_0055.html), a workshop focused on Improving Web Accessibility for Persons with Disabilities occurred in Geneva in February 2010 (http://www.wipo.int/meetings/en/2010/wipo_itu_wai/) and finally WIPO co-organized with the United States Copyright Office an international training course in Washington in March 2010 regarding the improved access to copyright protected content for the blind and other persons with visual or print disabilities).

VIP Initiative aims to facilitate and enhance access to copyrighted works for the blind, visually impaired and other reading-disabled persons and stresses the importance of common activities in this area. The visionip.org website (www.visionip.org) launched by WIPO is recognized as a vehicle to support this interagency effort and as a platform for attracting support, exchanging of views and disseminating information to all parties interested in the issue of access to information and cultural content by VIPs and other reading-disabled persons. Most recently (May 2010) an online forum to promote exchange of ideas and to build consensus on international measures to improve access to copyright-protected works in formats suitable for visually impaired persons and others with print disabilities was launched by WIPO. The Forum (www.visionip.org/forum) is designed to stimulate debate, enhance understanding, and broaden awareness of the issue.

At the same time SCCR, having agreed to address the issue of exceptions and limitations to copyright and related rights by exploring existing and proposed national laws on the subject, with a view to strengthening international understanding on exceptions and limitations, prepared a Questionnaire on Limitations and Exceptions, in which a part was dedicated on limitations and exceptions for persons with disabilities. This Questionnaire can be used as a tool for data collection to facilitate an analysis of the status of copyright limitations and exceptions in WIPO member states.

Apart from the discussions on a series of practical measures seeking to find convergence on operational matters, such as the integration of accessibility features into publishing software and on the question of the security on sharing digital master files -both of which will hopefully lead to an increase in accessible publishing of future titles- a draft treaty has also been proposed in SCCR to develop a harmonized set of international copyright exceptions for the benefit of the VIP and other persons with reading impairments. This proposal for a treaty (based on text prepared by the World Blind Union) was submitted during the 18th Session of SCCR, in May 2009, by Brazil, Ecuador, Paraguay and Mexico (SCCR/18/5, 2009, SCCR/19/13, 2009).

The limitations and the exceptions to this proposal of a Treaty would make it permissible without the authorization of the copyright owner on a non-profit basis under certain conditions to protect the interest of copyright holders to do the following:

- Make an accessible format of a work

- Supply the accessible format or copies to a VIP by any means including by non commercial lending or by electronic communications by wire or wireless means (Article 4a)
- Undertake any immediate step to achieve these objectives.

The most important feature of this proposed treaty though is that it aspires to legalize the cross-border exchange and the sharing of the legally made collections under copyright exceptions. Specifically, it permits the export to another country of any version of the work or copies of the work that any person or organization in one country is entitled to possess or make under the treaty proposal, and the import of that version of a work or copies of the work under the provisions of the treaty proposal in the other country (Article 8).

During the 19th session of SCCR (from December 14 to 18, 2009) it has been agreed to move forward with discussions that could lead to better access to copyright-protected works by the blind, visually impaired and other reading disabled persons. The SCCR decided to accelerate the work on copyright exceptions and limitations for the benefit of persons with reading disabilities. In concluding remarks (Conclusions of the 19th SCCR, 2009), it was noted that the Committee accepted the initiation of focused, open-ended consultations in Geneva "aimed at an international consensus regarding exceptions and limitations for print-disabled persons."

In the course of those open ended consultations in May, 2010 USA submitted a draft proposal for a consensus instrument (Draft proposal of the USA, 2010). Although several recommendations on national laws to aid the import and export of accessible books are included in this draft proposal, this movement was not accepted with great enthusiasm from the countries that have supported the treaty proposal most importantly due to the fact it is not a legally binding instrument (other reasons that the USA's proposal failed the expectations of the countries supporting the treaty proposal was that it does not create a legal obligation for countries to establish exceptions, it does not address the need to circumvent technological protection measures or contractual restrictions on needed exceptions (Kaitlin, 2010)). On the other hand Brazil, Ecuador, Mexico and Paraguay proposed a concrete timetable for the adoption of a Treaty for the visually impaired, that would see its completion till the spring of 2012 (SCCR/20/9, 2010).

EU proposed a Joint Recommendation solution (SCCR/20/12, 2010) instead of supporting a binding Treaty and also the African Group proposed a language for a Treaty covering exceptions also for educational and research Institutions, libraries and archive centers (Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers) (SCCR/20/11, 2010).

4. European Developments

The issue does not possess a central position only at the international forefront. Central role possesses also at the European scene and at the latest European Union copyright developments.

In the European context exists a legal framework regulating exceptions and limitations: the Information Society Directive. The list with the exceptions prescribed in the Directive is exclusive but not mandatory (apart from one). However, the provision of Article 5(3)(b) providing for an exception in favour of disabled people is now part of the copyright law of all member states.

Although all member states have implemented the relevant copyright exception into their national legislation, their approach is not harmonised, so a degree of legal uncertainty still arises. Furthermore the cross-border transfer and exchange of the accessible material continues to be impeded by the territorial limitation of exception under national legislation.

As a result in July 2008 the European Commission launched a public consultation in the form of a Green Paper in the Knowledge Economy. The Green Paper focused on general issues regarding exceptions to exclusive rights and specific issues relating to exceptions and limitations most relevant for the dissemination of knowledge. Among those exceptions was also the one for the benefit of people with a disability (the rest involved exceptions for the benefit of libraries and archives, allowing dissemination of works for teaching and research purposes, orphan works and user generated content). After examining the submissions to the public consultation (almost 400 responses from publishers, collecting societies, libraries, archives, universities, researchers, companies and consumer organizations, online at http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm) the Commission published a Communication on Copyright in the Knowledge Economy in October 2009. One of the priority areas that the Communication identifies is the print access for persons with disabilities. The Commission believes that the problem of accessibility could be improved at European level in a relative short time frame through goodwill and constructive discussions among stakeholders.

According to the Communication the immediate goal is to encourage publishers to make more works in accessible formats available to disabled persons. Technological protection measures should not be an obstacle to the conversion of legally acquired works into accessible formats. Additionally, exceptions for persons with disabilities including visually impaired persons should not be able to be contractually overridden (the British Library found that out of a sample of 100 licences it entered into with electronic publishers only two acknowledged the exceptions for visually impaired people).

One of the benefits of the public consultation was that it revealed a number of existing and effective collaborative efforts for persons with print disabilities across the EU. For instance, in Denmark, e-books or audio-books produced by the Danish Library for the Blind are equipped with a unique ID which allows control of the use and of the work and the tracing of possible infringers. In France, agreements are in place between a not-for-profit agency BrailleNet and publishers for delivery of digital copies of works which are stored on a specialised secure server accessible only by certified organisations (Green Paper COM(2009)466). The Communication underlines that such efforts should be accelerated and applied across the EU.

In order that constructive discussions among stakeholders to take place, a Stakeholder Dialogue has been set up by the European Commission concerning the needs of print disabled persons. The first meeting took place in Brussels, in December, 2009 (the importance of the issue was also highlighted at a European Parliament Workshop organized in Brussels in November 2009). The forum considered the range of issues facing the visually impaired persons and possible policy responses. In that meeting publishers, representatives of the European Blind Union and European Disabled Forum, technology experts, libraries as well as people from inside the European Commission from various departments have participated (http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&page=2&body=JURI). Aim of this forum is to look also at possible ways to encourage the export of a converted work to another Member State while ensuring at the same time an adequate remuneration of the rightholders for the use of their work.

The Dialogue will also tackle the technology issues of accessible formats. A considerable amount of European funding has already borne fruits in the form of projects, such as EUAIN network and PROACCESS. [v]

5. The innovative Greek legal framework

Article 28A of Copyright Law 2121/1993 is the provision concerning the exception established for the benefit of blind and other disabled (Off. Gaz. A' 25/4.3.1993). Article 28A provides the following:

Article 28A: Reproduction for the Benefit of Blinds and Deaf-mute

The reproduction of the work is allowed for the benefit of blinds and deaf-mute, for uses which are directly related to the disability and are of a non-commercial nature, to the extent required by the specific disability. By Ministerial Order of the Minister of Culture the conditions of application of this provision may be determined as well as the application of this provision for other categories of people with a disability.

Pursuant to Article 28A the reproduction of a previously published work is allowed and constitutes a legitimate limitation of the author's right, under the condition that the work is reproduced in special formats and solely for the benefit of certain beneficiaries, for uses which are directly related to their disability and are of a non-commercial nature, to the extent required by the specific disability and provided that the concrete application terms of the Ministerial Order are complied with. It is important to highlight that according to the exception in question only the reproduction right is limited and not the right of the communication to the public (and the distribution right), despite the fact that the Information Society Directive offered this possibility to the national legislators (Articles 2, 3, 5 (3)(b) & (4) Information Society Directive) (for instance Cyprus, Denmark, France, Hungary, Poland, Portugal and Spain did take advantage of this possibility, Westkamp, 2007). Thus, the reproduction of a work in Braille could fall under the exception according to the Greek legal framework, its online presentation, however, not.

Another concern is that the exception for people with a disability is not specifically provided in Directive 96/9/EC on the legal protection of databases (hereinafter database Directive). Although Article 6(2) Database Directive provides for other

exceptions, such as teaching or scientific research, and private use reproductions, it includes no exception for print disabled. This raises the concern that the exception for people with a disability could be undermined by invoking database protection on the basis that a particular literary work is simultaneously protected as a database, since Article 2(e) Information Society Directive leaves the provisions of the Database Directive intact. As pointed out in the Commission Staff Working Paper of 19 July 2004, this situation might arise when the literary work, such as an encyclopaedia, is protected as a work and as a database at the same time (Green Paper, Copyright in the Knowledge Economy). Accordingly the same situation appears in the Greek legal framework, where a similar exception is not included in the legal protection of a database. Thus, the exception in question does not apply to databases with all the risks that this statement brings.

The national legislator considered that the application terms of this provision should be detailed and that a specific procedure should be established in order the reproduction to be allowed. To this end it is prescribed by Copyright Law that the specific terms of application of this arrangement and all the necessary details should be determined by a Ministerial Order (by the Minister of Culture). This Ministerial Order (ΥΠΠΟ/ΔΙΟΙΚ/98546/2007, Off. Gaz. Β' 2065/2007) was enacted in October 2007, with a five years delay, since the amendment of Article 28A Law 2121/1993 was enacted in 2002 (Amendment of Copyright Law with Article 81(2) Law 3057/2002).

The till then non-enactment of this Ministerial Order held the regulation in abeyance and amounted to a fruitless provision, since without the necessary legal instrument the beneficiaries (blind, deaf-mute and persons with other disabilities) could not take advantage of this provision.

Analyzed in the next section, the Ministerial Order provides for the competent intermediate bodies, the beneficiaries, the categories of works whose reproduction is allowed, the formats of reproduction of a work, the publishers' obligation to provide files in electronic format and finally, the terms of applications.

5.1 Ministerial Order ΥΠΠΟ/ΔΙΟΙΚ/98546/2007

In the title of this paper the Greek legislative framework is described as innovative. The logical question is what characteristics attribute to the Ministerial Order this feature. There are two: the establishment of intermediate bodies and -most importantly- the publishers' obligation to deliver to the competent intermediate bodies the files of the works to be reproduced in electronic format. In order the rightholders not to fear that this obligation could cause irrevocable damage to their interests by losing the control of the reproduction of this electronic file, the Greek solution has provided the rightholders with a number of pledges. The most significant pledge is exactly this establishment of intermediate bodies, who are responsible for the reproduction of the copyrighted works, to check the status of beneficiaries and who are liable for any copyright infringements by third parties that they have selected for the reproduction of the copies.

At the outset it should be pointed out that this exception allows for a free use, *i.e.* it permits the intermediate bodies to undertake the acts restricted under copyright or

related rights protection to the extent permitted without having to contact the rightholders to obtain permission and without having to pay any remuneration.

The limitation described in Article 28A –as all the limitations applicable to the economic right (a.18-28C)– apply *mutatis mutandis* to the related rights (Article 52 Law 2121/1993). Thus, the limitation in favour of the blind and people with other disabilities apply also for the related rights, even though no specific mention is made neither in Article 28A nor in the Ministerial Order.

The Ministerial Order is presented and analyzed thoroughly below.

Beneficiaries

A major issue in this exception is the eligible beneficiaries. It is discussed in the international framework whether the beneficiaries should be the visual impaired persons, the print disabled, the reading disabled and so on (see Introduction). The terminology does not reflect only matters of linguistic but it covers also different categories of disabled persons. The wider the term the more beneficiaries can invoke the exception and the greater the impact for the rightholders. Article 28A refers to blind and deaf-mute persons and gives the possibility to the Ministerial Order to widen the circle of the beneficiaries "*... By Ministerial Order of the Minister of Culture ... may be determined as well as the application of this provision for other categories of people with a disability"*. In the Ministerial Order a functional definition -and not a medical one- was chosen based on a person's inability to read the published material. Beneficiaries are not only blind and deaf mute but also people with defective or reduced vision which cannot be corrected using corrective lenses to a degree that would be satisfactory for reading, and generally people that because of a disability are unable to read a printed text in a conventional way or perceive the content of a work using their physical senses (Article 3 Ministerial Order). Thus, the Ministerial Order provides a definition so wide so as to include only the people that they suffer from a reading disability.

Competent intermediate bodies

It is already mentioned that in the Greek legal framework intermediate bodies are used in the exception. That means that the beneficiaries are not allowed to proceed themselves to the reproduction of the relevant works but they have to refer to specific intermediate bodies, which they are competent to do so, if they comply with all legal requirements regarding their nature (Article 2(1) Ministerial Order) and with the general terms of application (Articles 7 and 6(4-7) Ministerial Order). The established conditions regarding the nature of the intermediate bodies are the following:

i) they have to be non-profit organizations or associations or unions or other pertinent organizations,

ii) whose main mission is to provide specialized services related to the education and training or to the facilitation of education and training of the blind and the other beneficiaries.

Educational establishments could also be competent bodies for the needs of the Ministerial Order. Certain universities' libraries are major producers of accessible

material as well as having more usual library functions in giving print disabled access to this material (Sullivan, 2006; SCCR/19/3, 2009).

In case of doubt as to whether a body is eligible to proceed to reproduction as a competent intermediate body, the Hellenic Copyright Organization (HCO) makes the final decision. The HCO maintains also a list of all competent bodies (Article 2(2) Ministerial Order).

Categories of works allowed to be reproduced

The Ministerial Order excludes only the artistic creations as a whole from the application of this exception. From the other works of literature or science all but one may be reproduced for benefit of disabled persons in order to obtain a format that they can perceive, in the case that in its existing form cannot be perceived by the beneficiaries: the source code of computer programmes (Article 4 Ministerial Order).

Necessary condition is that the work should already have been published (Article 7(1) Ministerial Order) in accordance also with the moral right of publication (it is not clarified though whether the publication must have been a lawful one).

Additionally, the exception cannot be invoked when the works are already available in the market in formats specifically designed for the needs of beneficiaries. This should not though be interpreted that once one accessible format is commercially available, all others are excluded from the exception, since there is no one format that is accessible to all disabled beneficiaries (Article 7(2) Ministerial Order).

Allowed formats for the reproduction

The Ministerial Order does not specify the allowed formats under the exception. The works whose reproduction is allowed may take formats such as Braille, Moon, Daisy (Digital Accessible Information System -www.daisy.org- offers the benefits of regular audio books, but they include also navigation), talking books and any other method solely designed to be used by the beneficiaries and to respond to their special needs, to the extent required by the specific disability (Article 5 Ministerial Order). In this way the law specifies that the making of copies in other formats not exclusively made for the print disabled, such as large print copies that can be read by anyone or sound recordings on media that can be played in standard audio equipment are excluded from this exception.

Advantage for the beneficiaries

Already mentioned beforehand, the ‘innovation’ that the Greek regulation brings is the publishers’ obligation to deliver to the competent intermediate bodies the files of the works to be reproduced in electronic format. More specifically, publishers are obliged within thirty (30) days of the evidenced receipt of the request by the competent intermediate body, to deliver to this body (not to the beneficiaries themselves) in electronic format the files of the works to be reproduced, under the condition that the work is kept in electronic format (Dakin and Wijesena, 2005).

The Greek legal framework provides for some specific requirements regarding the nature and the quantitative limits of the works covered by the specific limitation allowing reproduction. Works that may be delivered in electronic file include all educational books of primary and secondary education and all the mandatory books of tertiary education. For all other works, the publishers shall, if so requested, deliver to the competent body electronic files of works totaling up to 10% of their annual publishing production; such percentage does not include any educational books published. In the event that the publisher refuses to comply with this obligation, the percentage doubles (Article 6(1-2) Ministerial Order).

For the system to be effective two databases should be established and kept by the HCO and the Association of Book Publishers (for the time being only the one in HCO operates, http://web.opi.gr/opifiles/tyfloi/db_tyfloi.pdf). One database includes all the intermediate competent bodies, and the second the titles of works in electronic format held by each body, the name of the author, the publisher, the ISBN and the special format in which documents have been reproduced (Article 6(6) Ministerial Order). Both of them form a useful tool and function as an information resource for the intermediate bodies and the beneficiaries when they search for works that are already reproduced in an accessible format, so as to reduce costs and time for a second unnecessary reproduction.

One additional element that must be highlighted is the fact that the application of Ministerial Order's provisions cannot be eliminated by contract between the publisher and the author (Article 7(5) Ministerial Order). The law considered that mostly publishers would have an interest in overriding this exception and articulated in this specific way the non overridability of the provision. However, a more general prohibition would be more appropriate, like in Germany, where there is a provision which stipulates that contracts are void if they would have the effect of overriding exceptions to copyright and in Portugal, where contractual conditions that override the exception are null and void. For traditionally published works it is highly unlikely a binding contract to be agreed between the rightholder and the potential user, which would have the effect of overriding an exception. Such contract seems more likely in online available works, more commonly in a database, accessible only by users who agree to comply with contractual terms (Sullivan, 2006).

Pledges of rightholders' security

It is more than complicated to provide digital masters files without the necessary guarantees and safeguards for rightholders, who have to be confident that any digital format is being delivered through secure gateways only to the people who are intended to receive it. The fear of piracy and the evident ease with which it happens in the digital world are understandably a reason why there is a need to ensure that the process is carried out and maintained within a secure network and by trusted bodies. In the modern environment driven by the internet for content dissemination, security is a vital issue for rightholders (Bergman-Tahon, 2009).

The Greek legal instrument provides with a number of pledges to the security of the rightholders without though describing in detail the ways and the necessary technical measures in order the desired protection to be accomplished. Among

those measures, the most important is that the restriction of the limitation applies only to the reproduction right and not to the making available right. This restriction actually constitutes the most effective measure, since it contributes to the maintenance of the strictest control to impede one literary text available in digital form, to become the source of illegally produced and distributed copies in internet (Garnett, 2006). Another measure is the establishment of the intermediate bodies being responsible for the reproductions of the works in the accessible formats. To this aim the Ministerial Order introduces specific obligations to the intermediate competent bodies, one of which is their responsibility to investigate the capacity of beneficiaries (Article 7(7) Ministerial Order). Additionally, the intermediate competent bodies incur the principal's liability for any copyright infringements by third parties selected for the reproduction of their copies (Article 7(8) Ministerial Order).

The intermediate bodies shall notify the HCO and the Association of Book Publishers regarding the titles of the works in electronic format held by them and the special format in which the works have been reproduced (Article 6(6) Ministerial Order) in order the relevant database to be updated (http://web.opi.gr/opifiles/tyfloi/db_tyfloi.pdf). Moreover, the intermediates are obliged to notify the publisher of the number of copies reproduced and of the form of such reproduction.

Furthermore, in the event of a change in purpose or dissolution, the competent bodies must destroy all electronic files in their possession and report that destruction to the HCO and the Association of Book Publishers (Article 6(7) Ministerial Order).

The intermediate bodies are obliged to purchase one copy of the work to be reproduced, irrespective of the number of copies to be reproduced and subject to the limitations of Article 7(6) Ministerial Order.

Connected to this issue is whether or not the moral right might be infringed due to production of accessible copies, and particularly the integrity right. The Ministerial Order repeats the moral right's protection giving specifically attention to the paternity right and the integrity right.

The copy of the work reproduced pursuant to this Ministerial Order should mention the name of the author and the publisher, as well as the date of first publication, if such information is included in the work. The physical carrier of such copy should also mention that the copy has been reproduced pursuant to article 28A Law 2121/1993 and the Ministerial Order in question and that any further reproduction in formats other than the ones allowed (Article 5 Ministerial Order) will constitute an infringement of the copyright and will incur penal and civil sanctions (65 et seq. Law 2121/1993) (Article 7(3) Ministerial Order).

The text cannot be amended or changed without the authorization of the author and the publisher, in relation to each one's rights. Such prohibition does not concern though changes relating to layout and pagination, which are dictated by the need to convert the form of the work to serve the needs of beneficiaries. Competent bodies

have to respect the author's rights in the reproduction of the work and the fulfillment of its purpose (Article 7(4) Ministerial Order).

Finally, the Ministerial Order stresses out that copies reproduced on its basis cannot be used for purposes other than those provided for in the Ministerial Order. Any person making use of such a file for purposes other than those provided for (Article 1 Ministerial Order) will be liable for penal and civil sanctions (65 et seq. of Law 2121/1993) (Article 7(6)).

Save as otherwise stipulated in Law 2121/1993, any dispute arising from the non application of the Ministerial Order is resolved according to the injunction procedure (Articles 682 et seq. Code of Civil Procedure).

6. Three step test

One additional condition -or better formulated an additional test- is the three step test, which applies in addition to other requirements in the exception for the benefit of visually impaired persons.

Although generally it is not believed to be necessary to include the wording of this test in the legal framework, the Greek Copyright Law has incorporated *verbatim* the three step test that applies to all exceptions. In addition the Greek Copyright Law describes a number of conditions to the application of this exception according to the Ministerial Order (it has been supported that when an exception has to comply with the three step test, the law should be more flexible and should demand fewer conditions) (Sullivan, 2006). The Greek legislator chose the safest way and established a double way of protection.

The difficulty here as elsewhere is to identify conditions that are reasonable in that they do not make it too difficult to help print disabled access the written word, but they do give some reassurance to right holders (Sullivan, 2006).

6.1 The three step test – the general exception

Apart from the detailed exceptions Berne Convention provides a general one in Article 9(2), which has the form of a test for determining whether or not an unauthorised reproduction is lawful. The three step test, as it is known, provides as follows:

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

This Article stipulates three distinct conditions that an exception to the reproduction right must be complied with in order to be justified under national law:

1. Limitation of application to 'certain special cases';
2. The unauthorized reproduction 'does not conflict with the normal exploitation of the work'; and

3. The unauthorized reproduction ‘does not unreasonably prejudice the legitimate interests of the author’.

It is a vague and general criterion that allowed countries to grant exceptions to the -then- newly enshrined reproduction right and a formulation of compromise broad enough to cover all exceptions included in the legislation of the signatory countries (Senftleben, 2004; Geiger, 2007; Geiger, 2007a).

Although this provision in the framework of the Berne Convention refers only to the reproduction right, the TRIPs Agreement and the WCT (and the WPPT for the neighbouring rights) extended the application of the three step test to all exclusive rights, to exceptions granted under Berne Convention (because of the incorporation of the latter into TRIPs) and also to any new exceptions that member states may adopt in the future. Therefore the three step test applies not only to the reproduction right but also to all the exceptions and consequently also to the exception in favour of print disabled.

No authoritative interpretation was given to the three step test under Berne Convention (such an interpretation could only be given by the International Court of Justice). The only case in international context that has been heard was the IMRO case in front of the WTO Panel (US Section 110(5) Report). Despite the complexity that the interpretation of the three step test presents, we will look shortly at the three step test itself and afterwards we will examine how it is applied on the exception in favour of print disabled. All three steps of the test are cumulative.

6.2 The three steps of the test

First step: ‘Certain Special Cases’

The limitations and exceptions should be confined to “certain special cases”. The term ‘certain’ means that the ‘cases’ (the exceptions) should be clearly defined, known and particularized, without though being explicitly identified but guaranteeing a sufficient degree of legal certainty. ‘Special’ is interpreted as of a narrow scope or reach, or exceptional in quality or degree. The exception should be narrow in a quantitative as well as in a qualitative sense. An exception should be the opposite of a non-special, that is to say a normal, case (US Section 110(5) Report; Ricketson, 2003).

Second step: “Does not conflict with the normal exploitation of the work”

Regarding the second step it is accepted that it means that there should not be a conflict between the exception and the ways in which an author might reasonably be expected to exploit his work in the normal course of events (e.g. in the case of judicial proceedings) (Ricketson, 1987). More specifically the exempted uses should not enter into economic competition with the ways that authors normally extract economic value from that right and deprive them (the authors) of significant or tangible commercial gain (US Section 110(5) Report, § 6.180). If we would accept though a solely economic approach of the second step, considering that any free use permitted under Article 9(2) would have the potential of being in conflict with a normal exploitation of the work, this would have as a consequence that the third step would never be reached. Therefore, we should include in the consideration of the second step

also non-economic normative considerations, namely whether this particular kind of use is one that the copyright owner should control or not. In this way there may be uses that will not be in conflict with what should be within the normal exploitation of the work (in a normative sense) but it may not satisfy the third step (Ricketson, 2003).

Furthermore, there are also other parameters that have to be considered and in any event there has to be a case-by-case assessment by the courts. There is some uncertainty but the ultimate touchstone is that the use must be 'fair' (Ricketson, 2003).

Third step: "Does not unreasonably prejudice the legitimate interests of the author"

It is a fact that any exception prejudices to a certain degree the author's interests. The decisive factor though is the term 'unreasonably'. Prejudice to the legitimate interests of authors could turned out to be 'unreasonable', if the exception causes, or could cause, an unreasonable loss of income to the respective rightholder taking into account also the importance of the other interest at stake, that justify the exception (US Section 110(5) Report). The unreasonable prejudice implies the lack of proportionality. The unreasonableness of this economic harm, *i.e.* the prejudice, that such an exception could cause, might be countered by placing some conditions on the use of the work or even by a payment made for this use. The exception may take the form of either a free use or a legal (compulsory or statutory) license, depending essentially on the concrete circumstances (Ricketson, 2003). Although the unreasonable prejudice to the legitimate interests of the authors could be avoided by the payment of remuneration, this would not cure a use that conflicts with the normal exploitation of the work (second step) (Ricketson, 1987).

6.3 Application of the three step test on the exception for the benefit of print disabled

It is relevant to consider whether the Greek exception for the print disabled could pass successfully the three step test.

First step

Regarding the first requirement, in order the use of a work to be qualified as an exception, it should be a 'certain special case'. This means, as it is already analyzed, that the case in question should be clearly defined, known and particularized, without though being explicitly identified but satisfying a certain degree of legal certainty, narrow in quantitative as well as in a qualitative sense. This first step intends to keep the scope of the exception qualitatively and quantitatively restricted, so that it may be deemed a 'special case'. Applying this requirement to our case leads us to the necessity to define a well specified exception and to determine for this purpose the beneficiaries that could evoke this exception, to determine the allowed acts, the relevant categories of works, and the exclusive rights that would be limited.

An exception that is carefully limited to assisting print disabled by permitting only to the competent intermediate bodies (Article 2 Ministerial Order) to produce the accessible copies made under the exception and to provide them with those copies,

such as the Greek regulation, does appear to be a 'special case'. In addition the provision limits the application scope of the exception to cover only non profit institutions, whose main mission is to provide specialized services related to the education and training or to the facilitation of education and training of the blind and the other beneficiaries.

In the Ministerial Order not only the intermediate body but also the end beneficiary is clearly specified by using a functional definition based on a person's inability to read the material that has already been published (Article 3 Ministerial Order).

The exception here, while restricted to specified groups of end users (beneficiaries) and institutions, could nonetheless range widely to cover all kinds of works and uses. Clear definition and limitation of exceptions is therefore necessary to establish that these are 'certain special cases' within the first step of the three step test. To this end the Ministerial Order restricts the limitation to specific work categories (Article 4 Ministerial Order), in specific quantities of the works to be reproduced (all educational books and 10% of annual publishing production – Article 6(2) Ministerial Order) and in specific formats (Article 5 Ministerial Order). Furthermore, it underlines that the use of those works should be made only for the purpose of the Ministerial Order and the Law 2121/1993, and any other use of the works is excluded from the exception's scope (Article 7(6) Ministerial Order).

Finally, the Greek provisions cover uses that are limited only to the reproduction right, restrict the persons and the institutions that may take advantage of the exception, and the nature of the disability is defined.

Thus, the first step of the three step test may be deemed to be satisfied here.

Second step

The use of a copyrighted work in this context should not be conflicted with the normal exploitation of the work, so as the second step to be satisfied. This reproduction of works could be considered to enter into economic competition with the ways that rightholders normally extract significant commercial economic gain.

Some types of accessible formats such as audio recordings and large print, there may be significant market opportunities to increase commercial production to provide for the expanding needs of those with failing sight, as the average age of the population increases. An exception that permitted commercial activity would therefore potentially lead to activity that directly conflicts with the publishers own production of accessible formats and/or deny the original publisher the opportunity to license commercial special editions for these groups of readers/alternative format production by others (Ricketson, 2003).

The Greek law limits activity under the exception to acts that are non-commercial. The non-commercial limitation is mentioned directly in Article 28C Law 2121/1993 and Article 1 Ministerial Order and is delivered by requiring the intermediate body that acts under the exception to be non-profit making and any charges made for accessible copies are capped by not allowing a profit to be made (the Ministerial

Order provides that in the event that the cost of the reproduced copy is incurred by beneficiaries, it should not exceed the reproduction cost).

Greek exception rules out expressly not only the commercial activity but also it does not permit a work to be used, if an accessible format is already available to print disabled people. Such a provision is of paramount importance; the publishers are encouraged -or at least are given the possibility- to produce accessible copies for all groups of readers. They are not excluded from the beginning, but they do have the possibility to enter the relevant market. The crucial question remains though how big the time frame is before they decide to enter the relevant market. Publishers could make the necessary adaptation to the work at the production stage, so that an adapted version is created at the outset. In that case, there is no need and no room for the specific exception for the print disabled (Articles 5(3)(b) and 5(4) Information Society Directive) to apply anyway, because accessible content is already provided. The rationale for the application of that particular exception disappears and only the remaining exceptions, which do not address the specific needs of people with a disability, could apply. If this provision had not existed, then no one would buy accessible copies distributed by the publishers, since other copies would have been produced and distributed without any payment to the rightholders under this exception. This would be contrary to the three step test in any case (Sullivan, 2006).

Third step

Assuming that we have accepted that the second step is satisfied, the problem of the third step remains and must be also satisfied. Concerning the third step we have to deliberate under which conditions and circumstances the use is allowed, so that any prejudice caused to the rightholders' legitimate interests not to be unreasonable.

This use could have an impact on the market for sales of tangible copies and consequently could harm the primary and secondary markets of the rightholders. This statement though does not lead automatically to the exclusion of exception but to the ascertainment that it should be applied with caution in order to minimize the potential harm to rightholders' interests (so actually not to prejudice 'unreasonably' their legitimate interests). Depending upon the quantity and the nature of the works that may be reproduced, the eligible groups of users/beneficiaries, the eligible for the reproduction bodies, and whether or not the use is subject to an obligation to pay fair compensation, the third step may be satisfied (Ricketson, 2003).

This caution could be interpreted as an establishment of one further requirement. The intermediate bodies must implement some conditions and even technological measures, such as digital watermarking and encryption, to ensure that the work will not be reused beyond the allowed use and additionally that the recipients will be only the ones that are supposed to be (print disabled).

Finally, the question of unreasonable prejudice needs to be considered, and it is supported that this is an area that should be subject to pay equitable remuneration, rather than being a free use. Some countries, that do have exceptions to copyright for the benefit of print disabled, combine them with mechanisms by which rightholders can be or are paid a royalty for any accessible copies made. Greece though does not belong to one of them. Generally the exception provision that has been made is

governed by the three step test but this does not necessarily require a royalty payment to accompany an exception. It may, though, be easier to argue compliance with the test in some situations where right holders receive compensation for activity under an exception. Of course, exceptions vary too in the extent of the activity possible. The scope of what is permitted under an exception could be a key factor in deciding whether or not right holders should receive a royalty. As for any exception, determining the right balance between the interests of right holders and users is difficult with no precise rules about issues such as compensation (SCCR/9/7 page 127). The traditional exception in the analogue environment might not be found to be in full compliance with the three step test, when it comes to make available online digital copies. The online availability presents a potential of uncontrolled wide scale dissemination that may affect the market for, or the value of, the copyrighted works, as well as harm otherwise the legitimate interests of the rightholders (Lung, 2004). Since the Greek relevant exception is limited only to the reproduction right, it seems that there is no apparent problem regarding the conformity of this exception with the last step of the three step test.

The prejudice of unremunerated free use could be unreasonable to the legitimate interests of the author not only when economic interests are damaged but also in the case of moral rights interests, for instance, if a usage distorts the work or fails to identify the author. Also in this respect, the Greek provisions are consistent with the third step, in that they do not derogate from moral rights protections (Article 7(3) and (4) Ministerial Order) (Ricketson, 2003).

7. Technological protection measures and the exception in favour of print disabled

Digital technology has provided great opportunities for increasing access for people with print disabilities. Paradoxically, it has also in some respects increased the practical and legal complexity of accessing material, especially with the development and use of technological protection measures (TPMs) and Digital Rights Management (DRM). By whatever name TPMs are encoded into digital content by a variety of means (such as encryption or watermarking), so that users are incapable of accessing or using the content in a manner that the rightholder wishes to prevent. The ability to use technological protection measures to prevent unauthorized copying of their works is a further addition to rightholders' arsenal.

What is the relation though between the legal protection of technological measures and the exceptions to copyright and related rights and particularly to the exception for in favour of the print disabled?

If it is a digital version protected by TPMs, the person will need a copy without TPM in order to be able to make an accessible copy. Some countries have included provisions in their laws, so that the exception continues to apply and Greece is one of them.

So those TPMs could hinder the beneficiaries of the exception from taking advantage of the latter, exactly due to the TPMs put on the work. A solution should be found in order to regulate the protection of TPMs without depriving users allowed uses of the copyrighted works, such as use of the works in favour of print disabled. Article 6(4)

Information Society Directive aims at resolving this intersection between legal protection of TPMs and the exercise of limitations or exceptions. According to Article 6(4) member states should take voluntary measures, including agreements between themselves and other parties concerned, to ensure that the beneficiary of certain limitation provided for in national law (among those also the exception in favour of print disabled) has the means of benefiting from that limitation, to the extent necessary and that the beneficiary has legal access to the protected work or subject matter concerned. The Directive remains silent regarding the voluntary measures and it is at the right owners discretion to choose those ones (e.g. supply of a non-protected version of the work; supply of an encryption key to allow the user to circumvent the TPM; deposition of the encryption key with a third party, so that upon request the beneficiary of a limitation could obtain it; designing the TPM so, that certain lawful uses are permitted) (Guibault, et al., 2007, where you can find also examples of member states). Article 6(4) further provides that *"in absence of voluntary measures taken by rightholders … Member states shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided in national law"*. Once more the Directive is silent what the 'appropriate measures' taken by the member states are. Therefore member states have interpreted this provision in different ways and some have established a dispute resolution or mediation mechanism (Finland, Denmark, Estonia, Hungary and Greece), some have created an executive or administrative authority in order to prevent the abuse of such measures taken by the rightholders (France), some recourse to courts (Belgium, Germany, Spain and Ireland) and finally some others have not implemented it at all (Austria, Czech Republic and Netherlands) (First evaluation of Directive 2001/29/EC, 2007). Recital 51 of the Directive, however, stresses out that member states should take appropriate measures only in absence of *"voluntary measures taken by rightholders including the conclusion and implementation of agreements between rightholders and other parties"*. The nature of the member states intervention could refer to *"modifying an implemented TPM"* or *"other means"* (Recital 51). It is important to underline that, although the provision does create an obligation for rightholders and member states to provide the means to exercise the limitation, it does not allow beneficiaries to circumvent TPMs. Its aim is to facilitate the exercise of an exception (Denmark and Norway have entitled though beneficiaries to circumvent TPMs under certain narrow conditions) (First evaluation of Directive 2001/29/EC, 2007, Bechtold, in Dreier/Hugenholtz, 2006).

In short, and to apply this provision in our case to this exception, in the absence of voluntary measures taken by the rightholders and if the enjoyment of the exception for the benefit of disabled people is prevented by the use of TPMs put on works, member states have to intervene with appropriate measures.

The relevant Greek provision (Article 66(A)(5) Law 2121/1993) states the following:

Notwithstanding the legal protection provided for in par. 2 of this article, as it concerns the limitations (exceptions) provided for in Section IV of law 2121/1993, as exists, related to reproduction for private use on paper or any similar medium (article 18), reproduction for teaching purposes (article 21), reproduction by libraries and archives (article 22), reproduction for judicial or administrative purposes (article 24), as well as the use for the benefit of people with disability (article 28A), the rightholders should have the obligation to give to the beneficiaries the measures to

ensure the benefit of the exception to the extent necessary and where that beneficiaries have legal access to the protected work or subject-matter concerned. If the rightholders do not take voluntary measures including agreements between rightholders and third parties benefiting from the exception, the rightholders and third parties benefiting from the exception may request the assistance of one or more mediators selected from the list of mediators drawn up by the Copyright Organization. The mediators make recommendations to the parties. If no party objects within one month from the forwarding of the recommendation, all parties are considered to have accepted the recommendation. Otherwise, the dispute is settled by the Court of Appeal of Athens trying at first and last instance…."

Nevertheless the whole effect of this provision is soft pedaled by the last sentence of this provision (similar formulation as the fourth subparagraph of Article 6(4) Directive 2001/29) that provides differently in the digital networked environment: "*These provisions shall not apply to works or other subject-matter available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them."* This provision limits the possibility to intervene in the "online" environment and take appropriate measures described in Article 66(A)(5). In those cases a total preeminence of the TPMs is given over the exceptions (Martin-Pratt, 2001, p. 75).

In the digital context, what is important is to extend these limitations and exceptions specifically to works regardless of their protection by TPMs. In other words, neither the WCT (Article 11) nor the WPPT (Article 18) requires that TPMs be protected in a manner inconsistent with copyright's fundamental goals. Thus, the protection of TPMs can and should be circumscribed by appropriately tailored limitations and exceptions that include access for the benefit of print disabled in a digital context (Okediji, 2006).

8. Conclusion

The issue is whether the existing legal national and the perspective international framework strikes the right balance between the legitimate interests of the ones who create and the ones who invest in the creation of and the needs of the print disabled people. This is something that the Greek legal framework tried to achieve; how successful or not the attempt is only the future and the copyright history will prove it.

No matter what solutions the national laws offer though, the ultimate solution should come at international level in order the cross border exchange of accessible formats to be dealt constructively. The barriers that print disabled people have to face are enormous but an optimistic air is blowing in the fields of copyright: new opportunities, legislative changes and the ongoing discussions in the international forum make us hope that this copyright problem will not remain long in the agenda.

[i] "Article 19
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

"Article 27
Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

[ii] These Rules were adopted by the General Assembly in 1993, available at http://www.un.org/esa/socdev/enable/dissre00.htm. Although not a legally binding instrument, the Standard Rules represent a strong moral and political commitment on the part of Governments to take action to attain equalization of opportunities for persons with disabilities. The rules serve as an instrument for policy-making and as a basis for technical and economic co-operation.
The Standard Rules consists of 22 rules incorporating the human rights perspective which had developed during the decade preceding their adoption. The 22 rules concerning disabled persons consist of four chapters - preconditions and target areas for equal participation, implementation measures, and the monitoring mechanism - and cover all aspects of life of disabled persons.
Specifically Rule 5 provides in part as follows:
"Rule 5: Accessibility
States should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society. For persons with disabilities of any kind, States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication."
"Access to information and communication
Persons with disabilities and, where appropriate, their families and advocates should have access to full information on diagnosis, rights and available services and programmes, at all stages. Such information should be presented in forms accessible to persons with disabilities.
States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments.
States should encourage the media, especially television, radio and newspapers, to make their services accessible. States should ensure that new computerized information and service systems offered to the general public are either made initially accessible or are adapted to be made accessible to persons with disabilities.
Organizations of persons with disabilities should be consulted when measures to make information services accessible are being developed."

[iii] The Convention was adopted on 13 December 2006 and entered into force on 3May 2008 (http://www.un.org/disabilities/default.asp?id=150). Article 9 deals with a broad range of accessibility issues, Article 21 with the freedom of expression and access to information (among others the freedom to receive and impart information on an equal basis with others and through Braille and other accessible means), Article 30 focuses on participation in culture life (especially in par. 3 it is stated that States Parties are urged to take all appropriate steps, in accordance with international law, to ensure that laws protecting the intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. it is aimed to ensure that when framing national copyright laws the needs of VIPs should be taken into account providing a balance. Finally, Article 32 refers to the international co-operation. Analytically:
"**Article 9 - Accessibility**
1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others ... to information and communications, including information and communications technologies and systems ... These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:..
b) Information, communications and other services, including electronic services and emergency services.
2. States Parties shall also take appropriate measures:
a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
c) To provide training for stakeholders on accessibility issues facing persons with disabilities;...

f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost."

"**Article 21 - Freedom of expression and opinion, and access to information**
States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:
a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost; ...
c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities. ..."

"**Article 30 - Participation in cultural life, recreation, leisure and sport**
1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:
a) Enjoy access to cultural materials in accessible formats;
b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats; ...
2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.
3. States Parties shall take all 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.

"**Article 32 - International cooperation**
1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:
a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
c) Facilitating cooperation in research and access to scientific and technical knowledge;
d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.
2. The provisions of this article are without prejudice to the obligations of each State Party to fulfill its obligations under the present Convention."

The Convention entered into force in May 2008 and till now 84 countries have ratified it. Greece is not among them. (See all relevant information at: http://www.un.org/disabilities/default.asp?navid=12&pid=150).

[iv] No other rights are mentioned because only those ones are governed by the Information Society Directive. This does not necessarily mean that there cannot be an exception also to other rights, such as the public performance right.

[v] The European Accessible Information Network (EUAIN) is a EU funded project in which FEP participated alongside with EBU, academics and accessible formats producers. The project was established in 2004, when a core group of organizations involved in accessible content production came together on a European level to seek greater clarity and systematization for this field. The EUAIN Network has brought together the different stakeholders, including publishers and associations representing people with disabilities, in accessible content processing and sought to find new ways to

mainstream the provision of accessible content, to design for convergence, to describe the practical advantages of moving from ideas of accessible to adaptive environments.
Based on this extensive work over, it has been possible to identify key trends in accessible content processing that are likely to be of some importance in the coming years, such as accessibility on demand; accessibility to be embedded within mainstream content creation and production processes at the earliest stages; that is, accessibility from scratch.In synthesis, EUAIN provides support, tools and expertise to enable the provision of accessible information. One tool developed by the EUAIN Network is the Demonstrator: this has been set up in order to illustrate the potential of accessible publishing, whose concepts underpin the EUAIN project. The Demonstrator can be used for producing different output formats on-demand, from the same well-structured input file.
As a roll out of the EUAIN Network, another project has been developed (which is still ongoing) under the name of ProAccess. This is a "network of networks" project funded under the Digital Literacy strand from within the eLearning strand of the Commission. Improving accessibility of educational material for visually impaired people is the main pillar of the ProAccess project.
This project aims at providing publishers and intermediaries in the e-learning value chain (libraries, schools, charities and associations devoted to impaired people) with practical guidelines and instruments for the production and use of accessible content in a more effective way both from the productive process and copyright standpoint.
Within the framework of the EU project ProAccess a set of guidelines have also been developed to help the drafting of contracts between rightholders, intermediaries and final users. These guidelines aim to provide operational instructions to publishers, producers or other content providers of works in accessible format for the purpose of acquiring works in accessible format and making them available to disadvantaged people, also through libraries and other institutions, in compliance with legal and contractual rules on intellectual property rights (Bergman-Tahon, 2009).

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